MUCH ADO ABOUT (ALMOST) NOTHING:
THE YOUTH CRIMINAL JUSTICE ACT
Paradigms & Paradoxes within Canadian Youth Justice Philosophy

by

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Cand. Jur., Aarhus Universitet, Denmark, 1995

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Faculty of Law

We accept this thesis as conforming to the required standard

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August 1999

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Department of

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Date 08-17-99
ABSTRACT

The subject of this thesis is Canadian youth justice philosophy, and the paradigms and paradoxes within the youth criminal justice system. It focuses on the historical, socio-economic, political and intellectual elements of the changes in Canadian youth justice philosophy. I will explore the reason behind the federal government's recent political initiative, the Youth Criminal Justice Act, and look into the question of whether the government's youth justice strategy will accomplish its objectives and make significant changes to the existing legislation and justice system in the context of young offenders.

The purpose of the thesis is to delineate the development of Canadian youth justice philosophy and outline the changes in the developing process from a historical, political and intellectual perspective in order to understand the current regulatory framework.

I describe and analyze the changes in youth justice philosophy using Thomas Kuhn's model of change in order to determine whether a paradigm shift has happened with the progression from the Juvenile Delinquents Act, to the Young Offenders Act to the Youth Criminal Justice Act.

I go on to describe the principles and theories behind retributive and restorative justice philosophy, as it seems restorative principles might become more influential than they have been hitherto. I explore existing alternative measures within the restorative
framework in Canada, such as mediation, family group conferences and circle sentencing.

I argue that the federal government's intention to implement the new Act could be a step from retributive to restorative justice because of the government's promise of additional funding for restorative programs.

My thesis is that the intended renewal of the youth justice system in Canada is a political response to a polarized public debate about youth crime. I argue that the *Youth Criminal Justice Act* is not a complete transformation of youth justice philosophy.

My conclusion is that historical, political, intellectual and scientific changes in youth justice philosophy might have occurred in 1984 with the *Young Offenders Act*, but that the *Youth Criminal Justice Act* does not constitute a further advance.
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CHAPTER 1

INTRODUCTION

I. CHOICE OF TOPIC AND PURPOSE OF STUDY

On March 11, 1999, Minister of Justice and Attorney General of Canada Anne McLellan tabled the federal government's strategy for the renewal of youth justice in the new millennium, the Youth Criminal Justice Act\(^1\). The strategy is based on a report released on May 12, 1998\(^2\), named A Strategy for the Renewal of Youth Justice, which responded to the report made by a House of Commons Standing Committee\(^3\) that conducted a review of the Young Offenders Act, proclaimed in force in 1984.\(^4\)

_A Strategy for the Renewal of Youth Justice_ emphasizes the importance of three areas related to youth crime:

---

• Promoting crime prevention and effective alternatives to the formal youth justice system
• Ensuring that youth crime is met with meaningful consequences.
• Emphasizing rehabilitation and reintegration.

These key directions are projected catalysts for better protection of the public and include, among other elements, a replacement of the YOA with a new *Youth Criminal Justice Act* "that will put public protection first and that will command respect, foster values such as accountability and responsibility, and make it clear that criminal behavior will lead to meaningful consequences."\(^5\)

On the occasion of the release of *A Strategy for the Renewal of Youth Justice* Minister Anne McLellan stated: "We are responding to calls for necessary changes to the law, but we are doing much more than that. Our new youth justice strategy looks beyond legislation and even the youth justice system itself to explore ways society as a whole can address youth crime and associated factors such as poverty and child abuse."\(^6\)

With respect to these statements, my thesis will be concerned with Canadian youth justice policy and the importance of legal, historical, socio-economic, political and scientific elements in the understanding of youth justice policy. I will explore the reason behind the federal government's recent political initiative and look into the question of whether

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\(^5\) *A Strategy for the Renewal of Youth Justice*, supra note 2 at 1  
\(^6\) Ibid.
the government's youth justice strategy will accomplish its objectives and make actual alteration to the existing legislation and justice system in the context of young offenders.

My aim is therefore to delineate the development of Canadian youth justice philosophy and outline the changes in the developing process from a historical, political and intellectual perspective in order to understand the current regulatory framework.

Furthermore, the purpose of my study is to expand on the perspectives mentioned above; a 1982 article describing the shifting of paradigms in Canadian youth justice has lead me to describe the development in youth justice from a scientific perspective. It is my intention to analyze the changes in youth justice philosophy in accordance with Thomas Kuhn's model of change, and discuss whether a paradigm shift has happened with the progression from the YOA to the Youth Criminal Justice Act.

My thesis is that the intended renewal of the youth justice system in Canada is a political response to a polarized public debate about youth crime. I will also argue that the Youth Criminal Justice Act is only a legal response to political concerns about youth crime rather than a complete transformation of youth justice philosophy as predicted in A Strategy for the Renewal of Youth Justice. It will be my conclusion that historical, political, intellectual and scientific changes in youth justice philosophy might have

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occurred in 1984 with the YOA, but that these changes did not proceed with *A Strategy for the Renewal of Youth Justice* in 1998/99.

What has caused the politicians' concern about youth crime?

Reading through *A Strategy for the Renewal of Youth Justice* and the Thirteenth Report of the Standing Committee on Justice and Legal Affairs clearly reveals the political perception of the urgent need for protection of society because of troubling behavior patterns in youth crime.

This perception is also shared by society in general. The most recent example is the media's engrossing focus on home invasions in Vancouver, BC: Young offenders are dangerous and violent, and we need the protection.\(^9\)

Youth justice matters are constantly in the public eye and are carefully fueled by the media. The fear of crime is pervasive, and with *A Strategy for the Renewal of Youth Justice* that fear is justified.\(^10\)

---

\(^9\) Vancouver Sun, Weekend 13-14 February, with a message from the Minister of Attorney General: A reward of $100,000 for information that could lead to information about the home invaders.

\(^10\) In "Juvenile Delinquency & Juvenile Justice" by Joseph W. Rogers & G. Larry Mays (New York: John Wiley & Sons, 1987) in part I, social myths about juvenile delinquency are being described. The authors argue that social myths have influenced juvenile justice and the legislation regarding juveniles. They define 'social myths' as "beliefs collectively held by many persons in a given society, images of what people believe to be 'true' or 'correct'." The authors delineate nine basic myths, such as 1) America is being ravaged by a crime epidemic; 2) juvenile delinquents become adult criminals; 5) criminals are solely responsible for their crimes; and 9) the fight against crime can be won by a 'war' on juvenile offenders.
Yet, Canadian statistics regarding youths charged in criminal incidents, Criminal Code and federal statutes show that youth crime rates have seemingly decreased. (See table 1).

**Youths and adults charged in criminal incidents, Criminal Code and federal statutes, by sex,**

**Table 1**

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Their conclusion at 4: Despite the fact of the high crime rate itself, however, the fear of crime has been made worse by various myths about crime and, most important to us, about juvenile crime.
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**Source:** Statistics Canada, CANSIM, Matrices 2198 and 2199

In the period between 1993 - 1997 youth charges have decreased in all offenses: all criminal code, property crime, and other criminal code offenses. Only Violent Crimes seem to have increased. But when one considers the whole matrix, it becomes apparent that violent crimes have actually been decreasing. An increase in youths charged under federal statutes is evident.

So why are the society and the politicians so concerned about the current youth justice system?

The recent formulation of *A Strategy for the Renewal of Youth Justice* and the *Youth Criminal Justice Act*, intended to replace the YOA as the statutory authority for dealing with young offenders, reveals the trends in Canadian Youth Justice and sentencing
rationales. *A Strategy for the Renewal of Youth Justice* emphasizes that the new legislation will include a statement of principles and objectives.\(^\text{11}\)

The statement will also make clear that prevention, meaningful consequences for crime and rehabilitation are all essential and complementary components of a youth justice system that effectively protects the public. The statement will underscore that youth must be held accountable for their actions. It will also include the principle that youth should be treated differently from adults and that violent young offenders should be treated differently from nonviolent young offenders.\(^\text{12}\)

**II. METHODOLOGY**

This section is comprised of a brief description of the framework selected for this thesis.

