THE SENTENCING OF YOUNG OFFENDERS IN CANADA: A QUESTION OF PRINCIPLE?

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Recent decades have witnessed attempts to introduce reforms to juvenile justice in many western countries.[1] The reform process in Australia has been characterised as "slow, tortuous and highly contested",[2] a description which applies equally to the Canadian experience. Reform efforts have Reform efforts have been typified by a dissatisfaction with prevailing models of juvenile justice, particularly the failure of treatment oriented approaches to live up to expectation, concerns about the due process rights of young offenders and debates about the philosophical principles which should underlie juvenile justice. Whilst there has been widespread agreement about the need for reform of juvenile justice, there has been a lack of any clear consensus about the direction that such reform should take.

Moves to reform the practice of juvenile justice in Canada as elsewhere raise many fundamental questions about the principles which should determine the manner in which young offenders are to be dealt with. This paper will concentrate upon a selection of those issues arising from debates about juvenile justice reform, particularly as they relate to the sentencing of young offenders, and will examine the extent to which the Canadian *Young Offenders Act* (*YOA*)[3] has attempted to resolve such questions. Emphasis will be placed upon legislative attempts to formulate principles to guide the practice of juvenile justice and the effects of such provisions on dispositions. The focus will also be upon legal intervention concerning criminal behaviour rather than upon juvenile court proceedings related to so called "welfare" matters.

PRE-EXISTING MODELS OF JUVENILE JUSTICE AND THE NEED FOR REFORM

In Canada,[4] as in many other jurisdictions,[5] the practice of juvenile justice until recent times was based upon the doctrine of *parens patriae*, that is, the state assuming the role of parent allegedly to act in the best interests of the young person.[6]

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* I wish to thank Elaine Fishwick for her helpful comments on an earlier draft of this paper.

1 Hudson, B, "Justice of welfare? : A Comparison of Recent Developments in the English and French Juvenile Justice Systems" in Cain, M (ed), *Growing Up Good: Policing the Behaviour of Girls in Europe* (1989) 96; Bottoms, A E, "On the Decriminalization of English Juvenile Courts" in Hood, R (ed), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (1974); Leon, J S, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15(1) *Osgoode Hall LJ* 71.

2 Freiberg, A, Fox, R and Hogan, M, *Sentencing Young Offenders*, Sentencing Discussion Paper No11.

3 Revised Statutes of Canada (RSC) (1985) cY-1.

4 Bala, N, "The Young Offenders Act: A legal framework", in Hudson, J, Hornick, J P and Burrows, B A (eds), *Justice and the Young Offender in Canada* (1988).

5 See Morris, A and Giller, H, *Understanding Juvenile Justice* (1987) on the United Kingdom; Freiberg et al, above n2 on Australia; Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s* (1990) on NSW; and Lemert, E, *Social Action And Legal Change: Revolution Within the Juvenile Court* (1970) and

However, from about the 1960s, such models of juvenile justice began to attract criticism from a range of different ideological positions. There were those who attacked the juvenile justice system for being too lenient and others for being too willing to intervene in the lives of children coupled with a lack of attention to the rights of children.[7] These criticisms of the juvenile justice system must also be seen in the context of the decline of the rehabilitative ideal in many western nations.[8] Martinson's paper[9] evaluating treatment programs, (though much misquoted and misinterpreted as providing evidence that "nothing works"[10]), has been very influential among proponents of a "return to justice". Concerns about the apparent ineffectiveness of treatment approaches, and infringements upon defendants' rights have been associated with calls for a return to a more "justice oriented" criminal justice system for both juveniles[11] and adults.[12]

Several legal decisions rendered by the United States Supreme court have also had an influence upon debates about the principles which should underlie juvenile justice,[13] not only in North America but also in countries such as the United Kingdom[14] and Australia.[15] Decisions in *Kent*, *Gault* and *Winship*[16] extended to juveniles many of the same procedural rights as adults such as the right to counsel, to confront and cross-examine witnesses, to remain silent and to receive a transcript of the proceedings.[17] Whilst the Supreme Court did not guarantee to juveniles the full range of rights available to adults, the decisions have been associated with a shift to a more justice oriented juvenile justice system.[18]

Debates about children's rights within the juvenile justice arena have also been informed by similar debates occuring in other contexts such as within the areas of welfare and family law and by developments at the international level. The United Nations Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice give explicit acknowledgement to children's rights.

Krisberg, B, Schwartz, I M, Litsky P, and Austin, J, "The Watershed of Juvenile Justice Reform" (1986) 32 *Crime and Delinquency* 5 on the United States.

6 Above n4 at 12.

7 Above n2; Morris and Giller above n5; Youth Justice Coalition, above n5.

8 Caputo, T C, "The Young Offenders Act: Children's Rights, Children's Wrongs" (1987) XIII:2 *Canadian Public Policy* 125; Hudson, above n1 at 96.

9 Martinson, R M, "What works? Questions about prison reform" (1974) 35 *The Public Interest* 22.

10 Doob, A and Brodeur, J-P, "Rehabilitating the debate on rehabilitation" (1989) April *Canadian J of Criminology* 179.

11 Hudson, above n1; Platt, A, *The Child Savers: The Invention of Delinquency* (2nd edn, 1977).

12 von Hirsch, A, *Doing Justice* (1976).

13 This is so despite Platt's prediction that the Gault decision was unlikely to 'generate more than a few modest alterations in the total juvenile court system', above n11 at 163. See also Freiberg, et al, above n2.

14 Morris and Giller, above n5.

15 Freiberg, et al, above n2.

16 *Kent v United States* 383 US 541 (1966); Re Winship 397 US 358 (1967) ; Re Gault 387 US 1 (1967).

