



National Library
of Canada

Bibliothèque nationale
du Canada

Canadian Theses Service

Service des thèses canadiennes

Ottawa, Canada
K1A 0N4

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

**THEORY AND PRAXIS IN YOUTH JUSTICE: TREATMENT ORDERS AND THE YOUNG
OFFENDERS ACT**

by

Alison Josepha Hatch

B.A. Simon Fraser University, 1981

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS (CRIMINOLOGY)**

in the School

of

Criminology

© Alison Josepha Hatch 1988

SIMON FRASER UNIVERSITY

August 1988

All rights reserved. This work may not be reproduced in whole or in part, by photocopy or other means, without permission of the author.

Permission has been granted to the National Library of Canada to microfilm this thesis and to lend or sell copies of the film.

The author (copyright owner) has reserved other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without his/her written permission.

L'autorisation a été accordée à la Bibliothèque nationale du Canada de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur (titulaire du droit d'auteur) se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation écrite.

ISBN 0-315-48751-8

APPROVAL

Name: Alison Josepha Hatch

Degree: Master of Arts (Criminology)

Title of thesis: Theory and Praxis in Youth Justice: Treatment Orders and the Young Offenders Act

Examining Committee:

Chairperson: Margaret A. Jackson

Raymond Corrado
Senior Supervisor
Associate Professor
School of Criminology

Simon N. Verdun-Jones
Professor
School of Criminology

Robert M. Gordon
Instructor
School of Criminology

Christopher Webster
Professor of Criminology, Psychiatry, and Psychology
University of Toronto

Date Approved: August 5, 1988

PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of Thesis / ~~Project~~ / ~~Extended Essay~~ / ~~Essay~~

Theory and Praxis in Youth Justice: Treatment Orders and
the Young Offenders Act

Author: _____

(signature)

Alison Josepha Hatch

(name)

August 30, 1988

(date)

ABSTRACT

The Canadian youth justice system underwent significant reform when, in 1984, the *Young Offenders Act* (YOA) replaced the 65 year old *Juvenile Delinquents Act* (JDA). This signalled a shift from a paternal, treatment oriented system to one premised upon a rights and responsibility model. But, the change has not been an entirely smooth one. One especially controversial area involves the detention of adjudicated young offenders for mental health treatment. Historically, there has been a close alliance between the juvenile court and the mental health professions, one that could have been expected to continue. However, clinicians dislike the right of the offender to decline the order, the unenforceability of noncompliance, the narrowing of youth court jurisdiction, and the generally punitive trend in sentencing. Legal professionals applauded the move to give young persons greater legal rights, and would contest the appropriateness of treatment orders for the criminal courts.

Perhaps because of the practical problems engendered by this disagreement, judges rarely use this option. Several potential explanations for this outcome are considered. The treatment role of the court has been widely discredited and the back-to-justice philosophy of the YOA, having few concrete policy implications, may have left a vacuum for a conservative, punitive element that would regard treatment dispositions as low priority.

Moreover, as with many justice reforms, an apparent or intended reduction of social control may actually result in a continuation or expansion. The location, rather than the frequency, of treatment may have changed. Courts may still order treatment, for example as a condition of probation. The mental health system may be absorbing some of the behaviour problems previously dealt with by the juvenile court. And, the jurisdiction of the child welfare system is being expanded to include the criminal behaviour of children and some emotional problems of youth.

While it may be the nature of professional groups to maintain or extend their jurisdiction, this would require virtually unlimited fiscal resources. Governments seem most likely to fund penal measures, for which there is more public support. Ultimately, political and economic factors may dictate the frequency of treatment orders.

DEDICATION

To my family

Mabel, Don, Winn, Eamon, Karen, Graham
and my sweet baby girl, Hilary

and

in loving memory of

Arthur James Hatch
Ruth Pringle Hatch
William Stanley Seaton

ACKNOWLEDGMENTS

Oh, where to begin? The process that led to the completion of this thesis has been at once enjoyable, stimulating and very rewarding. The ideas presented here have evolved over several years of contact with the members of my committee. Ray Corrado first introduced me to the area of youth justice as a member of the research team for the National Study on the Functioning of the Juvenile Court. He was also instrumental in convincing me, and others, that I should start graduate school, and has had unswerving faith in me. I am grateful that he let me develop my ideas over time, without pushing, while I repeatedly changed topics. The final product is much the better for it. We don't always agree when it comes to juvenile justice, but Ray is always available for a lively debate.

Simon Verdun-Jones first dragged me into the area of mental health law, somewhere I definitely did not want to go at first. Sitting in his office for the first time, I was terrified of saying something stupid. But, this meeting has led to a warm friendship. Under his patient tutelage, I have learned about scholarship, sometimes a rare commodity in academe today. He has been actively interested in this thesis and it is from working with him that the idea for the topic came about. All those discussions about parenthood will come in handy, too.

Rob Gordon and I share an interest in historical analysis and have engaged in many a good conversation over a libation at the club or a cup of tea in his office. I became desperately sidetracked in history, at one point, and Rob was always eager to listen to my latest discovery. He gives me grief over political economy, but I am learning to live with that. Finally, I must thank Chris Webster for his efforts as external examiner. His opinion means a great deal to me, not only because of his work in mental health and the law in Canada, but because he is just such a nice person.

There are many friends and colleagues in the School of Criminology who, while not directly involved with my studies, have added, by their presence, to the warm and affectionate atmosphere that some might term the "work place." Margaret Jackson has never missed a birthday nor left anything I have done for her, even the smallest task, go unacknowledged. No one in the School can say that Margaret has not made their life on the hill a little happier. Her efforts in the role of chair of the Graduate Program Committee deserve special thanks. Karlene Faith is warm and honest and the most optimistic person I have ever met. I often use her as a touchstone because I value her opinion on social issues. Mary Sutherland is always there, faithfully ready with a quip but genuinely interested in the lives of her friends. She is a stronger person than she realizes and deserves all the happiness in the world. Curt Griffiths is the most entertaining person I have ever met and

he keeps the place laughing. I have benefitted also from my contact with Ted Plays. I admire him for his academic integrity and the enjoyment he derives from his work. All those discussions about parenthood will come in handy, too.

Finally, Aileen Sams deserves special recognition for her role as the most maternal graduate secretary in the world. I keep saying that she should go into the day care business, but then again maybe she already is. She provides assistance to her charges that is above and beyond the call of duty. A handmade baby blanket is a constant reminder of this.

The Criminology Research Centre has provided a haven from the indignities of cubicles and noise most graduate students must endure. I cannot underestimate what I have gained from my association with the Centre. I am most fortunate indeed to have had the opportunity to learn the craft of research from Bill Glackman. From him I learned not only the requisite technical skills, but the Bill Murphy's Laws of research. The right attitude is so important. All those discussions about parenthood will come in handy, too. Jill Hightower and George Tien were friends as well as colleagues, and I miss them since they found real jobs. Joyce Palmer has also found a life beyond the hill, but when she was there, she made life interesting.

My baby daughter, Hilary, deserves a great deal of credit as well. Her imminent arrival and early infancy provided me with the luxury of time to complete this work. Most of this thesis was written with her on my lap or playing happily at my feet. She didn't complain about the hours in the library or having to share her room with my books, papers and terminal. Her typing skills are also approaching mine.

My parents have been contributing to this moment since I was born, fostering within me a curiosity about the world and the diligence necessary to embark upon any academic endeavour. I hope I can instill in my daughter the same qualities. Significant financial contributions must also be acknowledged.

Lastly, my husband, Eamon, has brought a balance to my life. Yet, he has never understood why I spend so many nights hunched over a keyboard, agonizing over obscure points. I hope that, one day, he will discover a pursuit that gives him as much pleasure as I derive from work such as this.

TABLE OF CONTENTS

Approval		ii
Abstract		iii
Dedication		iv
Acknowledgments		v
List of Tables		ix
I. TREATMENT ORDERS AND THE YOUNG OFFENDERS ACT: ORIGINS AND CONSEQUENCES OF REFORM		1
The Origins of Treatment Orders in the YOA		2
Implementation: The Consequences of Reform		5
Theories of Reform and the JDA		9
Humanitarian Progress		10
Pluralism: Moral Entrepreneurs and Interest Groups		11
Political Economy		13
Five Models of Intentions and Consequences of Reform		14
Progress		14
Organizational Convenience		14
Ideological Contradiction		16
Professional Interest		16
Political Economy		16
II. MENTAL HEALTH TREATMENT AND THE YOUTH COURT		18
History		18
Mental Health Services and the JDA		22
Assessments		23
Fitness to Stand Trial		24
Insanity Defence		25
Treatment		26
Mental Health Services and the YOA		27
Medical and Psychological Reports		28
Fitness to Stand Trial,		30
Insanity Defence		32
III. INTEREST GROUPS AND TREATMENT ORDERS: WELFARE AND JUSTICE CRITIQUE		34
The Welfare Model		36
The Justice Model		41

Welfare and Justice in the YOA	43
Treatment Orders and the Welfare Model	47
Consent of Young Person	47
Consent of Facility	49
Enforcement of Treatment Orders	50
Narrowing of Youth Court Jurisdiction	51
Shift to Custody	51
Treatment Orders and the Justice Model	54
Ineffectiveness of Treatment	55
Children's Rights and the Capacity to Consent	56
Misuse of the Criminal Sanction	57
IV. FEDERAL-PROVINCIAL RELATIONS AND THE YOA: THE POLITICS OF TREATMENT ORDERS	60
Provincial Jurisdiction Under YOA	60
Provincial Offences	61
Criminal Behaviour of Children Under Twelve Years	62
"Status Offenders"	64
Shift to Alternate Systems of Treatment and Control	65
Youth Justice System	66
Provincial Mental Health Statutes	68
Provincial Child Welfare Legislation	70
The Economy of Treatment	75
V. SUMMARY AND ANALYSIS	78
Cohen's Five Models	79
Progress	79
Organizational Convenience	81
Ideological Contradiction	82
Professional Interests	83
Political Economy	85
The Future of Treatment Orders	86
REFERENCES CITED	87
CASES CITED	97

LIST OF TABLES

Table	Page
1.1 Cases with Guilty Findings Heard by Youth Courts for Federal Statute Offences by Most Significant Disposition, 1984/85 and 1985/86	7
1.2 Cases Heard by Youth Courts with Treatment Orders as Most Significant Disposition by Province, 1984/85 and 1985/86	8
1.3 Length of Detention for Treatment Orders, 1984/85 and 1985/86	9
1.4 Intentions and Consequences of Reform: Five Models	15
3.1 Dimensions of Welfare and Justice Ideologies	35
4.1 Number of Children Admitted to the Care of a Children's Aid Society or to the Superintendent of Family and Child Services and the Proportion Admitted by way of the Juvenile Delinquents Act, British Columbia, 1961/62 to 1985/86	72

CHAPTER I

TREATMENT ORDERS AND THE YOUNG OFFENDERS ACT: ORIGINS AND CONSEQUENCES OF REFORM

The recent passage of the *Young Offenders Act*¹ (YOA) has heralded what has been called a "new era" of youth justice in Canada.² Young persons are considered more responsible for their criminal behaviour than had been the case and, in return, are granted most due process protections.³ However, their special needs are to be recognized and they are not to be treated in exactly the same manner as adults. The advent of this new era was anticipated with much optimism. During the lengthy process that was to lead to the passage of the YOA, near consensus had been reached about the weaknesses of its predecessor, the *Juvenile Delinquents Act*⁴ (JDA). But much of this initial enthusiasm was dimmed when unanticipated problems came to light after only a brief period of operation.

One of the issues coming under scrutiny is that of treatment orders. Section 20(1)(i) of the YOA provides that a young offender may be "detained for treatment, subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available." Before such a disposition may be handed down, it must be determined that a young offender is "suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation." For this reason, a medical or psychological report is required, and the detention must be explicitly recommended by the assessor. It is further required that the young person, the designated mental health facility and, in most cases, the parent(s) all indicate their consent to the detention.⁵ The length of the period of detention is not to exceed two

¹ S.C. 1980-81-82, c. 110. It was proclaimed into force on April 2, 1984.

² N. 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.

³ Solicitor General Canada, *The Young Offenders Act, 1982* (Ottawa: Minister of Supply and Services, 1982).

⁴ R.S.C. 1970, c. J-3. This act was first enacted in 1908, permitting the creation of juvenile courts across Canada. It had remained substantively unamended since 1929.

⁵ S. 22(1) reads:

No order may be made under paragraph 20(1)(i) unless the youth court has secured the consent of the young person, the parents of the young person and the hospital or other place where the young person is to be detained for treatment.

years,⁶ except if there are subsequent convictions.⁷ It is the duty of the court, presumably acting upon the advice of the author of the medical or psychological report, to specify the length of the period of detention and, in the spirit of the YOA, this should be determinate.⁸

The Origins of Treatment Orders in the YOA

The process that led to the enactment of the YOA was a lengthy one, beginning in 1965, with the first formal recommendation to replace the JDA,⁹ and ending with the passage of the YOA, in 1982. The debate that waged during these two decades involved no discussion of treatment orders. This was due to the fact that they were a last minute addition, not even evident at the first reading of Bill C-61 in Parliament.¹⁰ The Bill was referred to the Standing Committee on Justice and Legal Affairs¹¹ where, as the proceedings commenced, Solicitor General Robert Kaplan announced the tabling of 42 suggested amendments.¹² Included was this proposed addition to the clause concerning dispositions:

Add a clause providing that where pursuant to Section 13 [medical or psychological reports], a young person has been examined by a qualified person and the report recommends that the young person undergo treatment ... the court may order as part or in lieu of any other disposition that the young person be detained, subject to any terms or conditions considered appropriate, in a hospital or other place where treatment is available if the young person with the concurrence of his parents consents to undergo such treatment and a treatment facility consents to receive him.¹³

Kaplan stated that the list of proposed amendments had been devised after consideration of the more than 40 briefs submitted to the Committee and the views expressed by members of the

⁶ S. 20(3).

⁷ Recent amendments to the YOA have clarified this point. See also *R. v. J.B.* (1985), 24 C.C.C. (3d) 142 (Ont. C.A.).

⁸ T. Wilson & M. Tomlinson, *Wilson: Children and the Law* (Toronto: Butterworths, 1986) at 366.

⁹ Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965). Actually, the reform process can be traced even further back. See A.J. MacLeod, "The Juvenile Delinquency Committee" (1964) 6 Can. J. Crim. & Corr. 43. The phenomenon credited with triggering government interest in reform was the maturation of the baby boom generation into their teenage years, and the implications of this for correctional resources.

¹⁰ *An Act Respecting Young Offenders and to Repeal the Juvenile Delinquents Act*, 1st Sess., 32nd Parl., 1980-81 (first reading, 16 February 1981).

¹¹ Canada, House of Commons, *Debates*, Vol. 124, No. 202 at 10203 (2 June 1981).

¹² Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st Sess., 32nd Parl., No. 72 (1 April 1982) at 5.

¹³ "Suggested Amendments for the Consideration of the Standing Committee on Justice and Legal Affairs," Canada, House of Commons, *Journals*, 1st Sess., 32nd Parl., 1980-81-82, Appendix 134, 4741 at 4745.

House of Commons during the debate that accompanied second reading. However, referral to these sources does not reveal any clear impetus for this amendment. A reference to the plight of mentally disordered young offenders was made during the second reading debate, but there was no direct mention of a modification of this sort.¹⁴ None of the briefs or oral submissions to the Standing Committee on Justice and Legal Affairs contained any direct recommendation for treatment orders,¹⁵ although the Canadian Bar Association noted some of the problems likely when, as was the case under the JDA, a judge orders treatment as a component of a disposition.¹⁴ A likely source for the idea is suggested in the similarity between s. 20(1)(i) and reforms contemplated for the

¹⁴ The comment was made by Svend Robinson, a Member of Parliament from British Columbia and justice critic for the New Democratic Party. First decrying the lack of resources for "psychiatrically disturbed" young offenders in his province, he expanded the criticism to the nation in general:

The failure to provide adequate treatment for emotionally disturbed young people is an indictment both of federal and provincial governments and is not dealt with in this bill. There must be adequate minimum standards right across this land.

Canada House of Commons, *Debates*, Vol. 124, No. 184 (15 April 1981) at 9320.

¹⁵ Oral presentations were made by the following groups: Canadian Foundation for Children and the Law (Justice for Children); Professors Anthony Doob, Jean Dozois and Jean Trépanier; Canadian Bar Association; and, Canadian Association of Chiefs of Police. Representatives of the governments of Saskatchewan, Quebec and Ontario also appeared before the Committee. In most cases, testimony was preceded by a written submission. In addition, written briefs were sent by R.S. Rogers, Ph.D.; St. Peter's United Church, Nanaimo, B.C.; Emanuel Baptist Church, Vernon, B.C.; The Board of Congregational Life of the Presbyterian Church in Canada; Viking Houses; B.C. Civil Liberties Association; Liba Duraj of Carleton University; Mildred E. Battel, LL.D.; John W. Zinkmann, LL.B.; John Howard Society of Ontario; John Howard Society of Prince Edward Island; John Howard Society of Vancouver Island; John Walker, University of Ottawa; Juvenile Court Citizen's Committee; Children's Aid Society of Metropolitan Toronto; Montreal Urban Community Police Force; Ontario Psychological Association; St. John Police Department; Montreal Lakeshore University Women's Club; Laren House Society, Victoria; Canadian Home and School and Parent-Teacher Federation; Volunteer Centre of Metropolitan Toronto; Probation Officers Association of Ontario; New Westminster Crime Prevention Committee; Canadian Association for the Prevention of Crime; and, Canadian Association of Children and Adults with Learning Disorders. Telegrams or letters were sent by the governments of P.E.I., New Brunswick, Nova Scotia, and British Columbia. See G. Lowery, *Youth, Opportunity, Action* (Toronto: Central Toronto Youth Services, 1982).

¹⁶ The passage reads as follows:

Where a disposition includes provision for psychiatric treatment, there is no provision in the Young Offenders Act to insure endorsement of the psychiatric disposition. In numerous instances, an individual must attend to a psychiatric institution upon disposition. However, often placement in the institution is not available, or staff members refuse to accept the juvenile.

Clearly, the disposition imposed by the Judge should not be taken lightly. If the specific order of psychiatric treatment cannot be met, there must be provision to return the individual before the Judge for re-consideration based upon the inability to meet the stipulated condition. Thus, in a situation where a psychiatric institution is not able to accept the youth for treatment, he should not be placed in another facility where such treatment is unavailable.

While s. 20(1)(i) appears to respond to these concerns, this recommendation cannot, with certainty, be said to be its origin. Personal communication with Robert Kaplan has not provided any insight into this process. Letter from Robert Kaplan, M.P. to Alison J. Hatch (1 June 1988), Ottawa, Ont.

adult system. Currently, courts have no power to mandate the treatment of those they sentence,¹⁷ but treatment orders were recommended for Canada by the Law Reform Commission as early as 1976¹⁸ and, more recently, were being discussed as a possible addition to the *Criminal Code*.¹⁹ "Hospital orders" have been used in England and Wales since 1959.²⁰

However, in the clause-by-clause analysis undertaken by the members of the Standing Committee on Justice and Legal Affairs, none of these factors was discussed. In fact, the addition of treatment orders was the subject of very little discussion. In oral submissions made to the Committee, the only forum where reaction to the change was possible, there was one brief expression of praise²¹ and one of concern.²² Perhaps the Minister of Social Services for the Province of Saskatchewan represented the views of many when he complained of the difficulty of responding to last minute changes.²³ He also, in all probability, reflected the views of all provincial governments

¹⁷ B. Dickens, "Legal and Ethical Considerations in 'Enforced Therapy'" in R. Freeman & S.N. Verdun-Jones, eds., *The Treatment of Sexual Aggression: Legal and Ethical Issues* (Burnaby, B.C.: Criminology Research Centre, 1988) 23.

¹⁸ *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Information Canada, 1976).

¹⁹ Canada, Minister of Justice, *Information Paper: Mental Disorder Amendments to the Criminal Code* (Ottawa: Minister of Justice, June 1986). See also, Department of Justice, *Mental Disorder Project: Criminal Law Review*, (Ottawa: Department of Justice, September 1985).

²⁰ See R. Gordon & S.N. Verdun-Jones, "Mental Health Law and Law Reform in the Commonwealth: The Rise of the 'New Legalism'?" in D.N. Weisstub, ed., *Law and Mental Health: International Perspectives, Vol. 2* (New York: Pergamon Press, 1986) 1 at 51-6. This sentencing option differs from the treatment orders of the YOA in that detention may be for an indeterminate period of time, the court relinquishes all control over the offender to the physicians, and the order is not contingent upon the initial or continuing consent of the individual. It is in many ways similar to civil commitment. Examination of hospital orders for 1977 revealed that the average period of detention was 4.5 years, somewhat longer than would have been the case for penal servitude. E. Parker, "Mentally Disordered Offenders and their Protection from Punitive Sanctions: The English Experience" (1980) 3 *Int'l J. Law & Psychiatry* 461.

²¹ Marion Lane, General Counsel for the Canadian Foundation for Children and the Law, Inc. (Justice for Children) simply stated that it was a "good amendment." However, the focus of this comment was principally on the requirement that consent was needed from the treatment facility before such a disposition could be given. She, and several other witnesses, wished to see this power extended to community groups. Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 63 (23 February 1982) at 20.

²² Marc Bélanger, advisor to the Comité de la protection de la jeunesse of Quebec, stated that the amendment "nous pose des questions." Chief among them was the concern that the reasons for which medical and psychological reports could be ordered were too broad. He was also concerned that there were no review provisions. Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62 (16 February 1982) at 10.

²³ Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 63 (23 February 1982) at 29. Some provincial governments had prepared detailed discussion papers, soliciting input from interested parties. E.g., Ontario, Interministry Implementation Project, *Implementing Bill C-61, the Young Offenders Act: An Ontario Consultation Paper*

in his concern over the financial expenditures that the treatment order amendments would necessitate.²⁴ No debate accompanied the approval by the Committee²⁵ or the passage by the House of Commons²⁶ of the clause that was to become s. 20(1)(i).

The decision to add treatment orders as a dispositional option in the YOA was apparently made in a private forum, away from public scrutiny. Motives for this move can only be a matter for speculation. It is possible that the impending nature of a similar *Criminal Code* reform influenced the Ministry of the Solicitor General. However, one must ask why such a change would be added at the last possible moment. Recognition by the Canadian Bar Association of problems encountered under the JDA with securing treatment as a disposition seems a likely source. Certainly, the requirement in the YOA for prior approval of a treatment facility is a reflection of their comments.²⁷ On the face of it, the idea seems reasonable and we do not know how it would have been received had time permitted closer scrutiny. However, the ramifications of the decision to create this dispositional option are very apparent.

Implementation: The Consequences of Reform

After four years of experience under the YOA, it appears treatment orders are not being utilized frequently, if at all, in most provinces. In describing the second year of operation under the YOA in Manitoba, it was noted that "one major concern resulting from the YOA is that there are fewer treatment orders, if any."²⁸ In the eight months immediately following the proclamation of

(cont'd) (Toronto: Interministry Implementation Project, 1981). Last minute comments made with the same degree of contemplation and consultation were impossible.

²⁴ While such a disposition required the consent of the judge, young person, parents and treatment facility, he noted that no one consults the "provincial director who pays the bill." *Ibid.* Submissions made by the provincial governments were unanimous in the expression of concern over financial arrangements for the expanded services required generally.

²⁵ Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 72 (1 April 1982). The requirement that the young person give consent to the order (s. 22) did stimulate some discussion of instances where the young person was, by virtue of mental illness, unable to give informed consent. It was agreed that children so mentally disturbed as to be incompetent should not be prosecuted criminally (see Chapter 4).

²⁶ Canada, House of Commons, *Debates*, Vol. 124 (17 May 1982) at 17495. Svend Robinson again chastized the bill for failing to "come to terms with some of the serious problems of a young person who may have psychiatric disturbances or may be mentally retarded" (at 17490). He was apparently not impressed with the ability of treatment orders to deal adequately with such a situation.

²⁷ *Supra*, note 16.

²⁸ Manitoba, Ministry of Community Services, *Young Offenders Act: The Second Year, April 1985 - May 1986* (Winnipeg: Ministry of Community Services, 1986) at 17. There was no direct mention of this issue in

the YOA, only five treatment orders were made in a nine county area in southern Ontario.²⁹ In the previous year, some 200 children were reported to have received treatment as a disposition, either as a condition of probation or through committal to a children's aid society.³⁰ The six committals to treatment in several other areas of Ontario in 1984/85 were said to constitute a "very low" incidence.³¹ A national survey conducted by the Canadian Council on Children and Youth, in 1985, revealed that treatment orders were "rarely" used.³²

These early observations have since been confirmed by the first national youth court statistics released by the Centre for Justice Statistics. In fiscal years 1984/85 and 1985/86, there were 60 and 57 cases respectively terminated with a treatment order as the most significant disposition (Table 1.1). As a percentage of all possible dispositions, these figures represented a fraction of one percent, indicating that treatment orders were not handed down frequently, compared with the other dispositional options. Examination of the frequency of use for each province does not reveal much variation, with Nova Scotia and Quebec evidencing the highest use (Table 1.2). Sentencing judges also have chosen to restrict the length of each detention stay to short periods, usually three months or less (Table 1.3). It is usually males who are detained for treatment (91.7% in 1984/85 and 94.7% in 1985/86). For the most part, older offenders are the subjects of treatment orders, although six children age 12 or 13 have been subject to this disposition.

Although many have postulated a link between some anti-social behaviours and mental illness, treatment orders were novel, having no parallel in Canadian criminal law. Under the JDA, the enforcement power of the juvenile court could be used to compel participation in treatment, when deemed necessary. Although there was no formally defined power to do so, it was consistent with the paternalistic philosophy of the JDA, and few questioned the benevolence of any measure aimed at rehabilitation. Including an explicit statutory recognition of court-mandated treatment in the YOA should have permitted the practice to continue, even increase. This seems not to have been the case.

.....
(cont'd) the review of the first year: Manitoba, Ministry of Community Services, *Young Offenders Act: The First Year, 1985* (Winnipeg: Manitoba Community Services, 1985).

²⁹ 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.

³⁰ *Ibid.*

³¹ S. Elson, *Experiences and Issues with the Young Offenders Act* (Thorold, Ontario: Niagara Children's Services Committee, 1986) at 17.

³² R. Weiler & B. Ward, "A National Overview of the Implementation of the YOA: One Year Later" (1985) 8 Perception 2.

Table 1.1

Cases¹ with Guilty Findings Heard by Youth Courts² for Federal Statute Offences
by Most Significant Disposition³ 1984/85 and 1985/86

	Number 1984/5	Percent	Number 1985/6	Percent
Secure Custody	1,685	(7.2)	4,098	(11.6)
Detention for Treatment	60	(0.2)	57	(0.2)
Open Custody	2,388	(10.1)	3,206	(9.1)
Probation	12,279	(52.2)	17,826	(50.6)
Fine	3,070	(13.0)	5,424	(15.4)
Compensation	109	(0.5)	153	(0.4)
Pay Purchaser	26	(0.1)	56	(0.2)
Compensation in Kind	26	(0.1)	60	(0.2)
Community Service	1,453	(6.2)	2,154	(6.1)
Restitution	376	(1.6)	271	(0.8)
Prohibition/Seizure/Forfeiture	32	(0.1)	15	(0.0)
Other	526	(2.2)	319	(0.9)
Absolute Discharge	1,514	(6.4)	1,569	(4.5)
TOTAL CASES	23,539	(100.0)	35,208	(100.0)

Source: Adapted from Canadian Centre for Justice Statistics, *Youth Court Statistics: Preliminary Tables, 1984-85* (Ottawa: C.C.J.S., 1987); and, *Youth Court Statistics: Preliminary Tables, 1985-86* (Ottawa: C.C.J.S., 1987).

¹ A case is defined as "one or more charges laid against a young person which were presented to the court at the same time and disposed of in the fiscal year specified. If the same young person re-appears in court on a different date on a new set of charges, this will constitute another case."

² Data are not available for Yukon in 1984/5 or Ontario in either period.

³ The most significant disposition of a case is defined as "that which has the greatest impact on the living situation of the young person." Where a case has more than one disposition, the most serious disposition among them is chosen as the most significant disposition. Dispositions are ranked by seriousness in the order presented in the above table, with secure custody being the most serious, absolute discharge the least. In cases where treatment orders are combined with other dispositions, the treatment order will be the only one recorded here, unless the other disposition is secure custody.

Table 1.2

**Cases with Guilty Findings Heard by Youth Courts
with Treatment Order as Most Significant Disposition
by Province, 1984/85 and 1985/86**

	Total Cases 1984/5	Treat- ment Orders	Percent of Total	Total Cases 1985/6	Treat- ment Orders	Percent of Total
Newfoundland	1,172	0	--	1,603	3	.19
P.E.I.	92	1	1.09	285	0	--
Nova Scotia	851	12	1.41	2,138	4	.19
New Brunswick	611	1	.16	1,215	0	--
Quebec	6,020	34	.56	6,868	28	.41
Ontario	N/A	N/A	--	N/A	N/A	--
Manitoba	3,650	2	.05	3,392	1	.03
Saskatchewan	877	0	--	2,753	4	.15
Alberta	5,149	2	.04	9,531	3	.03
British Columbia	4,815	8	.17	6,487	14	.22
Yukon	N/A	N/A	--	171	0	--
N.W.T.	302	0	--	765	0	--
<hr/>						
TOTAL CASES	23,539	60	.25	35,208	57	.16
<hr/>						

Source: Canadian Centre for Justice Statistics, *Youth Court Statistics: Preliminary Tables, 1984-85* (Ottawa: C.C.J.S., 1987); and, *Youth Court Statistics: Preliminary Tables, 1985-86* (Ottawa: C.C.J.S., 1987).

Table 1.3

Length of Detention for Treatment Orders, 1984/85 and 1985/86

	1984/5	Percent	1985/6	Percent
Less than 1 month	19	(31.7)	16	(28.1)
1 to 3 months	22	(36.7)	15	(26.3)
4 to 6 months	7	(11.7)	9	(15.8)
7 to 9 months	1	(1.7)	3	(5.3)
10 to 12 months	5	(8.3)	12	(21.0)
13 to 24 months	5	(8.3)	2	(3.5)
≥ 25 months	1	(1.7)	0	--
TOTAL CASES	60	(100.0)	57	(100.0)

Source: Canadian Centre for Justice Statistics, *Youth Court Statistics: Preliminary Tables, 1984-85* (Ottawa: C.C.J.S., 1987); and, *Youth Court Statistics: Preliminary Tables, 1985-86* (Ottawa: C.C.J.S., 1987).

It is not uncommon that the stated intentions of criminal justice reforms are at variance with the outcome. Unanticipated and sometimes undesirable consequences often result, despite conscientious planning. This was true for the JDA and, although the YOA has been in effect for only four years, it is already apparent that at least some observers are very critical of the result. Focusing upon the one issue of treatment orders, it is the purpose of this thesis to examine the consequences of reform. With the benefit of a historical vantage, three principal theories have been developed to explain the origin and consequences of the juvenile court in the early years of this century.