The intention is to expose the development of youth justice and the concepts behind the regulatory framework with respect to young offenders in order to reveal the cultural diversities in youth justice. I will therefore delineate the changes in the regulatory framework in the context of young offenders caused by socio-economic, political, historical and intellectual - scientific - changes in Canada from the turn of the century to today.

\(^{11}\) *A Strategy for the Renewal of Youth Justice*, supra note 6 at 2 and the accompanying text.

\(^{12}\) Ibid.
A major part of this thesis will focus on changes in the youth justice philosophy and compare these changes to the theories of paradigm shifts, using Thomas Kuhn's model of change. It is my intention to examine whether changes in paradigms have occurred between 1982 and today.

My approach will be legal, historical, political and scientific. The analysis of the current legislation and the theoretical structure of earlier legislation will be doctrinal, in the sense that I will examine theories and principles of the different legislation. Thereby, I will answer law within law itself.

In order to explain the culture within the legislation with respect to young offenders, a description of the historical development will be necessary: from the child saving movement and positivist school of criminology in the late 19th century to the latest attempts at legislating youth justice matters.

The political situations from the 19th century to today will also be described in order to provide an understanding of the current legislation. We can learn a lot about youth justice philosophy by looking at the political agenda.

The importance of history, politics and legal theory in youth justice matters is evident as one reads the literature.¹³

¹³ Gordon West, "Towards a More Socially Informed Understanding of Canadian Delinquency Legislation" in Alan W. Leschied, Peter G. Jaffe & Wayne Willis, eds., The Young Offenders Act: A Revolution in Canadian Juvenile Justice (Toronto: University of Toronto Press, 1991) at 9, where he states that: "Again,
Judge Penny J. Jones describes the importance of these factors in the following way:

"That legislation gives expression to certain values which, to be fully appreciated, must in my view be considered in light of the history of the Act which dates back to the turn of the century."\(^{14}\)

The survey of the development in youth justice from a legal, socio-economic, political and historical view will comprise Chapters 2, 3, 4 and 5.

Chapter 6 will delineate science in combination with the law; namely, describing shifting in paradigms in a youth justice context. An explanation of Kuhn's model will be offered in order to determine whether changes have occurred in the paradigms used in youth justice philosophy.

In the same chapter I will examine the paradoxes of and barriers to using the theories on change in paradigm. The section will consist of several academics' theories on Kuhn's model of change, and will analyze how habits of mind can govern scientific beliefs, such as paradigm shifts.\(^{15}\)

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\(^{14}\) Penny J. Jones, *Young Offenders and the Law, 2nd ed.*, (Ontario: Captus Press, 1997) at 11.

In Chapter 7 I will elaborate on Section 3 of the *Youth Criminal Justice Act* and the intended renewal of the philosophy behind the youth justice system. Minister of Justice Anne McLellan, has stated

As we approach the implementation phase, I want to underscore the need for increased community involvement. This is a fundamental shift in the Government’s new approach to youth justice and it is key to the success of our renewal efforts. Our experience over the last 15 years has made one thing abundantly clear — youth justice cannot be the sole purview of a few select system professionals working in isolation. Effective youth justice must also involve educators, child welfare and mental health systems, voluntary organizations, victims, families, youth employers, neighbourhood groups — just about anyone who works with or cares about our kids, our communities and our country.

The Government’s Youth Justice Strategy opens the door to greater public and professional involvement in dealing with youth crime, and I urge Canadians to get involved. The introduction today of the *Youth Criminal Justice Act* marks an important turning point for Canada’s youth justice system. It is our collective challenge to make sure we succeed.\(^6\)

I will describe the principles and theories behind retributive and restorative justice philosophy as it seems restorative principles *might* become more influential than hitherto. Furthermore, I will explore the existing alternative measures within the restorative framework in Canada, such as mediation, family group conferences and circle sentencing.

Chapter 8 will be the final chapter, and will therefore comprise of my conclusion. Even though the intention is to renew the youth justice strategy, and to enhance restorative

\(^6\)http://www.canada.justice.gc.ca/News/Discours/s110399_en.html
principles, it will be my assertion that the new *Youth Criminal Justice Act* does not provide a new breeding ground for changes in youth justice philosophy. Therefore, the new legislation will not provide a shift in paradigms, as the legislators expect.

This is the framework I have selected for my thesis.
CHAPTER 2

THE YOUNG OFFENDERS ACT - PRINCIPLES AND THEORY

In this chapter, I will delineate the current legislative framework with respect to young offenders: the YOA. The YOA profoundly altered the course of the youth justice system in Canada when it came into effect on April 2, 1984. There was a shift in the youth justice system, from the treatment-and welfare-oriented model under the JDA to the more justice-oriented model of the YOA, that "[e]xpressly injected principles of due process or the justice model into the field of youth justice, while at the same time retaining the principles of the medical or treatment model which had been such an integral part of its predecessor, the Juvenile Delinquents Act."\(^{18}\)

In Section I, I will expound the YOA. This will be a doctrinal analysis, as I will look at the legislative framework. In Section II, I will look at the various scholars' and other academics' opinions regarding the YOA, and thereby outline the pros and cons with respect to youth justice legislation. This analysis will describe the major concerns of the YOA, including the abundant criticism that has been made against it. Section III will include a conclusion.

\(^{17}\) See supra note 4.
The YOA must be understood in a historical, political and socio-economic context. Consequently, a more in-depth analysis of these factors will be offered in Chapters 3 and 4, which will delineate the development of youth justice philosophy. Therefore, in order to understand the underlying values and the philosophy behind the current legislation with respect to young offenders, Chapter 2 must be read in the context of the following chapters.

I. THE YOA - A LEGAL FRAMEWORK

With the enactment of the YOA in 1984, significant changes in the youth justice system were introduced, constituting what some authors have characterized as a "new era"\(^\text{19}\), a shift of paradigms\(^\text{20}\), and a "revolution".\(^\text{21}\)

Other authors have interpreted the YOA as "a conservative retreat from the "rehabilitative" ideal under the JDA to a more punitive and legalistic approach."\(^\text{22}\)

In order to understand the various academics approaches to the YOA, let me start by describing the legislative framework in the context of young offenders.

\(^{18}\) Lucien A. Beaulieu, "Introduction" in Lucien A. Beaulieu, ed., Young Offender Dispositions: Perspectives on Principles and Practice, (Toronto: Wall & Thompson, 1989) at 1.


\(^{20}\) M.G. Aultman & K.N. Wright, supra note 7 at 13.

\(^{21}\) Leschied, supra note 13.
A. Principles and Theory in the YOA

A.1. The Declaration of Principle

With the enactment of the YOA, Section 3, the "Declaration of Principle", was intended to guide judicial interpretation of the YOA. It should be noted that the original Section 3 was amended in 1995, and Sections 3 (1) (a) and 3 (1) (c.1) were added to the Declaration of Principle.\(^{23}\)

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\(^{23}\) An Act to amend the Young Offenders Act and the Criminal Code, S.C., 1995, c.19, s.1. See generally Nicholas Bala, Young Offenders Law, (Ontario: Irwin Law, 1997).

The Declaration of Principle now reads:

3.(1) It is hereby recognized and declared that

(a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;

(a.1) 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;

(c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;

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

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

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

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

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.
Sections 3 (1) (a) and 3 (1) (c.1) emphasize the importance of crime prevention in order to protect society and rehabilitation of the young offender. The addition was an attempt to respond to the criticism of the original Section 3, as will be discussed infra Section II at 20.

The ten items contained in Section 3 outline the policy for Canada with respect to young offenders.