17 Caputo, above n8; Platt, above n11.

18 Faust, F L and Brantingham, P J, *Juvenile Justice Philosophy: Readings, Cases and Comments* (1974); Sarri, R C, "The Use of Detention and Alternatives in the United States Since the Gault Decision" in Corrado, R R, Le Blanc, M and Trepanier, J (eds), *Current Issues in Juvenile Justice* (1983).

The *Juvenile Delinquents Act*[19]

The legislation which existed in Canada for over 70 years prior to the *YOA*, with only minor amendment, was the *Juvenile Delinquents Act* (*JDA*). It was enacted in 1908 largely in response to the "child-saving movement's"[20] concerns that large numbers of (immigrant) families were unable, allegedly, to exercise "proper control" over their children.[21]

The underlying philosophy of the legislation was explicitly that of *parens patriae*, as evident in section 38 of the *JDA*:

> This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.[22]

The legislation provided a single "offence" of delinquency. This was, at least in part, a necessary consequence of Canadian constitutional arrangements under which the Parliament of Canada has the power to legislate with respect to criminal conduct, but provincial and territorial governments have legislative power with respect to welfare matters. The federal government to some extent overcame the distinction between conduct which was "criminal" and welfare concerns by defining "delinquency", for the purposes of the *JDA*, in a manner which included behaviour beyond that which would normally be considered to be criminal.[23]

As Fox argues,[24] the single offence of delinquency "gave a uniformity to misconduct irrespective of its gravity " and thus tariff-based sentencing was eschewed. The Act gave wide discretion to the judiciary and to professionals dealing with young people who were deemed to be delinquent. There were no legislative guidelines concerning custodial dispositions and committals of young offenders to training schools tended to be for indefinite

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19 *JDA*, Revised Statutes of Canada 1970, c J-3.

20 Havemann, P, "From Childsaving to Childblaming: The Political Economy of the *Young Offenders Act*" in Brickey, S and Comack, E (eds), *The Social Basis of the Law* (1986) at 226-227, ascribes particular influence to the Children's Court Movement, "an eastern Canadian coalition of propertied, entrepreneurial and professional interests" who were "motivated by both humanitarian and self-serving impulses". The movement's concerns went far beyond crime to all forms of non-conformist behaviour by children, and focused particularly on the poor. See also West, W G, *Young Offenders and the State: A Canadian Perspective on Delinquency* (1984) and Leon, above n2.

21 Havemann, ibid; West, ibid; Leon, ibid; Reid, S, "The Juvenile Justice Revolution in Canada: The Creation and Development of New Legislation for Offenders" (1986) 8 *Canadian Criminology Forum* 6.

22 Cited by Department of Justice, *Report of the Department of Justice on Juvenile Delinquency* (1965) at 30-31 and by Havemann, above n20 at 226.

23 Department of Justice, ibid. A juvenile delinquent was defined as "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" (*JDA*, RSC, 1970, c J-3, subsection 2(1)).

24 Fox, R G, "The Treatment of Juveniles in Canadian Criminal Law" in Doob, A N and Greenspan, E L (eds), *Perspectives on Criminal Law: Essays in Honour of John L L Edwards* (1985).

periods.[25] A young person labelled as delinquent "could be vulnerable to the control of the juvenile court until he (sic) attained the age of twenty-one".[26]

There was no uniform age of juvenile jurisdiction, with maximum ages of jurisdiction varying across provinces and territories.[27] With a great deal of discretion vested in provincial administrators under the *JDA*, there was much variation across the provinces in the use of diversion, community sanctions and other outcomes.[28]

Growing concern about the *JDA* according to Currie[29] was associated with the emergence in Canada during the 1960s of the Children's Liberation Movement. The report of the Department of Justice Committee on Juvenile Delinquency[30] indicates that a wide range of government and non-government organisations and individuals were actively seeking improvements to the juvenile justice system at that time.[31] More than 70 professional and community organisations are listed in that report as having made submissions to that committee. Numerous committees, inquiries and attempts at legislative reform,[32] together with an enormous academic literature, demonstrate that juvenile justice was continually on the political agenda in Canada over a period of more than two decades. During this period disparities between the provinces and territories in the practice of juvenile justice were magnified as local legislatures and administrators took initiatives in the face of the apparent inability of the federal government to produce a workable reform.[33]

Among the aspects of the *JDA* which attracted criticism were: the broad discretion which it granted to courts, professionals and bureaucrats in dealing with young people; the potential for the abuse of due process; the definition of delinquency which extended beyond criminal offending and attempted to impose a particular (middle-class) standard upon children's behaviour; the variability in the practice of juvenile justice across provinces and territories, and the inadequacy of review mechanisms.[34] In addition, whilst the

25 Bala, above n4.

26 Fox, above n24.

27 In fact the issue of a uniform maximum age of jurisdiction under the *YOA* provided one of the key issues of contention in negotiations between the federal government and provincial and territorial governments in the reform process. The Ontario government in particular made strong submissions to the House of Commons Standing Committee on Justice and Legal Affairs seeking in the first instance no uniform maximum age, or in the alternative a uniform maximum age of 16 consistent with that which was at the time utilised within that province. See Minutes of Proceedings and Evidence of House of Commons Standing Committee on Justice and Legal Affairs, February 23, 1982, Issue No 63A: 89-95.

28 Bala, above n4; Caputo, above n8; Reid, above n21.

29 Currie, D, "The Transformation of Juvenile Justice in Canada: A Study of Bill C-61" in McLean, B, *The Political Economy of Crime: Readings for a Critical Criminology* (1986). See also Caputo, above n8.