Theories of Reform and the JDA

Much scholarly work has been conducted in attempts to provide theoretical insight into the evolution of juvenile courts. Emerging from late nineteenth century society, the JDA represented as remarkable a shift from the extant system as the YOA constitutes today. It permitted the establishment of a separate system of courts and detention facilities for children, making probation the dominant form of intervention. Previously, all offenders had been treated equally, regardless of age, and incarceration was common. When attempting to explain the impetus behind the creation

of juvenile courts, the role of private philanthropic and lobby groups is considered important by all, but there are competing views of their *motives* and the *outcome* of their efforts.

Humanitarian Progress

The orthodox view of the juvenile court, which remained virtually unchallenged until the 1960s, was of a benevolent institution, representing a vast improvement over the previous system. Cohen reminds us that this was the contemporary view of all criminal justice reforms, including the birth of the prison. Initiatives such as the juvenile court were seen as a stage in a progression or evolution, away from barbarity toward a more humane system. Motives were purely altruistic, the rationale provided by "science" and experts. Any failure to live up to stated goals is attributed to faulty implementation so the correctness of the system is never questioned.³³

The original proponents of the juvenile court, with little doubt, felt that they were bettering the lot of children. The publications of Julian Mack³⁴ in the U.S. and J.J. Kelso³⁵ in Canada reveal that they viewed the previous system as morally intolerable and criminogenic. As they described the plight of wayward youth and the logic of the juvenile court's effort at segregation, prevention, and paternal guidance, no compassionate individual could have objected. The legislators ultimately responsible for the passage of the JDA were simply acting in a moral and responsible manner.

This view was challenged by revisionist historians, beginning in the 1960s. While there is hardly complete accord concerning the precipitating factors and consequences of the creation of institutions such as the juvenile court, Cohen summarizes the points of agreement:

the motives and programmes of the reformers were more complicated than a simple revulsion with cruelty, impatience with administrative incompetence or sudden scientific discovery;

we cannot understand the emergence of [juvenile courts] apart from similar institutions of the same period;

the aims and regimes of such institutions must be understood in terms of a general theory, whether of the social order, power, class relations or the state;

experts and professionals created and captured a monopoly for their services despite their demonstrable lack of cognitive superiority; and,

control institutions can persist indefinitely despite their manifest failure.³⁶

Reference is also made to the massive social and economic changes occurring in the nineteenth

³³ *Visions of Social Control: Crime, Punishment and Classification* (Cambridge, Great Britain: Polity Press, 1985) at 18.

³⁴ "The Juvenile Court" (1909) 23 Harvard L. Rev. 104.

³⁵ E.g., "Delinquent Children: Some Improved Methods Whereby They May be Prevented from Following a Criminal Career" (1907) 6 Can. L. Rev. 106.

³⁶ Cohen, *supra*, note 33 at 30.

century, prompted to a great extent by the Industrial Revolution. However, various interpretations of the role of these factors can be found.

Pluralism: Moral Entrepreneurs and Interest Groups

The first school of thought that arose to challenge the whig view of historical change was advanced by authors such as Fox,³⁷ Rothman,³⁸ and the early work of Platt.³⁹ Reform efforts were viewed as a response to social changes in the aftermath of the Industrial Revolution in Europe, or the tremendous immigration and transiency of the population in North America. Traditional institutions of social control, such as the family and the church, were increasingly less effective and were being supplanted and replaced by state controlled mechanisms. This was coupled with an optimistic post-Enlightenment view of human behaviour which allowed room for redemption and reform. The need to impose order and regulation was part of the prevailing social norms. As such, the juvenile court went hand-in-hand with other institutions such as schools and the growing number of child welfare agencies.

Proponents of this view see the legislators as acting in response to the pressures of various interest groups. Individuals such as J.J. Kelso are termed "moral entrepreneurs,"⁴⁰ crusading to achieve legislative reform, armed with the belief that they are morally right in their perception of the problem, cause, and the solution. A moral panic may be the result, as the subject of the crusade is defined as a public threat, often in the media.⁴¹ Public opinion is mobilized by popularizing the idea immediate action is required to allay the downfall of the social order. This amplification of delinquency has been described in the Canadian situation by Houston, who argues that reform.s

³⁷ "Juvenile Justice Reform: An Historical Perspective" (1970) 22 Stanford L. Rev. 1187.

³⁸ *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown and Company, 1971); and, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston: Little, Brown and Company, 1980).

³⁹ *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969).

⁴⁰ This term was first used by Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press, 1963). He devised two categories: rule creators and rule enforcers. Kelso would belong to the former group, typical because of the crusading zeal with which he sought reforms of Canadian law concerning the detention and trial of juveniles. Becker describes this type of moral entrepreneur: "He is interested in the content of rules. The existing rules do not satisfy him because there is some evil which profoundly disturbs him. He feels that nothing can be right in the world until rules are made to correct it. He operates with an absolute ethic; what he sees is truly and totally evil with no qualification" (at 147-8).

⁴¹ A classic study of a moral panic was conducted by Stanley Cohen: *Folk Devils and Moral Panics* (London: Martin Robertson, 1972). See also I. Taylor, "Moral Enterprise, Moral Panic, and Law-and-Order Campaigns" in M.M. Rosenberg, R.A. Stebbins & A. Turowetz, eds., *The Sociology of Deviance* (New York: St. Martin's Press, 1982) 123.

efforts were initiated before there was any evidence of an increase in delinquency.⁴² In designing a response to delinquency they created a spiral effect whereby an increasing number of children were identified as delinquent, gradually expanding the scope of the system to those thought pre-delinquent. Sutherland also supports the position that juvenile justice reforms resulted, at least in part, from moral entrepreneurship:

Over a period of about two decades, then, Kelso, Scott, Gibson and others concerned with social improvement had convinced themselves and had persuaded many members of the relatively small group of Canadians who influenced or decided social policy that their new ideas for the prevention and cure of delinquency were workable propositions.⁴³

Other authors focus upon the vested interests of groups which sought to retain or gain increasing jurisdiction over children, some to further professional careers. Leon⁴⁴ has identified three groups that lobbied for or against the JDA. First, the police and magistrates, who had complete control over the apprehension and prosecution of juveniles at the time, opposed the JDA. Arguing from a crime control perspective, they believed children needed discipline and punishment rather than the "mollycoddling" of a paternal system. A second group was comprised of the few people who questioned the wisdom of withdrawing due process rights from proceedings involving children. Their views were overshadowed by those of the third group. The child-savers were ultimately successful in having their views expressed in the JDA. They saw the court as properly playing a social welfare function, ameliorating the criminogenic conditions of a child's environment rather than meting out punishment.

By the end of the nineteenth century, the function of this initially charitable group of individuals had been usurped and coopted by professional child savers, many of whom had originally been voluntary workers. The outcome of reform is seen to be the creation of professional positions, partly by the expansion of court jurisdiction into non-criminal areas. The benefits for children are, therefore, dubious as the rhetoric of the reforms are seen to differ from the reality. Increasing numbers are subject to prosecution and juvenile institutions are described as being similar to, or worse than, their adult counterparts. Many of these ideas about the negative consequences of the juvenile court are shared by those who regard political and economic factors as the key explanatory variables in its creation.

⁴² "Victorian Origins of Juvenile Delinquency: A Canadian Experience" (1972) 12 *Hist. of Ed. Q.* 254; and, "The 'Waifs and Strays' of a Late Victorian City: Juvenile Delinquents in Toronto" in J. Parr, ed., *Childhood and Family in Canadian History* (Toronto: McClelland and Stewart, 1982) 129.

⁴³ *Children in English-Canadian Society: Framing the Twentieth Century Consensus* (Toronto: University of Toronto Press, 1976) at 123.

⁴⁴ "The Development of Canadian Juvenile Justice: Background for Reform" (1977) 15 *Osgoode Hall L.J.* 71.

Proponents of this view see the juvenile court as one of a series of institutions of social control that were created by the state to maintain order in the industrial society of the nineteenth century. The assumption is made that power rests with those who hold capital in that the conditions necessary for the advancement of capitalism must be reproduced. The criminal justice system plays an instrumental function, coercively enforcing the moral standards of the ruling class and suppressing behaviour threatening either to the continued accumulation of capital or to the members of the dominant class. It also serves a hegemonic function in that blame for crime is placed on the individual offender rather than the state and economic factors; or upon behaviours of marginal and powerless groups, rather than political corruption or crime by the elites.

The structure of the nineteenth century family, nuclear and patriarchal, was seen as reflective of the mode of production. Women and children came to be dependent upon wage earners, both being effectively barred from the labour force, children by compulsory education and labour laws.⁴⁵ Family courts emerged as a mechanism for enforcing this essentially middle class conception of family. Havemann points out the social control function of the juvenile court, designed to regulate youth who were nonconformists or those who did not fall under the control of a patriarchal family, such as orphans and "street urchins."⁴⁶ Social instability, prompted by the migration and urbanization necessary to create an industrial labour force, had contributed to the increased need for state intervention in the family. By the end of the nineteenth century, this took the form of surrogate institutions, designed to supplement or replace the dysfunctional family.

The creation of a juvenile court was not seen as being of great benefit to children, especially those of the lower classes. The state had granted itself greater control over a wider variety of behaviours and, despite claims of treatment, sanctions were thought to have increased in severity.⁴⁷ Furthermore, the system had low visibility and no due process protections to serve the interests of the juvenile. The ultimate result was a system that perpetuated the problem by drawing in increasing numbers of children. The system remained unchallenged, despite the apparent "failure"

⁴⁵ D. Currie, "The Transformation of Juvenile Justice in Canada: A Study of Bill C-61" in B.D. MacLean, ed., *The Political Economy of Crime* (Scarborough: Prentice-Hall, 1986) 56.

⁴⁶ "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act 1908-1984" in S. Brickey & E. Comack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1986) 225.

⁴⁷ This view is refuted in the Canadian case by J. Hagan & J. Leon, "Rediscovering Delinquency: Social History, Political Ideology, and the Sociology of Law" (1977) 42 *Amer. Soc. Rev.* 587. Their argument is in turn criticized by W.G. West, *Young Offenders and the State: A Canadian Perspective on Delinquency* (Toronto: Butterworths, 1984).

to reduce delinquency.⁴⁸

Five Models of Intentions and Consequences of Reform

These three perspectives match Cohen's three models for the explanation of how and why changes in deviancy control emerged in the mid-nineteenth century.⁴⁹ They see the court as either a benevolent institution, a good idea gone sour, or a charade of social control with a hidden agenda. However, Cohen advances a more sophisticated analysis to explain recent trends in the execution of social policy. "Current deviancy-control patterns are much less clear than their predecessors, there are major disagreements about their implications, and the societal structures in which they are inbedded are far more complex."⁵⁰ His five models of the intentions and consequences of social action focus on the interplay and unique contribution of ideas, organizations, ideologies, professionals, and political economic forces (Table 1.4).

Progress

First, it is possible to explain reforms such as the YOA in terms of the traditional humanitarian model. Reforms are seen as as being stimulated by benevolent intentions fueled by scientific knowledge that discredits the current system, indicating a pressing need for change. The new measure is, therefore, a "rational" response, a natural progression in light of new understanding. Any deficiencies in the outcome are blamed on insufficient resources, failure to implement according to plan, or any other factors that do not force a re-examination of the original idea. Once these factors are remedied, the benefits originally envisioned will materialize.

Organizational Convenience

The second model views intentions as being likewise benevolent, but the outcomes go awry. Implementation of a new idea is either blocked by existing organizations resistant to change; or, the idea is co-opted and transformed. In either case, the result is often quite contrary to what had been envisioned. And yet, this view is optimistic in that the original idea is still viewed as valid, and correct implementation, while difficult, is not impossible.

⁴⁸ D.L. Snider & W.G. West, "A Critical Persepctive on Law in the Canadian State: Delinquency and Corporate Crime" in R.J. Ossenber, ed., *Power and Change in Canada* (Toronto: McClelland and Stewart, 1980) 199.

⁴⁹ *Supra*, note 33, c. 1. He calls his three models uneven progress; good (but complicated) intentions — disastrous consequences; and, discipline and mystification. The changes he considers include the birth of the prison, the rise of the asylum and theories of punishment, as well as the creation of the juvenile court.

⁵⁰ *Ibid.* at 87.

Table 1.4

Intentions and Consequences of Reform: Five Models

<i>Model</i>	<i>Original Intentions</i>	<i>Status of Eventual Consequences</i>
1. Progress	Benevolent — taken entirely at face value	More or less according to plan
2. Organizational Convenience	Somewhat mixed but on the whole benevolent — things could have worked out	Things not quite working out: unmet promises, unintended consequences. Organizational convenience snarls up the original plan
3. Ideological Contradiction	Contradictory and mixed and, for this reason, virtually impossible to realize	Because of contradictions, the emerging pattern bears little relationship to the plan. The policy area is a site in which contradictions are resolved
4. Professional Interest	Some benevolence, but on the whole, intentions are highly suspect and eventually self-serving	The system is shaped by self-interest
5. Political Economy	Intentions are more or less irrelevant or simply a mask for undeclared needs of the system	The system is shaped by the demands of the political economy

Source: S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press, 1985).

Ideological Contradiction

The last three models share a more pessimistic view of the intentions of reform. This model focuses upon the gap between the officially stated goals and the hidden agenda, the rhetoric and the reality. Surface messages may relay intentions of benevolent assistance to the target group, but the actual outcome may be reverse. This contradiction is inherent in the ideology of the reform, but is not apparent until implementation.

Professional Interest

The fourth model considers the power of the professionals, those attributed with superior knowledge about deviancy control through specialized training in the behavioural sciences. Taking hold in the nineteenth century, the role of "experts" has continually expanded and diversified, even during the recent period of "deprofessionalization." They seek to gain and maintain monopolies over their domains, and advance and support reforms that are in the interest of their group.

Political Economy

This model is a direct parallel to the political economy perspective discussed above. Little attention is paid to the rhetoric of reform for it is seen merely as a way for the state to legitimize its actions. Furthermore, the intentions of individuals, such as those who press for reform, are limited by the needs of the state and the economic imperative. The maintenance of the capitalistic system is the priority that guides even the crime control system. Increasingly repressive measures are employed by the state, to satisfy the need for order maintenance and to legitimate its actions by appearing to respond to the "crime problem," a problem which never abates. Some softer measures, such as treatment, are used to deflect attention, but there is no expectation of rehabilitation or "success."

While Cohen sees it as inappropriate to speak of the "success" or "failure" of any reform, many times it is necessary to explain the apparent incongruence between stated goals and outcome. Such is the case with treatment orders. The intentions of those most directly involved with the drafting of the YOA are discernible only from the official records of the parliamentary process. As discussed above, this reveals very little, as the issue was debated only for a short time. Personal communication with the former Solicitor General has shed no light upon the situation. We have no evidence, therefore, to doubt the intentions of these people that some mentally disordered young persons should receive treatment in a secure setting. This was to be one of the options available to sentencing judges, used when recommended by a mental health professional.

The consequences of this reform are just beginning to become apparent. With the information available at this early point, it can only be said that many people are dissatisfied with the treatment order provisions. However, as we shall see, the application of any one of the five models discussed above to the issue of treatment orders does not yield an entirely satisfactory explanation of the situation. The possible ideological contradiction inherent in the YOA must be recognized. The surface intent of the back-to-justice, neo-classical orientation of the YOA is to grant basic due process rights to young offenders; and yet the system, as it now operates, may be more punitive than before. But professional groups, with little doubt, are instrumental in how laws are both written and put into practice. Legal professionals must be satisfied with the situation, enjoying greater participation in the youth court arena since the passage of the YOA. But, mental health professionals and social workers, faced with declining roles in the youth justice system, may have been successful in retaining their legal and professional jurisdiction over the emotional problems of youth, but in other areas. And ultimately, the resources necessary to fund treatment must be provided by governments. Political economic forces dictate their priorities because funds are not unlimited. All of these factors will be examined below, but the discussion will begin with the history of treatment in the juvenile courts.

CHAPTER II

MENTAL HEALTH TREATMENT AND THE YOUTH COURT

When the treatment order provisions of the YOA came into effect in 1984, they were introduced into a system that had, for many decades, been responding to some juveniles in terms of their emotional and mental health needs. Resources permitting, juveniles could be assessed by mental health professionals and the court could mandate treatment or counselling. This was in keeping with the spirit, if not the letter, of the JDA. Before examining the divergent views on the wisdom of the provisions related to treatment for young offenders, it is helpful to review the relationship between the Canadian juvenile court and the mental health professions.

History

When the JDA was originally enacted, in 1908, no reflection of the nascent disciplines of psychiatry or psychology was evident in its pages. Far from a conception of crime as a result of individual pathology, the juvenile court had been premised upon a view of children as unfortunate victims of their family circumstances. The solutions defined in the act were based heavily on probation and other measures designed to ameliorate poor environments through early intervention in the home and, in extreme cases, removal of the child to foster care or industrial training.¹ The family was, therefore, the locus of both the problem and the solution.

The original supporters of the JDA shared an optimistic view of humanity, as redeemable and perfectable. If fully implemented, it was thought, the juvenile court could prevent children from becoming adult criminals, thereby stemming the rise in crime entirely. After scarcely a decade of operation, however, it became apparent that the revolutionary juvenile justice system envisioned by the supporters of the JDA had not fulfilled these expectations. Foremost among the indicators of this was the recidivism of children who had received the benefit of juvenile court services. In addition, rates of crime among the young were apparently rising even faster than those for adults.²

One rationalization evident in the writing of the time was that fault lay, not with the new techniques, but with the clients. Some of those who originally fought for the adoption of the juvenile court were apparently not prepared to abandon their beliefs. For example, in sharp contrast to her previous writings is this passage by Judge Helen MacGill of the Vancouver juvenile court:

¹ See, for example, J.J. Kelso, "Delinquent Children: Some Improved Methods Whereby They May be Prevented from Following a Criminal Career" (1907) 6 Can. L. Rev. 106.

² R.E. Watts, "The Trend of Crime in Canada" (1932) 39 Queen's Q. 402.

The gradual realization that the child who appears again and again in court is not merely "born bad," incorrigibly vicious by nature, but really abnormal or subnormal, brings to light the need for [a psychology] department in the juvenile court. Probation theories of the ordinary kind are wasted upon these cases. They lack the mentality to do right, they have no power of inhibition. Confused, harrassed, they stand in court pathetic figures, placed in a world too complex for their mental equipment, they are sore puzzled by the requirements. They have little idea of what is wrong - all they know is that they are always in trouble, and whatever they do is wrong.³

The court was no longer viewed as a panacea, some children simply being unsuitable candidates. The "co-opting" of psychology and psychiatry provided a scientific basis for the "individualized-treatment rhetoric" of the juvenile court⁴ and, in so doing, forestalled an examination of the juvenile court and its success by those involved with service delivery.

Although children were recognized as being as susceptible to mental diseases as adults,⁵ this was not the major concern. Instead, much effort came to be expended upon the classification of delinquents according to their intelligence. In 1919, for example, the Canadian National Committee for Mental Hygiene found that more than half of the delinquents in British Columbian industrial schools and the detention centre were "mentally abnormal."⁶ That most offenders were morons, imbeciles, backward or, at best, dull normal, was the main reason advanced for the inability of the juvenile justice system to achieve its original objectives:

British Columbia, like the other provinces of Canada, has apparently proceeded on the basis that the problem of juvenile delinquency was one involving only normal children. This preconception has led to the time honored system of placing offenders on probation or in reformatories with the hope of a successful issue. Failure, instead of success, has frequently been the result after painstaking and conscientious efforts along this line. [After finding that 59% of juvenile offenders were mentally abnormal] we would not expect the ordinary parole system or the industrial school to be effective reformatory agencies.... We would also be fearful that perchance the industrial schools might be hampered in exerting a good influence on their normal charges since they are called upon to deal with a mixed population.⁷

The recommendations of the Committee were to submit each child appearing before the court to a psychiatric or psychological examination, to establish separate institutions for "defective delinquents," and to allow for the indefinite detention of such children. A separate facility had yet to be

³ "The Relation of the Juvenile Court to the Community" (1919) 1 Can. J. Mental Hygiene 232 at 234-5.

⁴ F.L. Faust & P.J. Brantingham, "Models of Juvenile Justice: Introduction and Overview" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* 2nd. Ed. (St. Paul: West Publishing, 1979) 1 at 16.

⁵ Asylums for the custody of lunatics and the insane were constructed in Canada during the late nineteenth century. Between 1889 and 1900, 22 persons under the age of 15 years were admitted to the four large asylums in Ontario. At the time, masturbation was viewed as a common cause of insanity in children. J.D.M. Griffin & C. Greenland, "Early Days" in J. Shamsie, ed., *Experience and Experiment* (Toronto: Leonard Crainford, 1977) 13 at 19.

⁶ "Mental Hygiene Survey of the Province of British Columbia" (1920) 2 Can. J. Mental Hygiene 1. Only one of the 91 "mentally abnormal" children was diagnosed as being other than mentally retarded. He was found to be suffering from dementia præcox, an early term for schizophrenia.

⁷ *Ibid.* at 30-1.

built when the topic was reviewed by another committee, in 1936.⁸ In many provinces, such facilities were created but in others, such as B.C., efforts were made instead to provide segregated confinement within existing institutions.⁹

While some of those diagnosed as "mentally diseased," a term which had replaced lunacy and insanity, were seen to be amenable to treatment, no hope was held for any remedial program for defective children. Efforts were focussed upon their accurate identification, through extensive intelligence testing, at Child Guidance Centres or in the schools. Some were considered trainable, while others were subjected to long-term custodial care. As their reproduction was considered most harmful, sterilization, especially for girls, was lauded because it allowed their safe release into the community to be engaged as unskilled or domestic labourers.¹⁰ Eugenics and the custodial confinement of delinquents were but two of the priorities expressed by the mental hygienists, who also advocated restrictions on immigration and segregation of the public schools.¹¹

World War I provided the disciplines of psychology and psychiatry with practical applications. Widespread use had been made of psychometric techniques in the screening of military recruits and, after the war, psychiatrists were busy with the emotional problems of returning soldiers. The I.Q. testing of the soldiers had revealed that early definitions of feeble mindedness had been so broad as to encompass a huge proportion of the general population, and the lower cutoff point was revised.¹² Focus on developmental disabilities as explanations for delinquency gradually turned to mental diseases and emotional disturbances. The study of children as distinct from adults was also beginning,¹³ although initial work was focussed primarily upon child-rearing techniques

⁸ *Report of the Advisory Committee on Juvenile Delinquency* (Victoria: King's Printer, 1936). The "subnormal and mentally imbalanced" were still being found in industrial school populations, a problem attributed to lack of more appropriate resources for such children. It was further stated that "Reports from school psychologists and from the Provincial psychiatric clinic are invaluable to juvenile court judges and probation officers in diagnosis of the problem presented by a juvenile offender. Likewise, they serve as guides for the formulation of programme for a boy or girl at an industrial school. Some members of the Committee feel that all the children appearing before a juvenile court should be referred to the psychiatric clinic for examination and report as a matter of routine, and all are agreed that such examinations should be given in the majority of cases."

⁹ R.M. Gordon, *Mental Disorder, Law and the State*, Doctoral Dissertation, Department of Anthropology and Sociology, University of British Columbia [unpublished], 1988. No such facility was available in B.C. until 1953, with the establishment of Woodlands.

¹⁰ A.G. Westman, "Trends in the Care of Delinquent Girls" (1930) 6 *Child & Family Welfare* 33.

¹¹ N. Sutherland, *Children in English Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: University of Toronto Press, 1976) at 71-8.

¹² L.D. Zeleny, "Feeble-Mindedness and Criminal Conduct" (1933) 38 *Amer. J. Soc.* 564.

¹³ See, e.g., P.J. Miller, "Psychology and the Child: Homer Lane and J.B. Watson" in P.T. Rooke & R.L.

rather than the psychopathology of children.

In Toronto, psychiatrists had begun to offer consultation to the juvenile court as early as 1914, through the Toronto General Hospital. What had popularly been referred to as the "Feeble Minded Clinic" gradually began to consider the emotional and behavioural problems of children.¹⁴ While operating initially on a volunteer basis, the juvenile court clinic eventually expanded to the point where a full-time psychiatrist was appointed, in the 1930s. In these early years, psychiatric assessments were performed on an estimated 25% of juveniles appearing in the Toronto court, but the clinic "provided very little in the way of a treatment service, relying heavily upon environmental manipulation, and in extreme cases placement outside the home."¹⁵

In the years following the First World War, the desirability of institutionalized social services was acknowledged in Canada. Responsibility for health lay constitutionally with the provinces, so the establishment of a federal Department of Health, in 1919, was an early indication of the move toward the centralization of social services in Ottawa. But few measures were adopted and even the Great Depression did little to stimulate anything but token gestures.¹⁶ At the conclusion of World War II, discussion surrounding the desirability of an expansion of social security resumed, but little was actually accomplished until the 1950s.¹⁷ New ideas concerning the care and treatment of the mentally ill had been circulating for several decades, but the requisite resources and manpower were not available until the welfare state emerged in Canada.¹⁸

Throughout this period, the disciplines of psychiatry and psychology were both advancing and growing in acceptance. The term "emotionally disturbed" entered the professional vernacular in the 1930s,¹⁹ and more intrusive therapeutic techniques, such as psychosurgery and shock treatments, were adopted. Even the field of social work became increasingly focussed on psychological characteristics rather than the social and economic conditions that had been the target of early

(cont'd) Schnell, eds., *Studies in Childhood History: A Canadian Perspective* (Calgary: Detselig Enterprises Limited, 1982) 57.

¹⁴ Griffin & Greenland, *supra*, note 5.

¹⁵ C. Chamberlain & G. Awad, "Psychiatric Service to the Juvenile Court: A Model" (1975) 20 *Can. Psychiatr. Assoc. J.* 599 at 600

¹⁶ D. Guest, *The Emergence of Social Security in Canada* 2nd Ed. (Vancouver: University of British Columbia Press, 1985).

¹⁷ *Ibid.*

¹⁸ Gordon, *supra*, note 9. Most notably, the wide-spread use of institutions was coming under attack from those who advocated the use of community-based care and treatment.

¹⁹ R.M. Liebert & R. Wicks-Nelson, *Developmental Psychology* 3d Ed. (Englewood Cliffs: Prentice-Hall, 1981) at 511.

efforts.²⁰ Significantly, the criminal justice system adopted the medical model and armies of helping professionals were enlisted in the fight against crime.²¹ Universities graduated a better trained cohort of helping professionals²² and the new discipline of child care work emerged,²³ a recognition of the desirability of treating children and adolescents in a manner distinct from adults. Facilities specializing in the emotional problems of children and adolescents were eventually opened, in the 1960s.²⁴ Availability increased until the mid-1970s,²⁵ when a decline in residential treatment followed in favour of non-residential resources, such as outpatient services and home care.²⁶

Mental Health Services and the JDA

By the time the JDA was coming under scrutiny, in the 1960s, therefore, there was a generally recognized role for mental health services in the juvenile justice system. The theoretical connection between offending and emotional problems was both plausible and widely accepted. The flexibility afforded by the JDA permitted, even encouraged, any measures designed to prevent future anti-social behaviour.²⁷ After the failure of probation case work and industrial training to

²⁰ R. Lubove, *The Professional Altruist* (Cambridge: Harvard University Press, 1965).

²¹ A.M. Maxwell, Juvenile "Justice" and Child "Welfare" – The Historical Implications of Reform: From the Juvenile Delinquents Act to the Young Offenders Act, 1908-1984, Master of Social Work Thesis, University of British Columbia [unpublished], 1983. Sociological theories of delinquency, specifically those of the Chicago School, were developing parallel to the psychiatric theories in the 1920s and 1930s, particularly in Britain. These two trends never merged, and the sociological gradually gained dominance, at least in academic circles. See A. K. Bottomley, *Criminology in Focus: Past Trends and Future Prospects* (Oxford: Martin Robertson & Co., 1979) at 45-8. The policy implications of psychiatrically based theories were more straightforward and easier to implement than the vague pleas for institutional change of the sociologists, perhaps explaining the continued reliance upon the medical model of delinquency, at least in practice.

²² Ontario, Ministry of Community and Social Services, *Three Decades of Change: The Evolution of Residential Care and Community Alternatives in Children's Services* (Toronto: Ministry of Community and Social Services, 1983) at 3.

²³ J. Shamsie, ed., *Experience and Experiment* (Toronto: Leonard Crainford, 1977).

²⁴ Ministry of Community and Social Services, *supra*, note 22. The first mental hospital specifically for children, Thistletown, was opened in Ontario in 1957. See Shamsie, *ibid*.

²⁵ Residential treatment capacity in Ontario was at this time approximately 1,300 beds. Ministry of Community and Social Services, *ibid*.

²⁶ The length of stay decreased and more children were treated in the community. In the late 1960s, residential stays in Ontario had ranged from two to four years. Ministry of Community and Social Services, *ibid*.

²⁷ A court was not strictly limited to the law as written, but was encouraged to "liberally construe" the act and treat each juvenile "not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance." (s. 38).

positively affect recidivism rates, psychological explanations that concentrated blame on the internal characteristics of delinquents did not force a reexamination of the juvenile court model itself. The majority of young persons appearing before the juvenile court had no contact with the mental health system. But, some juveniles were the subjects of mental health assessments, usually for dispositional purposes. More rarely, the pre-adjudication issues of fitness to stand trial and the insanity defense were decided with the assistance of such reports.

Assessments

As mentioned above, the use of psychiatric assessments by Canadian juvenile courts began in some jurisdictions as early as the first world war. This practice, with little doubt, became more widespread as the necessary resources were made available, despite the fact that the JDA was silent on the issue. Still, there was likely great variation in the frequency with which assessments were performed, across Canada. In London, a city with a family court clinic, 10% of young persons appearing before the juvenile court were referred for assessment.²⁸ In another study, involving several cities, the figure reported was 5%.²⁹ It was less likely that assessments would be ordered in non-metropolitan areas.³⁰

Some variation in the frequency with which the courts requested assessments would have been attributable to the availability of the requisite resources. Cities such as Ottawa, Kingston, Toronto³¹ and London³² had clinics associated with the family/juvenile courts. Many assessment facilities were centralized in an urban area but provided inpatient services to the entire province. This would include Juvenile Services to the Court near Vancouver, and Children's Forensic Services, in Winnipeg.³³ Inpatient assessments were also performed in local hospitals, when there was no specialized adolescent facility, or by psychologists on staff in secure custody facilities. In many non-urban areas, outpatient mental health assessments were performed by local physicians/psychologists or by travelling teams of professionals.

²⁸ P.G. Jaffe, A.W. Leschied, L. Sas & G.W. Austin, "A Model for the Provision of Clinical Assessments and Service Brokerage for Young Offenders: The London Family Court Clinic" (1985) 26 *Can. Psychology* 54. This represented approximately 200 juveniles per year.

²⁹ N. Bala & R. Corrado, *Juvenile Justice in Canada: A Comparative Study* (Ottawa: Solicitor General Canada, 1985). The data were collected in 1981, predominantly in urban areas: Vancouver and Kelowna, B.C., Edmonton and environs, Winnipeg, Toronto, Montreal and Halifax.

³⁰ *Ibid.*

³¹ Chamberlain & Awad, *supra*, note 15.

³² Jaffe *et al.*, *supra*, note 28.

³³ The problem this creates for non-urban and northern children is obvious. See Manitoba Association of Social Workers, Brief Submitted to the Committee Studying the Juvenile Justice System, December, 1978.