Section 3 (1) (a.1) states that young persons should not be held accountable in the same manner or suffer the same consequences for their behavior as adults, but also states that young offenders nonetheless should bear responsibility for their contraventions. Section 3 (1) (b) states that society must be afforded the necessary protection from illegal behavior, and that protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation. Section 3 (1) (c) states that young persons require supervision, discipline and control, but also, because of their special needs, require guidance and assistance.

Section 3 (1) (d-g) contains a catalogue of the most fundamental and basic rights that a young person has when in conflict with the criminal justice system. It is interesting that in Section 3 (1) (f) it is stated that the rights and freedoms of young persons include a right to the least possible interference with freedom "that is consistent with the protection of society."

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Some academics have suggested that the Declaration of Principle reflects a certain ambivalence about how to deal with young persons in conflict with the criminal justice system, and that section 3 contains fundamental ambiguities.

Other academics have suggested that with the Declaration of Principle, we have criminal legislation with a broader social context and that the principles are more than rhetoric; they are also upheld by concrete measures. The YOA with its Section 3, they suggest, has created a coherent and balanced process for dealing with youth crime, "which will encourage respect for the law and promote the wellbeing of both the young offender and society."24

Indeed, the Declaration of Principle has been exposed to thorough examinations. I will elaborate on these examinations in section II, infra at 20ff.

It was not only the Declaration of Principle that initiated the significant changes in Canadian youth justice. Another important factor was the referral to children's rights and freedoms in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights.

A.1.2. Children's Rights and Freedoms

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Section 3 (1) (e-g) deals with a young person's rights as already described. The lack of children's rights had been evident in the JDA, but these rights were made visible in the YOA. The YOA does not only deal with fundamental rights; procedural changes were also made. As I will describe in Chapter 3, Section II, the criminal proceedings against young offenders under the YOA were informal and gave the judge a discretionary power in the trial.

Under the YOA, procedural safeguards became of crucial importance and the YOA formalizes many of the procedures of the youth court as it sets out in detail the procedures that are to be followed in various proceedings. Some examples are as follows:

*Section 2* of the YOA establishes a minimum and maximum age of 12 and 17.

The YOA also provides the young person with a right to counsel which is described in *Section 11*. This section delineates the situations in which young people can retain and instruct counsel.

*Section 12* reviews the situation in which a young person appears in court and spells out the guideline to be followed by the judge in youth court. There are specific instructions to the judge, which were not apparent in the JDA.

According to *Section 38*, the young person's identity is not to be published.

*Sections 20 - 24* explain in detail the dispositions to be made when a youth court finds a young person guilty of an offence. Specifying the available dispositions makes it clear
that youth court judges have a guideline that must be followed, and perhaps clarifies the earlier uncertainty about dispositions under the JDA.

Section 23, which describes the possible conditions attached probation orders, should also be mentioned. Section 16 deals explicitly with provisions for transferring young offenders to ordinary court. Under the YOA, a young person, who has committed an indictable offence can be transferred to ordinary court. The young offender can only be subject to this subsection "after the age of fourteen years".

In theory, a young offender can be transferred for any indictable offence "other than an offence referred to in section 553 of the Criminal Code". However, in practice most offences subject to transfer are serious violent offences. Section 16 (2) lists the factors that should be taken in consideration by youth court in a transfer hearing. Such factors include the seriousness and the circumstances of the alleged offence, the age, maturity, character and background of the young person, and "any other factors that the court considers relevant." (Section 16 (2) (f)). Section 16 (1.01) applies to young persons aged 16 or 17 years, who have alleged to have committed certain offences, such as:

- First-or second degree murder
- Attempted murder
- Manslaughter, or

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26 Bala, supra note 23 at 273 footnote 20, where the author refers to Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Statistics 1994-1995 (Ottawa: Statistics Canada, 1996) [1994-1995]. It is reported "that transfers were ordered for 123 cases (listed by most serious charge)" including murder.
• Aggravated sexual assault.

In these cases, Section 16 (1.01) states that prosecution should be conducted in ordinary
court unless the youth court on application makes an order, "that the young person should
be proceeded against in youth court."

In 1984, 1992 and 1995, Section 16 of the YOA was amended. According to Bala, the
amendments are responses to judicial controversy over the interpretations of the 1984 and
the 1992 amendments.²⁷

A.1.3. Alternative Measures

The YOA recognizes that young offenders have special needs and that because of their
age, they cannot be held accountable in the same way, as adult offenders would be. But
Section 3 and Section 4 under the YOA, state that the young offender should bear
responsibility for his or her contraventions towards society, towards the victim, and
towards him- or herself. Section 4 under the YOA expresses the importance of
alternative measures, and thereby outlines the legal framework for programs for
alternative measures.

²⁷ Ibid, at 286, where the author states that "...the 1995 amendments seem to be clearer than the 1992
provisions and would appear to specifically limit the factors to be considered in assessing the dual interests
of society, namely, rehabilitation of the youth and the protection of the public." Bala also conclude that
since the 1995 amendments the 'interest of society' as mentioned in Section 16 (1.1) does no longer include
accountability and arguably not general deterrence. This conclusion is based on the author's examination of
As described in Section 4, alternative measures are methods other than prosecution in youth court of dealing with youths who have committed offences. Some of these programs are known as "diversion". Some of the programs in Section 4 under the YOA are offered on a pre-trial basis, which means that the program can be completed before a charge is laid in youth court.28 Some of the program models for alternative measures are based on post-charge. As described in section 4 (1) (c), the young offender must fully and freely consent to participating in the alternative measures program. Also, the young offender must accept responsibility for his or her act.

The Attorney General has the authoritative power in alternative measures programs, according to Section 4 (1) (a). Furthermore, it is mandatory that the evidence be sufficient to proceed with the prosecution of the offence, and that the prosecution of the offence is not in any way barred by law. "Section 4 codifies the most unusual aspect of old paternalism".29

II. THE CRITIQUE OF THE YOA

During the 15 years since the passing of the YOA, it has generated much controversy. The critique has evolved on several levels: Scholars, as well as the public, have contributed to the debate. Politicians' response to concerns raised over the YOA can be

28 Penny J. Jones, supra note 14 at 20.
29 Lucien A. Beaulieu, "A Comparison of Judicial Roles under the JDA and YOA" in Leschied, Jaffe & Willis, supra note 13 at 138.
found in the three amendments of 1986, 1992 and 1995. Furthermore, the latest, and some would say most dramatic, political response can be read in *A Strategy for the Renewal of Youth Justice and the new Youth Criminal Justice Act.*

A. The Academics' Concern and Critique

A number of concerns have been raised about the implementation of the YOA. Soon after the enactment of the YOA it became clear to the federal government that the legislation being introduced was not as clear, precise or measurable as expected. Advocates from both the children's rights system and the welfare model criticized the YOA almost from the beginning of the new era, and potential problems were pointed out in an often heated debate. I will start by delineating the major arguments of the critique from the academics.

The debate started in 1983 among the provincial judges. One of the articles states that the YOA represents one of the most significant pieces of social legislation of the past few years. The author recognizes that the passage of the legislation "marked the end of a critical phase of the lengthy process of reform of our juvenile justice system." It is also stated that the YOA "is Parliament's response to this evolution of cultural values and attitudes towards criminal justice", and that "[t]he legislation is based on a new set of fundamental assumptions reflecting this evolution and inspired, as well, by extensive

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30 Lilles, supra note 19 ibid.
31 The Provincial Judges Journal dedicated volume 7 (2) to a Young Offenders Issue. These articles describe the fundamental problems with the YOA that formed the basis for the discussions in the two past decades.
32 Archambault, supra note 24 at 1.
33 Ibid.
research and a more sophisticated knowledge of human behavior generally, and the moral
and psychological development of children in particular."34

But the enthusiasm and the positivity towards the new legislation died down. As stated
by Judge A. Peter Nasmith, it soon became clear that the youth justice system had moved
away from "paternalism" and toward "principles of fundamental criminal justice", such as
a right to counsel, a minimization of interference with an accused person's freedom, and
so forth.35 But as Nasmith states, "Paternalism dies hard"; the by-products of paternalism
had not been entirely eradicated under the YOA. The author mentions as an example
Section 4, Section 13 (6) and Section 23, and concludes that the clash between
paternalism and "due process" under the YOA will lead to compromises. Therefore, the
predictability of the process under the YOA is not as clear as was intended.