30 Above n22.

31 Caputo, above n8.

32 *Report of the Correctional Planning Committee of the Department of Justice to the Minister of Justice* (1960); Department of Justice, above note 22; Department of the Solicitor General, *Draft Act Respecting Children and Young Persons* (1967); Bill C-192 (called the *Young Offenders Act*) (1970); *Young Persons in Conflict with the Law* (1975); Department of the Solicitor General, *Highlights of the Proposed New Legislation for Young Offenders* (1977); Department of the Solicitor General, *Legislative Proposals to Replace the Juvenile Delinquents Act* (1979); Bill C-61 *Young Offenders Act* (1982).

33 Osborne, J, "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979) 2 *Canadian J Family L* 7.

34 Caputo, above n8; Currie, above n29; Osborne, ibid; Reid, above n21.

JDA originally had been designed to avoid stigmatising young people, it has been argued that "a judicial finding of delinquency has tended to do just that".[35]

Whilst there was clearly a consensus about the need to reform the *JDA*, there was no consensus about the direction that such reform should take. Throughout the lengthy reform process debates about the philosophical basis which should underlie measures for dealing with young offenders remained unresolved.[36]

After a lengthy and contested passage, reform to the juvenile justice system in Canada was finally achieved in 1982 in the form of the *Young Offenders Act*. Numerous reform efforts by the federal government[37] over a period of greater than 20 years had failed to produce a reform package which was acceptable to all interest groups and especially to the governments of the provinces and territories.[38] However, with the introduction of the *Charter of Rights and Freedoms* imminent,[39] a renewed effort by the federal government, and particularly by the then Solicitor General, Mr Kaplan, saw the legislation passed on May 17, 1982. The legislation was not proclaimed until April 2, 1984 in order to give provinces and territories time to adjust their policies and programs.[40]

REFORMING JUVENILE JUSTICE — THE QUESTION OF PRINCIPLE

The lack of an articulated and agreed upon philosophy of juvenile justice was not confined to the Canadian reform process but rather was a reflection of the more general absence of a well developed jurisprudence concerning juveniles. As Sanford Fox argued in 1974, despite the apparent prevalence of philosophy in discussions about, and decisions handed down by, juvenile courts,

> it is probably more accurate to characterise this "philosophy" as a statement of the benign motives of judges or corrections administrators, or as a declaration of legislative intent behind the enactment of juvenile legislation.[41]

35 Osborne, ibid.

36 Fox, above n24; Havemann, above n20.

37 Under constitutional arrangements in Canada the federal government is responsible for all criminal legislation, whilst the provincial governments have responsibility for welfare matters, for the administration of justice generally and for correctional institutions for young offenders and for adults serving sentences of less than two years, see Fox, above n24.

38 Bala, above n4.

39 The Canadian *Charter of Rights and Freedoms* (Part I of the *Constitution Act*, 1982 being Schedule B of the *Canada Act* 1982 (UK), 1982, c11) which was introduced in 1982, guarantees to young persons and adults certain rights, including certain equality rights (s15), specific protections on arrest or detention (s10) and the right not to be subjected to cruel or unusual punishment (s12). There was real concern that the practice of juvenile justice under the *JDA* would infringe the equality rights under the *Charter*. This issue was explicitly addressed in parliament and in the deliberations of the House of Commons Standing Committee on Justice and Legal Affairs (see above n27 and Minutes of Proceedings and Evidence of the Standing Commitee on Justice and Legal Affairs, First Session 32nd Parliament, Issue Nos61-67; House of Commons Debates, *Young Offenders Act*, Vol VIII, First Session 32nd Parliament, April 14, 1981, 9307; House of Commons Debates, *Young Offenders Act*, Vol XV, First Session 32nd Parliament, May 17, 1982, 17485).

40 Fox, S J, "Philosophy and the Principle of Punishment in the Juvenile Court" (1974) *Family LQ* 373.

41 Id at 379.

He also claimed that most writings on jurisprudence "barely touch on juvenile justice". Indeed the area is addressed more comrehensively within welfare and social work literature than within that of jurisprudence. Although recent works concerning specific proposals for legislative reform of juvenile justice have attempted to redress this deficit,[42] it remains the case that mainstream writing on jurisprudence is largely silent on the issue of young offenders.[43]

With little guidance from jurisprudence about the principles which should inform juvenile justice, and no one vision of what should constitute an improved juvenile justice system arising from critiques of pre-existing models of juvenile justice, it is hardly surprising that the reform process typically has been lengthy and contested.

Procedural rights in juvenile courts

Proponents of juvenile justice reform have often invoked the concept of due process as central to a more justice oriented juvenile court. However, neither the term justice nor due process has a fixed or unitary meaning, and both have been used variously in conjunction with arguments emanating from a range of different political perspectives.[44]

In some instances calls for the extension of greater procedural rights to children have been concerned with allowing children to participate more fully in the juvenile justice process[45] and with protecting them from unwarranted intervention by the state in the form of sentencing which is disproportionate to the seriousness of the offence. Proposals have included giving children improved access to legal representation, to pre-sentence reports and to other information about themselves, as well as calling for more consistent and comprehensible procedures within the juvenile courts.[46]

Proposals for greater due process in juvenile courts also have been associated with a greater focus upon the responsibility of the young offender. In some jurisdictions this has been coupled with calls for a more retributive approach to sentencing and even with the abandonment of the juvenile court per se.[47]

Others have argued that a greater adherence to rules and procedures is largely antithetical to the individualised justice which has predominated in juvenile courts.[48] This is in large part because the conflation of adjudication and sentencing functions in the juvenile courts may obscure their underlying basis and may preclude the further development of the principles which inform the practice of these functions.[49]

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42 Beaulieu, L A, "Introduction" in Beaulieu, L A, *Young Offender Dispositions: Perspectives on Principles and Practice* (1989); Freiberg, et al, above n2.