Clearly, evaluations of juveniles were conducted; yet, there was no justification for this practice in the JDA. Some allied legislation, most usually mental health statutes, permitted judicial order of assessments in criminal cases.³⁴ At least one province had enacted legislation specifically permitting juvenile courts to order mental health evaluations, the purpose of which was to determine the emotional or physical circumstances of an alleged offender.³⁵ While the ability of provincial legislatures to expand the powers of a judge was eventually held to be *ultra vires*, the practice of performing assessments was not questioned.³⁶ Some direction may also have been found in the *Criminal Code*, wherein the criteria for adjournments for mental health evaluations for adults are defined.³⁷ However, just prior to the enactment of the YOA, a very narrow interpretation of the use of these provisions by juvenile courts was made, restricting their use to instances where assessments could aid in the determination of guilt or innocence.³⁸ It is, however, more likely that assessments played a greater role in the dispositional phase of juvenile court proceedings, some even arguing that such investigations were only properly conducted after adjudication.³⁹ Generally, legal responsibility was accorded little importance but, in recent years, competency to stand trial and diminished capacity due to insanity have both been debated in the juvenile courts of Canada.

Fitness to Stand Trial

It is a basic tenet of criminal law that an accused be able to participate meaningfully in his or her defence. A person determined to be, "on account of insanity, [in]capable of conducting his defence" may be found unfit to stand trial,⁴⁰ because any decisions made by such a person may not be in his best interests. In the non-adversarial arena of the traditional juvenile court, however, the need for an accused to comprehend the proceedings was not accorded great importance.⁴¹ Due to

³⁴ E.g., *Mental Health Act*, R.S.O. 1980, c. 262, s. 15.

³⁵ *Corrections Act*, R.S.M. 1970, c. C-230, s. 15. No previous medical evidence, indicating the possible presence of a mental disorder, was required for the court to make such an order.

³⁶ *R. v. Wiedeman*, [1976] 4 W.W.R. 160 (Man. C.A.).

³⁷ R.S.C. 1970, c. C-34, s. 738(5) and (6).

³⁸ The Manitoba Court of Queen's Bench upheld a lower court ruling that the Crown could not request an assessment to aid in a transfer hearing. *R. v. K. (A.I.)*, [1982] 1 W.W.R. 666. If s. 738 were used as the legal justification for a court-ordered assessment, some prior evidence of mental illness, such as a written psychiatric report, would have been required. There were also limitations on the length of any remand (s. 738(6)).

³⁹ E.g., Department of Justice Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965) 151.

⁴⁰ *Criminal Code*, s. 543(1).

⁴¹ T. Grisso, M.O. Miller & B. Sales, "Competency to Stand Trial in Juvenile Court" (1987) 10 Int'l J. L. &

age, a certain amount of incompetency was assumed and the members of the court were entrusted with the duty to act in the juvenile's best interests.

In recent years, as the juvenile courts came to more closely approximate the adult system, concern with fitness was heightened, but more so in the U.S. than Canada.⁴² Statistics Canada reports that in 1982, only six juveniles were declared unfit to stand trial.⁴³ Even among a clinical sample, the issue was rarely raised.⁴⁴ This low number was attributed to the diversion of possible candidates away from the justice system, and the ability to sentence juveniles to treatment, bypassing any need to raise the issue of fitness.⁴⁵ If the desired end was to achieve some manner of treatment for those thought to need it, alternate avenues existed.

Insanity Defence

If a person was declared fit to stand trial, or if there was no question as to fitness, he or she is still entitled to raise the defence of insanity. The insanity defence is concerned exclusively with the issue of the defendant's mental state *at the time of the alleged offence* and whether this state justifies absolution of criminal responsibility. If the defence is successfully raised, the accused is acquitted, but if the offence charged was an indictable one, the acquittal does not mean that the defendant is free to leave the courtroom. Those found not guilty by reason of insanity are to be kept "in strict custody" until the pleasure of the Lieutenant-Governor is known.⁴⁶ Almost invariably, an order for "safe custody" is made.⁴⁷ The Board of Review will consider the case of an accused, who has been maintained in custody, at regular intervals, and will make recommendations to the Lieutenant-Governor, concerning the potential release of the person.⁴⁸

(cont'd) Psychiatry 1.

⁴² *Ibid.*

⁴³ Letter from Roy Jones to Alison Hatch (2 October 1984), Ottawa, Ontario.

⁴⁴ Of 185 15 to 17 year olds assessed at Metropolitan Toronto Forensic Services between 1977 and 1985, only two were declared to be unfit to stand trial by treatment staff. M.S. Phillips & L.C. Thompson, "Psychiatric Assessments under the Young Offenders Act" (1986) 63 Dimensions in Health Services 20. The court outcome of these cases is not stated.

⁴⁵ C. Spears & M.S. Phillips, *The Lieutenant Governor's Warrant and the Young Offender*, Working Paper #67, Metropolitan Toronto Forensic Services [unpublished], 1984. The need for different legal criteria, to distinguish unfitness from the incompetency that normally accompanies youth, is also a factor that precludes some clinicians from raising what is essentially an issue of concern only for the court.

⁴⁶ *Criminal Code*, s. 542(2).

⁴⁷ *Criminal Code*, s. 545(1)(a). However, the Lieutenant-Governor may discharge the person, if it is not contrary to the public interest (s. 545(1)(b)).

⁴⁸ *Criminal Code*, s. 546(5).

In the juvenile court, the insanity defence was even more infrequently debated than was fitness. In 1982, only one juvenile was declared not guilty by reason of insanity.⁴⁹ One possible explanation was the availability of the presumption of *doli incapax*, when the burden of proof was transferred to the Crown to rebut the presumption that the child was incapable of forming criminal intent because of youth.⁵⁰ Of greater importance, however, was the inability of a juvenile court to order detention after an acquittal by reason of insanity.⁵¹ At least one judge had taken this to mean that juveniles were not entitled to raise the defence of insanity.⁵² Another opinion was that transfer to adult court was indicated in all such circumstances so that the juvenile could be subject to the adult provisions for committal.⁵³

Treatment

Juvenile delinquents could be mandated by the court to participate in a treatment programme. In fact, prior to 1971, wards of the court were in a better position to receive inpatient services than were their private counterparts.⁵⁴ Although the JDA was silent on this issue, a number of mechanisms were used to induct juveniles into treatment resources. Any detention could be for an indefinite period, the child's consent was not required, and cooperation was enforceable.

⁴⁹ Letter, *supra*, note 43.

⁵⁰ At least one court decision held that the defence of insanity was possibly encompassed within the broader presumption of *doli incapax* (*R. v. B.C.* (1977) 39 C.C.C. (2d) 469 (Ont. Prov. Ct.)). This was provided for in s. 13 of the *Criminal Code*. Those persons who were seven years of age or more but were still under the age of 14 could claim that, by reason of tender years, they were not able to appreciate that their behaviour was wrong and that they were not competent to understand the nature and consequences of their conduct. The onus was then put upon the Crown to prove the child was competent or had the capacity to distinguish right from wrong. Incapacity was presumed and had to be refuted. If the paucity of written judgments is any indication, however, *doli incapax* was very infrequently considered. See J.L. McLeod, "Doli Incapax: The Forgotten Presumption in Juvenile Court Trials" (1980) 3 Can. J. Fam. L. 251.

⁵¹ This was the consequence of the restriction of use of Lieutenant-Governor's warrants to matters involving indictable offences. As juveniles could be charged only with delinquencies, which were *summary conviction* offences, s. 542 of the *Criminal Code* did not apply and the juvenile court had no jurisdiction to order such custody.

⁵² See *Re B. and M.* (1975), 33 C.R.N.S. 362 (Ont. Prov. Ct.) and related comments in J. Wilson, *Children and the Law* (Toronto: Butterworths, 1978).

⁵³ See *R. v. P. (No. 2)*, [1979] 4 W.W.R. 340 (Man. Q.B.) and related comments in L. Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982).

⁵⁴ Initially, the system was user-funded on a per-diem basis. That being the case, the majority of spaces were occupied by wards, of the Crown or a children's aid society. After 100% government funding was introduced, private referrals increased. Ministry of Community and Social Services, *supra*, note 22. Preferential access to forensic resources for delinquents was also observed in Manitoba. Manitoba Association of Social Workers, *supra*, note 33 at 7-8.

Treatment could be a condition of probation, making noncompliance a new offence.⁵⁵ Juveniles could also received treatment after having their case adjourned *sine die*, again leaving provision for return to court and prosecution as a possible consequence of noncooperation. Commital to the care of a children's aid society or provincial child welfare agency, although not possible in all provinces, was one possible route.⁵⁶

Several examples of treatment programs for juvenile delinquents have been reported.⁵⁷ Wide variation in the frequency with which inpatient treatment was ordered through the court was likely the case. In one Ontario city, 27.8% of assessments resulted in recommendations for residential treatment,⁵⁸ a figure far higher than would have been the case in areas with no children's or adolescent treatment centre.⁵⁹

Mental Health Services and the YOA

In sharp contrast to the JDA, the YOA explicitly defines the procedures surrounding the use by young offenders of mental health services. A list of the mental health services now available for young offenders in British Columbia is probably representative of those in most provinces:

- a) court-ordered assessments, both inpatient and outpatient;
- b) court-ordered outpatient treatment as a condition of probation or bail;
- c) court-ordered inpatient treatment;
- d) outpatient assessment, treatment or consultation for case management of probation or bail cases;
- e) consultation or assessment for the purposes of pre-court enquiry, to aid Crown counsel or probation services in determining whether diversion from court proceedings is appropriate;
- f) emergency assessment and treatment services to young persons in custody;
- g) outpatient treatment as a part of an alternative measures agreement; and,

⁵⁵ JDA, s. 20(3).

⁵⁶ JDA, s. 20(1)(h).

⁵⁷ R.R. Ross & P. Gendreau, "A Study of Institutional Treatment Programs" in R.R. Ross & P. Gendreau, eds., *Effective Correctional Treatment* (Toronto: Butterworths, 1980) 391; and, M. Leblanc, "Retrospective Look at a Decade of Evaluation: Boscoville" in R. Corrado, M. Leblanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 267.

⁵⁸ Jaffe *et al.*, *supra*, note 28.

⁵⁹ In B.C., for example, a boy was sent to Alberta when the judge determined that no suitable treatment facility existed in his home province. The City of Vancouver and the Attorney General unsuccessfully appealed: *Re J.V.* (1981), 60 C.C.C. (2d) 121 (B.C.S.C.). With the appearance of a possible trend, as other judges followed suit, a 25-bed secure treatment unit was eventually opened.

h) outpatient alcohol and drug counselling and treatment.⁶⁰

In B.C., as in many provinces, this represents an expansion of services over the pre-YOA period. More inpatient beds and outpatient treatment personnel were provided after the proclamation of the YOA, aided by cost-sharing agreements between the federal and provincial governments (see Chapter 4).

Medical and Psychological Reports

Under the YOA, a court may order a psychological or psychiatric examination for dispositional purposes,⁶¹ or when considering the transfer of the case to the adult courts.⁶² Psychiatrists/physicians may also conduct examinations for the purpose of determining whether a young person is fit to stand trial⁶³ or if the young offender intends to raise the defence of insanity. Generally, however, the court may order a medical or psychological report be conducted for any reason if all parties agree to it⁶⁴ or:

...where the court has *reasonable grounds* to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation *and* where the court believes a medical, psychological or psychiatric report in respect of the young person might be helpful in making any decision pursuant to this Act.⁶⁵

This is extremely wide latitude, in both the reasons for a report⁶⁶ and the timing of such a

⁶⁰ B. Clark & D. Eaves, "Health Services for Young Offenders in British Columbia" (1985) 1 B.C. Psychologist 30 at 31.

⁶¹ S. 13(1)(c). See *R. v. D.S.* (Ont. Prov. Ct. (Fam. Div.)), May 2, 1984, Y.O.S. 84-015 where the definition of "disposition" was expanded to include bail hearings (i.e., the assessment of whether a young person would constitute a danger to himself or others if released). Judge Kent, in delivering the decision apparently felt that psychiatric/psychological evidence should be available to the court at any time. For a contradictory view, see the judgment of Bean, J. in *R. v. J.M.* (1984), 12 W.C.B. 390, 2 Y.O.S. 3096 (Ont. Prov. Ct.), discussed *infra*. See also commentary by W.H Swail, "Some Comments on Section 13 of the Y.O.A.: Forensic Reports and Fitness to Stand Trial" (1986) 1 Y.O.S. 7547.

⁶² S. 13(1)(a).

⁶³ S. 13(1)(b) and (2). In these cases, the procedures defined in s. 543 of the *Criminal Code* apply.

⁶⁴ S. 13(1)(d).

⁶⁵ S. 13(1)(3) [emphases added].

⁶⁶ B. Landau, "The Young Offenders Act: Important Features for Psychologists" (1983) 15 Ont. Psychologist 6. Even the Ontario Psychological Association recommended that "clinical assessment ordered by the court or the Crown only include severe mental disturbances such as would result in an insanity plea ... or as defined in [a provincial] Mental Health Act." Brief on the Young Offenders Act, Bill C-61, Presented to the Standing Committee on Justice and Legal Affairs, September, 1981. Such a limitation on assessments had been advocated by Bean, J. of the Ontario Provincial Court in *R. v. J.M.*, *supra*, note 61. He considered the ordering of an assessment an "extraordinary procedure," noting the serious infringement possible upon a young person's rights. He was, therefore, critical of any propensity to order assessments routinely, for almost any reason, and the wide latitude to do so afforded by the wording of the YOA. Section

request.⁶⁷

In its request for an assessment, the court should specify the reason(s) the examination is being sought. In contrast to the procedure defined for adults,⁶⁸ the belief that the young person may be suffering from one of the designated conditions need not be supported by evidence of a qualified person *prior* to the judicial order for an assessment.⁶⁹ The young person does not have to consent to the examination and may refuse to participate. The possibility that incriminating statements may be made during an evaluation does not compromise a youth's constitutional right to remain silent.⁷⁰

Assessments may be conducted on either an inpatient or outpatient basis. The young person may be held in custody for the purpose of the assessment for up to eight days or, with evidence from a qualified person that a longer period is necessary, for up to 30 days.⁷¹ In most cases, the young person and the parent(s) will be given a copy of any report emanating from an assessment,⁷² although the author may request that parts or all of the report be withheld if disclosure "would be likely to be detrimental to the treatment or recovery of the young person or would be

(cont'd) 13(1)(e) especially was considered by the judge to be open to too broad an interpretation:

It is obvious in my opinion that in virtually every case coming before the court, a psychiatric examination "might be helpful." Particularly, if one includes the next phrase "in making any decision pursuant to this Act," it is almost impossible to think of a situation in which a judge is required to make a decision under the *Young Offenders Act* in which a psychiatric examination and report may not be helpful. If only, for example, to prove or to establish that the young person is not suffering from any psychiatric or psychological illness, emotional disturbance, et cetera and clearly, in my view then, the words "might be helpful" cannot be construed at large.

He concluded that a "restrictive" interpretation must be given to s. 13(1)(e) and that the information gained from an assessment must have some bearing on the issue before the court.

⁶⁷ In the U.S., for example, there are many states where mental health evaluations are prohibited prior to the determination of guilt. As Grisso *et al.*, *supra*, note 41 at 4 explain, "the intent of this approach is to ensure that the adjudicative process is not tainted by evidence that is irrelevant for testing the formal charge."

⁶⁸ *Criminal Code*, s. 738(5).

⁶⁹ However, the desirability of such a safeguard has been noted in *R. v. J.M.*, *supra*, note 61; and by a higher court in *Re B.C. and the Queen* (1986), 29 C.C.C.(3d.) 434 (Ont. H.C.).

⁷⁰ An application by the Crown for a psychiatric assessment was unsuccessfully opposed by the defence in a recent case where two young persons were charged with murder in Mission, B.C. The argument advanced was that participating in such an evaluation was inconsistent with the right to remain silent, as mental health professionals are compellable witnesses. "Psychiatric Probe Challenged by Lawyer" *The Vancouver Sun* (13 February 1988) A7; and, "Juveniles Face Tests" *The Vancouver Sun* (27 February 1988) A3.

⁷¹ S. 13(3).

⁷² S. 13(4). This may well affect the content of reports compared with those prepared when the JDA was in effect. T. Melville, "An Issue of Confidentiality; Widened Disclosure in the Clinical Context" (1987) 45 U.T. Fac. L. Rev. 179.

likely to result in bodily harm to, or be detrimental to the mental condition of, a third party."⁷³ The author of that report may well be requested to present evidence in court and be cross-examined.⁷⁴

Little information is as yet available about the use of assessments under the YOA. In many areas, there have probably not been great changes in the procedures whereby mental health services are provided. In a survey conducted by the Canadian Council on Social Development and the Canadian Council on Children and Youth in March, 1985, the community organizations polled across the country reported that, although there was inter-jurisdictional variation, most assessments were being conducted within the 30 day period defined in the YOA.⁷⁵ The Children's Forensic Services, in Winnipeg, received 135 referrals from probation services during the first year of operation under the YOA. Of this number 84 were from urban areas and 51 (37%) were from rural areas. At that time, further extension of services to rural Manitoba was under review.⁷⁶ One study, which focused in the period immediately before and after proclamation, found that the proportion of charges which were associated with a request for assessment decreased significantly, from 11.8% to 5.5%.⁷⁷

Fitness to Stand Trial

In instances where young persons may not be capable of understanding the proceedings and instructing counsel, youth court judges may choose to address the issue of fitness to stand trial.⁷⁸ The potential need for a fitness hearing may be raised by any party to the proceedings, prior to adjudication. Where young persons are concerned, however, it would appear desirable that the intention to raise the issue of fitness should be indicated to, or by, the court prior to the ordering of an assessment, the purpose of which is to test fitness.⁷⁹ When the issue of fitness is raised, the

⁷³ S. 13(6).

⁷⁴ S. 13(5).

⁷⁵ R. Weiler & B. Ward, "A National Overview of the Implementation of the YOA: One Year Later" (1985) 8 *Perception* 2.

⁷⁶ Manitoba, Ministry of Community Services, *Young Offenders Act: The First Year, 1985* (Winnipeg: Manitoba Community Services, 1985) at p. 24.

⁷⁷ A.W. Leschied & P.G. Jaffe, "Implications of the Young Offenders Act in Modifying the Juvenile Justice System: Some Early Trends" (n.d.) Unpublished Paper, London Family Court Clinic. The generalizability of these figures is unwise, as the use of assessments has probably increased in some jurisdictions and decreased in others. In addition, possible changes in charging practices have not been taken into account even though "charge" is the unit of analysis.

⁷⁸ S. 13(7).

⁷⁹ *R. v. J.M.*, *supra*, note 61. This has been the focus of some debate. See Swail, *supra*, note 61.

procedures outlined in s. 543 of the *Criminal Code* will, with suitable modifications for young offenders, be applied by the court.¹⁰

The court will call upon a medical practitioner to prepare a report concerning fitness.¹¹ The evidence presented to the court in this report must be examined in light of the established legal criteria for defining fitness. Mental illness does not, in and of itself, render an accused person unfit to stand trial, but that person must be able to understand the proceedings and instruct counsel. The sole direction given to the courts is that an accused may only be found unfit to stand trial "on account of insanity."¹² Nevertheless, the judges have developed their own test of fitness, which has been consistently applied in modern Canadian cases.¹³

If the accused is declared to be fit, then the trial will resume.¹⁴ If the accused is found to be unfit, the court must order that the young person be detained indefinitely, at the pleasure of the Lieutenant-Governor.¹⁵ If and when an accused person "recovers" sufficiently for the purpose of standing trial, he or she may be returned to court and, provided that he or she is declared to be fit, the trial will recommence.¹⁶ The youth court will retain jurisdiction even if the accused has since become an adult.

On the other hand, the Crown may be content to enter a stay of proceedings or to withdraw charges against the accused rather than to proceed to trial. It appears that most unfit accused will

¹⁰ For example, the *Code* provisions concerning the remand of an adult in custody for a psychiatric examination, are superceded by s. 13(3) of the YOA. With the evidence of a qualified person, usually a psychiatrist or psychologist, the maximum remand period allowed for young persons is 30 days, shorter than the maximum permitted for adults in the *Criminal Code* (60 days). The spirit of the Act would seem to dictate that such custody would ideally occur in a facility specifically dedicated to young persons.

¹¹ S. 13(1)(b) and 13(2). Such an order may be made either with or without the consent of the young person. Ss. 13(1)(d) and (e).

¹² *Criminal Code*, ss. 543(1) and 543(6).

¹³ A leading formulation of this test is that of Martin, C.J.S. in the case of *Woltucky*:

...the test of this issue is whether or not the accused is able to understand the proceedings; to try him if he is not able to understand the proceedings and to instruct counsel would deprive him in all probability of his rights to make his full defence.

(1952), 103 C.C.C. 43 (Sask. C.A.) at 46-47. See generally, P.S. Lindsay, "Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada" (1977) 19 *Crim. L. Q.* 303; A. Manson, "Fit to be Tried: Unravelling the Knots" (1982) 7 *Queen's L. J.* 305; and, S.N. Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada: The Forked Tongue of Social Control" (1981) 4 *Int'l J. Law & Psychiatry* 363.

¹⁴ *Criminal Code*, s. 543(5).

¹⁵ *Criminal Code*, s. 543(6).

¹⁶ *Criminal Code*, s. 543(8).

be rendered fit within a relatively brief period once treatment is administered.⁸⁷ It should be noted that, in all provinces, a Review Board will regularly consider the cases of unfit persons, who are subject to a regime of lengthy detention. The Board is required to report to the Lieutenant-Governor as to whether, in its opinion, "that person has recovered sufficiently to stand trial."⁸⁸ The Board's report will also include any recommendations that it considers in the interests of the recovery of the person to whom such review relates provided that they are not "contrary to the public interest."⁸⁹ When the accused remains unfit, the Lieutenant-Governor has the power to keep him/her in custody or, alternatively, the Lieutenant-Governor may, "if in his opinion it would be in the best interests of the accused and not contrary to the best interests of the public," make an order "for the discharge of the accused either absolutely or subject to such conditions as he prescribes."⁹⁰

Insanity Defence

The defence of insanity is not specifically addressed in the YOA, as the *Criminal Code* provisions governing insanity now apply to young persons.⁹¹ In addition, all related case precedents used for assessing the sanity of adults may equally be used for young persons.⁹² The only modifications

⁸⁷ For example, a British Columbia study indicates that, in recent years, the average period of hospitalization served by unfit defendants, committed for treatment at the British Columbia Forensic Psychiatric Institute, has been six months. R. Roesch, D. Eaves, R. Sollner, M. Normandin & W. Glackman, "Evaluating Fitness to Stand Trial: A Comparative Analysis of Fit and Unfit Defendants" (1981) 4 *Int'l J. Law & Psychiatry* 145. For the problems facing developmentally disabled defendants, who are found unfit to stand trial and may not respond to "treatment," see H.S. Savage, "The Relevance of the Fitness to Stand Trial Provisions to Persons with Mental Handicaps" (1981) 59 *Can. Bar Rev.* 319.

⁸⁸ *Criminal Code*, s. 547(5)(c).

⁸⁹ *Criminal Code*, s. 547(5)(f).

⁹⁰ *Criminal Code*, s. 545(1). In June, 1986, the federal government announced its intention to amend the *Criminal Code* in order to bring the provisions relating to the mentally disordered offender into line with the perceived requirements of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*]. The proposals include provision for the Boards of Review to be granted the power to release those acquitted by reason of insanity or found unfit to stand trial. This question would effectively abolish the Lieutenant-Governor's Warrant. In addition, it was proposed that there be a "cap" or "outer limit" set upon the period during which such individuals may be detained. It remains to be seen whether these proposals will be introduced to Parliament in the form of a Bill.

⁹¹ In that statute, the following definition of insanity is provided:

For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong. *Criminal Code*, s. 16(2).

⁹² See, generally, D.R. Klinck, "Specific Delusions' in the Insanity Defence" (1983) 25 *Crim. L. Q.* 458;

made to the application of these provisions to young persons is that the period of pre-trial detention, to allow for a psychiatric assessment,⁹³ is limited to a period not to exceed eight days or, upon the evidence of a "qualified person," a period not to exceed 30 days.⁹⁴ Under the YOA, at least one young person has been found not guilty by reason of insanity.⁹⁵

In conclusion, in the absence of legislative guidance in the JDA, a significant role was defined for the mental health professions in the juvenile court system. The expansion into this domain paralleled the growth of the mental health professions generally, in all Western countries. Claims to scientific knowledge about behaviour, including criminality, gave tremendous power and prestige. The YOA appears to explicitly recognize many of the mental health functions performed under the JDA. The alliance between the court and the mental health professions would have been expected to continue, even flourish. Indeed, this has probably been the case for most mental health services. Current practice in assessments probably represents a continuation, modification or extension of services previously available under the JDA. For fitness to stand trial and insanity, use in the adult courts has provided models for implementation and few problems are being encountered in the translation to youth courts. Although the treatment orders provisions are novel, a network of services for mental health care and treatment for young offenders has existed in many areas of the country.

In the process that led up to the YOA, many professionals had a vested interest in maintaining the important role for mental health in the new legislation. As we shall see, other groups were critical of the effectiveness of mental health interventions. The views of interest groups on juvenile court philosophy generally, and treatment orders specifically, is examined next.

(cont'd) A.W. Mewett, "Section 16 and 'Wrong'" (1976) 18 Crim. L. Q. 413; A. Stalker, "The Law Reform Commission of Canada and Insanity" (1983) 25 Crim. L. Q. 223; S.N. Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843-1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country?" (1979) 14 U.B.C. L. Rev. 1; and, S.N. Verdun-Jones, "The Insanity Defence Since *Schwartz v. the Queen*: First Steps Along the Road Toward Rationalization of Canadian Policy?" (1979) 6 C.R. (3rd) 300.

⁹³ Although not legislatively dictated, it appears that, as a matter of practice, the court recognizes only psychiatric expert evidence in relation to this issue. An exception to this may arise when a judgment needs to be made regarding the mental age of a developmentally handicapped individual claiming insanity because of "natural imbecility." In such cases, a psychologist may be asked to testify. See *R. v. Cooper* (1978), 40 C.C.C. (2d) 145 (Ont. C.A.) for a discussion of the term "natural imbecility."

⁹⁴ YOA, s. 13(3).

⁹⁵ *R. v. M.L.S.* (1985), 2 Y.O.S. 4008 (Ont. Prov. Ct.). The boy was diagnosed as a latent schizophrenic after being accused of the premeditated murder of two young girls.

CHAPTER III

INTEREST GROUPS AND TREATMENT ORDERS: WELFARE AND JUSTICE CRITIQUE

The JDA had been passed, in 1908, after approximately ten minutes debate in the House of Commons.¹ In contrast, federal government involvement in the process that led to the enactment of the YOA spanned two decades. During this period, input was sought for all interested parties. While the provincial governments had their own agenda,² most others were engaged in a vigorous debate surrounding the most desirable philosophical orientation for the new legislation. In the many briefs submitted, two dominant philosophies were apparent. Some felt that the JDA needed to be updated, but its underlying assumptions should be retained. Following the lead of U.S. reforms, however, a growing body of juvenile justice professionals articulated the belief that well-meaning attempts to rehabilitate delinquents had not proved successful enough to justify the denial of due process. Reforms which would extend to juveniles the rights enjoyed by adult defendants were sought instead. These two views reflect the welfare and justice models of juvenile court functioning (See Table 3.1).³

Many professional groups sought to influence the reform process by providing responses to or critiques of the various proposals. In these documents, the operational principles of both models are revealed. As mentioned in Chapter 1, treatment orders were not specifically debated before the passage of the YOA. Because the exact origins of the treatment order provisions are unclear, it would be purely supposition to suggest that a compromise was the intention, but it would appear

¹ J. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15 Osgoode Hall L.J. 71. The original impetus for the JDA came from private charitable groups that had been pushing for reforms for several decades in Ontario.

² For an excellent discussion, see J. Osborne, "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979) 2 Can. J. Fam. L. 7. Constitutional division of powers, cost-sharing and the upper age limit of youth court jurisdiction were chief among the concerns of the provinces. See Chapter 4.

³ These two terms are widely used in the literature. E.g., R.R. Corrado, "Juvenile Justice: From Creation and Optimism to Disillusionment and Reform" in R.R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 1; S.A. Reid & M. Reitsma-Street, "Assumptions and Implications of New Canadian Legislation for Young Offenders" (1984) 7 Can. Crim. Forum 1; and, T.C. Caputo, "The Young Offenders Act: Children's Rights, Children's Wrongs" (1987) 13 Can. Public Policy 126. Other authors have adopted different phraseology. For example, K. Catton, "Models of Procedure and the Juvenile Courts" (1976) 18 Crim. L.Q. 181 uses the terms "family" and "due process," borrowed from H. Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 1; and, J. Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1970) 79 Yale L.J. 359. The terms "socialized" and "constitutional" are used by F.L. Faust & P.J. Brantingham, "Models of Juvenile Justice: Introduction and Overview" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* 2nd. Ed. (St. Paul: West Publishing, 1979) 1. Reid and Reitsma-Street also discuss a third model, crime control, which will not be used here because of the lesser relevance to the issue of treatment orders and the overlap with the other models.

Table 3.1

Dimensions of Welfare and Justice Ideologies

<i>Dimension</i>	<i>Welfare</i> ¹	<i>Justice</i>
Primary Goal	Needs and Interests of Youth	Youth and Societal Well Being
Ideology	<i>Parens Patriae</i>	Equal Justice; Due Process; Procedural Fairness
Perceptions of the Problem	Youth Viewed as Handicapped, Ill, or Disadvantaged, and Victim of Environment and Psychological Forces	Focus on Behavioural Allegations and Definition of Criminal Behaviour
Courts' Role in Processing	Treatment; Provide Resources to Protect Against and Overcome Adverse Circumstances; Informal	Determine Guilt or Innocence; Process Fairly and Quickly; Formal/Informal
Organizational Outcome	High Rates of Detention and all Types of Post Adjudication Programs	Low Rates of Detention; Dispositional Equality; Least Intrusive Means of Intervention
Correlation Between Offence and Sanction	Little or None	High

Source: R. Sarri, "The Use of Detention and Alternatives in the United States Since the Gault Decision" in R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 315 at 320.

¹ Sarri uses the term "rehabilitation" to describe what is being called here the "welfare" model. The latter term has been substituted for consistency with the text.

that aspects of both models have been satisfied. The explicit possibility that treatment can be ordered as a consequence of criminal behaviour acknowledges the place of rehabilitation as a goal of the youth court. However, the due process protections afforded all young offenders are extended to those thought to be candidates for treatment. In light of recent experience, it appears that neither group is entirely content with the provisions as written. Their views on the subject provide insight into the patterns of use of treatment orders.

The Welfare Model

Supporters of the welfare model generally believe that society is best served by a juvenile court that is concerned with rehabilitating rather than punishing juvenile offenders. They envision a non-confrontational, system where the best interests of the child are paramount to procedural formality or retribution. Groups such as the Canadian Association of Social Workers and the Canadian Mental Health Association were among the most influential of those that advanced the welfare view.