The YOA is worded so broadly that the Declaration of Principle contains both the
philosophy of the JDA and the new philosophy:

In the overall terms, the Act does, I think, betray one of the
unfortunate, but perhaps inevitable results of so many years
of consultation and redrafting: that is tendency to include
provisions which betray some inconsistency or at least
ambivalence about both the approaches which should be
taken with young offenders and the objectives it is hoped
will thereby be achieved.36

34 Ibid. at 3.
27.
Another concern raised by Judge Thomson is the question of whether there will be adequate resources to implement the YOA. That question was answered in *A Strategy for the Renewal of Youth Justice* 15 years later! To support the implementation of the YOA, the federal government entered into a cost-sharing agreement with the provinces and territories. That resulted in proportionately less federal support for provinces with lower custody rates. In addition to the cost-sharing agreement, federal funding was frozen in 1989 at $156 million. Judge Thomson's concern 15 years earlier still holds true. I will elaborate on the cost-sharing aspect in Chapter 7.

The debate about the YOA continued through the following years. What was the impact of the YOA? Jim Hackler, from the Department of Sociology at the University of Alberta, stated in 1987 that the use of counsel for a young offender, for example, had led to young people speaking less in court. Instead of the youth giving their version of the act, the defense lawyer became the young person's spokesman. The author claims that the disrespect for the youth justice system as outlined in the YOA among the young offenders has grown because of the confusion within the legislation itself. Hackler concludes, "The Youth Court is becoming a better place for lawyers but a poorer place for children in need of help."

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37 *A Strategy for the Renewal of Youth Justice*, supra note 2 at 5.
39 Ibid.
Academics from McGill University made a review of the first decade of the YOA in 1993.\textsuperscript{40} The critique was scathing. The authors claimed that the YOA represented a compromise between a variety of often contradictory philosophies. According to the authors, the YOA does not fully represent any philosophical position. Because of the ambiguities of the YOA, youth courts are not provided with clear guidance as to the principles' relative priority or their precise meaning. The authors reached that conclusion by analyzing the central principles of phrases such as "special needs", "protection of society" and "least possible interference with freedom" used throughout the YOA.\textsuperscript{41} The guiding principles in Section 3 under the YOA, particularly, reflect the ambiguities in the Act, as already described on page 14.

The authors blame the extremely long process of drafting a reform under the JDA.\textsuperscript{42} The legislators had hoped for a clear, precise and predictable legislation with respect to young offenders, but "the broad language of the Declaration of Principle gives a large role to judicial discretion in the interpretation and application of the YOA".\textsuperscript{43} Therefore, "[a]ccordingly, we will suggest that the Declaration of Principle, and the ambiguous concepts used therein, should be removed or de-emphasized under the YOA."\textsuperscript{44}

\textsuperscript{40} Bolton, et al., supra note 22 at 939.
\textsuperscript{41} Ibid.
\textsuperscript{42} The process of reform is being described in Chapter 4.
\textsuperscript{43} Bolton, et al., supra note 41 ibid.
\textsuperscript{44} Ibid.
The critique continued systematically during the next years, and in *Renewing Youth Justice*, 1997, the critique was being heard: The guiding principles should be made more clear and precise, and education of the public was necessary in order to make the YOA or an amendment more accessible.\(^{45}\) The Minister of Justice followed the recommendations in *A Strategy for the Renewal of Youth Justice* and suggested a replacement of the YOA with a new *Youth Criminal Justice Act*. The report emphasized that serious questions had been raised about the YOA since its enactment in 1984. The main problem was lack of public confidence in the Act and the lack of satisfactory alternatives to incarceration, as well as inadequate reintegration and rehabilitation.

The new *Youth Criminal Justice Act* was tabled March 11, 1999.

**B. The Public Concern and Critique**

Jim Hackler states in his conclusion that

> Despite evidence that delinquency is decreasing, shrill voices from politicians and the press still capitalize on the public fear of crime to emphasize punishment. The shift of public resources to those activities guaranteed to be ineffective may lead social historians to describe this period as one where designers of legislation meant well but ended up doing considerable damage.\(^{46}\)

Not many will disagree that the media has fueled the public fear of young offenders. The major complaint from the public has been that the YOA is too lenient towards youth crime and that violent and dangerous young offenders can "get off easily" because of the

\(^{45}\) See for a further description of *Renewing Youth Justice*, Chapter 4.
"gentle" YOA.47 The public also wanted a change in the youth justice system. The maximum sentence for murder in youth court was 3 years in 1984 until 1992. This disposition was under attack by the public, which led to an amendment in 1992. The maximum sentence for murder in youth court was raised to 5 years less a day. The public continued criticizing this disposition, which led to a new amendment in 1995. Maximum sentence for murder in youth court is now 10 years for 1st degree murder and 7 years for 2nd degree murder. (Please refer to Section C for a description of the politicians' concerns). The prohibition of publishing the names of young offenders was also under attack by the public. Establishing a minimum age at 12 was another point of criticism. "Canadians want a youth justice system that protects society and that helps youth avoid crime or turn their lives around if they do become involved in crime."48 The paramount goal for the new youth justice strategy is protection of society and involvement from both the society and communities. It is therefore important that the public be informed about youth crime and youth justice philosophy. This might take away the public fear that has impeded the progress of a sensible youth justice system.

C. The Politicians' concern

As noted above, the critique of the YOA has been predominantly negative. Even though some authors have argued that the YOA just needs time, not criticism, the tendency in Canadian youth justice philosophy has been abundant criticism of the present system. That is also the conclusion of the proponents of the YOA.49

46 Hackler, supra note 39 at 209.
47 See for information, Bolton, et al., supra note 44 at 941 footnote 7.
48 Minister of Justice, Anne McLellan in A Strategy for the Renewal of Youth Justice, supra note 2 at 1.
49 Omer Archambault, "Foreword", Leschied, Jaffe & Willis, supra note 13.
Most unfortunately, in my view, professionals in the social and behavioral sciences failed to tackle the new law with the same degree of enthusiasm and vigour. It appears to me that many of them spent too much time and energy lamenting lost ground and not enough in ensuring that the new law be implemented in a balanced way. Others devoted much of their energy to criticizing the act and characterizing it a 'pure justice', or essentially, 'offence'-based model with the result that they are convincing themselves and everyone else (much like a self-fulfilling prophecy) that, under the Young Offenders Act, the treatment and rehabilitation of young offenders are out of the window. May I suggest that they would better serve the system by spending more effort on showing and emphasizing the essential differences between the Young Offenders Act and the ordinary criminal law than building the case for their similarity.

Even though Judge Archambault was of the opinion that the YOA was a realistic and effective blueprint for youth justice, the politicians were afraid not to respond to the systematic critique of the YOA. Therefore, in response to the growing concerns over the YOA, the Act has been amended three times: in 1986, 1992 and 1995. The 1992 amendments raised the maximum sentence for first or second-degree murder from three to five years and made transferring youths facing serious offences to adult court easier. The amendments were a result of a perceived public belief that the YOA was vague, inconsistent and overly lenient towards young offenders. But the criticism continued and it was not long before the YOA got amended again. In 1994, Bill C-37, "An Act to Amend the Young Offenders Act", was introduced. The Bill was a response to the public critique and the academic critique, respectively. The critique was two-fold: one side thought the YOA was not tough enough on crime, and one side thought that the Act
failed to rehabilitate the young offender. Bill C-37 was proclaimed in force on December 1, 1995. Bill C-37 again increased the lengths of sentences in youth court to 10 years; allowed victim-impact statements to be read in youth court; changed parole ineligibility periods, and so forth.