43 See for example Harris, J W, *Legal Philosophies* (1980).

44 Clarke, J, "Whose justice? The Politics of Juvenile Control" (1985) *Int J of the Sociology of Law* 407; Freiberg, et al, above n2; Freiberg, A, Fox, R and Hogan, M, "Procedural Justice in Sentencing Australian Juveniles" (1989) 15 *Monash ULR* 279.

45 Freiberg, et al, id at 283.

46 Freiberg, et al, above n2; Morris and Giller, above n5; Youth Justice Coalition, above n5 at 39.

47 Giller, H, "Is There a Role for a Juvenile Court?" (1986) 3 *The Howard Journal* 161; see also discussion by Youth Justice Coalition, above n5 at 41-43.

48 Morris and Giller, above n5.

49 Id at 171.

It is also the case that a desire to move away from an adversary model of justice with rigid procedure was one of the motivations behind the establishment of the juvenile court. Concerns with procedure were to be secondary to the needs of the individual.[50]

In considering the calls for greater due process in juvenile courts it is important to recognise that research concerning due process in adult courts has questioned the extent to which such procedural rules do in fact provide greater protection for the accused. Such research indicates that the legal rules of due process are *for* the agents in the legal system, enabling rather than constraining their actions and providing both the rationale and language with which to justify their actions.[51]

In a similar way Naffine et al explicitly question whether the extension of due process will enhance the position of children vis a vis the state.[52] They argue that justice oriented reforms rely on the young person taking up the right to contest the case against them through pleading not guilty. As Naffine et al demonstrate with respect to South Australia, the large majority of young offenders appearing in court plead guilty, and thus exercise few of their procedural rights. These findings are supported by research from a number of other jurisdictions.[53]

However, debates about the desirability, and likely impact, of procedural reforms within the juvenile court need to address the specificity of each of the practices which might be labelled due process. For example shifts to make the court process more comprehensible to young offenders, and to provide them with greater access to legal representation are not necessarily antithetical to concern with the individual needs of the young person, nor do they necessarily invoke a model which places greater emphasis upon punitive responses. That is not to deny that elements of due process have been invoked in some jurisdictions in precisely these terms, rather it is to challenge the notion that there is any inevitability about such a connection.[54]

As indicated above, the emergence of claims about children's legal rights has been coincident with the push to a more justice-oriented legal system for young offenders and, in some jurisdictions, with proportional sentencing. The advocacy of procedural reform to bring the juvenile courts more into line with the procedure practised in adult courts therefore cannot be considered in isolation from more sweeping changes to the approach to juvenile justice especially those concerning dispositions.

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50 Freiberg, et al, above n2 at 92.

51 Ericson, R V, and Baranek, P M, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982); McBarnett, D, "Pre-trial Procedures and the Construction of Conviction" in Carlen, P (ed), *The Sociology of Law* (1976); Morris and Giller, above n5 at 172.

52 Naffine, N, Wundersitz, J, and Gale, F, "Back to Justice for Juveniles: The Rhetoric and Reality of Law Reform" (1990) 23 *Aust & New Zealand J of Criminology* 192.

53 Freiberg, et al, above n2; Naffine, et al, id at 196-200; Morris and Giller, above n5 at 171.

54 Krisberg, et al, above n5, and Sarri, above n18, report on the differential response throughout the United States to the *Juvenile Justice and Delinquency Prevention Act* of 1974. Despite an explicit federal policy of de-institutionalisation, some states introduced elements of due process explicitly in connection with a harsher sentencing regime whilst other states did so at the same time as reducing their incarceration rates.

Dispositions for young offenders and the principles underlying the sentencing of adults

A key issue for consideration in any discussion of the juvenile justice system is the question of what principles should govern the sentencing of young offenders? Whilst there is a large literature concerning the sentencing of adults much less work has been done concerning the principles which should guide the sentencing of young offenders.

In the case of adult offenders, the question of which principle/s should underlie the sentencing of adults remains a contentious issue. However, in recent years retributive principles, especially in modified form as "just deserts",[55] have re-emerged as the predominant model underpinning reform efforts concerned with the sentencing of adults, although this has been contested.[56]

The Canadian Sentencing Commission, in reviewing the literature concerning the utilitarian justifications for sentencing, found that much more was known about what punishment could *not* achieve than about what it might accomplish. They recommended that the paramount principle governing (adult) sentencing should be "that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence". They argued for a Declaration of Purpose and Principles of Sentencing which, unlike that provided for in the *YOA* (see below), "establishes a clear order of priority with regard to its sentencing policy".[57]

The principle of proportionality between sentence and the severity of the offence, which is increasingly being invoked as the basis for the sentencing of adults, provides a direct challenge to the practice within the juvenile courts.[58] Individualised sentencing, with a focus upon the needs of the young person has long been the prevailing approach of juvenile courts in Canada, and elsewhere.[59] Yet it is precisely the excesses of an individualised model of sentencing that have attracted strong condemnation.

However, despite the decline of treatment-based models, concerns about the rehabilitative potential of young people continue to dominate debates about their sentencing. As Freiberg, et al, argue,

> There is no doubt that rehabilitative purposes enter into the dispositional decisions made in relation to adults, but the hope of reclaiming children gives the objective of rehabilitation a more sustaining force in courts for juveniles. The various attempts to accommodate the tension between desert-based approaches and needs based ones creates the permanent conflict in the sentencing of young offenders. There is a constant ambiguity

55 Canadian Commission on Sentencing, *Sentencing Reform: A Canadian Approach* (1986); von Hirsch, above n12; von Hirsch, A, *Past or Future Crime: Deservedness and Dangerousness in the Sentencing of Criminals* (1985); von Hirsch, A, "The Politics of Just Deserts" (July 1990) *Canadian J of Criminology* 397.