Identification of the causes of delinquency is seen as crucial. Youthful crime may be transitory behaviour which will cease with time. Or, it can be the manifestation of a serious emotional disorder which will worsen in the absence of intervention:

Some anti-social behaviour must ... be seen as a normal part of growing up.... On the other hand, some delinquent behaviour is symptomatic of social or psychological maladjustment deserving of serious attention and sympathetic, competent help.⁴

While desirable that the latter situation be distinguished from the former, error in the form of false positives is preferred. Using a medical conception of delinquency, it is felt that to respond to the symptom without treating the underlying causes will leave the problem unresolved, likely to worsen:

As long as the juvenile justice system continues to get caught up in treating only the symptomology and does not get at real causes of behaviour (which has its roots in poverty, in poor housing, unemployment, decaying communities, fragmented service structures, etc.), no lasting change can be effected.⁵

The likelihood of success, of preventing recidivism, is thought to be high, after professional intervention. Permanent patterns of behaviour generally have not taken hold in young persons, so they are regarded as redeemable. Being so impressionable, however, exposure to negative influences, too early or too often, can be harmful. In fact, the creation of the juvenile court was itself an

.....
⁴ Canadian Association of Social Workers, "Brief Presented to the Standing Committee on Justice and Legal Affairs Respecting Bill C-192, The Young Offenders Act" 1971 at 2.

⁵ Manitoba Association of Social Workers, Brief Submitted to the Committee Studying the Juvenile Justice System, December, 1978.

attempt to shield children from the negative impact of the criminal justice system and contact with hardened adult offenders. More recently, concern with the stigmatizing effect of the juvenile court also found expression in support for extra-judicial handling of cases, so-called "diversion."

According to the welfare model, most young persons should not be held totally accountable for their actions: "Young persons definitely do not have the inner quality and life experience to be fully aware of the consequences of their choices."⁶ It has long been held that, in order to be culpable for a crime, the offender must be able to appreciate the nature and consequences of his/her action. Any condition which lessens this capacity, such as extreme youth⁷ or insanity,⁸ is seen to mitigate against criminal responsibility and, therefore, punishment. The welfare model extends this idea to all young persons, not just the very young.⁹

The juvenile court is thought to be most successful when dealing with a young person whose criminal behaviour has not become an entrenched pattern. Early intervention, even prevention, is the ideal. The factors that indicate a predisposition to criminality are thought to be empirically determinable. Potential variables have included poor school attendance, early sexual experiences, and being beyond the care and control of parents. Juvenile court jurisdiction was wider than that of the criminal courts in that such behaviours, so-called status offences, were included. A broad definition of delinquency facilitated the possible induction of almost any young person into the juvenile justice system. It is anathema that any child thought to be in need of assistance would be denied help because they had not, or not yet, committed a crime.

The intake process is important in a welfare-based court. An at-risk population, those coming to police attention, is scrutinized, usually by probation officers. This has frequently been equated with diagnosis,¹⁰ again a medical metaphor. A social history report prepared prior to the court

⁶ L. Duraj, Brief Presented to the Standing Committee on Justice and Legal Affairs (19 August 1981) at 5.

⁷ *Criminal Code*, s. 12.

⁸ *Criminal Code*, s. 16.

⁹ In fact, some felt that juveniles should not be able to use the insanity defence:

The very existence of special legislation and special procedures for children recognizes that the concept of responsibility and criminal intent applies to them in a different way. To apply a finding of insanity to children brings in the concept of responsibility and criminal intent through the back door.

Canadian Criminology and Corrections Association, "Brief on Young Offenders Act" (1971) 13 Can. J. Crim. & Corr. 307 at 313.

¹⁰ E.g., Canadian Criminology and Corrections Association, *ibid.*; and, Canadian Criminology and Corrections Association, *Young Persons in Conflict with the Law: A Report on the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act* (Ottawa: C.C.C.A., 1976).

appearance will focus on such variables as family relationships and school performance.¹¹ The intent is to distinguish normal youthful peccadilloes from those behaviours which indicate deeper disturbances. A course of action tailored to the individual circumstances of the young person is devised.

The role of juvenile court personnel is seen as one of advocacy, each person working to determine and implement the best course of action for each young person. The adversarial system, therefore, is not encouraged, for focus would be inappropriately diverted from the child's best interests to a consideration of legal guilt:

It is generally known that lawyers have little training in regards to the developmental and therapeutic needs of children and adolescents. While we recognize that there must be an advocacy system which ensures that the rights of children are protected and that planning is done in the "best interests of the child," we do not support the legal manoeuvres which end up denying children essential treatment and rehabilitation.¹²

Plea bargaining, discouragement of confession and other measures designed to secure the most lenient outcome are disadvantages that outweigh any benefits due process rights bring:

The safeguarding of the civil liberties and social rights of a child or a young person and the provision of a code of appropriate procedures and consequences which relate to specific unacceptable behaviour may be important and helpful to the court but, in the case of children and young persons, they are of less importance than the provision of legal machinery for meeting their particular needs.¹³

Generally, the welfare court considers who a person is rather than what he or she has done. When emphasis is shifted from the offence to the offender, the determination of guilt or innocence is secondary to the selection of an appropriate disposition. For example, the Manitoba Association of Social Workers was concerned with the tendency of some judges to place too much emphasis upon the charge when determining a disposition:

There must be increasing effort to deal holistically with each child: a juvenile brought into custody on a Breach of Liquor may be released even though there is information from the court worker that this same juvenile has threatened his parent, has run away from home, has not attended school regularly, and has been "on the run." Such disregard results in the possibility of seriously denying both intervention and treatment.¹⁴

In one case, a trivial offence committed by a troubled girl may dictate a lengthy period of institutionalization.¹⁵ In another, a serious crime may result in a lenient outcome because the

.....
¹¹ While this may occur in criminal courts, the role of probation was created expressly for the welfare-based juvenile court. E.g., Leon, *supra*, note 1; and, N. Boyd, "An Examination of Probation" (1978) 20 *Crim. L.Q.* 355.

¹² Manitoba Association of Social Workers, *supra*, note 5 at 6.

¹³ Canadian Mental Health Association, Memorandum to Members of Parliament (7 December 1970).

¹⁴ *Supra*, note 5 at 4.

¹⁵ A.W. Leschied, "Implications of the Consent to Treatment Section of the Young Offenders Act: A Case Study" (1986) 27 *Can. Psychologist* 312.

offender has a stable family and good school record. Sentencing tariffs would, therefore, play little role in a welfare court. Detention is not intended to be punitive, but helpful:

... a high proportion of the young people in trouble with the law are in need of treatment, and when they have served short-term determinate sentences, treatment ... will need to be available. ... Adolescents in the process of maturation are rebellious and in need of controls. A high proportion of the adolescents, who are in serious conflict with the law, are asking to be controlled and, while rebelling more violently against the control, are often, at the same time, terrified of the knowledge that the adults in their lives are failing to control them. ... they often need to be removed from the community for at least a short period of time, so that some controls can be imposed before they can be helped to accept the kind of therapeutic relationship which might lead to their rehabilitation.¹⁶

There is also a distinct dissatisfaction with statutory restrictions and mandatory procedures.¹⁷ Limitations on non-judicial decision-making are seen as placing formality ahead of the best interests of the child. As an example, the Canadian Association of Social Workers was extremely critical of proposed attempts to place limits on the length of dispositional adjournments or the duration of probation orders and committals to training school, terming them "arbitrary" and "rigid." Indeterminate dispositions are preferred, with extensions permitted when treatment considerations so demand.¹⁸ Requiring certain issues to be discussed in probation orders was also seen as an interference with rehabilitation.¹⁹ Even the moves to codify diversion was opposed by some because "it would result in limitation rather than expansion of existing practice."²⁰

Instead, wide discretion, informality, and flexibility are encouraged. Vesting power in the hands of those trained in treatment and rehabilitation, such as probation officers and social workers, is seen as important. In contrast, too much judicial discretion is thought dangerous.²¹ This may be due to the perception that judges are not trained in the social sciences and, therefore, are

¹⁶ Children's Aid Society of Metropolitan Toronto, Comments on the Young Offenders Act [Submitted to the Standing Committee on Justice and Legal Affairs] June, 1981.

¹⁷ For example, the Canadian Association of Social Workers, in 1971, stated: "While recognizing the purpose and need for extensive procedural provisions, it is felt that consistent emphasis in this area carries with it implicit and substantial encouragement for the excessively formal and inflexible conduct of the Courts and related procedures." *Supra*, note 4 at 13.

¹⁸ Canadian Association of Social Workers, *supra*, note 4 at 9, states that: "It is often the case that a two year period of probation is not sufficient time to accomplish treatment objectives set up between client and probation officer, and an extension may be in the young person's best interest and in fact is frequently seen as such by the young person."

¹⁹ *Ibid.* at 10: "These place too much emphasis on formal conditions on surveillance, and on unacceptable behaviour, such that the constructive, helping aspect of probation is over-shadowed."

²⁰ J.A. MacDonald, "Critique of Bill C-192, the Young Offenders Act" (1971) 13 Can. J. Crim. & Corr. 166 at 170.

²¹ As it was once put, "[t]he sentencing powers left to the judge are frightening...." Canadian Association of Social Workers, *supra*, note 4 at 9.

not qualified to make decisions, such as sentencing, from a treatment perspective.²² Non-judicial handling of offenders is seen as preferable in many cases, so key decisions are made by probation staff.

The welfare model was reflected in the JDA in several ways. A broad definition of delinquency facilitated the induction of almost any young person into the juvenile justice system:

"juvenile delinquent" means any child who violates any provision of the *Criminal Code* or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.

Some of these behaviours were not criminal, such as truancy, incorrigibility and sexual immorality. They were seen as indicators of future offending, which may be preventable if identified at this early stage. Concern for the stigmatizing effect of court processing was manifested in separate trials and detention, private hearings, and limitations on media coverage. With children viewed as impressionable, contact with adult offenders and publicity were both discouraged. The proceedings could be informal and judges were given wide discretion. Procedural matters, such as admissibility of evidence and burdens of proof, were relaxed, if in the best interests of the child. Disposition of indeterminate duration were possible and the juvenile could be subject to court control until attaining 21 years of age. Probation officers played an integral role, by investigating social backgrounds and providing supervision of offenders. Moreover, the overall philosophy was paternal and benevolent. Courts were directed to "liberally construe" the act so that:

...the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.²³

The welfare model described here is an ideal that may not exist in practice. But it does represent the type of court envisioned by the drafters of the JDA.²⁴ During the debates that preceded its replacement, supporters of the welfare model of juvenile court functioning favoured retaining much

²² For example:

Judges, as well as lawyers, usually do not excel in knowledge of the world of children or young persons, which could be readily offered by the child welfare workers, psychologists or psychiatrists, policemen [sic] working with this area, or even a teacher or a representative of the local community.

Duraj, *supra*, note 6 at 7. Also sharing this view were the Manitoba Association of Social Workers, *supra*, note 5; and, Canadian Association of Social Workers, Brief in Response to the Proposed Legislation Regarding "Young Persons in Conflict with the Law" (31 March 1976).

²³ S. 38.

²⁴ See the writings of the drafter; for example, W.L. Scott, *The Juvenile Court in Law and the Juvenile Court in Action* (Ottawa: Canadian Council on Child Welfare, 1930).

of the status quo.²⁵ In making submissions to the government of Canada concerning reform of the JDA, these views were expressed frequently, especially in the 1960s. But the number of those seeking a strict adherence to the welfare ideal declined as the years passed. For example, the elimination of status offences was advocated by most observers.²⁶ The role of legal professionals was also acknowledged as desirable in some cases. Attacks upon the rehabilitative capabilities of the justice system²⁷ were a body blow for the welfare model, but supporters responded by claiming that insufficient resources has been expended to give treatment a fair chance. Nevertheless, as time passed, focus shifted to the justice model.

The Justice Model

The welfare model was clearly dominant for the first half of this century, but the justice model gained prominence in Canada during the 1970s, with the courts granting juveniles greater due process rights,²⁸ and it eventually formed much of the underpinning of the YOA. While the parallel is not direct, many of the elements Packer²⁹ describes are similar to the type of youth court envisioned by such groups as the Canadian Bar Association and civil liberties groups.³⁰ There is

²⁵ In fact, as late as 1981, the retention of the entire act was still being suggested, for example, by an Associate Professor at the Carleton School of Social Work, L. Duraj. *Supra*, note 6; and, D.M. Aird, "It is Never Too Late, Please Stop! Think! Reconsider! Brief Presented to the Standing Committee on Justice and Legal Affairs on Behalf of Viking Houses, Toronto (n.d.). In the previous years, this opinion was not uncommonly raised, such as in a high profile work by the Canadian Criminology and Corrections Association, from 1976, *supra*, note 10.

²⁶ An exception was Aird, *supra*, note 25. However, this view was predicated upon the assumption that alternate resources would be made available to deal with the juveniles who, while committing no crime, were felt to be in need of assistance. Specifically, child welfare services were seen to need expansion to deal with status offenders.

²⁷ E.g., D. Lipton, R. Martinson & J. Wilks, *Effectiveness of Correctional Treatment: A Survey of Evaluation Studies* (New York: Praeger, 1975). The medical model of deviant behaviour came under much criticism in the 1970s. See A.K. Bottomley, *Criminology in Focus: Past Trends and Future Prospects* (Oxford: Martin Robertson & Co., 1979).

²⁸ 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.

²⁹ *Supra*, note 3.

³⁰ Canadian Bar Association, Submission to the Solicitor General of Canada Concerning Bill C-192, the Young Offenders Act (10 March 1971); Barreau du Québec, *Mémoire au gouvernement fédéral sur le projet de loi concernant les jeunes délinquants et abrogeant l'ancienne loi sur les jeunes délinquants*, April, 1972; The Canadian Bar Association, Comments on the Ministry of the Solicitor General's Report on Young Persons in Conflict with the Law (10 January 1977); The Canadian Bar Association, Submission Regarding Bill C-61 Made to the Standing Committee on Justice and Legal Affairs (4 February 1982); and, B.C. Civil Liberties Association, Submission on the Young Offenders Bill Made to the Standing Committee on Justice

little concern for explaining the underlying motivations for delinquency or crime, except to distinguish intentional acts from accidents and other non-culpable ones. The role of the court is to respond to law breaking behaviour, balancing society's need for protection with individual rights designed to avoid conviction of the innocent. Each defendant is provided with a representative to balance the power of the state and challenge errors. An impartial judgement of the facts is the goal, achieved with standard procedures, and high burdens of proof and evidence. Discretion, while unavoidable, is tempered somewhat by reliance upon case precedence and some decision-making guidelines. Punishment is to be proportionate to the severity of the offence and disparity among cases is regarded as undesirable. Finally, the system is to be self-monitoring and self-correcting in that appeals and remedies are available to rectify errors and abuses.

While this is again an ideal, probably rare in practice, the justice model reflects a justice system which is valued in democratic societies. Yet, due process protections were denied young persons with the enactment of the JDA, being summarily dismissed as not being in the best interests of the child.³¹ In the U.S., however, where such rights were guaranteed by the Constitution, the issue was the subject of much debate prior to the creation of the first juvenile court in 1899. Several challenges of the state's ability to indefinitely institutionalize, children many of whom had committed no crime, were unsuccessful.³² The English doctrine of *parens patriae* was used to affirm the right of the state to deny due process when acting in a child's interests.³³ This idea remained largely unchallenged until the 1960s. California and New York redrafted their juvenile court

(cont'd) and Legal Affairs, July, 1981.

³¹ Leon, *supra*, note 1.

³² E.g., *Ex parte Crouse*, 4 Wharton (Pa.) 9 (1838); *Petition of Alexander Ferrier*, 103 Illinois 367 (1882); and, *Commonwealth v. Fisher*, 213 Pennsylvania 48 (1905). Most of these children were placed in Houses of Refuge for being incorrigible or neglected.

³³ This is a term from medieval Chancery courts that evolved to mean the duty, or power, of the monarchy to oversee the well-being of children, lunatics and idiots. D.R Rendleman, "Parens Patriae: From Chancery to the Juvenile Court" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* 2nd. Ed. (St. Paul: West Publishing Company, 1979) 58. It has been argued that this doctrine was misapplied in order to justify the unconstitutional activities of Houses of Refuge. See, e.g., K. Wang, "The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts" (1972) 18 McGill L.J. 219, 418. This was the conclusion of several contemporary courts; e.g., *Ex parte Becknell*, 51 Pacific Reporter (Ca.) 692 (1897); and, *Mill v. Brown*, 88 Pacific Reporter (Utah) 609 (1907). Perhaps the most eloquent judicial statement against the wisdom of using *parens patriae* to deny children due process can be found in the judgment of *O'Connell v. Turner*, 55 Illinois 280 (1870). Daniel O'Connell had been committed to an indefinite term at the Chicago Reform School for the charge of "misfortune." When the detention was declared unconstitutional, the precedent led ultimately to the closure of the School. The State of Illinois was left without legislative justification for its exercise of *parens patriae* until 1899, when it created the first juvenile court in the United States. Its *Juvenile Court Act* was the model used for the drafting the JDA. However, *parens patriae*, being a civil doctrine, has never been used in Canadian juvenile courts. For a discussion of *parens patriae* in Canadian courts, see *Eve v. E.*, [1986] 2 S.C.R. 388.

legislation in response to criticisms of the welfare court, but real changes in practice were not to occur until the U.S. Supreme Court reviewed the issue.³⁴ In 1966, Justice Fortas made this oft quoted observation:

... there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.³⁵

Two subsequent decisions affirmed the right of juveniles to the "essentials of due process and fair treatment," including the right to confront accusers, and be notified of charges,³⁶ and to have charges proved beyond a reasonable doubt,³⁷ but the Court stopped short of extending jury trials to juveniles.³⁸ The exact impact of these events in Canada is unknown, but the legislation eventually adopted in Canada reflects very closely the justice model.

Welfare and Justice in the YOA

The JDA, being welfare-based, represented the status quo in the 1960s. Moreover, reforms which would make their system more in line with the welfare model were being considered in Great Britain at the time.³⁹ It is not surprising, therefore, that initial proposals to replace or amend the JDA deviated only slightly from the welfare ideal. The Department of Justice Committee on Juvenile Delinquency supported the aims of a paternalistic juvenile court and suggested that the problems apparent in the system could be remedied with better trained personnel, federal standards,

³⁴ P.J. Brantingham, "Juvenile Justice Reform in California and New York in the Early 1960s" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* 2nd. Ed. (St. Paul: West Publishing Co., 1979) 259. Brantingham notes that the major concerns emerging in the 1950s focused on "legal fairness and procedural formality; casual use of detention; a perceived failure of the [welfare] court to deliver on its promise to protect and reform troublesome youth; and a growing gap between the social concerns of juvenile codes which had been substantively untouched for 50 years and the social problems of contemporary society."

³⁵ *Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84. Morris Kent, 16 years old, was charged with housebreaking, robbery and rape, and was sentenced to serve 30 to 90 years by an adult court. The waiver decision was made with no hearing. The Supreme Court ruled that Kent was entitled to a hearing, access to all records used, and to a statement of reasons for the waiver.

³⁶ *Re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527.

³⁷ *In Re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Winship, a 12 year old boy, was convicted of larceny in the theft of \$112 from a locker. There was some doubt as to his guilt, but the New York Family Court Act required only a "preponderance" of evidence. The upper court held that, as for adults, the charge had to be proved "beyond a reasonable doubt."

³⁸ *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647.

³⁹ *Report of the Committee on Children and Young Persons* (London: Her Majesty's Stationery Office, 1960); and, *Committee on Children and Young Persons, Scotland: Report* (Edinburgh: Her Majesty's Stationery Office, 1964).

and more resources.⁴⁰ This report was well received,⁴¹ and much of the JDA was reproduced verbatim in its first proposed replacement.⁴² Provincial opposition has been speculated as the reason for abandoning this draft.⁴³ The next version, introduced to Parliament in 1970,⁴⁴ was entirely different. More in keeping with the justice model,⁴⁵ it was severely criticized as being too legalistic⁴⁶ and died on the order paper. All the drafts which followed appeared to adopt neither model as a dominant theme, representing, instead, elements of both.⁴⁷

Commentators have noted this apparent compromise in the YOA citing, as evidence, the lengthy declaration of principle.⁴⁸

(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;

⁴⁰ *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965). The Committee was created to investigate the Canadian juvenile justice system and made 100 recommendations for change.

⁴¹ E.g., 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.

⁴² *First Discussion Draft: An Act Respecting Children and Young Persons* (Ottawa: Department of the Solicitor General, September, 1967.) This version was drafted by Jacques Fortin, a law professor at the University of Montreal. It was faithful to the recommendations of the Department of Justice Committee.

⁴³ The provinces agreed with most areas in principal but disagreed on several key issues. One area of discussion was the possibility of updating the JDA without replacing it altogether. *Proceedings of the Federal-Provincial Conference on Juvenile Delinquency* (Ottawa: Department of the Solicitor General, January, 1968).

⁴⁴ Bill C-192, *The Young Offenders Act*, 3rd Sess., 28th Parl., 1970.

⁴⁵ See analysis in Catton & Leon, *supra*, note 28; and, R.G. Fox & M.J. Spencer, "The Young Offenders Bill: Destigmatizing Delinquency?" (1972) 14 Crim. L.Q. 172.

⁴⁶ E.g. MacDonald, *supra*, note 20. Several interest groups, most notably the Canadian Mental Health Association, strongly opposed the bill. *Supra*, note 13. See D. Cousineau & J.E. Veevers, "Juvenile Justice: An Analysis of the Canadian Young Offenders Act" in C.L. Boydell et al., eds., *Deviant Behaviour and Societal Reaction* (Toronto: Holt Rinehart and Winston) 243.

⁴⁷ *Report of the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act* (Ottawa: Department of the Solicitor General, 1975); *Highlights of the Proposed New Legislation for Young Offenders* (Ottawa: Ministry of the Solicitor General, 1977); *Legislative Proposals to Replace the Juvenile Delinquents Act* (Ottawa: Solicitor General Canada, 1979); and, Bill C-61, *The Young Offenders Act*, 1st Sess., 32nd Parl., 1981.

⁴⁸ For example, S.A. Reid & M. Reitsma-Street, *supra*, note 3. They assume that "explicit principles are overt indicators of the more covert values and assumptions that guide the implementation of legislation and social policy" (at 6).

(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 freedoms 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.⁴⁹

Indeed, this section addresses multiple, and possible conflicting goals.⁵⁰ Consistent with the welfare model, practitioners are required to provide guidance and assistance, because of the special needs, state of dependency and level of maturity of young persons. Extra-judicial measures are also permitted, although optional, and removal from parental supervision is to be a last resort.⁵¹ Justice model tenets recognizable in the declaration of principle include accountability, the right to the least possible interference with freedom, and access to all *Charter* protections, including a right to participate in decisions.⁵²

It could be argued that this balance promised in the statement of principles is not carried through in the act itself. A reading of the act reveals that the YOA represents a marked departure from the rehabilitative and individualized justice orientation of its predecessor,⁵³ with few vestiges

⁴⁹ S. 3(1). Having such a statement of policy, in contrast to a preamble, incorporated within the statute, provides a "guide to the interpretation and application" of the act. N. Bala & H. Lilles, *The Young Offenders Act Annotated* (Ottawa: Solicitor General Canada, 1982) at 13.

⁵⁰ It has been termed a "piece of rhetoric" by R.G. Fox, "The Treatment of Juveniles in Canadian Criminal Law" in A.N. Doob & E.L. Greenspan, eds., *Perspectives in Criminal Law* (Toronto: Canada Law Book, 1985) 149 at 164. He continues:

The declaration is far more concerned with giving placatory expression to the different interest groups and philosophies which had to be accommodated during the birth pangs of the legislation than with setting out, in any consistent and functional order of priority, the policies and values to be pursued by those called upon to implement it (at 165).

⁵¹ Reid & Reitsma-Street have identified s. 3(1)(c), (d), (f) and (g) as containing references to principles of the welfare model. *Supra*, note 3.

⁵² The justice model is said to be represented in s. 3(1)(a), (e), (f) and (g). *Ibid.* It is important to note that these authors have identified reflection of the crime control model in the YOA declaration of principle. These include that society "must be afforded the necessary protection from illegal behaviour" (s. 3(1)(b)), that young offenders require "supervision, discipline and control" (s. 3(1)(c)), and that the protection of society must be considered in any decision to divert a case (s. 3(1)(d)) or in determining a disposition (s. 3(1)(f)).

⁵³ See also Caputo, *supra*, note 3. This view is not shared by Fox, *supra*, note 50, who feels that the

of the welfare orientation of the juvenile court remaining.⁵⁴ A majority of the provisions, on the other hand, allude to the justice model. Many rights previously available only to adults are extended to young persons.⁵⁵ Some due process protections available to young offenders are even more rigorous than those available to adults; for example, the right to counsel⁵⁶ and the admissibility of statements.⁵⁷

However, the treatment order provisions do appear to reflect the marriage of philosophies encouraged in the statement of principles. Treatment orders could be applauded as a non-punitive avenue through which to respond to the underlying causes of a young person's criminal behaviour. This would be consistent with the welfare model of juvenile court functioning. On the other hand, the justice model was represented. The civil rights of any candidate for treatment orders have been considered, to protect against the capricious or involuntary use of this serious measure. For example, the detention may be refused as, arguably, may the treatment, once detained.

(cont'd) continued recognition of a separate court for young persons is itself indication of the extension of the philosophy of the JDA. However, he does concede that "[t]he fundamental break with the past is the clear direction that rehabilitative goals must give way to due process values and that chancery modes and *parens patriae* can no longer be invoked to justify unfettered discretionary powers over juveniles", (at 166).

⁵⁴ These include the possibility of diversion into non-justice programs (s. 4); the separate detention of young persons in most cases (s. 7(2)); restrictions on the identification of young persons in the media (s. 17 and s. 38); restrictions on sentence length or severity (i.e., fines cannot exceed \$1,000 (s. 20(1)(b) and (9)); custodial sentences cannot exceed two or three years (s. 20(1)(k)(i) and (ii)), even if consecutive (s. 20(3) and (4)); limiting the committal of very young persons to custody (s. 24.1(3) and (4)); and the allowance for a major role for youth workers. While the degree of their participation varies by province, youth workers, formerly probation officers, generally focus on the social characteristics of a young person in attempt to determine an appropriate course of action. For example, predisposition reports address many non-offence characteristics, such as school attendance and performance, and parental control over the young person (s. 14(2)).

⁵⁵ Unless otherwise indicated in the YOA, young persons enjoy all the rights and freedoms guaranteed under the *Charter* and many of the defences, protections and duties defined at common law or in the *Criminal Code*. For example, young persons are subject to prosecution only for breaches of the criminal law (s. 2(1)); they have most rights of judicial interim release defined in Part XIV of the *Criminal Code* (s. 8 and 51); they have the right to counsel and the right to be so advised (s. 11); and the issue of fitness to stand trial can be raised (s. 13(7)). Release of a young offenders from custody prior to the expiry of sentence is now possible only with judicial approval or upon recommendation of a review board. T.T. Daley, "Release from Custody and the Judiciary Under the Young Offenders Act or a Sigh or Things to Come?" (1986) 10(2) *Prov. Judges J.* 21. See also sections relating to the evidence of children (s. 60), substitution of judges (s. 64), and exclusion of the public (s. 39).

⁵⁶ Bala & Lilles, *supra*, note 49 at 73, assert that the "rights to counsel afforded a young person under the Y.O.A. are considerably broader than the minimum guarantees of the *Charter of Rights*...." (at 73).

⁵⁷ S. 56(2). See *ibid.* at 381. See also the provision requiring justification for any disposition (s. 20(6)). There is also an explicit proscription of the imposition of a disposition more onerous than that likely for an adult, a practice tolerated by the justice model (s. 20(7)).

Attaining a balance between treatment needs and legal rights was an ambitious undertaking:

Children have a need for protection against unreasonable or unnecessary intrusion into their lives by providers of health and welfare services, but they also have a need for informed and compassionate treatment. Hence the increasing involvement of both law and lawyers in various areas of delivery of children's mental health services has tended to alarm many children's mental health professionals.⁵¹

Indeed, the treatment order provisions of the YOA have met with criticism from both camps. Noting the difficulties of using this disposition, welfare supporters lament the "benign neglect" of offenders, whose criminal and anti-social behaviour is thought to indicate emotional problems rather than criminal culpability. On the other hand, some legal professionals feel that treatment orders are an inappropriate use of the criminal sanction, open to possible abuses. With legal rights elevated to a position of, at least, equal prominence with treatment goals, can such a compromise be successful in practice?

Treatment Orders and the Welfare Model

Those welfare advocates taking an interest in the issue of treatment orders include mental health professionals who participate in the evaluation and treatment of young offenders. Concerns of this group focus on the problems involved with extending consensual powers to young persons, the enforceability of treatment orders, and the general decline of welfare model priorities in today's youth justice system.

Consent of Young Person

Prior to issuing a treatment order, a judge must secure the consent of the young person,⁵⁹ making this the only sentencing option for which an offender is granted a veto. The infrequency of treatment orders has been attributed by some to a general reluctance of youth to accept such a disposition.⁶⁰ Perhaps to maintain standing within a peer group, young persons would rather be thought "bad" than "mad"; for many, the alternative is secure custody. A young offender convicted of breaking and entering had refused a treatment order. In sentencing him to custody, the judge said:

.....
⁵¹ B.J. McConville & N. Bala, "Children's Rights: For or Against Treatment" (1985) Dec. *Canada's Mental Health* 2 at 2.

⁵⁹ S. 22(1).

⁶⁰ A.W. Leschied & C.W. Hyatt, "Perspective: Section 22(1), Consent to Treatment Under the Young Offenders Act" (1986) 28 *Can. J. Crim.* 69; A.W. Leschied & P.G. Jaffe, "Implications of the Young Offenders Act in Modifying the Juvenile Justice System" in N. Bala & H. Lilles, eds., *Young Offenders Service* (Toronto: Butterworths, 1985); and, A.W. Leschied, "Need for Youth's Consent Can be Bar to Treatment" (1985) 5(24) *Ont. Lawyers Weekly* 4.

There is no doubt a disposition involving custody or detention is required in this case. Since the defence has chosen to rule out such detention being accomplished as an aspect of a treatment order, the only other two forms of detention, open custody and secure custody, must be considered.⁶¹

This has led to criticism of the YOA by those who believe that young persons should not be granted such broad consensual powers. In fact, the psychological disorders which makēs them candidates for treatment orders may render them unable to understand what is in their own best interests.⁶² Within the mental health system, legal mechanisms exist to override a person's wishes and commit involuntarily an individual, of any age, with a serious mental disorder.⁶³ This recourse is not available if the treatment is sought through the YOA.

The second concern is voiced by those who believe that young persons generally, because of their immaturity, cannot give informed dissent.⁶⁴ Those under 14 especially are thought not to have attained a sufficient level of cognitive development.⁶⁵ Certainly, this is the common law view⁶⁶ and, prior to the *Charter*, children were statutorily not able to consent even to voluntary mental health admission.⁶⁷ Jumping from one extreme to the other, in the YOA there is a blanket stipulation that *all* young persons, even those as young as 12 years, are deemed to be able to give informed consent. No consideration of the individual circumstances of the child is made, nor is there any allowance for the court to override the young person's decision when his or her ability to give

⁶¹ *Re James B.* (1987), 2 Y.O.S. 3491 (Alta. Prov. Ct., Yth. Div.) per Fitch Prov. J. He was sentenced to 15 months secure custody with one year probation.