The debate in the House of Commons regarding the implementing of the Bill C-37 was heated but definitely expounds the two-fold critique of the YOA. The first example shows the disbelief in rehabilitation, and the feeling that the YOA is too lenient towards the young offender:

Mr. Rose: "You're asking if there's something we can do to help rehabilitate these kids, and you're saying that imprisonment is not the way to do it....We put the mandatory treatment in there to rehabilitate....If a man commits a crime, he serves time for the crime, he very seldom walks away. But a kid knows he can refuse treatment, so he refuses treatment. As the lady was saying before, you're wasting money having the social worker sit down in front of the kid when the kid say's he's not going to anything, so goodbye....The provincial government is spending a lot of money anyway on these kids that could be better used. Put the mandatory in there and tell them if they don't want to talk to us today, they'll have to talk to us tomorrow....I'm saying we should put the law in there, put in the automatic transfer to adult court if they commit crimes. Hey, they committed a crime."50

Another example is the hope for a strengthening of the rehabilitative aspects of the YOA:

"First, we understand the causality of crime. We understand that why kids commit crime and we target that within our programs. For example, it means providing programs that take seriously the underlying causes of the

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conditions within the family, with family-therapy targeting the strident belief some young people have that there's justification in anti-social values that justify the anti-social behaviour....The guiding principles that promote the delivery of effective human service are reflected in statements that promote the importance of rehabilitation. They go beyond the accountability and responsibility provisions and actually state rehabilitation as a principle - a guidepost...It's not enough to be punishing, punitive and accountable. We need to go beyond that and treat, rehabilitate and understand."\textsuperscript{51}

Coinciding with the debates on Bill C-37 in 1994, the then Minister of Justice asked the Standing Committee on Justice and Legal Affairs to review the YOA. The report from the Standing Committee, \textit{Renewing Youth Justice}, was released in 1997. In 1998 the federal government released \textit{A Strategy for the Renewal of Youth Justice}, and on March 11, 1999 the new \textit{Youth Criminal Justice Act} was tabled.\textsuperscript{52}

Indeed, the politicians' concern about the public's and the academics' growing dissatisfaction with the YOA once again led to a change in the youth justice system and philosophy. But maybe the change was not as dramatic as the politicians claimed.

\section*{III. CONCLUSION}

\textsuperscript{51} House of Commons, Justice and Legal Affairs Debates, 20-10-1994 at 1115-1120.
\textsuperscript{52} For a further description of the reports, see Chapter 4.
Reading through the YOA makes it clear that the youth justice system has moved away from being a treatment-oriented system and a surrogate parent to becoming a youth justice system concerned with extending legal rights to young people.\(^5\)

The ideology behind the YOA is mentioned above, outlined in the Declaration of Principle in Section 3. The philosophy behind the youth justice system as described in the YOA is that of a separate system for young offenders with as little intervention from the state as possible and an ideology evoking support for a system of legal justice for young offenders equivalent to the adult justice system.

"The Young Offenders Act, as has been well established in both numerous reviews and case law, is not child-welfare legislation."\(^5\)

Rehabilitation and accountability is still important in the YOA but the rights of young persons in the criminal justice system are just as important. Consequently, the youth justice philosophy under the YOA is a cross between setting up a legal framework that protects the rights of young offenders and a focus on rehabilitation and treatment within that legal framework.

Instead of calling this section "Conclusion", I might as well have called it "The classical school of criminology revisited". Under the YOA it is emphasized that the sentencing should commensurate with the severity of the act. Focusing on the severity of the offence rather than looking at the offender is a return to the principles introduced by the classical school of criminology in the late 18\(^{th}\) century.\(^5\)

The ambiguity lies in the fact that

\(^5\) The parens-patriae doctrine is discussed in detail in Chapter 3.
\(^5\) Leschied & Jaffe, "Dispositions as indicators of conflicting social purposes under the JDA and YOA" in Leschied, Jaffe & Willis, supra note 29 at 160.
\(^5\) See for further information Chapter 3.
rehabilitation, reminiscent of the positivist school of criminology, is still one of the guiding principles under the YOA.

The YOA has constituted some significant changes in youth justice philosophy in the 1980s, as has been stated by several academics. But the changes were a result of a 20-year political and philosophical process leading to the YOA.

I agree with the criticism, which states that, because of this long process, the YOA represents a compromise between a variety of contradictory philosophies and ideologies, and that the Declaration of Principle, describing the leading principles, embodies too many possible interpretations. The Canadian youth justice system has moved much closer to the adversarial adult justice system with the YOA.

The critique of the YOA is two-fold: academic and public. The ambivalence between the two perceptions of an ideal youth justice system is quite clear as described in Section II. This discrepancy could be one of the reasons why the YOA has not been able to work in practice. The Act was criticized right after it was enacted and the YOA has been subject of ongoing debate since then.

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56 See generally Bolton, et al., supra note 47 at 939.
In *A Strategy for the Renewal of Youth Justice* the description of the YOA is delineated as follows:

The Young Offenders Act blended four fundamental principles: that young people must assume responsibility for their illegal behaviour; that society has a right to be protected from illegal behaviour; that if young people are held responsible for their criminal acts, they are entitled to traditional rights and some additional protections; and that young people, because they are not fully grown or mature, have special needs and should not be held accountable in the same manner or to the same extent as adults.\(^57\)

Despite the support of the implementation of the YOA by the federal government entering into cost-sharing agreements with the provinces and territories, the YOA has not been a success. The Minister of Justice noted in the beginning of the 1990s that "the Act was too controversial and that questions had been raised about whether it remained the best model for juvenile justice in Canada."\(^58\)

An extensive review of the Act has led to *A Strategy for the Renewal of Youth Justice* and a new *Youth Criminal Justice Act*.

What is the background of the YOA?

In Chapter 3, I will delineate the background of the YOA and the chapter will contain a detailed description of the various factors leading to the YOA, including socio-economic

\(^{57}\) *A Strategy for the Renewal of Youth Justice*, supra note 2 at 5.

\(^{58}\) Ibid. at 7.
changes, political changes, intellectual changes and legal changes of the 19th century and the early 20th century.
CHAPTER 3

THE HISTORICAL EVOLUTION OF YOUTH JUSTICE

"It is wiser and less expensive to save children than to punish criminals"
W.L. Scott, 1908

In this chapter I will delineate the historical development of Canadian youth justice. The aim is to outline the underlying values/objectives in the developing process of youth justice in order to understand the current regulatory framework. In Section I, I will describe the early developments in youth justice legislation and the rise of juvenile justice based on welfare philosophy in the late 19th century. The concern for children and their welfare formed the basis of the Juvenile Delinquents Act. In this section, I will also describe the dramatic changes in society, and the decline of the classicist approach to crime. In Section II, I will focus on the developing process of the JDA, including a description of the theoretical structure of the objectives of the legislation. Furthermore, I will delineate the intellectual and social changes in society that lay the foundations of

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59 The Canadian Law Times (1908) 28 at 892
60 Juvenile Delinquents Act, S.C., c. 40 [hereinafter the JDA]
early 20th century youth justice, including youth courts, the child saving movement and the *parens patriae* doctrine.

I. THE RISE OF YOUTH JUSTICE IN THE 19th CENTURY

A. The Legislation

A.1. The Historical Status of Youth in Canada

The young offender's legal status in the 19th century must be considered in a social, political and intellectual context.61 The historical aspects of Canadian youth delinquency legislation demonstrate that concern for children and youth was apparent in early legislative measures.62 "Concern for child welfare in Canada did not originate with the late nineteenth century reformers' 'discovery' of urban social problems. The family as a unit for the socialization of children had been long supplemented by state efforts."63

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61 For a historical background on the conceptual and legislative development of Canadian youth justice, see Jeffrey S. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15 Osgoode Hall L.J. at 71-106. Compare Gordon West, supra note 13 for a theoretic and socio-historical background.