56 Braithwaite, J "Challenging Just Deserts: Punishing White Collar Criminals" (1982) 73 *J of Crim L and Criminology* 723; Braithwaite, J and Pettit, P, *Not Just Deserts: A Republican Theory of Punishment* (1990); Gendreau, P, "Programs That Do Not Work: A Brief Comment on Brodeur and Doob" (1989) *Canadian J of Criminology* 193.

57 Above n56 at 152.

58 Fox, above n40.

59 Young, A, "Appellate Court Sentencing Principles for Young Offenders" in Beaulieau, above n42.

> at the heart of the process with both tariff principles and the child-saving philosophy vying for attention.[60]

This conflict raises fundamental questions beyond that of the practice of sentencing within the juvenile courts. In the face of changes in juvenile court procedure which provide young offenders with legal rights approaching that of adults, it can be argued that the key distinguishing feature between adult and juvenile courts is in the approach taken to sentencing.[61] Any shift toward proportionality in sentencing as a governing principle[62] would challenge not simply sentencing practice within the juvenile courts, but the rationale for a separate juvenile court per se. As discussed further below, recent reform efforts have tended to introduce mixed models in which, where proportionality is at issue, it is in the form of a limiting principle.[63]

Debates about the need for a separate juvenile court are vexed and complex and cannot be fully explored in this paper.[64] However, among the issues central to such debates are the shifting principles underlying the practice of juvenile justice , and the transfer of young offenders between adult and juvenile courts.

Despite these arguments the distinct nature of young offenders vis a vis adult offenders continues to be recognised by the courts as does the need for a separate juvenile court.[65] However, as Young argues,[66] there has been little attention paid to the precise nature of this distinction.[67]

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60 Above n2 at 9.

61 Above n60.

62 Freiberg, et al, above n2 at 71-6 utilise the distinction made by von Hirsch (above n56 at 83) between proportionality as a governing principle and proportionality as a limiting principle. The former requires the establishment of a sentencing scale of penalties commensurate with offence seriousness. The latter could involve the abolition of indeterminate sentences, the development of a "common law of limited intervention", or the placing of a ceiling upon sanctions for juveniles through express reference to the sanctions for adults.

63 Freiberg, et al, above n2 at 73 note that the Canadian courts have recognised in interpreting the *YOA* the difficulty in applying the principle of proportionality.

64 For a review of the debate see Morris and Giller, above n5 at 238, 239; Giller, above n47 and Freiberg, et al, above n2 at 191.

65 The most frequently cited decision in the Canadian context is:
"I do not suggest that all of the provisions of the Young Offenders Act represent departures that are radically different from principles or practices which are part of the adult system. [For example] it is an implicit principle of the criminal law generally that courts should be guided by the principle of the least possible interference with freedom that is consistent with the protection of society... Nevertheless, *the formal statement of the principle in the Act and all of the others that emphasise the special needs of young persons,* such as being removed from parental supervision only when appropriate, together with the detailed provisions relating to dispositions, give a force and emphasis that has to be recognised — *and make the youth court system significantly different from the adult system.*" [emphasis added] Morden JA of the Ontario Court of Appeal in *R v RL* (1986) 26 CCC (3d) 417.

66 Above n60.

67 The developmental approach adopted by the NSW Youth Justice Coalition in explicitly arguing for differential treatment of young offenders is one recent exception, above n5 at 40.

REFORMS TO JUVENILE JUSTICE

Although reforms in the area of juvenile justice in recent years have typically moved towards a justice orientation, they have not abandoned the concern with individual need. Typically reforms have introduced a mixed model which combines justice (in the form of elements of due process, determinant sentences and proportionality), and welfare.[68] Although much of the literature presents a bipolar justice versus welfare account of juvenile justice, the reality is more complex with elements of a range of different orientations evident within the practice of juvenile justice.[69] Freiberg et al cite the standards of the Institute of Judicial Administration/American Bar Association as an example of such an approach:

> Once the category and duration of the disposition have been determined, the choice of a particular program within the category should include consideration of the needs and desires of the juvenile.[70]

Whilst the guidelines give precedence to proportionality, the needs of the individual are also explicitly recognised.

THE *YOUNG OFFENDERS ACT*

The *YOA* has been described by some as representing a revolution in juvenile justice in Canada involving a complete change in orientation and procedure.[71] The legislation represents what Markwart and Corrado call a "rights and responsibilities model of juvenile justice" and a clear shift away from the welfare orientation of the *JDA*.[72] The Act applies only to criminal offences, all status offences and welfare matters have been excluded. There is a uniform (across provinces and territories) maximum age limit of less than 18 years, and a minimum age of 12 years.

Procedures are formalised under the *YOA*, young people charged with an offence have a right to retain and instruct counsel and the young person's access to medical and or psychological reports about themselves are clarified. Some commentators have argued that these gains in rights for young offenders may have come at a high cost since the result has been a more adversarial and formal system which is closer to the adult system of justice.[73]

One of the clear distinctions between the *YOA* and the pre-existing legislation is that at the dispositional hearing the focus has shifted from the "condition" of the young offender to the offence, which is to be considered together with the needs of the young person and the interests of society.[74] Thus whilst the *YOA* represents a shift towards a "justice model", it does not approach the just deserts model advocated by Von Hirsch[75] nor that

68 Morris and Giller, above n5; Reid above n21; Youth Justice Coalition, above n5 at 43.

69 Freiberg, et al, above n2; Youth Justice Coalition, above n5; Pratt J "Corporatism: The Third Model of Juvenile Justice" (1990) 29 *Brit J of Criminology* 3; Clarke, above n45.