⁶² Leschied & Hyatt, *supra*, note 60 report the results of a study, utilizing an unknown number of cases, that indicated young persons who were "disturbed" were less likely to consent to treatment than were "normal" youngsters. P. Simpson, Characteristics of Young Offenders Consenting to Treatment, Honours Thesis, University of Western Ontario [unpublished], 1985.

⁶³ Such a disorder must fall within the purview of the mental health statute of the province. A person must generally constitute a danger to him/herself or others, in the opinion of medical practitioners, in order to be eligible for involuntary admission to a mental health facility.

⁶⁴ Leschied & Hyatt, *supra*, note 60.

⁶⁵ *Ibid.* They cite as evidence T. Grisso & L. Verling, "Minor's Consent to Treatment: A Developmental Perspective" (1978) 9 Professional Psychology 412.

⁶⁶ As one example, children under 14 years were presumed to be *doli incapax*, or unable to form criminal intent. See Chapter 2.

⁶⁷ Regardless of their wishes, surrogate consent was obtained from a parent or guardian. It is still the case that children under 16 must be admitted by their parents in B.C. (*Mental Health Act*, R.S.B.C. 1979, c. 256) but reforms to align this statute with the *Charter* are contemplated. Individuals who have attained 16 years of age generally considered free to consent to voluntary admission except in those jurisdictions where there is a period prior to total emancipation where joint consent of child and parents is required. This is true for those aged 16 and 17 in Yukon (*Mental Health Ordinance*, R.O.Y.T. 1976, c. M-7, s. 6.1(1)(b)).

consent is questionable.⁶⁸

Finally, there is some concern that legal counsel will encourage young offenders to decline treatment orders because their "fortunes ride on the number of young persons 'gotten off'."⁶⁹ While this view may be somewhat extreme, it is certainly the case that the priorities of legal professionals and clinicians may well be different.

Consent of Facility

Even when both parent and child consent to detention for treatment, the mental health facility, which is the intended venue of the treatment, may block the admission. Some young offenders may be deemed unsuitable. Experience in England has shown this to be one possible reason for a reduction in the use of hospital orders.⁷⁰ Concerns over the requisite degree of security, the unamenability of some offender groups to treatment (e.g., psychopaths), and a shortage of beds were noted.⁷¹ Extremely violent children or sex offenders, for example, may not be appropriate candidates for some therapeutic settings. This may also be true of the developmentally disabled.⁷² In B.C., most offenders undergoing treatment orders are admitted collaterally under the *Mental Health Act*, restricting access to those who conform to the statutory definition of mental illness.⁷³

Another concern is the young offender who becomes an adult while being detained for treatment. If an order of custody were involved, an application to the court could result in an offender serving the remainder of the sentence in an adult facility.⁷⁴ However, no such provision is

⁶⁸ Leschied & Hyatt, *supra*, note 60.

⁶⁹ *Ibid.*

⁷⁰ R. Gordon & S.N. Verdun-Jones, "Mental Health Law and Law Reform in the Commonwealth: The Rise of the 'New Legalism'?" in D.N. Weisstub, ed., *Law and Mental Health: International Perspectives*, Vol. 2 (New York: Pergamon Press, 1986) 1.

⁷¹ *Ibid.*

⁷² M.S. Phillips & L.C. Thompson, "Psychiatric Assessments under the Young Offenders Act" (1986) 63(5) *Dimensions in Health Services* 20. Community Coastal Services in Victoria, B.C., an open custody residential program where treatment orders may be served, specifically excludes those convicted of violent crimes, sex offences and arson.

⁷³ J.A. MacDonald, "Justice for Young Persons and the Young Offenders Act" (1985) *Can. Social Work Rev.* 64 at 76. This definition is, under current legislation, very broad.

⁷⁴ S. 24.5. The provisions of the YOA continue to apply in respect of that person. See T.T. Daley, "Release from Custody and the Judiciary Under the Young Offenders Act or a Sign of Things to Come?" (1986) 10(2) *Prov. Judges J.* 21. It was anticipated that this measure would not be resorted to as a matter of general practice. N. Bala & H. Lilles, *supra*, note 49. See also s. 668 of the *Criminal Code*.

made for treatment order dispositions. The administrators of an adolescent treatment centre may be reluctant to admit a young offender who will soon be 18 years old and for whom there is no mechanism for transfer to a facility for adults.

Perhaps the major concern is that detention is to be for a determinate period, and one dictated by the court. This may not be consistent with notions of treatment and recovery, which cannot be predicted and planned to such an exact degree and which may require longer periods of time.⁷⁵ Administrators of facilities may also want the authority to return to court young offenders who are not cooperating with a treatment program. It is now apparent that sentencing judges are defining rather short periods of time for treatment orders. The maximum period permitted is two years⁷⁶ but, in two-thirds of the cases, the detention is ordered for six months or less (see Table 1.3) and the actual period may be shorter, if the young person withdraws consent.

Enforcement of Treatment Orders

Preliminary information indicates that some young persons may withdraw consent after being detained for treatment.⁷⁷ A young offender who "wilfully fails or refuses to comply" with a disposition may be charged with an offence.⁷⁸ In this manner, non-compliance with a disposition may be enforced. However, this does not apply to treatment orders. If consent is withdrawn, or treatment is refused, the court cannot force the young person to comply. Upon review, the disposition may be varied, but a custody term cannot be substituted.⁷⁹ The ability to withdraw consent has been called a "major impediment to therapeutic processes."⁸⁰ The inability to enforce treatment orders is also likely to be a major impediment to sentencing judges' use of treatment orders.

.....
⁷⁵ Phillips & Thompson, *supra*, note 72.

⁷⁶ S. 20(3).

⁷⁷ A. Leschied & P. Gendreau, "The Declining Role of Rehabilitation in Canadian Youth Justice: Implications of Underlying Theory in the Young Offenders Act" (1986) 28 Can. J. Crim. 315. They report that two of five treatment orders, in one area of Ontario, were terminated after consent was withdrawn. The generalizability of these figures is obviously limited.

⁷⁸ S. 26.

⁷⁹ S. 32(7)(c). A disposition can be reviewed if the young person "is unable to comply with or is experiencing serious difficulty in complying with the disposition" (s. 32(2)(b)). For direction as to the length of any new disposition, see *R. v. K.L.* (1987), 37 C.C.C. (3d) 280 (B.C.Co.Ct.)

⁸⁰ Leschied & Gendreau, *supra*, note 77 at 320.

Narrowing of Youth Court Jurisdiction

In order to qualify for a treatment order, a young person must have been convicted of a federal offence. Under the JDA, the courts were not so limited. The juvenile court's jurisdiction also included provincial offences, municipal by-laws, and status offences, such as truancy, incorrigibility, and sexual immorality.¹¹ Having this broad jurisdiction was regarded as beneficial in that the juvenile court could be used as a referral service for children with a wide variety of social and emotional problems. For example, it has been noted that one of the advantages to the prosecution of truancy was the "ability the court has to use some community services for young people and their families such as family court clinics and probation which [were] only accessible through the court."¹²

The narrower jurisdiction of the YOA has drawn criticism: "In many respects, the state has legitimized the neglect of young persons who were previously cared for under the *Juvenile Delinquents Act*."¹³ Unless a criminal offence has been proved, a treatment order is not possible. Those under twelve, regardless of their behaviour, and provincial offenders cannot be subject to treatment orders.¹⁴

Shift to Custody

At the same time treatment orders are being infrequently used, it is becoming apparent that the use of custody dispositions has increased under the YOA.¹⁵ It has been hypothesized that those

¹¹ While the prosecution of status offences declined drastically in the years preceding the YOA, 19.5% of juveniles referred for psychological assessment in one Ontario jurisdiction were status offenders, mostly truants. P.G. Jaffe, A.W. Leschied, L. Sas & G.W. Austin, "A Model for the Provision of Clinical Assessments and Service Brokerage for Young Offenders: The London Family Court Clinic" (1985) 26 *Can. Psychology* 54. This figure is taken from 616 referrals made to the Clinic between 1974 and 1981. (It is interesting to note the sex differences: 11.8% of boys were status offenders compared with 40.9% of the girls.)

¹² A.W. Leschied, "The Use of Court for Compulsory School Attendance: The Case for Us and Against Us." Unpublished Paper, London (Ontario) Family Court Clinic, October, 1985 at 2. See also Jaffe *et al.*, *ibid*.

¹³ Leschied & Gendreau, *supra*, note 77 at 315.

¹⁴ Only in Newfoundland can a provincial young offender potentially be detained on a treatment order. *Young Persons Offences Act*, S.N. 1984, c. Y-1, ss. 11(1)(e) and s. 13. It is not known if such a disposition is used for provincial offenders in Newfoundland and Labrador, but it would seem very unlikely.

¹⁵ A.W. Leschied & P.G. Jaffe, "Impact of the Young Offenders Act on Court Dispositions: A Comparative Analysis" (1987) 29 *Can. J. Crim.* 29; and, H. Kopyto & A. Codina, "Young Offenders Act Means More Frequent Custody Terms" (1986) 6(1) *Ont. Lawyers Weekly* 8. In one Ontario study, however, the overall rate of non-residential sentences increased from 66% to 81%. But, when a residential placement was used, custody was more likely than before. A.W. Leschied, G.W. Austin & P.G. Jaffe, "Impact of the Young Offenders Act on Recidivism Rates of Special Needs Youth: Criminal Policy and Implications" (1988) 20 *Can. J. Behav. Sci.* 322.

who previously would have been candidates for treatment may now be appearing in custodial settings:

[In Ontario] young persons in open custody appear to have been drawn from those who may have been previously ordered into the care of a children's aid society or placed in a treatment centre as a term of probation. The fact that a judge can no longer order a child into C.A.S. care or treatment may be having the effect of placing these heretofore child welfare/treatment groups into open custody.¹⁶

In the same jurisdiction, those receiving mental health assessments are three times more likely to be committed to a place of custody than were their JDA counterparts, although most of the increase is in admissions to open custody facilities.¹⁷ This trend is nonetheless disturbing to clinicians, who feel that custody is inappropriate, perhaps harmful, for many adolescents¹⁸ and that mental health problems are not uncommon among young offenders.¹⁹

One interpretation of this situation is that there has been a shift toward punitive and away from rehabilitative responses to youth crime. Despite the statement of principle in the YOA, young persons' "special needs" are not being considered. Sentences given with the purpose of deterrence, including community-based options, are thought to ignore the underlying causes of criminal behaviour and, therefore, are ultimately ineffective in preventing recidivism.²⁰ Some successful treatment programs have been reported²¹ but welfare proponents would charge that the justice model excludes any consideration of the benefits of and genuine need for treatment in some cases. Welfare advocates question the assumption, implicit in s. 22, that treatment professionals are not competent and benevolently motivated to independently make decisions concerning the liberty of others.²² The emphasis on individual rights has ultimately been harmful to children, it is argued.

¹⁶ A.W. Leschied & P.G. Jaffe, "Implications of the Young Offenders Act in Modifying the Juvenile Justice System: Some Early Trends" London (Ontario) Family Court Clinic [unpublished], 1985 at 3-4. Such a scenario may not apply in jurisdictions where child welfare agencies did not accept juvenile delinquents or where mental health services were not widely available for delinquents.

¹⁷ Leschied & Jaffe, *supra*, note 85.

¹⁸ Leschied & Hyatt, *supra*, note 60.

¹⁹ A.H. Thompson, "Young Offender, Child Welfare, and Mental Health Caseload Communalities" (1988) 30 Can. J. Crim. 135. This Alberta study found that 18% of young offenders had previous contact with the province's mental health services.

²⁰ Leschied *et al.*, *supra*, note 81. This study compared the recidivism rates of 259 juveniles sentenced under the JDA and 291 sentenced under the YOA. All had been assessed at the London Family Court Clinic, had been charged with federal offences and were between 12 and 15 years old. Of the 40% who could be located after one year, more of the YOA group had been charged with new offences. It is not stated whether non-compliance with a previous disposition was considered as a new offence.

²¹ E.g., A.W. Leschied & K.E. Thomas, "Effective Residential Programming for Hard-to-Serve Young Offenders" (1985) 27 Can. J. Crim. 161.

²² See McConville & Bala, *supra*, note 58.

Moreover, it has been suggested that the intentions of due process supporters have been coopted by crime control interests:

It would appear that justice model proponents have fallen prey to ultra conservatives who believe the overriding goal of the criminal justice system is social protection and safety, to the exclusion of the concerns of the offenders.⁹³

Such a view is illustrated in a recent case involving the transfer of a 14 year old boy accused of first degree murder. A child psychologist testified that the boy was mentally disordered but the condition could probably be remedied within the three years which was the maximum period for which he could be detained under the YOA. Based partially on psychiatric evidence, which contradicted this optimistic prognosis, the court felt that three years was insufficient time to render the boy safe for release. While the sentence almost certainly to be passed in adult court was 25 years penal incarceration, with little or no access to the type of treatment thought likely to be beneficial to him, the Court allowed the transfer.⁹⁴

Welfare advocates have consistently demanded that rehabilitation resources have been underfunded. The justice philosophy of the YOA may be a means to avoid the expenditures that would be necessary if treatment were entrenched as a right. If a right to treatment existed, governments would be legally obligated to treat all young persons sentenced by the court to treatment orders. Instead, the intention might always have been to displace rehabilitation. The terminology of the YOA connotes control. For example, training or industrial schools are now termed "places of custody," abandoning the pretext of any educational or vocational value. Moreover, recent amendments⁹⁵ are aimed at increasing police effectiveness in public protection.⁹⁶ Welfare advocates decry

⁹³ Leschied & Gendreau, *supra*, note 77 at 317.

⁹⁴ The defence successfully appealed to the Court of Queen's Bench (34 Man. R. (2d) 163) but this decision was overturned by the Court of Appeals, which ruled that the provincial court judge was within his jurisdiction to accept either prognosis and make the decision on that basis. *R. v. G.S.K.* (1985), 22 C.C.C. (3d) 99. Husband, J.A., in his dissent, was critical of the outcome, terming it "monumentally absurd" and "patently ridiculous":

In simple terms, the evidence does not support a conclusion that either the good of the child or the interests of the community will be served by this accused serving 25 years in a federal penitentiary. On the contrary, the evidence is overwhelming that such a sentence will be destructive of any chance for rehabilitation, while there is at least some hope for his rehabilitation with a sentence under the *Young Offenders Act* (at 101-102).

⁹⁵ Maximum sentence lengths have been raised, restrictions on privacy have been relaxed and arrest of those contravening probation orders is now possible. S.C. 1986, c. 32. For example, information identifying young persons may be published or broadcast if a youth at large is considered dangerous and such publication is necessary to assist in apprehension. Also, more liberal access to youth court records is permitted and the procedures surrounding record destruction have been relaxed. See T.B. Thomas, "Young Offenders Act: A Review of 1986 Amendments Relating to Court Records - Practicality Rules Supreme" (1987) 11(2) *Prov. Judges J.* 30.

⁹⁶ See Solicitor General Canada, News Release: Beatty Introduces Young Offenders Act Amendments to

the law-and-order priorities of both the act as written and as implemented.

Treatment Orders and the Justice Model

As mentioned above, the very existence of the treatment order provisions in the YOA is a reflection of a basic tenet of the welfare model: that youth should be responded to in terms of their emotional needs. Basic tenets of the justice model, however, are that punishment should be proportionate to the offence and that legal counsel must take direction from their clients. Some would argue that the latter may be appropriately disregarded in the youth court, in order for a competent adult to give advice to a minor. For example, encouragement to accept a treatment order may be offered if the youth has an obvious psychiatric problem. However, one Toronto-area lawyer, confronted with this dilemma, has taken this stand:

If a [s. 13] report recommends a secure setting and my client doesn't want it, and it is not proportionate, I will do everything in my power to bury that report.... The report might be quite accurate and correct, but my job is to represent the wishes of the young person.... If someone steals a loaf of bread, no matter how much they need psychiatric treatment, it doesn't mean you can sentence them to two or three years in order to treat them.⁹⁷

In addition to the support of a young person's right to make decisions, a certain amount of skepticism characterizes the justice model's response to treatment orders. This has stemmed largely from a pessimism about the welfare juvenile court generally. These comments, made in response to an early draft of the YOA, summarize the major points of contention:

1. The [JDA] is poor, largely because it is based on well-intentioned but pre-social science notions that since have been found to be mistaken.
2. The [Children and Young Persons Act], which makes a number of improvements, fails to depart from the same fundamental notions, basically that the condition or a symbol of conditions that the juvenile court can and should treat.
3. Accordingly the treatment approach, with the judge ordering the most suitable disposition for the correction of the child is invalid.
4. Moreover, the treatment approach, where it has been studied, has been found to be ineffective.
5. The treatment approach is objectionable also in that it is incompatible with elementary justice and is capable of much abuse.
6. This does not amount to a sad state of affairs requiring more money, resources, staff and

(cont'd) Better Protect the Public (30 April 1986).

⁹⁷ K. Makin, "Lawyers Will Follow Clients' Wish, Panel on Young Offenders Told" *The [Toronto] Globe and Mail* (30 October 1987) A3. The article continues:

[The lawyer] confessed that in a recent case, he was "wheeling and dealing" with a Crown attorney when he landed a deal that was too good — probation. The parents and everyone else working on the case knew the youth needed some treatment, he said. Mr. Bias [the lawyer] suggested how they might make their views known to the court. "Even to that minimal extent, I was breaching the trust of a lawyer, and it bothered me afterwards," he said.

training.⁹⁹

Those supporting these views might argue that treatment orders have no place in a criminal court.

Ineffectiveness of Treatment

Justice model proponents would not deny the benefit that treatment would have for the individual and society, if it were effective. Such commentators stress the potentially dual nature of treatment: benevolence and coercion. Detention for treatment, an extremely serious disposition, would only be warranted if some benefit were promised, and delivered. But, criticisms of the ability of either mental health or justice responses to have any positive impact upon their young charges has been vitriolic. At the very least it must be said that, where the mental illness of juvenile offenders has been the target of intervention, results have been disheartening.⁹⁹ Mistrust of psychiatric decision-making generally has been prompted by fears of overcommitment, the possibly negative effects of treatment, and the realization that there was no right to treatment after admission had been secured.¹⁰⁰ The reliability and validity of psychiatric diagnoses and predictions, called into question by many empirical studies, are possibly more suspect where minor patients are concerned.¹⁰¹ In addition to these issues, children were seen to be potentially more vulnerable to abuses at the hands of mental health authorities because their rights were protected only by parents or guardians, whose interest may have been in conflict with those of the child. Stone has implicated the medical model stating that:

(a) Inpatient psychiatric facilities for children have with rare exception been horrendous. (b) Whatever the value of traditional diagnostic criteria may be they are not readily applicable to children, except in the case of profound illness. (c) Psychotherapeutic methods that do exist are geared to the intact family, and that is rarely the target group of the juvenile courts. (d) Finally ... the dollar and resource cost of the medical model is totally unrealistic.¹⁰²

Certainly, the cost of these programs is high. The the U.S., secure treatment for juveniles was

⁹⁹ L. MacDonald, "Some Comments on Juvenile Delinquency Legislation" Paper Presented at the Canadian Bar Association Annual Meeting, Ottawa, 1969.

⁹⁹ M.S. Aber & N.D. Reppucci, "The Limits of Mental Health Expertise in Juvenile and Family Law" (1987) 10 Int'l J. Law & Psychiatry 167. See also C.S. Widom, "Juvenile Delinquency" in W.J. Curran et al., eds., *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice* (Philadelphia: F.A Davis Co., 1986); S.J. Shamsie, "Anti-social Adolescents: Our Treatments Do Not Work - Where Do We Go From Here?" (1981) 26 Can. J. Psychiatry 357; J. Byles & A. Maurice, "The Juvenile Justice Services Project: An Experiment in Delinquency Control" (1979) 21 Can. J. Crim. 151; and, L.C. Wilson, "Young Offenders: Another Look at Individualized Justice" in J. Menezes, ed., *Legal Perspectives on Social Issues: A Decade of Adjustment* (Toronto: Butterworths, 1980) 146.

¹⁰⁰ McConville & Bala, *supra*, note 58.

¹⁰¹ D.P. Simet, "Power, Uncertainty, and Choice: The Voluntary Commitment of Children - Parham v. J.L." (1982) 20 U.W.O. L. Rev. 141.

¹⁰² *Mental Health and Law: A System in Transition* (Rockville, Maryland: National Institute of Mental Health, 1975) at 146.

found to cost more than \$26,000 per person.¹⁰³ Given all the disadvantages and the few advantages, the denial of rights is not deemed to be justified by the promise of any real benefit.

Children's Rights and the Capacity to Consent

Where adults are concerned, the tenets of the justice model would demand that consent be obtained prior to making a treatment order.¹⁰⁴ Recognizing some exceptions, this was the recommendation of the Law Reform Commission of Canada: "as a general rule there [should] be no treatment of accused or offenders at any stage of the criminal process without consent."¹⁰⁵ Extension of this right to all competent young offenders would be dictated. Therefore, justice model advocates make reference to developmental psychology, for empirical evidence that children are capable of giving informed consent earlier than usually assumed.¹⁰⁶ As for adults, there is still the difficulty of determining when consent is voluntary and not given only with consideration of the alternatives.¹⁰⁷ But, generally, an examination of legal sources reveals that, with increasing frequency, young persons are being given a voice in the decisions made about their medical, dental and mental health care.¹⁰⁸ For example, it had been the case that minors could not give consent to residential mental health care or treatment. Although the involuntary commitment of children was "almost never used,"¹⁰⁹ admission of those under 16 was achieved only with the surrogate consent of the parent(s) or guardian. Regardless of the wishes of the child, this constituted a voluntary admission. Landau notes the paradox: "if the child met the criteria for involuntary admission he/she would in fact have greater procedural rights than a child who was diagnosed as not presenting a danger to himself/herself or the community."¹¹⁰

¹⁰³ A.R. Roberts, "National Survey and Assessment of 66 Treatment Programs for Juvenile Offenders: Model Programs and Pseudomodels" (1987) 38 Juv. & Fam. Ct. J. 39.

¹⁰⁴ Gordon & Verdun-Jones, *supra*, note 70.

¹⁰⁵ *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Information Canada, 1976) at 31.

¹⁰⁶ E.g., B. Landau, "The Rights of Minors to Consent to Treatment and to Residential Care" in B. Landau, ed., *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986) 93.

¹⁰⁷ G.M. Thomson, "Commentary on the Young Offenders Act" (1984) 1 Y.O.S. 7501.

¹⁰⁸ B. Landau, "Barriers to Consent to Treatment: The Rights of Minors in the Provision of Mental Health Services" (1979) 2 Can. J. Fam. L. 245.

¹⁰⁹ N. Bala & K.L. Clarke, *The Child and the Law* (Toronto: McGraw-Hill Ryerson, 1981) at 128.

¹¹⁰ *Supra*, note 106 at 97.

With the enactment of the *Charter of Rights and Freedoms*,¹¹¹ a statutory limitation on the age of consent to voluntary admissions became the possible target for court challenges. A variable test of the ability to give informed consent is contained in the Uniform Law Conference's *Uniform Mental Health Act* being considered for adoption by many provinces.¹¹² The Law Reform Commission of Canada has made similar recommendations.¹¹³

Misuse of the Criminal Sanction

The YOA, in granting consensual powers to young offenders, appears to be in-step with wider reform efforts. However, that may not have been a consideration for its architects. Indeed, the then Solicitor General stated simply that he was "pursued that it would be a waste of resources to 'impose' treatment if the young person was against it."¹¹⁴ When discussing the wording of the treatment orders provisions, one member of the Standing Committee on Justice and Legal Affairs expressed concerns, similar to those of clinicians, about the consent requirement:

We are dealing here with young people who perhaps have mental problems and so on. What if the young person is not in a position to give consent? If we want them to be treated properly in a treatment facility, what if they are, in fact, precisely one of those people who cannot give consent? Should there not be some provision in there to waive consent of the young person under those circumstances?¹¹⁵

The reply given, and accepted by the Committee, was that the YOA concerned the determination of criminal liability:

Perhaps the problem is that if the young person is in that condition, maybe they ought to be proceeding under the mental health act of the province, with the proper procedures, with medical examinations, et cetera.¹¹⁶

The Solicitor General added that "if you have him up for personal responsibility for an offence, he ought not to be there if he is not capable of giving consent."¹¹⁷ As is the case for adults, fitness to

¹¹¹ Section 15 guarantees individuals equality before and under the law, without discrimination based on either age or mental disability.

¹¹² A case by case assessment of ability to give informed consent is envisioned in this clause from the *Model Mental Health Act*:

For the purposes of consent under this Act, a person is mentally competent if the person is able to understand the subject-matter in respect of which consent is being requested and able to appreciate the consequences of giving and refusing consent.

¹¹³ *Working Paper 26: Medical Treatment and Criminal Law* (Ottawa: Ministry of Supply and Services Canada, 1980).

¹¹⁴ Letter from Robert Kaplan to Alison Hatch (1 June 1988) Ottawa, Ont.

¹¹⁵ Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 72 (1 April 1982) 45. The question was posed by Svend Robinson.

¹¹⁶ *Ibid.* at 46. This reply was given by Judge Omer Archambault, one of the principal drafters of the YOA.

¹¹⁷ *Ibid.* at 46.

stand trial would be at issue.

It appears to have been the intent of the government of Canada to restrict the use of treatment orders, but what cases would qualify? The diagnosis of a mental disorder should not be the justification for the imposition of a disposition more severe than would be the case for another young person,¹¹⁸ or for an adult.¹¹⁹ It could be argued that the use of the criminal sanction to facilitate mental health treatment is appropriate only if it is determined that the criminal behaviour was related to a mental disorder. It should further be stated by the clinician that the young person is amenable to treatment, that, with the administration of this treatment, a reoccurrence of the behaviour would be less likely, and that there is no better alternative. In this context, mental health treatment may be administered as a means of preventing recidivism, or "curing" the child of delinquency. As stated above, it does not have an admirable record in the prevention of juvenile crime or delinquency. The presence of legal counsel is to safeguard against the imposition of measures with non-justice aims by focussing to a greater degree on the determination of legal guilt. As one lawyer has noted:

There is a fundamental role to be played by counsel in youth court. No lawyer would advocate the right of the state to intervene in a youth's life and impose "treatment" because it was considered necessary, even though it had not been established that the youth committed acts that would justify imposing the treatment. It is of the highest importance that the procedures of adjudication be adapted to careful and reliable fact-finding to determine whether the criminal act has been committed.¹²⁰

Therefore, there would be few instances, if any, where supporters of the justice model would agree that treatment orders were justified. Such a potentially intrusive measure as detention for treatment should be used only when the nature and severity of the offence dictates. Given the low base rate of mental illness among children, in the general population,¹²¹ or even among violent delinquents,¹²² reliance upon treatment by the court is seen as being over-stressed, possibly a throwback to the welfare court.

Overall, the YOA seems to have preserved very few of the welfare elements of its predecessor, despite indication to the contrary in the declaration of principle. Treatment orders are notable

¹¹⁸ B. Landau, "The Young Offenders Act: Important Features for Psychologists" (1983) 15 Ont. Psychologist 6.

¹¹⁹ An impediment to the use of treatment orders in some cases is the requirement that any disposition given a young offender be no more onerous than that to which an adult may be sentenced (s. 20(7)). Given that treatment orders are not, as yet, an option for sentencing judges in criminal courts, the determination of when a sentence is greater is difficult.

¹²⁰ P.J. Harris, "Youth Justice on Trial" (1986) 5 Advocates' Soc. J. 35.

¹²¹ Stone, *supra*, note 102.

¹²² J.J. Coccozza *et al.*, "Mental Health Treatment of Violent Juveniles: An Assessment of Need" (1981) 27 Crime & Delinquency 487.

exceptions. As stated above, on the surface, they appear to be an attempt to please supporters of both the justice and welfare models. Whether it was the intent of the drafters to achieve this balance is not known.

Once proclaimed into force, however, the legislators must relinquish control to the practitioners. Youth court actors may block or circumvent changes. Despite recognition of the "special needs" of young persons in the YOA, the ability of the mental health professions to retain control over court mandated treatment appears to be blocked by legal restrictions. More than this, however, political factors that define areas of responsibility and economic factors that control availability of resources are crucial. These will be examined next.

CHAPTER IV

FEDERAL-PROVINCIAL RELATIONS AND THE YOA: THE POLITICS OF TREATMENT ORDERS

The division of powers between the federal and provincial governments was originally defined in the *British North America Act*.¹ Regarding justice, the government of Canada was responsible for the enactment and prosecution of criminal laws, while the provinces were granted authority over the administration of justice, and matters of health, child welfare and education. This split jurisdiction, at least where youth crime was concerned, proved to make the creation of a juvenile court difficult in the late nineteenth century.² To overcome these constitutional restrictions, the federal offence of "delinquency" was created in order to subsume under federal jurisdiction behaviours that constitutionally fell under provincial purview. These included breaches of provincial statutes and actions such as sexual immorality, truancy and incorrigibility, which came under child welfare acts of the time. Under the JDA, juveniles were not convicted of specific offences, such as theft. They were technically adjudicated as being in a state of delinquency. Delinquency itself was the offence.³

Provincial Jurisdiction Under YOA

Parallel to the process, discussed in Chapter 3, where interest groups were attempting to influence the reform process, discussions between the two levels of government concentrated principally upon issues of jurisdiction and cost. The broad jurisdiction of the juvenile court was one of the features of the JDA that attracted the greatest criticism. Throughout the 1970s, several provinces sought to gain greater power to define procedures in the juvenile justice systems they operated.⁴ While the courts consistently declared these efforts *ultra vires*, Wilson is among those who

¹ 1867, 30 & 31 Vict., c. 3, s. 91-93.

² Coordinating reforms at both levels of government in order to give one court jurisdiction over both provincial and federal offences was unsuccessful and would probably have limited the existence of juvenile courts to Ontario, at least for several decades. For a complete discussion, see J. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15 Osgoode Hall L.J. 71.

³ When drafting the JDA, an American statute was used as a model. In that country, delinquency was a civil status and *parens patriae* was the doctrine used to justify state involvement. In Canada, however, delinquency could not, constitutionally, be a civil matter and still fall under federal jurisdiction. See L. Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982) at 11.

⁴ Wilson, *ibid.* Osborne summarized the approaches used: 1. dealing with children outside the justice system (e.g., child welfare); 2. using the JDA but limiting the sanctions; 3. using provincial summary procedures; or, 4. setting up a completely different system. "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979) 2 Can. J. Fam. L. 7.

credit this federal-provincial conflict as the most important catalyst to the repeal of the JDA.⁵ As early as 1970, all federal proposals to replace the JDA included returning to the provinces the jurisdiction that was abrogated in 1908 over provincial offences, but disagreements over other issues effectively stymied legislative change until 1982. The choice of an upper age limit on youth court jurisdiction was among the most contentious areas. Once the YOA was proclaimed, youth court involvement was restricted to breaches of federal offences committed by those aged 12 to 17 years. All other behaviours previously dealt with by juvenile courts became provincial responsibility. In terms of jurisdiction, therefore, there are three areas over which the provincial governments have sole responsibility.