62 Leon, ibid. at 75.

63 Ibid.

64 1799, 39 Geo. III, c. 3, s. 1 (Can.).
persons as may be killed in His Majesty's Services, and An Act to make remedy in cases of seduction more effectual, and to render the Fathers of illegitimate Children liable for their support: These are only an extract of the legislation concerning children without parents, in particular those without fathers. The early development of legislation therefore clearly reveals the status of the child; legally as well as socially.

The acts dealt with neglected children or youth in different situations. Although children's rights had so far been considered relatively unimportant, the 19th century legislation displays a growing concern for children and youth. A combination of political, intellectual and social enterprises was conducive to the emergence of the welfare philosophy, and consequently, youth justice philosophy. Until the 19th century, north-American children who violated the Criminal Code had been treated like adults and processed through same courts and prisons.

The concern for children without parents, and more specifically, without fathers, was also extended to children with 'inadequate' parents. Dr. Charles Duncombe, an early advocate of prison reform in Canada, was distressed by the number of Toronto children in 1836 with a "ragged and uncleanly appearance", using "vile language", and displaying "idle and miserable habits". Their misbehavior was due to a lack of control, with the blame being placed on their parents, who were "too poor, or too degenerate to provide them with clothing fit for them to be seen in

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65 1813, 53 Geo. III, c. 4 (Can.).
66 1837, 7 Wm. IV, c. 8 (Can.).
68 Frederic L. Faust & Paul J. Brantingham, eds., Juvenile Justice Philosophy: Readings, Cases and Comments (St. Paul, Minn.: West Publishing Co., 1974) at 36. The authors state that social, political and economic conditions forced (encouraged) public policymakers to support significant changes in the legal codes. See also infra at 51.
school; and know not where to place them in order that they may find employment, or better be cared for...”

Therefore, social problems with respect to family and youth existed before the Industrial Revolution was in actual progress. The citation mentioned above also reveals that concern and welfare philosophy regarding young people evolved during the 19th century:

The early legislation was concerned with a young person's legal status in a social context, for example, legislation concerned with orphanage to legislation concerned with the hiring of juveniles in factories. The legislation mixed the perceived need for the protection of others from children with the perceived need for the protection of children from themselves or others.

The legislation which succeeded the previous state efforts in dealing with young people in the society was therefore concerned with the focus on control of the family, and especially dysfunctional families, where the neglect of children could be a possibility. "The question was not whether a child would be held accountable for his or her behavior - criminal or otherwise - but rather how to treat the child in order to effect adequate socialization before the child became a 'convicted criminal'." Reading through the 19th century legislation makes it obvious that the state was assumed to have responsibility for the juveniles when the family as a social unit failed to assume it.

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70 Leon, supra note 63 at 75ff, with citations from L. Johnson, History of the County of Ontario, 1615-1875 (Whitby, Ont.: Corporation of the County of Whitby, 1973) at 158.
71 Ontario Factories Act (1884), 47 Vict., c. 39.
72 Leon, supra note 70 ibid.
73 Ibid.
74 Parker, supra note 67 at 747.
Volunteer organizations and individuals were intensely concerned about juvenile problems in the increasingly industrialized society. The paramount goals were to improve youth welfare and to control youth behavior.\textsuperscript{75}

It was not until 1857 that two statutes relating to the treatment of young offenders convicted of criminal offences were enacted in Canada: \textit{An Act for Establishing Prisons for Young Offenders}\textsuperscript{76} and \textit{An Act for the more Speedy Trial and Punishment of Young Offenders}.\textsuperscript{77}

The first statute formed the basis of the construction of "youth prisons" to which young offenders could be sent in order to "be detained and corrected, and receive such instruction and be subject to such discipline, as shall appear most conducive to their reformation and the repression of crime."\textsuperscript{78} The latter statute was concerned with the sentencing process in the context of the young offender. The act provided an opportunity for special summary trial procedures.

These statutes demonstrate that the state intended to evolve social reform efforts in response to young offenders. The protection of children and juveniles took the pride of

\textsuperscript{75} See e.g. \textit{An Act to Amend the Law Relating to Apprentices and Minors, 1851, 14 & 15 Vict., c. 11 (Can.)} and \textit{An Act to Incorporate the Boy's Industrial School of the Gore Toronto, 1862, 25 Vict., c. 82 (Can.).}
\textsuperscript{76} \textit{An Act for Establishing Prisons for Young Offenders, for the Better Government of Public Asylums, Hospitals and Prisons, and for the Better Construction of Common Gaols, 1857, 20 Vict., c. 28 (Can.)}
\textsuperscript{77} \textit{1857, 20 Vict., c. 29 (Can.).}
\textsuperscript{78} See supra note 76, the preamble.
place in legislation that "intended to improve child welfare and the control of juvenile behavior."\textsuperscript{79}

Many of the efforts to control young offenders' behavior were treatment-oriented responses and were seen as preventive measures. An example is \textit{An Act respecting Industrial Schools}\textsuperscript{80}, which accepted industrial schools as a residence for troubled youth as an alternative to the reformatory. As Leon concludes: "These developments provided for the background for the eventual enactment of juvenile delinquency legislation in Canada."\textsuperscript{81} The industrial school and other preventive measures could be viewed as a supplement to the family which could not function adequately as a social unit.\textsuperscript{82}

In 1891, the Commission of Inquiry into the Prison and Reformatory System of Ontario finished its report, \textit{Report of the Commissioners Appointed to Enquire into the Reformatory System of Ontario}.\textsuperscript{83} So far, the legal status of young offenders was defined in two statutes from 1857, and these related only to the sentencing process. New recommendations, however, became a reality with the 1891 report. The Commissioners recommended, for example, that no child should be arrested and taken through a public street; that if the offence was trivial, a summons be issued to the parents to produce the child in court; and that if the offence was serious, the child be detained separately from adult offenders. Also, industrial schools should be favored over reformatories.\textsuperscript{84}

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\textsuperscript{79} Leon, supra note 73 at 77.
\textsuperscript{80} 1874, 37 Vict., c. 29 (Ont.).
\textsuperscript{81} Leon, supra note 79 ibid.
\textsuperscript{82} As described in T. Morrison, "Reform as Social Tracking: The Case of Industrial Education in Ontario, 1870-1900" (1974) 8 J. of Ed. Thought at 88.
\textsuperscript{83} (Toronto: Warwick, 1891). As cited in Leon, supra note 81 at 84.
\textsuperscript{84} Ibid.
\end{flushleft}
In 1894, the first separate treatment of young offenders became a reality at the federal level with *An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*. The act dealt explicitly with young offenders. The act ensured a separate treatment of young offenders under the age of 16 years involved in the criminal process; once convicted, the young offender would be kept in custody separate from adult offenders. Thereby, the 1894 act re-enacted Section 550 of the then Criminal Code. With the enactment of the 1894-act, the change in the status of young offenders' rights had been ensured both legally and socially through legislation.

In conclusion; the development in 19th century legislation in the context of young offenders was based on a 'welfare' model. The concern for children/young people and their behavior made it clear that it was not so much a question of the young offender's accountability for his or her behavior as it was a question about how to treat, control and rehabilitate this offender. The 'welfare'-model placed a high value on these structures and solutions to crime-control rather than actual punishment.

A.2. Summary

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86 S. C. 1892, c. 29. 
As described in the previous section, legislation concerned with children and young offenders emerged in the 19th century. The legislation clearly established the status of children and young offenders in a social and criminal justice context, respectively.

The social work profession also emerged in the 19th century and legislation in the context of young offenders from that time particularly represents this profession's view on youth justice matters. As Leon states: "Thus, at the close of the nineteenth century, a comprehensive base of legislation had been secured as authorization for child saving ventures."88

Therefore, in order to understand the underlying values of the 19th century legislation, a doctrinal analysis is not sufficient. An examination of the socio-economic situation in the 19th century is necessary in order to provide us with an understanding of the development of youth justice philosophy.