70 Above n2 at 85.

71 Reid, above n21; Coflin, J, "The Federal Government's Role in Implementing the Young Offenders Act" in Hudson, J, Hornick, J P and Burrows, B A (eds), *Justice and the Young Offender* (1988).

72 Markwart, A E, and Corrado, R R, "Is the Young Offenders Act more punitive?" in Beaulieu, above n42.

73 Caputo, above n8 at 135.

74 Beaulieu, above n42.

proposed for adult offenders by the Canadian Sentencing Commission[76] since the *YOA* explicitly retains a reference to the needs of the young person.[77] As Doob[78] argues, however, whilst there is an apparent consensus that under the *YOA* the offence is a much more central consideration than it had been under the *JDA*, there remains considerable debate about just how central it is.

Diversion from judicial proceedings is given emphasis in the legislation in section 3 (1) (d) which states that:

> 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;

and in section 4 which provides the conditions under which alternative measures may be used.[79]

Whilst disparities in the practice of juvenile justice between provinces and territories was one of the criticisms of the pre-existing *JDA*, the new legislation leaves the development of alternative measures programs to the provinces. Indeed in a case brought before the Supreme Court of Canada under the Canadian *Charter of Rights and Freedoms* it was held by the court that the failure of the province of Ontario to develop such programs at that time was not in contravention of the *YOA* since the power was discretionary only, and further that it did not contravene the equality rights of the appellant since the legislation allowed for a province-based distinction "which is a reflection of distinct and rationally based political values and sensitivities".[80]

The maximum sentence which can be imposed upon a young offender is two years, or in the case of an offence for which an adult can be sentenced to life imprisonment, the maximum sentence is three years (section 20 (1)(k)(i) and (ii)).[81] Where the young person is convicted of more than one different offence, the maximum combined sentence which can be imposed is three years in custody (section 20(4)).[82]

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75 Above n56.

76 Above n56.

77 Trepanier, J, "Principles and goals guiding the choice of dispositions under the *YOA*" in Beaulieau, above n42.

78 Doob, A N, "Dispositions and the Young Offenders Act: Issues Without Answers?" in Beaulieu, above n42.

79 Alternative measures may be used instead of judicial proceedings only if the program is an authorised one, the program is determined to meet the needs of the young person and is in the interests of the community, the young person gives consent and prior to giving this consent has an opportunity to consult with counsel, the young person accepts responsibility for the alleged offence, and it has been determined that there is sufficient evidence to prosecute (*YOA* section 4(1)).

80 *R v S(S)* (1990), 57 CCC (3d) 115, [1990] 2 SCR 254, 77 CR (3d) 273.

81 This has been a particularly controversial aspect of the legislation, with arguments that three years is insufficient, and/or that the disparity between a maximum sentence of three years in the juvenile court and 25 years for a young offender transferred to be dealt with in an adult court is too great — see Bala, above n4. As Markwart and Corrado, above n72, point out, however, in considering the maximum sentences available to juveniles one needs to acknowledge that they do not attract the earned remissions and parole of the adult system, thus a three year youth custody disposition could be the equivalent of any where from four and a half years to nine years in the adult system.

82 Although where the offence which is the subject of a disposition hearing was committed whilst the

The Declaration of Principles

The Act sets out in section 3 a Declaration of Principles to guide the manner in which young people are to be dealt with and in section 3(2) provides that the Act "shall be liberally construed to the end that young persons will be dealt with in accordance with the principles". A copy of the Declaration of Principles is included in Appendix 1. The eight principles are not prioritised, and provide evidence of a range of competing and on occasions, contradictory philosophical approaches.[83]

Reid and Reitsma-Street have analysed the Declaration of Principles in the *YOA* in terms of four competing models of juvenile justice: crime control, the justice model, the welfare model and the community change model.[84] They argue that the Declaration of Principles contains elements of three of the four models of justice which they used in their analysis, those of crime control, justice and welfare.

The competing models inherent in the Declaration of Principles can be demonstrated by considering two of the principles. Section 3(1)(a) for example states that:

> 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;

and in subsection (c) that

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

According to Reid and Reitsma-Street's analysis,[85] section 3(1)(a) (that cited first above) contains elements of the justice, welfare and crime control models. In the case of section 3(1)(c) they identified aspects of both crime control and welfare models.

Clearly these principles evidence competing philosophical approaches and arguably offer little real guidance to the judiciary who must decide upon an appropriate disposition in any individual case. As Reid and Reitsma-Street demonstrate:

> There are no points of resolution for the persons and bureaucracies responsible for implementing the *YOA* and there are many possibilities for discretion. Since the principles provide a rationale for every possible direction, it is more likely that other factors, such as bureaucracies' access to funds and the ideologies of those responsible for enforcing the new Act, will influence the implementation of the provisions.[86]

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offender was already serving a sentence, the combined duration of all dispositions may exceed three years (*YOA* section 20(4.1).

83 Reid, above n21; Fox, above n24.

84 The crime control model is that which emphasises the responsibility of the state and courts to maintain order for society; the justice model focuses upon consent and limitations upon interference with freedom; the welfare model is concerned with the needs of the youth and of the family; and, the community change model attributes responsibility for promoting welfare and preventing youthful crime to society generally, Reid, S A and Reitsma-Street, M, "Asumptions and Implications of New Canadian Legislation for Young Offenders" (1984) 7(1) *Canadian Criminology Forum* 2.