Provincial Offences

The provinces are again responsible for the prosecution of young persons who breach provincial statutes. In the juvenile court, this had constituted 21% of all charges adjudicated nationally,⁶ most usually involving traffic offences or violations of liquor laws. In British Columbia,⁷ Alberta,⁸ Newfoundland,⁹ Prince Edward Island,¹⁰ Nova Scotia,¹¹ and the Northwest Territories¹² legislation has been passed specifically defining the procedures for the prosecution of provincial young offenders, in most cases extending the principles of the YOA to this offender group. Other provinces have modified the procedures defined for the prosecution of adult offenders¹³ or adopted them directly.¹⁴ Another approach is to ally provincial offenders with the child welfare system.¹⁵

⁵ *Ibid.* at 33.

⁶ Statistics Canada, *Juvenile Delinquents, 1983* (Ottawa: Canadian Centre for Justice Statistics, 1984).

⁷ *Young Offenders (British Columbia) Act*, S.B.C. 1984, c. 30.

⁸ *Young Offenders Act*, S.A. 1984, c. Y-1.

⁹ *Young Persons Offences Act*, S.N. 1984, c. 2.

¹⁰ *Young Offenders (P.E.I.) Act*, S.P.E.I. 1985, c. 47.

¹¹ *Young Persons Summary Proceedings Act*, S.N.S. 1985, c. 11.

¹² *Young Offenders Ordinance*, O.N.W.T. 1984, c. 2.

¹³ Ontario: *Provincial Offences Act*, R.S.O. 1980, c. 400, as amended; and, Saskatchewan: *Summary Offences Procedure Act*, R.S.S. 1978, c. S-63, as amended.

¹⁴ *Judicature Act*, R.S.N.B. 1973, c. J-2, as amended.

¹⁵ *Youth Protection Act*, S.Q. 1977, c. 20, as amended; and, *Children's Act*, S.Y.T. 1984, c. 2. In Nova Scotia, s. 8 of the *Young Persons Summary Proceedings Act*, S.N.S. 1985, c. 11, reads as follows: "At any stage of the proceedings under this Act the youth court may refer the matter to an agency for an assessment regarding whether the young person is a child in need of protection or could benefit from services under the

Criminal Behaviour of Children Under Twelve Years

According to the *Criminal Code*, children under 12 are not considered criminally responsible for any offences they commit.¹⁶ Children who commit acts, which would be considered in contravention of the law if they were committed by adults or young persons, now fall under provincial jurisdiction.

During the consultative process that led to the passage of the YOA, there was almost complete consensus concerning the desirability of raising the minimum age of criminal responsibility, beginning with the first recommendation to do so in 1965.¹⁷ Children were rarely prosecuted,¹⁸ and the possible stigmatizing effect of court processing, concern over which led to the enactment of alternative measures for some young offenders, was thought to be even more serious and likely for young children. The possibility that children under 14 did not have the capacity to form criminal intent and, therefore, were not criminally responsible, has been recognized in common law with the presumption of *doli incapax*.¹⁹ De-criminalizing the behaviour of those under 12 also had the indirect effect of increasing the degree to which young offenders were held responsible for their behaviour.²⁰ Especially since the proclamation of the YOA, however, law enforcement groups and some welfare model supporters²¹ have been vocal in their opposition to the new minimum age, advancing several arguments. They point to the deterrent value of *possible* prosecution and the incidence of law breaking by children, apparently rising in both frequency and severity.²²

(cont'd) Children's Services Act."

¹⁶ Prior to 1984, prosecution had been possible for children as young as seven (s. 12).

¹⁷ Department of Justice Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965) at 40-53. Proposals ranged from 10, as the desirable minimum, to 14.

¹⁸ In 1983, only 2% of juveniles appearing in court were between seven and 11, and 40% of these were adjudicated not delinquent. There was, however, great inter-provincial variation: at one extreme, 8.5% of youth appearing before the court in P.E.I. were under 12, while at the other extreme, the corresponding figure for Quebec was .09%. Statistics Canada, *Juvenile Delinquents, 1983* (Ottawa: Supply and Services Canada, 1984). This is reflective of different legislation and policy. In several provinces (e.g., Manitoba and B.C.) diversion of young children was practised almost routinely. In other provinces, the prosecution of children was legislatively prohibited (e.g., Quebec: *Youth Protection Act*, S.Q. 1977, c. 20, s. 60) or restricted (e.g., Alberta: *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 72 and 73.)

¹⁹ J. McLeod, "Doli Incapax: The Forgotten Presumption in Juvenile Court Trials" (1980) 3 Can. J. Fam. L. 251.

²⁰ N. Bala & H. Lilles, *Young Offenders Act Annotated* (Ottawa: Solicitor General Canada, 1982) at 422.

²¹ A.W. Leschied & S.K. Wilson, "Criminal Liability of Children Under Twelve: A Problem for Child Welfare, Juvenile Justice or Both?" (1987) 30 Can. J. Crim. 17.

²² Concern had also been expressed that adults may manipulate children into committing crimes, knowing that the children cannot be prosecuted. It had been the case that the adult could not be charged with

The provinces could have opted to continue the prosecution of children who violate provincial offences, but this has not been done. Rather, the provision that restricts the prosecution of children for federal offences²³ has been joined by parallel provincial laws.²⁴

Where provinces have defined statutory procedures for the handling of child "offenders," this has been accomplished in the context of the child welfare system. Peace officers are empowered to detain child offenders and return them to their parents in British Columbia,²⁵ Ontario,²⁶ Nova Scotia,²⁷ and Prince Edward Island.²⁸ Police are encouraged to identify the child offenders who may also be in need of protection in Alberta,²⁹ Nova Scotia,³⁰ and Prince Edward Island.³¹ Even without a statutory directive to this effect, police officers, as with all professionals working with children, must inform child welfare authorities if they encounter a child who may be in need of protection.³² Once the referral has been made, the child must still conform to the statutory definition of a child in need of protection and the regular procedures apply, except perhaps in those provinces where the criminal behaviour itself is considered possible indication of the need for protective services. Ontario has provided the most explicit direction in this regard. In that province, a child is in need of protection if:

the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not

(cont'd) counselling an offence, because the acts of children are not technically "criminal." Section 23.1 of the *Criminal Code* now prevents this situation.

²³ *Criminal Code*, s. 12.

²⁴ *Young Offenders (British Columbia) Act*, S.B.C. 1984, c. 30, s. 2; *Young Offenders Act*, S.A. 1984, c. 30, s. 4; *Summary Offences Procedure Act*, R.S.S. 1978, c. S-63, s. 2.1; *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 91(b); *Summary Convictions Act*, R.S.Q. 1977, c. P-15, s. 2.1; *Young Offenders (P.E.I.) Act*, S.P.E.I. 1985, c. 47, s. 4(1); *Young Persons Summary Proceedings Act*, S.N.S. 1985, c. 11, s. 4; *Young Persons Offences Act*, S.N. 1984, c. 2, s. 5; *Young Offenders Ordinance*, O.N.W.T. 1984, c. 2, s. 5. See also *Lunenburg County District School Board v. R.C.* (1984), 2 Y.O.S. 6631 (N.S. Fam. Ct.).

²⁵ *Family and Child Service Act*, S.B.C. 1980, c. 11, s. 22.1.

²⁶ *Child and Family Services Act, 1984*, S.O. 1984, c. 55, s. 40(10).

²⁷ *Children's Services Act*, R.S.N.S. 1976, c. 8, s. 45(1A)(b).

²⁸ *Young Offenders (P.E.I.) Act*, S.P.E.I. 1985, C. 47, s. 4(2).

²⁹ *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 4 and 5. A police officer has the discretion to report the matter to the Director of Social Services and Community Health, if there are reasonable grounds to believe that a child has committed a federal offence. The Director must then investigate the matter.

³⁰ *Children's Services Act*, R.S.N.S. 1976, c. 8, s. 45(1A)(b).

³¹ *Young Offenders (P.E.I.) Act*, S.P.E.I. 1985, c. 47, s. 4(2).

³² E.g., *Children's Act*, S.Y.T. 1984, c. 2, s. 115(2).

provide, or refuses or is unavailable or unable to consent to, those services or treatment;

the child is less than twelve years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.³³

Child welfare legislation in New Brunswick explicitly permits both young offenders and child offenders to be brought into that system.³⁴ Child offenders may also be considered to be in need of protection in Newfoundland³⁵ and the Northwest Territories.³⁶ The same is true for Yukon,³⁷ but children discovered committing offences can also be referred to diversion committees.³⁸

"Status Offenders"

The YOA has also eliminated the category of status offences by restricting prosecution to behaviours for which adults can be convicted. Although there was a great deal of provincial variation, by the 1980s, few such offences were heard in juvenile courts in Canada.³⁹ Provinces still retain the jurisdiction over truancy,⁴⁰ but if such a charge were to be laid, it would fall under the provincial school statute. Certainly, underage drinking, considered a status offence by some, will

³³ *Child and Family Services Act*, 1984, S.O. 1984, c. 55, s. 37(2)(j) and (k).

³⁴ The *Child and Family Services Act*, S.N.B. 1980, c. C-21, s. 31(1)(l) provides that a young person or child who commits an offence may be characterized as a child whose security and development are potentially in danger.

³⁵ *Child Welfare Act*, S.N. 1972, c. 37, s. 2(1)(a.1)(xiv). A child in need of protection can include "a child actually or apparently under the age of 12 years who performs an action that contravenes a provision of an Act or a regulation made there under or a municipal regulation or a by-law or an Act of the Parliament of Canada."

³⁶ *Child Welfare Ordinance*, R.O.N.W.T. 1974, c. C-3, s. 14(1)(i). A child may be in need of protection if "he is or, in the absence of evidence to the contrary, appears to be under the age of twelve years and behaves in a way which, in the case of any other person, would be an offence created by an Act of Parliament or by any other regulation, rule, order, by-law or ordinance made thereunder or an enactment or municipal by-law."

³⁷ *Children's Act*, S.Y.T 1984, c. 2, s. 115(1).

³⁸ *Ibid.* These committees are available for both young offenders and children potentially "in need of guidance." The child must admit the substance of the allegation and agree to the diversion program decided upon. This seems to be almost an offence-oriented approach in that children are drawn into exactly the same system that deals with some of those persons who commit crimes.

³⁹ In 1983, 108 charges were laid against juveniles for sexual immorality, representing .09% of all charges. Half of these charges were heard in Manitoba. Over half (55%) resulted in findings of not delinquent. Education related offences, mostly truancy, were somewhat more common. They constituted 0.5% of all charges, but truancy was prosecuted in only three provinces: Nova Scotia, Ontario and Alberta. Again, over half of the charges were terminated without a finding of delinquency. Statistics Canada, *supra*, note 18.

⁴⁰ *British North America Act*, s. 93.

continue to be prosecuted, by authority of liquor control acts. However, sexual immorality has been decriminalized and provinces no longer have the power to create such offences as incorrigibility or unmanageability.

Shift to Alternate Systems of Treatment and Control

The boundaries of the major service delivery systems for youth – education, child welfare and health – were considerably blurred when the JDA was in effect. As discussed in Chapter 3, welfare model supporters believed that the prosecution of status offences permitted the referral of emotionally troubled young persons into social service resources, such as treatment. As another possible disposition, a juvenile delinquent could be ordered into the care of the provincial child welfare system.⁴¹

Currently, the responsibility for children in need of protective or mental health services lies explicitly with agencies designed to service these client groups, a more distinctive division of powers, as described by Professor Bala:

The YOA makes clear that while there is to be a special law and a separate justice and corrections system for young offenders, the basis for state action is the imposition of criminal sanctions, not the promotion of the welfare of children. As with adults, state involvement in the life of a young person is only justified when a criminal offence is alleged, and duly proven according to law.⁴²

This narrowing of jurisdiction has been thought by welfare advocates to represent an abandonment of some young persons, especially children under 12 and status offenders (see Chapter 3). It is perhaps in these groups where the most emotionally disturbed persons may be found. Cohen would think it unlikely that a deviancy control system would ever abandon anybody; a new place for them would simply be found. Many of the juveniles who were sentenced to treatment under the JDA have now been made the responsibility of other control systems. Status offenders and child offenders, for example, may have been “relabelled downwards” or considered to be in need of treatment within the child welfare system.⁴³ The mental health system can accommodate many of those for whom treatment orders cannot be used, by involuntary commitment for conduct disorders. And finally, it seems likely that to circumvent the problems encountered in the use of treatment orders other sentencing options may be used. In all cases, with exceptions in some provinces, these alternate methods of induction into treatment are less visible and/or occur with fewer

⁴¹ JDA, s. 20(1)(h). This would bypass entirely any need to justify his/her status as a child in need of protection or any legal recourse to contest such a designation.

⁴² “The Young Offenders Act: Why a New Era of Juvenile Justice?” (1985) Paper presented at the Meetings of the Canadian Psychological Association, June, 1985, at 8.

⁴³ *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press, 1985) at 54-5.

of the due process protections candidates for treatment orders enjoy.

Youth Justice System

Court-mandated treatment is still possible using other sentencing options that do not require the consent of the young person. This was a prevalent practice in the juvenile court. For example, treatment may be included as a condition of probation. In a B.C. case, a condition of probation requiring a youth to live at a facility [Moffat House] where he could receive treatment was contested as being "tantamount to him being detained for treatment without the consent of himself or his mother contrary ... to subsection 22(1)." The petition was dismissed because "the order in question does not direct that he be detained for treatment" so no consent was required.⁴⁴ Courts will generally accept a condition that is specifically related to a certain place and time, unlike the practice, common in the adult courts,⁴⁵ where the vague condition that a person "seek out and be amenable to treatment" can be used.⁴⁶ One of the advantages seen to using probation orders in this way is that non-compliance can result in a new charge or a varied disposition.⁴⁷

Another option is to sentence a young offender to secure custody with a requirement for treatment on an out-patient basis at a nearby treatment facility. At least one jurisdiction has overcome the problems posed by s. 20(1)(i) by designating a treatment facility as a secure custody facility and sentencing young persons under s. 20(1)(k). Treatment may also be administered in open custody.⁴⁸ Four private organizations claim to administer treatment orders on a non-residen-

⁴⁴ *C.B. v. R.* (1984), 2 Y.O.S. 3491 (B.C.S.C.) per MacDonald J. The court continued: "The fact is that Moffat House is the only facility available to the petitioner at this time where he can receive treatment of the type and kind recommended. ... The Provincial Court Judge was well aware of the petitioner's objections to Moffat House, but properly considered his treatment to be 'by far the most important thing.' I agree." Speaking also to the measures to which a court will consent when a child's rehabilitation is at issue, it has recently been held that having an AIDS test is a reasonable condition of probation for a boy convicted of soliciting. *R. and G.D.M.* (3 February 1988), Vancouver CC871598 (Co. Ct.)

⁴⁵ *R. v. Dobson* (1975), 11 N.S.R.(2d) 81, 5 A.P.R. 81 (S.C., A.D.); *R. v. Gouchie* (1975), 11 N.S.R.(2d) 100, 5 A.P.R. 100, 1 C.R.(3d) S-33 (S.C., A.D.); and, *R. v. Beauvais* (1978), 5 C.R.(3d) S-27 (Ont. C.A.). For adults, attendance at a treatment centre is justified by s. 663(2)(h) of the *Criminal Code*, which empowers the court to specify "reasonable conditions." See *R. v. Chisholm* (1985), 18 C.C.C. (3d) 518 (N.S.S.C., App. Div.).

⁴⁶ R.N. Komar, "Annotation to *C.B. v. R.*" (1987) 2 Y.O.S. 3492.

⁴⁷ S. 26. As noted above, the provision for non-compliance specifically does not apply to treatment order dispositions.

⁴⁸ R. Weiler & B. Ward, "A National Overview of the Implementation of the YQA: One Year Later" (1985) 8 Perception 2. Included in the facilities where this is possible are Coastal Community Services, in Victoria, B.C.; Davenport Youth Home, Toronto, Ontario; and, Davenport Youth Home, Toronto, Ontario.

tial, counselling basis.⁴⁹ Certainly, an acquittal due to insanity or a finding of unfitness to stand trial would usually result in a Lieutenant-Governor's Warrant, thereby securing detention in a mental health facility.

All of these measures would attain the same end as treatment orders. Indeed, young persons sentenced by these means to residential treatment may be detained in the same facilities as those on treatment orders. It is important to note, however, that while treatment is the goal, offenders sentenced in this way will be recorded, in official statistics, as recipients of probation or custody. The frequency with which these measures occurs would remain unknown. In any event, they constitute a legal circumvention to the problems of consent in treatment orders. In all other respects, the due process protections of the YOA will be available. However, this is not necessarily the case for non-criminal justice placements.

Many young persons and children may not be candidates for treatment, even in custody or as a condition of probation. "Status offenders," children under 12 years, and provincial offenders cannot be subject to such measures because they are outside of the jurisdiction of the YOA. Even young offenders convicted of minor offences may be ineligible, as they warrant only a minor sentence. If any child manifests emotional problems, and that is the main reason for state intervention, the youth court is no longer the appropriate place for them. That is the explicit goal of the YOA. As Kirvan has noted: "Where the welfare of a young person is at issue and commitment or wardship may be necessary for mental health and child protection reasons, respectively, resort should be made to the appropriate legislation."⁵⁰ In reference specifically to treatment orders, she continues: "It is not suggested that the specific needs of a young person should not be addressed by the juvenile justice system. Rather, it is suggested that these needs would be more appropriately addressed outside of the criminal law once a disposition commensurate with the offence has been satisfied."⁵¹ Contact with the justice system could be avoided altogether, if an emotional problem was severe:

the mentally disordered condition of the accused would clearly permit the exercise of prosecutorial discretion not to prosecute for a minor offence not involving dangerous conduct, and to divert such an accused from the criminal process entirely, where the utilization of mental health services in the community or civil commitment to a psychiatric facility might

⁴⁹ These are the Family Counselling Centre, Sarnia, Ontario; KAIROS, Kingston, Ontario; the John Howard Society, Windsor, Ontario; and, Alternative Sentencing Plan, Winnipeg, Manitoba. It is not clear how this can be done, unless the courts agree that detention does not have to be involved.

⁵⁰ M.-A. Kirvan, "Commentary on the Implications of the Young Offenders Act for Treatment and Rehabilitation" in H. Stutt, ed., *Learning Disabilities and the Young Offender: From Arrest to Disposition* (Ottawa: Canadian Association for Children and Adults with Learning Disabilities, 1986) 39 at 52.

⁵¹ *Ibid.* at 54.

be more suitable.⁵²

Perhaps in anticipation of this void left by the YOA, provincial systems of child welfare have expanded their scope to encompass the emotional and mental health problems of young persons. The same is true for diagnostic classification systems for mental health professionals. Although devised in the U.S., that country has witnessed reforms similar to the YOA in that status offences have been decriminalized and the justice model has been adopted in most states.

Provincial Mental Health Statutes

Each province has a statute that governs the care and treatment of persons who suffer from mental disorders. Within each statute are defined the procedures for the voluntary admission of individuals. Those not competent to give consent can be committed involuntarily, if they conform to the statutory definition of mental disorder. A third avenue of admittance involves surrogate consent. As discussed above, in some jurisdictions, persons under 16 are not considered able to consent, so their parents must provide surrogate consent. This situation is gradually changing, as statutes are being amended to conform to the *Charter*. For example, the Uniform Law Conference has supported the use of a definition of consensual powers that recognizes that some children have the maturity to make decisions about their lives earlier than others, and earlier than age 16 (see Chapter 3). This parallels the trend, discussed above, toward granting children greater rights.

If competent young persons can now refuse admission to treatment facilities and, as experience with treatment orders has revealed, adolescents are generally unwilling to consent to such measures, an overall reduction in the number of mental health admissions for this age group might be expected. It is also possible, however, that such admissions would increase. Impediments to the use of treatment orders and the narrower jurisdiction of the youth court might have combined to decrease the involvement of the youth court in the psychiatric problems of children and young persons. For example, the 671 children and young persons admitted to health facilities for delinquents in fiscal year 1982/83, and the 1,112 admitted in the following year,⁵³ could no longer be admitted under the jurisdiction of federal legislation. Admission, either voluntary or involuntary, using mental health statutes will be necessary. It is already the case that, in B.C., the adolescent treatment centre will only accept young offenders on treatment orders if there is parallel admission under that province's mental health statute.⁵⁴

⁵² R. v. Simpson (1977), 35 C.C.C.(2d) 337 at 362, per Martin, J.A.

⁵³ Statistics Canada, *Selected Tables from Annual Return of Special Care Facilities 1982/83* (Ottawa: Supply and Services Canada, 1986); and, Statistics Canada, *Residential Care Facilities* (Ottawa: Supply and Services Canada, 1987).

⁵⁴ B. Clark & D. Eaves, "Health Services for Young Offenders in British Columbia" (1985) 1 B.C. Psychologist 30.

Many young persons, being unwilling to consent to care and treatment, may only be admitted involuntarily. In order to qualify for involuntary admission, a person must manifest a mental disorder. In this regard, the mental health system has been expanding its scope from "classical" mental illness and psychoses to include the anti-social behaviour typical of adolescence, so-called "conduct disorders." Features of this mental illness include:

Difficulties at home and in the community are common. Frequently there is precocious sexual activity, which may be aggressive or submissive, depending on subtype. The child typically blames others for his or her difficulties and feels unfairly treated and mistrustful of others. Self-esteem is usually low, though the individual may project an image of "toughness." Unusually early smoking, drinking, and other substance use are also common. Poor frustration tolerance, irritability, temper outbursts, and provocative recklessness are often present. Academic achievement is frequently below the level expected on the basis of intelligence and age. Attentional difficulties are common, and may justify the additional diagnosis of Attention Deficit Disorder.⁵⁵

Recent modifications to this classification system make the category of conduct disorder almost synonymous with the types of behaviours prosecuted by the juvenile court. In order to be diagnosed with a conduct disorder, a young persons must exhibit criminal behaviour, truancy, and/or running away from home. The new category of "oppositional defiant disorder" encompasses many of the behaviours previously called "incurability":

Children with this disorder commonly are argumentative with adults, frequently lose their temper, swear, and are often angry, resentful, and easily annoyed by others. They frequently actively defy adult requests or rules and deliberately annoy other people. They tend to blame others for their own mistakes or difficulties. ... Typically, symptoms of the disorder are more evident in interactions with adults or peers whom the child knows well. Thus, children with the disorder are likely to show little or no signs of the disorder when examined clinically.⁵⁶

Few adolescents would not fall under such a broad definition.

An increase in mental health admissions for juveniles has been observed in the United States by Lerman, despite a decrease for all other age groups. More than half of such admissions are for general behavioural disorders, "a variety of 'acting out' or deviant behaviours or symptoms that are not classical signs of psychiatric disturbance."⁵⁷ Lerman concludes:

It appears that the increase of juveniles in the mental health subsystem has been accompanied by a distinct utilization pattern. The state hospitals, in particular, are probably admitting many youth who may be engaging in deviant behaviours, but who are not mentally ill in the classical sense. This indicates that the mental health system has probably broadened its definitional boundaries to include a heterogeneous array of behaviours that evoke official and adult concerns.⁵⁸

⁵⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 3d Ed. (Washington, D.C.: American Psychiatric Association, 1980) at 46.

⁵⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 3d Ed. Rev. (Washington, D.C.: American Psychiatric Association, 1987) at 56.

⁵⁷ P. Lerman, *Deinstitutionalization and the Welfare State* (New Brunswick, NJ: Rutgers University Press, 1982) at 134. In 1975, this constituted 57.2% of admissions for under 18 year olds to the psychiatric units of general hospitals, and 71.8% of admissions to state or county mental hospitals for the same age group. He included in this category alcohol and drug disorders.

⁵⁸ *Ibid.* at 136.

Aided by the privatization movement and coverage under medical plans,⁵⁹ private adolescent psychiatric facilities are comprising a hidden correctional system in the U.S.

It is too early to determine if a similar situation will occur in Canada. Some of this shift has been related to U.S. reforms such as the decriminalization of status offenders, now accomplished in Canada by the YOA. The privatization of youth mental health treatment is occurring here, but socialized medical plans extend insurance coverage for these services to all socio-economic levels. It would, therefore, be unlikely that institutionalization in non-state run facilities would be used mostly by affluent groups, as in the U.S.

In any case, the repeal of the JDA meant that one avenue to treatment was blocked, but some young persons previously dealt with by the juvenile court may end up in the mental health system. Legal jurisdiction was easily obtained over juveniles, with such a broad definition of delinquency. Now, the mental health system has defined itself as responsible for the criminal behaviour of youth and those behaviours previously called status offences. The consent of the young persons is not required, whether admission is involuntary, or accomplished "voluntarily" with surrogate consent. Especially in the latter case, legal protections may be lacking and the young persons has little recourse to "appeal."⁶⁰ Decisions are made in private and do not have to be justified, unless contested. As such, children and young persons treated through the mental health system do not necessarily enjoy the same legal rights they would have if detained under treatment orders.

Provincial Child Welfare Legislation

It is a provincial responsibility to enact legislation and provide services for children who are considered to be "in need of protection" by the state. In such circumstances, family intervention may be dictated or, in more extreme circumstances, the child may be removed from the home. The applicable statute of each province defines those characteristics of a child or the family that indicate state intervention may be required. Physical or sexual abuse, family violence, abandonment, neglect, and the death, infirmity, or imprisonment of the parent(s) are frequently cited as justifications for removing a child from his/her home. Failure of a parent to allow recommended medical treatment is explicitly considered grounds for apprehension in all provinces.

⁵⁹ P. Lerman, "Child Welfare, the Private Sector and Community Based Corrections" (1984) 30 *Crime & Delinquency* 5; and, C. Warren, "New Forms of Social Control: The Myth of Deinstitutionalization" (1981) 24 *Amer. Beh. Sci.* 724.

⁶⁰ As noted above, there is no review for "voluntary" admissions, as it is assumed that the patient may leave whenever desired.

The passage of the YOA has two possible consequences for the child welfare system. First, child welfare caseloads could decrease, because admission to care is no longer possible as a disposition of the youth court. All children accepted into care must now conform to the definition of "child in need of protection"⁴¹ whereas adjudication as a delinquent was the only requirement previously. No doubt, many young persons dealt with in this manner would not have qualified for protective services.⁴² In British Columbia, it is reported that, at the end of fiscal year 1985/86, the child-in-care caseload was the lowest it had been in 20 years.⁴³ However, it is too early to discern a trend concerning the number of *admissions* to care, at least in B.C. (see Table 4.1).

A second, and more likely, possibility is that admissions to welfare services would increase. Such services continue to be cost-shared with the federal government, under the *Canada Assistance Plan*.⁴⁴ More importantly, the jurisdiction of child welfare services has expanded to include the "criminal" behaviour of those under twelve (see above) and the behaviours previously called status offences now fall under their purview alone. In addition, the mental health problems of children have been accepted by the child welfare system as an area falling under their purview. In recent years, legislative amendments have reflected this expansion. All provinces, with the exception of B.C.,⁴⁵ incorporate some form of emotional deprivation, injury, or neglect into the statutory definition of "child in need of protection."⁴⁶ This is in contrast to the other criteria, which typically focus

⁴¹ Except, arguably, those taken into care on a voluntary basis. For a discussion of this process, see D. Turner & B. Shields, "The Legal Process of Bringing Children into Care in British Columbia" in K.L. Levitt & B. Wharf, eds., *The Challenge of Child Welfare* (Vancouver: University of British Columbia Press, 1985).

⁴² Criminal behaviour had been a common criterion of the need for protective services. However, there is only one province where such is still the case (New Brunswick). See *supra*, note 34. An exception may be juvenile prostitution. "The C.A.S. Looks at the Young Offenders Act: 'It's a Definite Improvement'" (1984) 10(6) *Liaison* 23.

⁴³ British Columbia, Ministry of Human Resources, *Services for People: Annual Report 1985/86* (Victoria: 1987). This includes children admitted to care by their parents voluntarily.

⁴⁴ S.C. 1966-67, c. 45. This statute provides for the sharing of the costs for assistance and welfare service programs and describes formulas whereby the federal government will assign monies to the provinces. Those covered include any person "under the age of twenty-one years who is in the care and custody or under the control or supervision of a child welfare authority..." s. 2(g)(i).

⁴⁵ In B.C., the court is required to consider the emotional and mental condition of the parent rather than the child (*Family and Child Services Act*, S.B.C. 1980, c. 11, s. 14(3)(a)). The limitations of not being able to consider the child's mental and emotional health became evident in the case of *A.E. and B.E. v. Superintendent of Family and Child Services* (1986), 49 R.F.L. (2d) 337 (B.C.C.A.). The parents were deemed fit, but a 16 year old daughter was found to suffer from "mental ill-health which manifested itself in an irrational and inexplicable fear of the parents." Faced with a situation where apprehension was considered necessary, the court had to rule that the parents had a disability, to be consistent with the statutory definition.

⁴⁶ *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 1(2)(f) and (g); *Family Services Act*, R.S.S. 1978, c. F-7, s. 15(d); *Child and Family Services Act*, S.M. 1985, c. 8, s. 1 and 17(c). *Child and Family Services Act*, S.O. 1984, c.

Table 4.1

Number of Children Admitted to the Care of a Children's Aid Society
or to the Superintendent of Family and Child Services,
and the Proportion Admitted by way of the Juvenile Delinquents Act
British Columbia, 1961/62 to 1985/86

<i>Fiscal Year</i>	<i>Total Admitted</i>	<i>JDA Admissions</i>	<i>Percent of Total</i>
1961-62	2,454	54	2.2%
1962-63	2,870	86	3.0%
1963-64	3,702	101	2.7%
1964-65	3,888	80	2.1%
1965-66	4,190	120	2.9%
1966-67	4,879	158	3.2%
1967-68	*	*	*
1968-69	*	*	*
1969-70	*	*	*
1970-71	*	*	*
1971-72	5,187	574	11.1%
1972-73	*	*	*
1973-74	*	*	*
1974-75	*	*	*
1975-76	*	*	*
1976-77	*	*	*
1977-78	3,452	104	*
1978-79	4,602	*	*
1979-80	4,978	*	*
1980-81	5,460	73	1.3%
1981-82	5,521	72	1.3%
1982-83	5,894	63	1.1%
1983-84	5,440	*	*
1984-85	5,672	N/A	N/A
1985-86	5,563	N/A	N/A

Source: British Columbia, Department of Social Welfare, *Annual Report of the Department of Social Welfare* (Victoria: Queen's Printer, 1960 to 1968); *Annual Report of the Department of Rehabilitation and Social Improvement* (Victoria: Queen's Printer, 1969 to 1972); Ministry of Human Resources, *Services to People, Annual Report* (Victoria: Queen's Printer, 1973 to 1986).

* Figures are not available.

upon acts or omissions of the parent(s), physical or medical factors, characteristics of the child's environment, or moral judgments regarding the quality of life which the child enjoys. In some cases, rather explicit statutory direction has been made of the types of emotional problems which could lead to a declaration that a child is in need of protective services. Such definitions appear to encompass many of the behavioural problems commonly manifested in adolescence, although, in Alberta at least, indication of parental blame is necessary.⁶⁷ In Ontario, however, only demonstration of a parental inability or reluctance to take remedial measures is required.⁶⁸

If an emotional or mental disorder has been determined to render a child in need of protective

(cont'd) 55, s. 37(f) to (h); *Youth Protection Act*, S.Q. 1977, c. 20, s. 38(b) and (h); *Family and Child Services Act*, S.P.E.I. 1981, c. 12, s. 1(2)(g); *Child Welfare Act*, S.N. 1972, c. 37, s. 2(a.1)(vi); *Children's Services Act*, R.S.N.S. 1976, c. 8, s. 2(m)(iv); *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 31(1)(d) and (e); *Children's Act*, S.Y.T. 1984, c. 2, s. 118(1)(d); and, *Child Welfare Ordinance*, R.O.N.W.T. 1974, c. C-3, s. 14(1)(l).