**B. The Socio-Economic Situation in the 19th Century**

In Section B, I will delineate the dramatic changes in society that lead to the movement of social reforms concerned with the neglect of children. This movement soon became a part of a larger child saving movement. The emergence of the child saving movement is seen as the most important contributor to the development of youth justice legislation and youth justice philosophy in late 19th century and early 20th century. The breeding ground of this movement was urban disenchantment.
B.1. Urban Disenchantment and Socio-Economic Changes.

Throughout the 19th century the Industrial Revolution caused incredible growth of cities and an increase in the urban population. The wake of the industrial revolution combined with urbanization gave rise to socio-economic changes in the society. Apart from bringing with it material wellbeing for certain citizens, the industrial revolution also brought economic instability for those who were not able to maintain a secure position in the work force.

For children it was even worse: they were exploited as a cheap labor force, and this provided a breeding ground for crime and non-controllable behavior. The conditions of family life changed in line with the technological revolution - it caused a breakdown of the family as an economic unit. Every family member became dependent on his or her own skills.

In this context it is important to compare the growing discontent which was the result of urbanization to the consequences of the breakdown of the family unit. From my perspective, the breakdown of the family stemmed from the industrial and political unrest. To use an economic phrase; the breakdown in micro-cosmos was caused by unrest in the macro-cosmos.

88 Leon, supra note 84 at 91, and for further information Parker, supra note 74 at 744.
90 West, supra note 61 at 5.
So, even though the industrial revolution increased economic and financial wellbeing, it also brought with it "tenement slums, the city streets as playgrounds and the "dark satanic mills" of a manufacturing society replacing the uncomplicated and self-sufficient rural environment."  

Corporate reformers tried to "readjust institutions to conform to the requirements of the emerging system of corporate capitalism." These reformers were also aware that there was

a necessity for far-reaching economic, political and social reforms. It was their intention to oppose traditional laissez-faire business practices, increase the role of the state in economic regulation, and develop a new political economy characterized by long-range planning and bureaucratic routine.

The need for reform was also partly based on the fact that 75,000 homeless British young people arrived in Canada during the late 1800s, which exacerbated the problem with the Canadian urban youth.

Thus far, problems with youth had been recognized and were considered to be huge, as youth living in urban communities in late 19th century were confronted with a very

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91 See generally Parker, supra note 88 ibid.
92 Ibid.
93 Platt, supra note 89 at xix.
95 West, supra note 90 at 5.
complex; industrial way of life. But actual reforms did not progress until late 19th century, as described in Section A.1.

"To some social reformers, children were the innocent victims of culture conflict and the technological revolution." Described in another way:

If it is environment in childhood that counts in the making of criminals, the true and only way to cope with crime is to improve the environment, and when that cannot be accomplished, to remove the children to better surroundings.

It was the general assumption among politicians and social reformers that youth living in the city were very much in need of guidance from parents and the educational system in order to survive as non-criminal subjects in the cities.

It became more and more evident that most parents could not provide sufficient guidance for their children. Families that were low in the feudalistic hierarchy experienced that problem. At least, that was the explanation given by the social reformers.

Not only were social reforms in the context of young offenders needed, but intellectual and political reforms were also at a premium. These reforms became a part of a movement called the child saving movement. This movement did for youth justice what

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96 Platt, supra note 94, ibid.
97 Ibid.
98 Scott, supra note 59 at 894.
corporate leaders did for the economy in the late 19th century. The child savers tried to gain social control of troubled youth, as Section B.2. will describe.

B.2. The Rise of the Child saving Movement

The fundamental transformation in economic and political structures also caused a transformation of the family unit and the life of the individual. And one of the products of the modernization/ transformation was the troubled youth.

As described in Section B.1., urban disenchantment lead to political and economic reforms. But social reforms were needed to control the troubled youth who had become more and more visible in the cities. The young people were the victims of "the age of transition", because "mankind [had] outgrown old institutions and old doctrines and have not yet acquired new ones."99

New movements in the cities dedicated themselves to saving or rescuing children from the horrible and frightening urban life. The social workers assumed that aspects of life in the urbanized society were "undesirable" and harmful for children.

Children acquire a perverted taste for city life and crowded streets; but if introduced when young to country life, care of animals and plants, and rural pleasures, they are likely to

enjoy these, and to be healthier in mind and body for such associations.  

The child savers wanted to control juvenile misbehavior and prevent future criminal behavior. This movement was growing in response to both the disturbing expansion in juvenile crime and the hard treatment of young people in the reformatories. "Seen in this way, the impulse to "save" children came hand-in-hand with the impulse to protect society, because those children who were not properly socialized could later grow up to be dangerous criminals."  

Thus, the child savers wanted a social safety net that could adequately protect the young people, who were either neglected by their parents or influenced by the "evils" of urban life. As described by Platt, there were many different opinions about the causes of youth crime, but it was generally agreed that biological and environmental forces influenced young offenders.  

Consequently, young offenders had to be reached and controlled, because "[t]hey are born to crime, brought up for it. They must be saved."  

The legislation mentioned in Section A.1. can be viewed as a result of the child savers' attempt to socially control the troubled youth. In their attempts to control the young  

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101 Bolton, et al., supra note 56 at 954.  
102 Platt, supra note 100 at 124
people, the child savers did not distinguish between neglect and delinquency but recognized them as being of the same class. Both neglect and delinquency should be dealt with in a way which serves the children’s best interests. The goal was an improvement of child welfare and control of juvenile behavior.

There was a strong belief among the social reformers/child savers that active intervention in family life was a necessity in order to prevent criminal behavior; especially if the family was dysfunctional. This control of poverty and family life that can be seen in early legislation in the 19th century can therefore be traced to the growing public concern about:

1) The treatment that children were receiving under the Criminal Code; and
2) An increasing awareness of the perceived threat that city slum-life posed to the preservation of middle-class, rural North-American values.\(^\text{104}\)

According to A. Platt, the problem of the later justification of the control of youth started with the enterprising reforms of the child savers, who created judicial and correctional institutions for the labeling, processing, and management of "troublesome" youth. Child savers saw themselves as altruists and humanitarians committed to rescuing children less fortunately placed in the social order.\(^\text{105}\)

Who were the child savers?

\(^{104}\) Faust & Brantingham, supra note 100 at 36.
\(^{105}\) Platt, supra note 97 at 3, and also Rogers & Mays, supra note 10 at 19.
Scholars have considered the child saving movement to be essentially composed of middle-class citizens attempting to impose middle-class values on lower-class groups.\textsuperscript{106}

Because of the industrial revolution, "[t]he middle class had to operate in a social milieu which had never existed before; they were directly responsible for child-rearing and felt the pressure to maintain a social position and material comforts for the family."\textsuperscript{107}

The first child savers can therefore be recognized as 19\textsuperscript{th} century middle class citizens who wanted to maintain a feudalistic society and the traditional values that were familiar to them.\textsuperscript{108} As the child saving movement spread during the 19\textsuperscript{th} century, it tried to gain political influence on youth justice matters. It was argued by some child savers that criminal behavior depended as much upon social experiences and economic circumstances as it did upon the inheritance of biological traits.\textsuperscript{109}

Consequently, the child savers saw themselves as 'crusaders', saving children from these perceived facts by intervening the children's lives. According to the child savers, the state had to assume responsibility where the private individual failed.\textsuperscript{110}

This idea has been rationalized in the notion that the child and his parents entered into a social contract with the state.

\textsuperscript{106} Platt, ibid. See generally Parker, supra note 92.
\textsuperscript{107} Parker, ibid.
\textsuperscript{108} Douglas Rendleman, "Parens Patriae: From Chancery to the Juvenile Court" in Faust & Brantingham, supra note 104 at 73ff.
\textsuperscript{109} Platt, supra note 106 at 35.
\textsuperscript{110} Ibid.
which undertook to protect and foster a child who had become a victim of the industrialized society in which he lived. Closely related was the idea that society had to be protected against the undesirable forces, which could destroy it.¹¹¹

Middle class citizens might have been the forerunners of child saving but, especially during the latter two decades of the 19ᵗʰ century, the movement expanded.