85 Id at 9.

86 Id at 12.

Similar criticisms have also been made above with respect to law reform endeavours in the United Kingdom and the United States. Burney[87] argues that the United Kingdom *Criminal Justice Act* of 1982 failed in its explicit attempt to reduce custodial outcomes for young offenders because of "the contradictory nature of the Act's provisions". In analysing the unintended consequences of the United States Juvenile Justice and Delinquency Prevention Act of 1974, including the wide variation in outcomes between different states, Sarri[88] emphasises the ambiguities and contradictions in the philosphies and goals of the juvenile courts, particularly in the dual mandate to act "in the best interests of the child" and also "in the best interests of the community". The failure of the legislature to resolve the problem of competing principles underlying the practice of juvenile justice is not confined to the Canadian experience.

Fox argues that the inconsistencies inherent in the statement of principles in the *YOA* reflect the compromises reached in the policy-making process.[89] According to Fox, greater emphasis was placed upon placating interest groups than upon achieving a consistent and functional order of priority for the principles that would guide a decision-maker.[90]

Whilst the lack of clarity and direction in the Declaration of Principles has attracted strong criticism from some commentators, others have been less critical. In a partial defence of the principles Bala argues that:

> While it is not inaccurate to suggest that the Declaration of Principles reflects a certain social ambivalence about young offenders, it is also important to appreciate that it represents an honest attempt to achieve an appropriate balance for dealing with a very complex social problem. The *YOA* does not have a single, simple underlying philosophy; there is no single, simple philosophy that can deal with all situations in which young persons violate criminal law. When contrasted with the child welfare oriented philosophy of the *JDA*, the *YOA* emphasises due process, the protection of society, and limited discretion. In comparison to the adult Criminal Code, however, the *YOA* emphasises special needs and the limited accountability of young persons.[91]

Dispositions under the *Young Offenders Act*

Comparisons of dispositions under the *YOA* and the pre-existing legislation are fraught with problems. Among the factors which limit such comparison the most important relates to the change in the maximum age to which the legislation applies. Under the *JDA* there was considerable variation between provinces and territories in the age of jurisdiction. Only two provinces, Manitoba and Quebec, have the same maximum age under the *YOA* as they had under the *JDA*. Clear variations between the provinces and territories were also evident under the *JDA* in the programs and services associated with young offenders, and in the philosophies underpinning the practice of juvenile justice, rendering comparisons between provinces particularly problematic. The simplest way to control for such

87 Burney, E, *Sentencing Young People: What Went Wrong with the Criminal Justice Act* 1982? (1985).
88 Above n18.
89 Above n 24.
90 Above n24 at 165.
91 Above n4 at 15.

variations is to consider only those young offenders less than 16 years old within a single jurisdiction, however, this excludes the largest number of young people who are actually subject to the legislation, that is 16 and 17 year olds.

Markwart and Corrado analyse the available data concerning dispositions under the *JDA* and *YOA* for each province, controlling for the effects of the change in maximum age.[92] They put particular weight on the evidence from British Columbia on the basis that administrative and other arrangements concerning young offenders in that province remained largely unchanged in the shift from the *JDA* to the *YOA*. They present data which indicates an increase of 85 per cent in admissions of young offenders to secure custody and open custody between 1983-84 and 1986-87, at a time when adult custody decreased by 12 per cent. Data from seven of the ten provinces supports a finding of an increase in punitiveness, especially in the form of an increased reliance upon custody, under the *YOA* as compared with the *JDA*.

They also present some evidence which suggests that the oldest offenders, those who would have been dealt with under the Criminal Code prior to the change in maximum age, were being more harshly dealt with under the *YOA*. This was probably because their juvenile records would feature in their sentencing in juvenile courts whilst they would have been dealt with as first offenders in adult courts under previous legislative provisions.

Further evidence concerning changes in dispositions between the *JDA* and the *YOA* is provided by Doob and Meen[93] who compared dispositions handed down at three youth courts in Toronto over three time periods — the last two years of the *JDA*, and 1984-86 and 1989-90 under the *YOA*. They found that the nature of cases coming before the courts changed over the time period with a shift to a higher proportion of older youths, a higher number of charges forming the basis of sentencing and more serious offences. The use of custody increased under the *YOA*, although they acknowledge that some of this increase may be due to definitional changes, and there was a much greater use of shorter terms of custody as compared with the *JDA*.

They demonstrated that a shift had taken place in the type of factors associated with the severity of disposition. Whilst under the *JDA* there was no clear relationship between legal factors, such as the nature of the offence, and the severity of the sentence, under the *YOA* legal characteristics predominated in predicting the disposition. They conclude that, at least in the courts studied, dispositions were much more related to characteristics of the offence under the *YOA* than they had been under the *JDA*.

Principles and Dispositions under the *Young Offenders Act*

Research by Doob and Beaulieu[94] has provided an important insight into the manner in which the judiciary utilise principles of sentencing under the *YOA*. Their study included 43 judges who read identical accounts of four hypothetical cases involving young offend-

92 Above n72.

93 Doob, A N, and Meen, J M, "An Exploration of Changes and Dispositions for Young Offenders in Toronto" Unpublished, (1990).

94 Doob, A N, and Beaulieu, L A, "Variation in the Exercise of Judicial Discretion With Young Offenders" (1991) *Canadian J of Criminology* (in press).

ers. They were asked to sentence each person, to respond to questions about the principles underlying each sentence and to indicate the relative importance in determining those sentences of the goals punishment/denunciation, rehabilitation, general deterrence, individual deterrence and incapacitation.

Doob and Beaulieu found a wide range in dispositions for each (hypothetical) offender, though the individual judges tended to be consistent in their own approach to sentencing. There was also no consensus on which goal/s should be pursued through sentencing, with a split evident between those who favoured individual deterrence and those who favoured rehabilitation. In addition, most judges found most goals important or somewhat important in determining the disposition — in fact on average judges chose 3.5 of the 5 sentencing goals as being relevant for every offender.

They interpret their findings as demonstrating that the sentencing process is a considered and rational one and they argue that the disparity in outcome reflects the *YOA* — different dispositions can be quite legitimately given in identical cases under the provisions of the *YOA*.