⁶⁷ A child is emotionally injured

(i) if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development, and

(ii) there are reasonable and probable grounds to believe that the emotional injury is the result of

(A) rejection,

(B) deprivation of affection or cognitive stimulation,

(C) exposure to domestic violence or severe domestic disharmony,

(D) inappropriate criticism, threats, humiliation, accusations or expectations of or towards the child, or

(E) the mental or emotional condition of the guardian of the child or chronic alcohol or drug abuse by anyone living in the same residence as the child.

Child Welfare Act, S.A. 1984, c. C-8.1, s. 1(3)(a).

⁶⁸ A child is in need of protection if it is determined that:

(f) the child has suffered emotional harm, demonstrated by severe,

(i) anxiety,

(ii) depression,

(iii) withdrawal, or

(iv) self-destructive or aggressive behaviour,

and the child's parents or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm;

Child and Family Services Act, 1984, S.O. 1984, c. 55, s. 37(2).

services, the usual measures available⁶⁹ have been augmented in some areas by explicit avenues for therapeutic mental health services. In Ontario and Manitoba, parents may voluntarily yield their children to care if they are unable to provide the services required by a child who has a special need, which may include a mental disorder.⁷⁰ Alberta was the first province to delineate when and how children could receive residential treatment. Provision was made for the secure treatment of wards who suffer from a mental or behavioural disorder and present a danger to themselves or others. Short-term, emergency detention is possible if it is necessary to confine the child in order to protect his/her survival, security or development.⁷¹ Detention for a longer term may be judicially ordered if it is determined that it is necessary to confine the child in order to remedy the mental or behavioural disorder.⁷²

The legal protections available to candidates for treatment orders are generally not available if treatment is sought through the child welfare system.⁷³ In this arena, the "best interests of the child" are to be paramount and the paternal philosophy that led to a disregard for due process in the juvenile court is still at work. Moreover, most children are admitted to care under voluntary, informal agreements, so judicial scrutiny of decisions is rare.⁷⁴ Given the expanded statutory jurisdiction and the lack of visibility or due process, the juvenile court seems to be recreated in the child welfare system. The only constraint upon this would be the resources provided by the provincial governments.

⁶⁹ These include 1) return of the child to the parent(s); 2) return of the child with agreement that the agency responsible maintain supervision of the family; 3) placement of the child with a third party with no transfer of guardianship; 4) making the child a temporary ward of the agency, while maintaining the option to extend the wardship at a later date or order a period of supervision for after the expiry of the wardship; and 5) making the child a permanent ward of the agency or a ward for an indefinite period.

⁷⁰ In Ontario, this is defined as "a behavioural, developmental, emotional, physical, mental or other handicap." *Child and Family Services Act, 1984*, S.O. 1984, c. 55, s. 30. Section 198(e) allows the Ministry of Community and Social Services to further define "special need" in the regulations. In Manitoba, among the possible conditions are illness, mental retardation, or "chronic medical disability." *Child and Family Services Act*, S.M. 1985, c. 8, s. 14(1).

⁷¹ *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 41.

⁷² *Ibid.*, s. 42.

⁷³ An exception is Ontario, where a child may be granted access to counsel and, if 12 years or over, a say in the proceedings.

⁷⁴ D. Poirier, "Social Worker Enforcement of Child Welfare Legislation: An Increasing Potential for Abuse of Power" (1986) 5 Can. J. Fam. L. 215; and, Turner & Shields, *supra*, note 61.

The Economy of Treatment

The provincial governments are constitutionally responsible for the areas of child welfare and mental health. Treatment resources, usually a responsibility of ministries of health, fall under their auspices. With the shift of jurisdiction dictated by the YOA, the provinces anticipated that their expenditures would increase dramatically,⁷⁵ so they engaged in cost-sharing negotiations with the federal government. Saskatchewan was the first to attain an agreement, while Ontario has yet to do so. Most provinces signed an agreement whereby cost would be evenly shared for treatment orders, custodial services (excluding remand) and alternative measures.⁷⁶ The federal government pays 50%, or 40 cents per capita, of provincial expenditures for legal aid costs.⁷⁷

Some provinces have embraced the YOA with more enthusiasm than others. This may be related to the different degree of changes its passage necessitated across Canada. Manitoba and Quebec did not have to accommodate an increase in the maximum age of youth court jurisdiction. The *Youth Protection Act* of Quebec was very similar to the YOA, and that province already had an extensive system of diversion and procedures for the extra-judicial handling of offenders under 14 years of age.

Perhaps the province which has taken the most aggressive minimal compliance stance is Ontario. For example, they do not currently participate in the youth court survey of the Centre for Justice Statistics, providing only aggregate data instead of case by case data.⁷⁸ Ontario has failed to provide for alternative measures programs, despite a policy of deinstitutionalization and providing community alternatives.⁷⁹ It was among the provinces that requested an extension for the date of proclamation, already delayed from April 1, 1983 to April 1, 1984. When this was denied by Robert Kaplan, there was a general state of unpreparedness. Little training of justice personnel had been done and several key policy decisions had yet to be made.⁸⁰ But, perhaps the measure

⁷⁵ E.g., British Columbia, Ministry of the Attorney General, *Young Offenders Act: Caseload and Cost Projections* (Victoria, November, 1982).

⁷⁶ E.g., Manitoba, Ministry of Community Services, "YOA Funding Agreement Signed" (1984) 4 *Young Offenders Act Info Line* 1.

⁷⁷ This amount is 90% in the Atlantic provinces. In 1985-86, the federal contribution was estimated at \$5.9 million, more than double the \$2.7 million figure of the previous year. Department of Justice, *Annual Report, 1985-1986* (Ottawa: Minister of Supply and Services Canada, 1986) 30.

⁷⁸ Canadian Centre for Justice Statistics, *Juvenile/Youth Court Statistics: The Transition Period* (Ottawa: Canadian Centre for Justice Statistics, 1987) 7.

⁷⁹ R. Burgess, "Juvenile Corrections in Ontario" (1982) 44 *Corrections Today* 40.

⁸⁰ J. Gault, "Political Delinquency: Queen's Park is Setting Sorry Example by its Procrastination on

most in discord with the YOA is the creation of a two-tiered system. As with several other provinces, responsibility for youth justice had to fall either under the child welfare ministries that previously dealt with juvenile delinquents, or under the corrections system. Other provinces selected one or the other but, in Ontario, they opted to retain the status quo. Those under 16 years of age are the responsibility of the Ministry of Community and Social Services, while 16 and 17 year olds remain under the auspices of the Ministry of Correctional Services.

Another indication of variable response by the provincial governments concerns the availability of treatment resources. The inclusion of s. 20(1)(i) in the YOA was a matter of some surprise, being added at the last moment. Despite the cost-sharing arrangements, therefore, existing treatment resources may not have been significantly or sufficiently augmented since the proclamation of the YOA, in some areas. Several key issues were unresolved at the time of the passage of YOA. Provinces were divided as to what would constitute a treatment facility, some wanting a loose definition with others wishing to use a more clinical definition.¹¹ The need for security in any facility that accepted treatment orders was not agreed upon by all.

The willingness of the provinces to create or expand the necessary resources is important in understanding the use of treatment orders. Concern has been expressed that young persons are being assessed in adult facilities, by personnel unfamiliar with adolescent psychology.¹² Treatment may also be delayed or denied where the lack of bed space creates lengthy waiting lists. In one British Columbia case, a boy of 15, considered a prime candidate for the provincial adolescent treatment facility, was sentenced instead to 18 months secure custody because his admission was not imminent.¹³ The problem of the centralization of resources in urban areas, long decried by those in the northern areas of the country, still exists in many regions. In addition, some provinces have few, or no, resources of the type necessary for the treatment of young persons. It is the

(cont'd) Implementing the Young Offenders Act" (1984) May Toronto Life 15. Ontario also requested that the creation of a uniform maximum age be postponed. "People" (1985) 11(2) Liaison 30.

¹¹ Telephone conversation with Alice Ruskin, former YOA Coordinator, Forensic Psychiatric Services, Burnaby, B.C. (11 July 1988).

¹² M.S. Phillips & L.C. Thompson, "Psychiatric Assessments Under the Young Offenders Act" (1986) 63(5) Dimensions in Health Services 20.

¹³ The boy's appeal that the sentence was unduly harsh was denied in *Regina and R.P.C.* (13 August 1986), Vancouver CA 005720 (B.C.C.A.). He had been on the waiting list for admission to the facility prior to his involvement with the court. In denying the appeal, Carrothers, J.A. stated: "The disturbed condition of this young person is confirmed by the psychiatric assessment. He is and has been for some years a permanent ward of the Province. Apparently, he does not have immediate prospect of getting admitted to the [adolescent treatment] unit." The committal to custody of youths because of no treatment beds has also been noted in several areas of Ontario. See S. Elson, *Experiences and Issues with the Young Offenders Act* (Thorold, Ontario: Niagara Children's Services Committee, 1986) at 17.

responsibility of the provincial governments to create such facilities, and the courts are limited by this situation. One Nova Scotia judge attempted to have a 14 year old boy sent to Toronto for treatment, under the authority of s. 20(1)(i), but the Court of Appeals disallowed the disposition.¹⁴ Some young persons are sent out of their home jurisdiction, by arrangement with other provinces, causing obvious difficulties for preserving family and community ties. Above all the other issues discussed above, therefore, the low rate of use for treatment orders might simply be explained by the lack of bed space and the inability of the federal and provincial governments to coordinate a satisfactory funding arrangement.

¹⁴ *R. v. B.M.* (1985), 2 Y.O.S. 3469 (N.S.C.A.). Provision for interprovincial arrangements for treatment orders has since been made (s. 25.1).

CHAPTER V

SUMMARY AND ANALYSIS

The foregoing discussion has revealed that the use of treatment orders is fraught with many problems. On the surface appearing to attain a balance between the needs of young offenders and their legal rights, treatment orders actually have few fans. Welfare model proponents support the concept but are critical of the way it is being applied. Contentious issues include the ability of a young person to veto the treatment option, the difficulty of finding an appropriate facility, the requirement for a court imposed determinate period and the inability to enforce noncompliance. These concerns stem from a general critique of both the different philosophy of the YOA and the way it is being put into practice. The elimination of the social welfare function of the court and the reference to legal rights rather than needs have been keenly criticized by welfare supporters. Moreover, experience since the passage of the YOA has demonstrated an emphasis on punishment, despite a declaration of principles acknowledging rehabilitation as a valid goal.

On the other hand, those who support a due process orientation for the youth court would support the use of legal mechanisms to prevent the treatment of persons against their will, even those obviously suffering from mentally disorders. Young persons are seen as generally competent to give consent, or dissent, to treatment and to instruct counsel as to their wishes. As in the adult courts, incompetent persons should not be subject to prosecution, until judicially declared fit to stand trial. Recent years have seen wider legislative efforts to restrict the discretion of psychiatric decision-making, in response to fears of overcommittal and intrusive treatments with little guarantee of benefit. In the context of the youth court, treatment might be accepted as a valid disposition were it not for the litany of unsuccessful attempts to rehabilitate offenders. The low rate of use of treatment orders is not viewed as a problem by this group, because there are only a limited number of scenarios in which they would be appropriate.

On the surface, a reconciliation of these views seemed to be embodied in treatment orders but, in practice, neither is satisfied. For any or all of these reasons, sentencing judges may perceive the difficulties associated with even attempting to impose such a disposition. In any event, it seem obvious that, if young persons are receiving treatment as a result of their anti-social behaviour, it is not as a result of treatment orders.

Cohen's Five Models

It is not unusual to find that criminal justice reform efforts are followed by practice that is at variance with the stated goals. Cohen describes many examples, including diversion, determinate sentencing, and many community-based programs.¹ He has identified five major categories of theories that are commonly advanced to explain this gap between rhetoric and reality. These models are presented in Chapter 1. Cohen has suggested that each refers to "different parameters of social action. Each can be emphasized for different purposes, and all might be needed for something like a complete explanation." Thus:

the notion of progress is always present in the sense that things can obviously be better;

organizations which try to implement each new good idea start with (and then generate more of) their own demands;

whatever these demands, we will tell stories (ideologies) to justify and rationalize what we are doing;

these ideologies will justify action in such a way as to give a privileged position to their tellers and to safeguard their interests; and, finally

these stories and interests exist and must be located in a particular social or political economy.²

These factors — ideas, organizations, ideologies, professionals, and political and economic forces — can be applied to explain the pattern of use of treatment orders, but none satisfactorily accounts for all the possible variables. However, the last three models appear most useful.

Progress

This model represents the whig view of change. Reform efforts are thought to be a positive move, made in light of new scientific findings. Intentions are purely altruistic. In this case, we can only speculate about the exact origins of the treatment order provisions. They seem to have been a last minute addition to a proposed act that was otherwise subjected to extensive scrutiny. Still, they seem to represent a codification of existing practice. For most of this century, juvenile courts have been turning to the mental health system for assistance with their clients. Rooted in positivist criminology, the JDA was a reflection of the view that children are amenable to change and care should be taken to discover the underlying causes of delinquency in each. Despite the justice imperatives in the YOA, treatment orders seemed to be an explicit recognition that underlying causes of behaviour continued to be important.

The drafters of these provisions, from the evidence available, seem to have had a sincere desire to improve the system. Official statements by Robert Kaplan and Judge Omer Archambault,

¹ S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press, 1985).

² *Ibid.* at 89.

in the House of Commons, the Standing Committee on Justice and Legal Affairs and publications of the Ministry of the Solicitor General, portrays a desire to respond to youth in the manner most likely to prevent recidivism, in a democratic and humane society. The JDA is presented as outmoded and a detriment to young persons. The YOA, on the other hand, is a rationally thought out replacement, borrowing measures from the previous system, while adding some improvements.

Treatment orders were not discussed specifically in a public forum, and correspondence with Robert Kaplan has revealed that he does not remember the process "in detail." Because of the perceived futility of forcing young persons to participate in treatment, as Solicitor General he agreed that young person should be able to dissent. On the face of it, this seems a reasonable move with a logical motive. Proponents of the progress model would not feel it necessary to question this or to investigate further to uncover hidden agendas.

If the motives are beyond question, so are the consequences. The outcome of reform is seen as generally positive, "according to plan" as Cohen would put it.³ Those instrumental in passing the JDA viewed their efforts as an improvement over the previous system. But history has shown that the system created under that statute probably did little to help the lot of the children, even though that was its explicit intent. The power and scope of the state was extended considerably but rates of delinquency did not drop, as promised. Quite to the contrary, greater numbers of children were accused of delinquencies and subject to "help and guidance."

It is still too early to judge the overall effect of the YOA. Like the situation that emerged after the passage of the JDA, rates of both prosecution and punitive sanctions may be increasing. This is not consistent with the liberal progressive view officially espoused by the drafters. However, crime control proponents would regard this as a definite improvement. Therefore, interpreting this situation as success or failure requires making a value judgment about the actual goals of the youth court.

The same is true for treatment orders. Welfare proponents are critical of the treatment order provisions because the frequency with which young offenders receive treatment may have decreased. On the other hand, knowing that treatment orders are infrequently used would not necessarily be viewed as an undesirable outcome by justice advocates. But this group would not be pleased if it is true that increased rates of incarceration is the result. Generally, like the child savers, today's reformers may have to face the possibility that some of the benefits envisioned have not materialized.

³ *Ibid* at 88.

Organizational Convenience

Cohen cites many examples of reforms that have been advanced with good intentions, even sound theoretical reasoning, but have failed to achieve the desired results. Diversion is perhaps the most notorious of those that were blocked or transformed for the sake of organizational convenience, resulting in a situation opposite to that intended. A widening of the social control net was found to be the result, increasing, rather than decreasing, the numbers of children subject to sanction. However well thought out, intentions may be undermined by the organizational dynamics inherent in the criminal justice system. Faced with a possible reduction of their jurisdiction, perhaps a loss of their jobs, those who held the power compete with the new controllers. The result may be that both the old and new guard coexist.

Such a struggle for supremacy was evident around the passage and implementation of the JDA. Although the child savers' views were codified in the new legislation, the police and magistrates resisted and managed to hold sway over the practice of juvenile justice for many years. Eventually, it was realized that the juvenile court could accommodate both welfare and crime control priorities. Resulting practice differed from the original vision, but this was seen as modification supported by new ideas and theories, not a retreat. For example, mental health professionals gained a place, as did lawyers, at least to a limited degree.

In the YOA, no actors have been explicitly excluded from their previous roles. In fact, an expansion may have occurred in that the role of legal professionals is now much greater. They have successfully entered an arena to which access was previously limited. The legal right to counsel is in some ways greater for young offenders than for adults. Generally, lawyers applaud the YOA and are critical of it only in terms of the manner in which it is being implemented. For example, they wish to increase the access of young offenders to legal aid.⁴ They seem to feel no need to circumvent or block the intentions of the act.

Obviously dissatisfied, however, are the clinicians who claim their caseloads have decreased significantly since treatment orders began. This is, they would argue, an undesirable consequence. Giving an equal priority to due process has, it is felt, taken too much power from the hands of clinicians, those in the best position to determine the wisest course of action. Furthermore, the ability to block or circumvent the provisions is rendered difficult. The powers granted young persons to decline treatment, targeted as the reason for the problems, is entrenched in the statute. Even if treatment is taking place in custody facilities or as conditions of probation, this involves different professionals. As one strategy to regain their original position, spokespersons for this group are

⁴ Canadian Bar Association - Ontario, Special Committee on the Young Offenders Act, "Report to Council" (6 December 1985).

waging a vigorous campaign to have the YOA amended by repealing s. 22. Such a change would rectify the situation and permit the system to operate as it was intended. If this is the only recourse for this group, they have been unsuccessful in blocking or circumventing the reform.

Ideological Contradiction

The third type of explanation for the difference between intentions and outcomes focuses upon the contradictions inherent in the ideologies that support some reforms. Justifications for reform, so called "reform chatter"⁵ or "stories of change,"⁶ are advanced. On the surface, they are attractive alternatives to the *status quo*, but this only hides a deeper, hidden agenda. Cohen shows how the rise of community-based programs was justified as being pragmatic, humanitarian, theoretically sound, and cost effective. The very word "community" conjured up nostalgic images of a lost world and appealed to the 1960s anti-bureaucracy, counter-culture movement. Ultimately, however, the move to community could never be expected to succeed. The state could not sponsor a movement to dismantle itself, and state control merely continued.

Cohen also reviews the outcome of recent attempts to restrict state power, by diversion, decriminalization and due process. Concerning the later, Ericson and Baranek note: "the apparent desire is to minimize arbitrary action by state agents and resolve conflicts within a framework of rules which ensure predictability of action on both sides."⁷ The impetus for this move apparently comes from pragmatic critiques of rehabilitation ("nothing works"), neo-conservative critiques of rehabilitation ("we told you so"), liberal fear of state paternalism and professionals, or near anarchistic pleas for radical non-intervention.⁸

Indeed, the shift to the justice model in the YOA was justified largely as an alternative to these problems. Rehabilitation was said to be ineffective and inefficient, and the rhetoric of treatment permitted the denial of human rights with only a shallow promise of benefit. Treatment professionals came under attack as repressive agents of social control. Returning to a classical conception of criminal justice could only be better than the state paternalism that justified institutions such as the juvenile court. Accordingly, legal counsel, who advise young offenders, do not generally see treatment as a valid goal of criminal proceedings.

⁵ R.V. Ericson & P.M. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982).

⁶ Cohen, *supra*, note 1.

⁷ *Supra*, note 5 at 220. These researchers posit that this cannot work because "legal rules are not the only rules which frame the processing of criminal cases" (at 221).

⁸ Cohen, *supra*, note 1 at 127-30.

Cohen calls this a "story of control," and examination reveals a contradictory outcome. The justice model, defining itself in opposition to state paternalism, has no immediately obvious policy implications for sentencing, except punishment. After the welfare model was discredited, the vacuum may have been filled by policies, consistent with neo-conservative interests, to increase the severity of punishment. Actual attempts to minimize state control have been selectively focussed upon cutting the welfare state. Cohen does not see privatization as a viable option for "downsizing" the criminal justice system. Instead, expenditures for rehabilitative efforts have been redistributed to more visible and generally more punitive areas. Emphasis is again upon the overt behaviour of an individual so any measure that prevents recidivism, including incapacitation, is supported. Measures such as psychodynamic therapy, that are thought to produce changes in underlying thought patterns, in order to prevent recidivism, are no longer a priority.⁹

The welfare group sees the move toward due process as misguided, perhaps identifying the contradiction inherent in the ideology. They believe that rehabilitation was dismissed too early, before it had been allowed to demonstrate that treating underlying causes of behaviour was, in the long run, better protection for society than punishment. Justice imperatives with emphasis on individual rights has led only to punitive treatment in practice. It is posited that justice views have been coopted by conservative elements, using the liberal democratic arguments against treatment. In this way, treatment as a goal of the juvenile court has been largely abandoned, replaced by punishment. This is consistent with neither the welfare or justice models. Only crime control interest are appeased by increases in the use of incarceration.

Professional Interests

But the role of the *professionals* in shaping the system cannot be overlooked. Even more than legislators, those imbued with special knowledge of human behaviour have tremendous control over the operation of the criminal justice system. The mental health professions have created a new language and system of classification that excludes the non-initiated from playing. As Cohen has summarized:

The rise of psychiatry has become the paradigmatic case for understanding the emergence during the last century of various experts in deviancy control, each with its own elaborate ideology and systems of classification. This success of psychiatry was to establish a radical, legally formalized monopoly on its services and to be able to claim esoteric knowledge, effective technique and the right to treat.¹⁰

This continued even in the face of rising delinquency rates. Intentions were good and the

⁹ Another indicator of a conservative trend is the intrusion by the state into the family. State sponsored social control is seen as necessary only because traditional mechanisms — family, church, community — have been weakened. Efforts to bolster the family are tried, and that domain continues to be the target of intervention, contrary to classical justice imperatives.

¹⁰ *Supra*, note 1 at 168.

alternative was thought to be far worse. Moreover, both the juvenile court and the mental health system shared a concern with the "anticipatory syndrome," the notion that, even in the absence of manifest anti-social behaviour, a latent problem existed that needed attention to offset future problems. In both cases, an expansion into the realm of the "treatable," "amendable," "dangerous," "predelinquent," "at risk," or "deserving" was facilitated by this new language.¹¹

The low rate of use of treatment orders may be related to the shrinkage of youth court jurisdiction over those delinquents most typically the target of psychiatric intervention: status offenders, the pre-delinquents and the at-risk. The YOA legally prohibits intervention until a crime has actually been committed and minor offences are to warrant only a light sentence, regardless of the characteristics of its perpetrator. As a consequence of the passage of the YOA, provincial systems such as mental health and child welfare have been given residual power over those young persons who no longer fall under federal jurisdiction. These include not only status offenders and child offenders but, given the inability to impose treatment under the YOA, possibly those persons thought to need treatment as indicated by criminal behaviour. Rather than an abandonment of these children as has been charged by some professionals supporting the welfare model, this may represent only a shift of control.

In the mental health system, the trend is towards granting competent young persons the right to decline voluntary admission to mental health facilities. This could result in an overall reduction of admissions, because a young person's refusal to enter residential treatment cannot be vetoed by a parent. But the mental health professions have increased their scope beyond traditional mental illnesses to include conduct disorders, which encompass many of the behaviours previously termed status offences. Criminal behaviour as well is now the indication of a mental disorder. As occurred in the U.S., therefore, an increase in the extent to which young offenders are inducted into the mental health system could occur, despite the non-use of treatment orders.

The child welfare system too is a likely place for those not able to be treated through the youth justice system. Recent trends in legislative reform reveal that this system is assuming responsibility over a larger group of children than before. Intervention is no longer restricted to cases of physical abuse or neglect. State intervention is now possible to remedy emotional problems and reduce exposure to the influence of parents which may cause them. With one exception, the legal protections granted young offenders surrounding the use of treatment orders are not available, as the paternal "best interests of the child" philosophy still guides protection proceedings.

¹¹ *Ibid.* at 174.

Legal reforms such as these are often the result of professional groups lobbying legislators. As an example, psychologists have been successful in having their services explicitly recognized in legislation where only psychiatric and medical practitioners were recognized before. It is in the interests of professional groups to define as large a role for their membership as possible. Where mentally disordered young offenders are concerned, any decrease in treatment through the youth court can possibly be balanced by an increase in treatment in other systems.

Political Economy

But, while jurisdiction may expand, resources will not necessarily keep pace:¹¹

Professional growth only takes place when it is allowed to by the political economy. Professional expansion might be self-contained, but the conditions for expansion (budgets and manpower) are determined by wider political interests. Even the most self-serving of professional groups — academics are a good example — cannot expand indefinitely without appropriate financial and political support.¹²

The final model, therefore, focusses upon political and economic factors. Intentions of the professionals are not important here, for their ability to either aid their charges or affect the system is negligible. Above all other factors discussed above, therefore, the low rate of use of treatment orders may be explained simply by a lack of bed space. An exhaustive political economy argument is not possible using the information presented here. The fiscal priorities of the federal and provincial governments have not been examined. Moreover, the role of the privatization of resources has not been considered. But it can be said that economic factors are probably very important in the use of treatment orders. There can simply be no treatment if there is no funding. If bed space is limited, so will be the number of detainees.

When all of the above factors are considered, it seems apparent that the consequences of reform are not necessarily straight forward. They are viewed as positive by some and regressive by others. It is impossible to speak of "success," without assuming a theoretical position or making a moral judgment. Certainly, with opposing views, one cannot unequivocally say that a measure has been a progressive change. In the case of treatment orders, opinions do vary widely. Justice advocates are generally content with the circumstances, as they believe that the treatment process is open to much abuse. Welfare groups lament the inability to use treatment orders and clinicians claim to be powerless to change the situation. It is their view that the justice attack on treatment was coopted by conservative crime control elements. Children will suffer in a repressive system that values punishment. However, it would appear that the location of treatment may merely have shifted. The mental health and child welfare systems have expanded their jurisdiction to include those children and young persons who cannot or will not accept treatment orders. Professional groups seem to create ways to maintain or expand their monopolies. While this may have

¹² *Ibid* at 168.

happened in this case, it is still unclear whether this shifting or expansion will be permitted to occur by the infusion of the requisite funding.

This thesis has been written after only four years of operation under the YOA. Much speculation has been done to fill in the gaps where information is unavailable. Future research should focus upon the methods used to circumvent the problems of treatment orders. Specifically, attention should be paid to the possibility that, with one avenue of treatment blocked, more child offenders and young offenders will be found in the child welfare and mental health systems.

The Future of Treatment Orders

Federal-provincial negotiations following the implementation of the YOA have touched upon the issue of treatment orders. Disenchantment with the situation was obviously voiced. However, changing these provisions seems not to be a priority. Amendments to the YOA are not considered to warrant Parliamentary time, relative to free trade and the Meech Lake Accord, in these last months of the Mulroney government. Moreover, any amendments would be more likely to focus upon measures that respond to the public's image that the YOA is too soft on offenders, than upon efforts at rehabilitation. Such have been the pronouncements of the Solicitor General in the media.

Criminal Code amendments that would create a similar sentencing option for adults are pending. It seems likely that any move to alter s. 20(1)(i) of the YOA will be stalled until these changes are in place. However, reformers should be aware of the problems encountered at the youth court level before they hurl headlong into creating treatment orders for adults. Certainly, it seems unlikely that a veto over detention will be offered offenders. This one change will allay many problems, but create others. Another option to be seriously considered is to forego any creation of treatment orders for adults. The resources necessary to successfully implement rehabilitation in the Canadian justice system are lacking. Success is unlikely under these circumstances.

REFERENCES CITED

- M.S. Aber & N.D. Repucci, "The Limits of Mental Health Expertise in Juvenile and Family Law" (1987) 10 *International Journal of Law and Psychiatry* 167.
- Advisory Committee on Juvenile Delinquency, *Report of the Advisory Committee on Juvenile Delinquency* (Victoria: King's Printer, 1936).
- D.M. Aird, "It's Never too Late. Please Stop! Think! Reconsider!" submitted on behalf of Viking Houses to Standing Committee on Justice and Legal Affairs (n.d.).
- American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 3d Ed. (Washington, D.C.: American Psychiatric Association, 1980).
- American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 3d Ed. Revised (Washington, D.C.: American Psychiatric Association, 1987).
- N. Bala, "The Young Offenders Act: Why a New Era of Juvenile Justice?" Paper presented at the Meetings of the Canadian Psychological Association, June 1985.
- N. 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.
- N. Bala & K.L. Clarke, *The Child and the Law* (Toronto: McGraw-Hill Ryerson, 1981).
- N. Bala & R.R. Corrado, *Juvenile Justice in Canada: A Comparative Study* (Ottawa: Solicitor General Canada, 1985).
- N. Bala & H. Lilles, *The Young Offenders Act Annotated* (Ottawa: Solicitor General Canada, 1982).
- Barreau du Québec, Mémoire au gouvernement fédéral sur le projet de loi concernant les jeunes délinquants et abrogeant l'ancienne loi sur les jeunes délinquants, April 1972.
- H. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press, 1963).
- A.K. Bottomley, *Criminology in Focus: Past Trends and Future Prospects* (Oxford: Martin Robertson & Co., 1979).
- N. Boyd, "An Examination of Probation" (1978) 20 *Criminal Law Quarterly* 355.
- P.J. Brantingham, "Juvenile Justice Reform in California and New York in the Early 1960s" in F.L. Faust & P.J. Brantingham, *Juvenile Justice Philosophy: Readings, Cases, and Comments* 2nd Ed. (St. Paul: West Publishing Co., 1979) 259.
- British Columbia, Department of Rehabilitation and Social Improvement, *Annual Report* (Victoria: Queen's Printer, 1969 through 1972).
- British Columbia, Department of Social Welfare, *Annual Report* (Victoria: Queen's Printer, 1960 through 1968).
- British Columbia, Ministry of the Attorney General, *Young Offenders Act: Caseload and Cost Projections* (Victoria: November 1982).
- British Columbia, Ministry of Human Resources, *Services to People, Annual Report* (Victoria: Queen's Printer, 1973 through 1986).
- British Columbia Civil Liberties Association, Submission on the Young Offenders Bill, submitted to the Standing Committee on Justice and Legal Affairs, July 1981.
- R. Burgess, "Juvenile Corrections in Ontario" (1982) 44 *Corrections Today* 40.
- J. Byles & A. Maurice, "The Juvenile Justice Services Project: An Experiment in Delinquency Control" (1979) 21 *Canadian Journal of Criminology* 151.
- Canada, Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965).
- Canada, Department of Justice, *Mental Disorder Project: Criminal Law Review* (Ottawa: Department of Justice, September, 1985).