Whilst appellate court decisions also provide an important guide to the principles influencing judicial interpretation of the legislation the evidence concerning the role of such decisions in shaping the interpretation of the *YOA* is disputed. Trepanier places considerable emphasis upon the role of the appellate courts:

> It is no doubt true that some of the principles may enter into conflict with one another; the conclusion might be drawn that different judges can interpret them in such a way as to give precedence to those they prefer, with the result that decisions would be influenced by the viewpoint of each judge rather than by the declaration of principle of the Act. The courts of appeal, however, have interpreted the principles in such a way that they cannot be ignored.[95]

A somewhat different position is taken by Young[96] who argues that the appellate courts "have not successfully developed sentencing principles that promote a unique identity for juvenile justice". The approach taken by the courts, according to Young, has not differed significantly from that taken with respect to adults, with the judges apparently being guided by the same principles and considerations. In a conclusion which echoes Sanford Fox's[97] critique of the state of juvenile jurisprudence, Young argues that the constant allusion to the special needs of young offenders is not translated into a specific penal philosophy.[98]

YOUNG OFFENDERS AND PROVINCIAL LEGISLATION

Assessments of the impact of the *YOA* all too often ignore important shifts in jurisdiction which accompanied the move from the *JDA* to the *YOA* and fail also to acknowledge that

95 Above n77 at 43.
96 Above n59.
97 Above n40.
98 Above n60.

the reforms were driven not only by concerns about justice for young offenders but equally by constitutional, political and economic factors.

Whilst the shift in administrative responsibility from the federal to the provincial government for those young offenders aged 16 to 18 years is widely recognised within the literature, and formed the focus of much of the inter-governmental wrangling during the reform process,[99] other changes are given much less recognition.

With the introduction of the *YOA* — a federal act administered by the provinces and territories — came two important shifts which placed legislative responsibility for large categories of young offenders directly with the provinces and territories. These changes were with respect to young people between the age of 7 years and 12 years[100] who allegedly committed an offence, and for those young people under 18 years who allegedly offended against provincial or territorial legislation and not against the *Criminal Code*.[101] The significance of acknowledging these categories of young offenders is highlighted by the fact that the number of young people prosecuted for offending against provincial and territorial legislation is greater than that under the *YOA*.[102]

An ironic outcome of the *YOA* is, therefore, that despite the rhetoric about the need for a uniform approach to juvenile justice, the reform process has created greater opportunity for difference. Large numbers of young people are excluded from the jurisdiction of the *YOA* and the arguable benefits of its allegedly more principled approach with greater due process protections. Differential provincial and territorial legislation and procedure continues to characterise the practice of juvenile justice. Even within the *YOA*, the development of alternative measures has been left to the provinces and territories, an outcome which perhaps is explicable as a reasonable acknowledgement of the real disparities across Canada in the available resources, the size of different juvenile justice systems and the differential capacities of provinces and territories to finance such schemes. Whatever the rationale, however, the outcome remains that of a diversity in approach which means that what constitutes juvenile justice largely continues to depend upon where in Canada it is practised.[103]

DISCUSSION AND CONCLUSION

The current era truly represents a watershed in juvenile justice reform. Despite widespread agreement on the need to abandon pre-existing models of juvenile justice, especially those based upon the doctrine of *parens patriae*, there is little consensus about what should replace it. Fundamental questions remain about what principles should inform juvenile justice, and an important issue continues to be the separation of jurisdiction between adults

99 Above n27 and n39.

100 The minimum age of jurisdiction for the *YOA* is 12 years.

101 The *YOA* applies only to those offences in the Criminal Code. Previously offences by young people against provincial or territorial legislation were incorporated in the definition of delinquency under the *JDA* (see above).

102 Wilson, L C, "Changes to federal jurisdiction over young offenders: the provincial response" (1990) 8 *Canadian J of Family L* 303 at 305, 343.

103 Id at 343.

and juveniles. Whilst there seems to be little enthusiasm for the abandonment of a separate juvenile court, there is no clear articulation of how such a system should differ from that which operates for adults. Despair with treatment-based models, which had themselves constituted reforms in reaction to the deficiencies of classical approaches to dealing with young offenders, has resulted in experimentation with a range of mixed models of juvenile justice.

Reforms such as the *YOA* and the United States and United Kingdom legislation mentioned above, differ in detail but share the attempt to limit the number of juveniles being brought into the formal system, to give young offenders greater procedural safeguards, to limit the use of custodial options and to meet the needs of individuals.

Research in each of these jurisdictions points to concerns about the extent to which the recent reforms have lived up to their promise. In general terms the experience in all three countries has been disappointing. A lack of precise and unambiguous principles to govern practice within juvenile courts has been cited in each case as a factor contributing to the unintended consequences of the legislation, such as an increased reliance upon incarceration. The absence of clear principles, as Reid[104] has argued, leaves the way open for the exercise of considerable discretion at the implementation stage and for ideology (which is often not made explicit) to determine the resultant practice.

It is important of course not to have unrealistic expectations about what might be achieved through legislative reform. Bala is right to acknowledge that the exercise of juvenile justice is a complex and fraught endeavour and that no single guiding philosophy can prevail.[105] Reforms are mediated too by the implementation process and the many professional and bureaucratic influences which shape that process. Decisions taken at court must also be seen in the context of the broad discretion exercised concerning young offenders at other points in the legal process. However, whilst these factors are important considerations, the key difficulty with reform efforts to date lies in the failure to provide unambiguous, meaningful and structured guidance to the judiciary and other agents of the criminal justice system about the principles which should govern the practice of juvenile justice.

104 Above n21.
105 Above n4.

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