- Canada, Department of Justice, *Annual Report, 1985-1986* (Ottawa: Minister of Supply and Services Canada, 1986).
- Canada, Department of the Solicitor General, *First Discussion Draft: An Act Respecting Children and Young Persons* (Ottawa: Department of the Solicitor General, September 1967).
- Canada, Department of the Solicitor General, *Proceedings of the Federal-Provincial Conference on Juvenile Delinquency* (Ottawa: Department of the Solicitor General, September 1968).
- Canada, Department of the Solicitor General, *Report of the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act* (Ottawa: Department of the Solicitor General, 1975).
- Canada, House of Commons, *Debates*, Vol. 124, No. 63 (23 February 1982).
- Canada, House of Commons, *Debates*, Vol. 124, No. 184 (15 April 1981).
- Canada, House of Commons, *Debates*, Vol. 124, No. 202 (2 June 1981).
- Canada, House of Commons, "Some Suggested Amendments for the Consideration of the Standing Committee on Justice and Legal Affairs" *Journals*, 1st Sess., 32nd Parl., 1980-81-82, Appendix 134.
- Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st Sess., 32nd Parl., No. 62 (16 February 1982).
- Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st Sess., 32nd Parl., No. 63 (23 February 1982).
- Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st Sess., 32nd Parl., No. 72 (1 April 1982).
- Canada, Minister of Justice, *Information Paper: Mental Disorder Amendments to the Criminal Code* (Ottawa: Minister of Justice, 1986).
- Canada, Ministry of the Solicitor General, *Highlights of the Proposed New Legislation for Young Offenders* (Ottawa: Ministry of the Solicitor General, 1977).
- Canada, Solicitor General Canada, *Legislative Proposals to Replace the Juvenile Delinquents Act* (Ottawa: Solicitor General Canada, 1979).
- Canada, Solicitor General Canada, *The Young Offenders Act, 1982* (Ottawa: Minister of Supply and Services, 1982).
- Canada, Solicitor General Canada, News Release: Beatty Introduces Young Offenders Act Amendments to Better Protect the Public (30 April 1986).
- Canadian Association for Children with Learning Disabilities, Brief on the Young Offenders Act (Bill C-61), submitted to the Standing Committee on Justice and Legal Affairs, January 1982.
- Canadian Association for the Prevention of Crime, Comments on Bill C-61 1981, submitted to the Standing Committee on Justice and Legal Affairs, August 1981.
- Canadian Association of Chiefs of Police, A Brief Concerning Bill C-61, An Act Respecting Young Offenders and to Repeal the Juvenile Delinquents Act, submitted to the Standing Committee on Justice and Legal Affairs, February 1981.
- Canadian Association of Chiefs of Police, Text of the Oral Presentation of the C.A.C.P. to the Justice and Legal Affairs Committee (24 February 1982).
- Canadian Association of Social Workers, Brief Presented to the Standing Committee on Justice and Legal Affairs Respecting Bill C-192, the Young Offenders Act, 1971.
- Canadian Association of Social Workers, Brief in Response to the Proposed Legislation Regarding "Young Persons in Conflict with the Law" (31 March 1976).
- Canadian Bar Association, Submission to the Solicitor General of Canada Concerning Bill C-192, the Young Offenders Act (10 March 1971).

- Canadian Bar Association, Comments on the Ministry of the Solicitor General's Report on Young Persons in Conflict with the Law (10 January 1977).
- Canadian Bar Association, Submission Regarding Bill C-61 The Young Offenders Act, submitted to the Standing Committee on Justice and Legal Affairs, February 1982.
- Canadian Bar Association - Ontario, Special Committee on the Young Offenders Act, "Report to Council" (6 December 1985).
- Canadian Centre for Justice Statistics, *Juvenile/Youth Court Statistics: The Transition Period* (Ottawa: Canadian Centre for Justice Statistics, 1987).
- Canadian Centre for Justice Statistics, *Youth Court Statistics: Preliminary Tables, 1984-85* (Ottawa: Canadian Centre for Justice Statistics, 1987).
- Canadian Centre for Justice Statistics, *Youth Court Statistics: Preliminary Tables, 1985-86* (Ottawa: Canadian Centre for Justice Statistics, 1987).
- Canadian Criminology and Corrections Association, "Brief on Young Offenders Act" (1971) 13 *Canadian Journal of Criminology and Corrections* 307.
- Canadian Criminology and Corrections Association, *Young Persons in Conflict with the Law: A Report on the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act* (Ottawa: C.C.C.A., 1976).
- Canadian Foundation for Children and the Law (Justice for Children), Brief on the Young Offenders Act (Bill C-61), submitted to the Standing Committee on Justice and Legal Affairs; September 1981.
- Canadian Mental Health Association, Memorandum to Members of Parliament (7 December 1970).
- Canadian National Committee for Mental Hygiene, "Mental Hygiene Survey of the Province of British Columbia" (1920) 2 *Canadian Journal of Mental Hygiene* 1.
- T.C. Caputo, "The Young Offenders Act: Children's Rights or Children's Wrongs" (1987) 13 *Canadian Public Policy* 126.
- K. Catton, "Models of Procedure and the Juvenile Courts" (1976) 18 *Criminal Law Quarterly* 181.
- K. Catton & J. Leon, "Legal Representation and the Proposed Young Offenders in Conflict with the Law Act" (1977) 15 *Osgoode Hall Law Journal* 107.
- C. Chamberlain & G. Awad, "Psychiatric Service to the Juvenile Court: A Model" (1975) 20 *Canadian Psychiatric Association Journal* 599.
- Children's Aid Society of Metropolitan Toronto, Comments on the Young Offenders Act, submitted to the Standing Committee on Justice and Legal Affairs, June 1981.
- B. Clark & D. Eaves, "Health Services for Young Offenders in British Columbia" (1985) 1 *B.C. Psychologist* 30.
- J.J. Coccozza, E. Hartstone & J. Braff, "Mental Health Treatment of Violent Juveniles: An Assessment of Need" (1981) 27 *Crime and Delinquency* 487.
- S. Cohen, *Folk Devils and Moral Panics* (London: Martin Robertson, 1972).
- S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press, 1985).
- Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (London: Her Majesty's Stationery Office, 1960).
- Committee on Children and Young Persons (Scotland), *Committee on Children and Young Persons, Scotland: Report* (Edinburgh: Her Majesty's Stationery Office, 1964).
- R.R. Corrado, "Juvenile Justice: From Creation and Optimism to Disillusionment and Reform" in R.R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 1.

- D. Cousineau & J. Veevers, "Juvenile Justice: An Analysis of the Canadian Young Offenders Act" in C.L. Boydell, C.F. Grindstaff & P.C. Whitehead, eds., *Deviant Behaviour and Societal Reaction* (Toronto: Holt, Rinehart and Winston, 1972) 243.
- D. Currie, "The Transformation of Juvenile Justice in Canada: A Study of Bill C-61" in B.D. MacLean, ed., *The Political Economy of Crime* (Scarborough: Prentice-Hall, 1986) 56.
- T.T. Daley, "Release from Custody and the Judiciary Under the Young Offenders Act or a Sign of Things to Come?" (1986) 10(2) *Provincial Judges Journal* 21.
- B. Dickens, "Legal and Ethical Considerations in 'Enforced Therapy'" in R. Freeman & S.N. Verdun-Jones, eds., *The Treatment of Sexual Aggression: Legal and Ethical Issues* (Burnaby, B.C.: Criminology Research Centre, 1988).
- A.N. Doob, J. Dozois & J. Trépanier, Brief Presented to the Standing Committee on Justice and Legal Affairs Concerning Bill C-61 An Act Respecting Young Offenders, August 1981.
- L. Duraj, Comments on Bill C-61 The Young Offenders Act, submitted to the Standing Committee on Justice and Legal Affairs, August 1981.
- S. Elson, *Experiences and Issues with the Young Offenders Act* (Thorold, Ontario: Niagara Children's Services Committee, 1986).
- R.V. Ericson & P.M. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982).
- F.L. Faust & P.J. Brantingham, "Models of Juvenile Justice: Introduction and Overview" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* 2nd. Ed. (St. Paul: West Publishing, 1979) 1.
- R.G. Fox, "The Treatment of Juveniles in Canadian Criminal Law" in A.N. Doob & E.L. Greenspan, eds., *Perspectives in Criminal Law* (Toronto: Canada Law Book, 1985) 149.
- R.G. Fox & M.J. Spencer, "The Young Offenders Bill: Destigmatizing Delinquency?" (1972) 14 *Criminal Law Quarterly* 172.
- S. Fox, "Juvenile Justice Reform: An Historical Perspective" (1970) 22 *Stanford Law Review* 1187.
- J. Gault, "Political Delinquency: Queen's Park is Setting a Sorry Example by its Procrastination on Implementing the Young Offenders Act" (1984) May *Toronto Life* 15.
- R.M. Gordon, Mental Disorder, Law and the State, Doctoral Dissertation, Department of Anthropology and Sociology, University of British Columbia [unpublished], 1988.
- R.M. Gordon & S.N. Verdun-Jones, "Mental Health Law and Law Reform in the Commonwealth: The Rise of the 'New Legalism'?" in D.N. Weisstub, ed., *Law and Mental Health: International Perspectives, Volume 2* (New York: Pergamon Press, 1986) 1.
- J.D.M. Griffin & C. Greenland, "Early Days" in J. Shamsie, ed., *Experience and Experiment* (Toronto: Leonard Crainford, 1977) 13.
- J. Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1964) 113 *University of Pennsylvania Law Review* 1.
- T. Grisso, M.O. Miller & B. Sales, "Competency to Stand Trial in Juvenile Court" (1987) 10 *International Journal of Law and Psychiatry* 1.
- T. Grisso & L. Verling, "Minor's Consent to Treatment: A Developmental Perspective" (1978) 9 *Professional Psychology* 412.
- T. Grygier, "Juvenile Delinquents or Child Offenders: Some Comments on the First Discussion Draft of an Act Respecting Children and Young Persons" (1968) 10 *Canadian Journal of Corrections* 458.
- D. Guest, *The Emergence of Social Security in Canada* 2nd. Ed. (Vancouver: University of British Columbia Press, 1985).
- J. Hagan & J. Leon, "Rediscovering Delinquency: Social History, Political Ideology and the Sociology of Law" (1977) 42 *American Sociological Review* 587.

- P.J. Harris, "Youth Justice on Trial" (1986) 5 *Advocates' Society Journal* 35.
- P. Havemann, "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act 1908-1984" in S. Brickey & E. Comack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1986) 225.
- S. Houston, "Victorian Origins of Juvenile Delinquency: A Canadian Experience" (1972) 12 *History of Education Quarterly* 254.
- S. Houston, "The 'Waifs and Strays' of a Late Victorian City: Juvenile Delinquents in Toronto" in J. Parr, ed., *Childhood and Family in Canadian History* (Toronto: McClelland and Stewart, 1982) 129.
- P.G. Jaffe, A.W. Leschied, L. Sas, & G.W. Austin, "A Model for the Provision of Clinical Assessment and Service Brokerage for Young Offenders: The London Family Court Clinic" (1985) 26 *Canadian Psychology* 54.
- John Howard Society of Ontario, Position on the Young Offenders Bill Adopted October 1981, submitted to the Standing Committee on Justice and Legal Affairs (n.d.).
- John Howard Society of Prince Edward Island, Brief, submitted to William C. Corbett, Clerk, Standing Committee on Justice and Legal Affairs (n.d.).
- John Howard Society of Vancouver Island, Letter to William C. Corbett, Clerk, Standing Committee on Justice and Legal Affairs (19 October 1981).
- R. Jones (Statistics Canada), Letter to Alison J. Hatch (2 October 1984).
- "Juveniles Face Tests" *The Vancouver Sun* (27 February 1988) A3.
- R. Kaplan, Letter to Alison J. Hatch (1 June 1985).
- J.J. Kelso, "Delinquent Children: Some Improved Methods Whereby They May Be Prevented From Following a Criminal Career" (1907) 6 *Canada Law Review* 106.
- M.-A. Kirvan, "Commentary on the Implications of the Young Offenders Act for Treatment and Rehabilitation" in H. Stutt, ed., *Learning Disabilities and the Young Offender: From Arrest to Disposition* (Ottawa: Canadian Association for Children and Adults with Learning Disabilities, 1986) 39.
- D.R. Klinck, "'Specific Delusions' in the Insanity Defence" (1983) 25 *Criminal Law Quarterly* 458.
- H. Kopyto & A. Codina, "Young Offenders Act Means More Frequent Custody Terms" (1986) 6(1) *Ontario Lawyer's Weekly* 8.
- B. Landau, "Barriers to Consent to Treatment: The Rights of Minors in the Provision of Mental Health Services" (1979) 2 *Canadian Journal of Family Law* 245.
- B. Landau, "The Young Offenders Act: Important Features for Psychologists" (1983) 15 *Ontario Psychologist* 6.
- B. Landau, "The Rights of Minors to Consent to Treatment and Residential Care" in B. Landau, ed., *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986) 93.
- Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Ottawa: Information Canada, 1976).
- Law Reform Commission of Canada, *Working Paper 26: Medical Treatment and Criminal Law* (Ottawa: Ministry of Supply and Services Canada, 1980).
- M. LeBlanc, "Retrospective Look at a Decade of Evaluation: Boscoville" in R.R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 267.
- J. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15 *Osgoode Hall Law Journal* 71.
- P. Lerman, "Child Welfare, the Private Sector and Community Based Corrections" (1984) 30 *Crime and Delinquency* 5.

- P. Lerman, *Deinstitutionalization and the Welfare State* (New Brunswick, NJ: Rutgers University Press, 1982).
- A.W. Leschied, "Need for Youth's Consent Can Be Bar to Treatment" (1985) 5(24) *Ontario Lawyer's Weekly* 4.
- A.W. Leschied, *The Use of Court for Compulsory School Attendance: The Case for Us and Against Us*, London Family Court Clinic [unpublished], October 1985.
- A.W. Leschied, "Implications of the Consent to Treatment Section of the Young Offenders Act: A Case Study" (1986) 27 *Canadian Psychologist* 312.
- A. Leschied, G.W. Austin & P.G. Jaffe, "Impact of the Young Offenders Act on Recidivism Rates of Special Needs Youth: Criminal Policy and Implications" (1988) 20 *Canadian Journal of Behavioural Sciences* 322.
- A.W. Leschied & C.W. Hyatt, "Perspective: Section 22(1), Consent to Treatment Under the Young Offenders Act" (1986) 28 *Canadian Journal of Criminology* 69.
- A. Leschied & P. Gendreau, "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the Young Offenders Act" (1986) 28 *Canadian Journal of Criminology* 315.
- A.W. Leschied & P.G. Jaffe, "Implications of the Young Offenders Act in Modifying the Juvenile Justice System: Some Early Trends," London Family Court Clinic [unpublished] (n.d.).
- A. Leschied & P.G. Jaffe, "Implications of the Young Offenders Act in Modifying the Juvenile Justice System" in N. Bala & H. Lilles, eds., *Young Offenders Service* (Toronto: Butterworths, 1985).
- A.W. Leschied & P.G. Jaffe, "Impact of the Young Offenders Act on Court Dispositions: A Comparative Analysis" (1987) 29 *Canadian Journal of Criminology* 29.
- A.W. Leschied & K.E. Thomas, "Effective Residential Programming for Hard-to-Serve Young Offenders" (1985) 27 *Canadian Journal of Criminology* 161.
- A.W. Leschied & S.K. Wilson, "Criminal Liability of Children Under Twelve: A Problem for Child Welfare, Juvenile Justice or Both?" (1987) 30 *Canadian Journal of Criminology* 17.
- R.M. Liebert & R. Wicks-Nelson, *Developmental Psychology* 3d Ed. (Englewood Cliffs, Prentice-Hall, 1981).
- P.S. Lindsay, "Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada" (1977) 19 *Criminal Law Quarterly* 303.
- D. Lipton, R. Martinson & J. Wilks, *Effectiveness of Correctional Treatment: A Survey of Evaluation Studies* (New York: Praeger, 1975).
- R.E. Logan, Minister of Justice, New Brunswick, Telex to Bernard J. Fournier, Clerk, Standing Committee on Justice and Legal Affairs (24 February 1982).
- G. Lowery, *Youth, Opportunity, Action* (Toronto: Central Toronto Youth Services, 1982).
- R. Lubove, *The Professional Altruist* (Cambridge: Harvard University Press, 1965).
- J.A. MacDonald, "Critique of Bill C-192, the Young Offenders Act" (1971) 13 *Canadian Journal of Criminology and Corrections* 166.
- J.A. MacDonald, "Justice for Young Persons and the Young Offenders Act" (1985) *Canadian Social Work Review* 64.
- L. MacDonald, *Some Comments on Juvenile Delinquency Legislation*, paper presented at the Canadian Bar Association Meeting, Ottawa, 1969.
- H. MacGill, "The Relation of the Juvenile Court to the Community" (1919) 1 *Canadian Journal of Mental Hygiene* 232.
- J. Mack, "The Juvenile Court" (1909) 23 *Harvard Law Review* 104.

- A.J. MacLeod, "The Juvenile Delinquency Committee" (1964) 6 *Canadian Journal of Criminology and Corrections* 43.
- K. Makin, "Lawyers will Follow Client's Wish, Panel on Young Offenders Told" *The [Toronto] Globe and Mail* (30 October 1987) A3.
- Manitoba, Ministry of Community Services, "YOA Funding Agreement Signed" (1984) 4 *Young Offenders Act Info Line* 1.
- Manitoba, Ministry of Community Services, *Young Offenders Act: The First Year, 1985* (Winnipeg: Ministry of Community Services, 1985).
- Manitoba, Ministry of Community Services, *Young Offenders Act: The Second Year, April 1985 - May 1986* (Winnipeg: Ministry of Community Services, 1986).
- Manitoba Association of Social Workers, Brief Submitted to the Standing Committee on Justice and Legal Affairs Respecting Bill C-192, The Young Offenders Act, 1971.
- Manitoba Association of Social Workers, Brief Submitted to the Committee Studying the Juvenile Justice System, December 1978.
- A. Manson, "Fit to be Tried: Unravelling the Knots" (1982) 7 *Queen's Law Journal* 305.
- A.M. Maxwell, Juvenile "Justice" and Child "Welfare" - The Historical Implications of Reform: From the Juvenile Delinquents Act to the Young Offenders Act, 1908-1984, Master of Social Work Thesis, University of British Columbia [unpublished], 1983.
- B.J. McConville & N. Bala, "Children's Rights" For or Against Treatment" (1985) Dec. *Canada's Mental Health* 2.
- J.L. McLeod, "Doli Incapax: The Forgotten Presumption in Juvenile Court Trial" (1980) 3 *Canadian Journal of Family Law* 251.
- G.R. McMahon, Minister of Justice and Attorney General, Prince Edward Island, Telex to Bernard J. Fournier, Clerk, Standing Committee on Justice and Legal Affairs (2 March 1982).
- T. Melville, "An Issue of Confidentiality: Widened Disclosure in the Clinical Context" (1987) 45 *University of Toronto Faculty Law Review* 179.
- A.W. Mewett, "Section 16 and 'Wrong'" (1976) 18 *Criminal Law Quarterly* 413.
- P.J. Miller, "Psychology and the Child: Homer Lane and J.B. Watson" in P.T. Rooke & R.L. Schnell, eds., *Studies in Childhood History: A Canadian Perspective* (Calgary: Detselig Enterprises Limited, 1982) 57.
- Montreal Urban Community Police Force, Memorandum of the M.U.C. Police Force Concerning the Young Offenders Bill, submitted to the Standing Committee on Justice and Legal Affairs (n.d.).
- Nova Scotia, Executive Council, Telex to Jean-Guy Dubois, Chairman, Standing Committee on Justice and Legal Affairs (4 March 1982).
- Ontario, Interministry Implementation Project, *Implementing Bill C-61, the Young Offenders Act: An Ontario Consultation Paper* (Toronto: Interministry Implementation Project, 1981).
- Ontario, Ministry of Community and Social Services, *Three Decades of Change: The Evolution of Residential Care and Community Alternatives* (Toronto: Ministry of Community and Social Services, 1983).
- Ontario Psychological Association, Brief on the Young Offenders Act Bill C-61, submitted to the Standing Committee on Justice and Legal Affairs, September 1981.
- J. Osborne, "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979) 2 *Canadian Journal of Family Law* 7.
- H. Packer, "Two Models of the Criminal Process" (1964) 113 *University of Pennsylvania Law Review* 1.

- E. Parker, "Mentally Disordered Offenders and their Protection from Punitive Sanctions: The English Experience" (1980) 3 *International Journal of Law and Psychiatry* 461.
- "People" (1985) 11(2) *Liaison* 30.
- M.S. Phillips & L.C. Thompson, "Psychiatric Assessments Under the Young Offenders Act" (1986) 63(5) *Dimensions in Health Services* 20.
- A. Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969).
- D. Poitier, "Social Worker Enforcement of Child Welfare Legislation: An Increasing Potential for Abuse of Power" (1986) 5 *Canadian Journal of Family Law* 215.
- Presbyterian Church in Canada, Committee on Studies and Statements of the Board of Congregational Life, Submission to the House of Commons Standing Committee on Justice and Legal Affairs (n.d.).
- "Psychiatric Probe Challenged by Lawyer" *The Vancouver Sun* (13 February 1988) A7.
- S.A. Reid & M. Reitsma-Street, "Assumptions and Implications of New Canadian Legislation for Young Offenders" (1984) 7 *Canadian Criminology Forum* 1.
- D.R. Rendleman, "Parens Patriae: From Chancery to the Juvenile Court" in F.L. Faust & P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* (St. Paul: West Publishing Company, 1979) 58.
- A.R. Roberts, "National Survey and Assessment of 66 Treatment Programs for Juvenile Offenders: Model Programs and Pseudomodels" (1987) 38 *Juvenile and Family Court Journal* 39.
- R. Roesch, D. Eaves, R. Solner, M. Normandin & B. Glackman, "Evaluating Fitness to Stand Trial: A Comparative Analysis of Fit and Unfit Defendants" (1981) 4 *International Journal of Law and Psychiatry* 145.
- R.R. Ross & P. Gendreau, "A Study of Institutional Treatment Programs" in R.R. Ross & P. Gendreau, eds., *Effective Correctional Treatment* (Toronto: Butterworths, 1980) 391.
- D. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown & Co., 1971).
- D. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston: Little Brown & Co., 1980)
- Saint John Police Department, Letter to Jean-Guy Dubois, Chairman of the Standing Committee on Justice and Legal Affairs (26 October 1981).
- St. Peter's Church, Brief from the Social Action Committee in response to the Youth Offenders Bill - C-61, submitted to the Standing Committee on Justice and Legal Affairs (n.d.) Nanaimo, B.C.
- R. Sarri, "The Use of Detention and Alternatives in the United States Since the Gault Decision" in R.R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 315.
- Saskatchewan, Response to the Proposed Young Offenders Act (Bill C-61); submitted to the Standing Committee on Justice and Legal Affairs, August 1981.
- H.S. Savage, "The Relevance of Fitness to Stand Trial Provisions for Persons with Mental Handicaps" (1981) 59 *Canadian Bar Review* 319.
- W.L. Scott, *The Juvenile Court in Law and the Juvenile Court in Action* (Ottawa: Canadian Council on Child Welfare, 1930).
- J. Shamsie, ed., *Experience and Experiment* (Toronto: Leonard Crainford, 1977).
- S.J. Shamsie, "Anti-Social Adolescents: Our Treatments Do Not Work - Where Do We Go From Here?" (1981) 26 *Canadian Journal of Psychiatry* 357.

- D.P. Simet, "Power, Uncertainty, and Choice: The Voluntary Commitment of Children — Parham v. J.L." (1982) 20 *University of Western Ontario Law Review* 141.
- P. Simpson, Characteristics of Young Offenders Consenting to Treatment, Honours Thesis, University of Western Ontario [unpublished], 1985.
- D.L. Snider & W.G. West, "A Critical Perspective on Law in the Canadian State: Delinquency and Corporate Crime" in R.J. Ossenberg, ed., *Power and Change in Canada* (Toronto: McClelland Stewart, 1980) 199.
- C. Spears & M.S. Phillips, The Lieutenant Governor's Warrant and the Young Offender, Working Paper #67, Metropolitan Toronto Forensic Services [unpublished], 1984.
- A. Stalker, "The Law Reform Commission of Canada and Insanity" (1983) 25 *Criminal Law Quarterly* 223.
- Statistics Canada, *Juvenile Delinquents, 1983* (Ottawa: Ministry of Supply and Services Canada, 1984).
- Statistics Canada, *Selected Tables from Annual Return of Special Care Facilities 1982/83* (Ottawa: Supply and Services Canada, 1986).
- Statistics Canada, *Residential Care Facilities* (Ottawa: Supply and Services Canada, 1987).
- N. Sutherland, *Children in English-Canadian Society: Framing the Twentieth Century Consensus* (Toronto: University of Toronto Press, 1976).
- W.H. Swail, "Some Comments on Section 13 of the Y.O.A.: Forensic Reports and Fitness to Stand Trial" (1986) 1 *Young Offenders Service* 7547.
- I. Taylor, "Moral Enterprise, Moral Panic, and Law-and-Order Campaigns" in M.M. Rosenberg, R.A. Stebbins & A. Turowetz, eds., *The Sociology of Deviance* (New York: St. Martin's Press, 1982) 123.
- T.B. Thomas, "Young Offenders Act: A Review of 1986 Amendments Relating to Court Records — Practicality Rules Supreme" (1987) 11(2) *Provincial Judges Journal* 30.
- A.H. Thompson, "Young Offender, Child Welfare, and Mental Health Caseload Communalities" (1988) 30 *Canadian Journal of Criminology* 135.
- G.M. Thomson, "Commentary on Young Offenders Act" (1984) 1 *Young Offenders Services* 7501.
- D. Turner & B. Shields, "The Legal Process of Bringing Children into Care in British Columbia" in K.L. Levitt & B. Wharf, eds., *The Challenge of Child Welfare* (Vancouver: University of British Columbia Press, 1985).
- Uniform Law Conference of Canada, *Model Mental Health Act* (Ottawa: Uniform Law Conference of Canada, 1984).
- S.N. Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to Mother Country?" (1979) 14 *University of British Columbia Law Review* 1.
- S.N. Verdun-Jones, "The Insanity Defence Since Swartz v. The Queen: First Step Along the Road Toward Rationalization of Canadian Policy?" (1979) 6 *Criminal Reports, Third Series* 300.
- S.N. Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada: The Forked Tongue of Social Control" (1981) 4 *International Journal of Law and Psychiatry* 363.
- J.A. Walker, Letter to Bernard J. Fournier, Clerk, Standing Committee on Justice and Legal Affairs (4 March 1981).
- K. Wang, "The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts" (1972) 18 *MacGill Law Journal* 219, 418.
- C. Warren, "New Forms of Social Control: The Myth of Deinstitutionalization" (1981) 24 *American Behavioral Scientist* 724.
- R.E. Watts, "The Trend of Crime in Canada" (1932) 39 *Queen's Quarterly* 402.

- R. Weiler & B. Ward, "A National Overview of the Implementation of the YOA: One Year Later" (1985) 8 *Perception* 2.
- W.G. West, *Young Offenders and the State: A Canadian Perspective on Delinquency* (Toronto: Butterworths, 1984).
- A.G. Westman, "Trends in the Care of Delinquent Girls" (1930) 6 *Child and Family Welfare* 33.
- C.S. Widom, "Juvenile Delinquency" in W.J. Curran, A.L. McGarry & S.A. Shah, eds., *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice* (Philadelphia: F.A. Davis Co., 1986).
- A. Williams, Attorney General, British Columbia, Letter to Jean-Guy Dubois, Chairman of the Standing Committee on Justice and Legal Affairs (1 March 1982).
- J. Wilson, *Children and the Law* (Toronto: Butterworths, 1978)
- J. Wilson & M. Tomlinson, *Wilson: Children and the Law* (Toronto: Butterworths, 1986).
- L. Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982).
- L.C. Wilson, "Young Offenders: Another Look at Individualized Justice" in J. Menezes, ed., *Legal Perspectives On Contemporary Social Issues: A Decade of Adjustment* (Toronto: Butterworths, 1980) 146.
- L.D. Zeleny, "Feeble-Mindedness and Criminal Conduct" (1933) 38 *American Journal of Sociology* 564.

CASES CITED

- A.E. and B.E. v. Superintendent of Family and Child Services* (1986), 49 R.F.L. (2d) 337 (B.C.C.A.).
- C.B. v. R.* (1984), 2 Y.O.S. 3491 (B.C.S.C.).
- Commonwealth v. Fisher*, 213 Pennsylvania 48 (1905).
- Eve v. E.*, [1986] 2 S.C.R. 388.
- Ex parte Becknell*, 51 Pacific Reporter (Ca.) 692 (1897).
- Ex parte Crouse*, 4 Wharton (Pa.) 9 (1838).
- In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d. 368.
- Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d. 84.
- McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d. 647.
- Mill v. Brown*, 88 Pacific Reporter (Utah) 609 (1907).
- O'Connell v. Turner*, 55 Illinois 280 (1870).
- Petition of Alexander Ferrier*, 103 Illinois 367 (1882).
- Re B. and M.* (1975), 33 C.R.N.S. 362 (Ont. Prov. Ct.).
- Re B.C. and the Queen* (1986), 29 C.C.C. (3d) 434 (Ont. H.C.).
- Re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d. 527.
- Re James B.* (1987), 2 Y.O.S. 3491 (Alta. Prov. Ct., Yth. Div.).
- Re J.V.* (1981), 60 C.C.C. (2d) 121 (B.C.S.C.).
- R. v. B.C.* (1977), 39 C.C.C. (2d) 469 (Ont. Prov. Ct.).
- R. v. Beauvais* (1978), 5 C.R. (3d) S-27 (Ont. C.A.).
- R. v. B.M.* (1985), 2 Y.O.S. 3469 (N.S.C.A.).
- R. v. Chisholm* (1985), 18 C.C.C. (3d) 518 (N.S.S.C., App. Div.).
- R. v. Cooper* (1978), 40 C.C.C. (2d) 145 (Ont. C.A.).
- R. v. Dobson* (1975), 11 N.S.R. (2d) 81, 5 A.P.R. 81 (S.C., A.D.).
- R. v. D.S.* (1984), 2 Y.O.S. 84-015 (Ont. Prov. Ct.).
- R. and G.D.M.* (3 February 1988), Vancouver CC871598 (B.C. Co. Ct.).
- R. v. Gouchie* (1975) 11 N.S.R. (2d) 100, 5 A.P.R. 100, 1 C.R. (3d) S-33 (S.C., A.D.).
- R. v. G.S.K.* (1985), 22 C.C.C. (3d) 99 (Man. C.A.) reversing (1985), 34 Man. R. (2d) 163 (Man. Q.B.).
- R. v. J.B.* (1985), 24 C.C.C. (3d) 142 (Ont. C.A.).
- R. v. J.M.* (1984), 12 W.C.B. 390 (Ont. Prov. Ct.).
- R. v. K. (A.I.)*, [1982] 1 W.W.R. 666 (Man. Q.B.).
- R. v. K.L.* (1987), 37 C.C.C. (3d) 280 (B.C.Co. Ct.).
- R. v. M.L.S.* (1985), 2 Y.O.S. 4008 (Ont. Prov. Ct.).
- R. v. P. (No. 2)*, [1979] 4 W.W.R. 340 (Man. Q.B.).

Regina and R.P.C. (13 August 1986), Vancouver CA 005720 (B.C.C.A.).

R. v. Wiedeman, [1976] 4 W.W.R. 160 (Man. C.A.).

R. v. Woltucký (1952), 103 C.C.C. 43 (Sask. C.A.).