Another major influence on youth justice philosophy was the emergence of philanthropic societies. 'Philanthropy' referred to the concept of social sympathy being expressed in the care of the dependent members of society - the physically, mentally and morally defective.¹¹²

Philanthropists also saw themselves as child savers, and their methods were educational in nature. Several organizations used all their strength in working in "the best interest of the child", and these were the social, middle class reformers and the philanthropists.

Who were the philanthropists?

They were mainly "Victorian maiden ladies and clubwomen."¹¹³ The child saving movement was therefore highly influenced and mobilized by feminist reformers who, at the turn of the century experienced a complex and far-reaching status revolution.¹¹⁴

¹¹¹ Parker, supra note 107 at 747.
¹¹³ Parker, supra note 111 ibid.
¹¹⁴ Platt, supra note 110 at 77.
At the turn of the century, social work emerged as a profession and women were considered especially suited to working with young delinquents.

As described by Platt: "Philanthropic work filled a void in their own lives, a void which was created by the decline of traditional religion, increased leisure and boredom, the rise of public education and the breakdown of communal life in impersonal, crowded cities."\(^{115}\)

In all fairness, most women who pursued a career in the child saving movement were generally well educated and had access to political and financial support and were therefore extremely important to the development of youth justice philosophy.

At the end of the 19th century, society philanthropists, career women, social reformers and political groups were engaged in saving children. Among this group, certain persons achieved prominence in the Canadian child saving movement, and they would eventually take up the cause for the enactment of legislation for a specialized juvenile court with probation services. The founder of this particular group was J.J. Kelso, who in 1887 brought together prominent citizens from Toronto to organize the Toronto Humane Society - an organization with a mission: "Better laws, better methods [and] the development of the humane spirit in all the affairs of life."\(^{116}\) Kelso later became Superintendent of Neglected and Dependent Children in Ontario and many Acts

\(^{115}\) Ibid.
\(^{116}\) Leon, supra note 88 at 82.
representing institutional treatments can be traced to J.J. Kelso and his group of influential members. It was also Kelso who conducted an active campaign for separate treatment of young offenders.

**B.3. Summary**

It is evident that political changes became a reality in line with the expansion of the child saving movement.

Why did politicians support this movement?

First of all: the movement did empirical analyses of young offenders and used the statistics to advocate their ideas.\(^{117}\) Secondly; the movement consisted of well-educated people who were influential in political circles. Thirdly; politicians regarded child saving as a cause worthy of supporting. They could hardly fail to support the movement, whether it was from personal values or political aim.

The catalogue is not prioritized.

Consequently, politicians experienced the perception and pressure of a social crisis. The special interest groups were extremely skilled at manipulating the politicians. The child

\(^{117}\) Scott, supra note 98, ibid. In his article, Scott reproduces a cost-benefit analysis on immigrant issues and young criminals.
savers would use their extensive political and professional contacts to implement their reforms for the protection of society and the reformation of the young offender.\textsuperscript{118}

In conclusion, "....at the close of the nineteenth century, a comprehensive base of legislation had been secured as authorization for child saving ventures."\textsuperscript{119}

C. The Decline of the Classical School

In Section B.2, I described the social reformers' growing concern about socio-economic changes and the perceived belief that youth should be protected. In this section, I will delineate a possible response to the changes in society that were developing within a revolution in the criminological environment.\textsuperscript{120}

C.1. Classical School Contributions: Cesare Beccaria (1738-1794)

In the 19\textsuperscript{th} century, the classical school dominated criminology. The classical school was representative of the metaphysical stage in the development of criminology as it attempted to produce a correspondingly abstract equation between crime and punishment with its abstract notions of crime.\textsuperscript{121}

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\textsuperscript{118} Ray Jeffery, "Theoretical Structure of Crime Control" in Faust & Brantingham, supra note 108 at 9ff.
\textsuperscript{119} Leon, supra note 116 at 91.
\textsuperscript{120} See for further information about the positive school of criminology, infra at 55.
\textsuperscript{121} See generally Hermann Mannheim, \textit{Pioneers in Criminology}, 2\textsuperscript{nd} ed., (Montclair: Patterson Schmith, 1973) at 36ff. Platt, supra note 115 at 15, and compare to Jeffery, supra note 118 at 68.
\end{flushright}
An essay called *On Crimes and Punishments*\textsuperscript{122} from 1764 by Cesare Beccaria triggered the classical school. Beccaria later became known as the 'creator' of the classical approach towards crime, which was formulated in his essay.\textsuperscript{123}

Due to the existing criminal laws, which were, in general, repressive, uncertain and barbaric, Beccaria advocated in his essay a substitute for the confusing, uncertain and inhuman practices inherent in the criminal law. Beccaria's social contract theory of the state phase is an essential part of the classicist thinking:

Laws are the conditions whereby free and independent men unite to form society. Weary of living in a state of war, and of enjoying a freedom rendered useless by the uncertainty of its perpetuation, men willingly sacrifice a part of this freedom in order to enjoy that, which is left in security and tranquillity. The sum of all of the portions of the freedom surrendered by each individual constitutes the sovereignty of a nation, deposited in and to be administrated by a legitimate sovereign. It was not, however, alone sufficient to create this depository of freedom, it was also essential to defend this sovereignty from private usurpation of every man who would want not only that portion of the sovereignty that he individually had contributed but also which had been contributed by all others. It is because of this that punishments were established to deal with those who transgress against the law.\textsuperscript{124}

According to the classicists, the basis for punishment is the necessity to restrain citizens from breaking the social contract. The classicists assumed that men are self-seeking by nature and motivated to gain all that they can from one another. It was therefore

\textsuperscript{122} (Indianapolis: Bobbs-Merril, 1963)
\textsuperscript{123} Mannheim, supra note 121 ibid.
important to find a method of dealing with those who deliberately did not accept the boundaries of society. To classicists, the basis or the purpose of punishment was to ensure the continued existence of society.  

The classicists also introduced the principle of proportionality between the seriousness of offences and the punishment imposed for these offences. Proportionality ensures that punishment is not about tormenting offenders but rather about preventing offenders from doing further harm to society. Predictable, clear, precise, and consistent laws are needed in order to deter an offender. Therefore, the laws of society must apply equally to all members of society regardless of their status since they all are considered to be equal contractors.

In order to avoid arbitrary decisions, the laws had to be written in a clear language for people to better understand them.

The classical school, with contributors such as Beccaria and Bentham, made criminology a part of moral philosophy. Reading Beccaria's famous essay, it becomes evident that laws should be a means of social control and protection of the rights of the individual against the state. The classicists thereby raised all people, including non-law-abiding citizens, to the level of self-determining individuals. "As such, persons were..."
expected to act on the basis of reason and intelligence and, thus, to be held fully and personally responsible for their behavior."\textsuperscript{128}

Classicists approached crime with the assumption that human beings were "rational" and that as such they decided to break the social contract and thereby disturb the society. Because of the precise and predictable laws, \textit{everyone} could decide for himself or herself whether they dared challenge the social order.

"Children, the mentally retarded, and even the insane were indistinguishable before the strict rule of classical law."\textsuperscript{129}

\textbf{C.2. The Intellectual Revolution - Positive Criminology}

In the last quarter of the 19\textsuperscript{th} century, a new movement within criminology emerged. Theorists like Lambroso, Ferri and Garifalo founded The Italian School of Criminology; known as the positivist school of criminology.

Due to socio-economic changes in the 19\textsuperscript{th} century, the criminal justice system had proven not to be efficient. Crime still existed and it was abundantly clear that young people in particular were affected by the "harsh" criminal justice system.

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\textsuperscript{128} Rogers \& Mays, supra note 105 at 71.
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\textsuperscript{129} Ibid.
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The positivists rejected the classical school's explanation that human beings had a free will and as logical consequence of this human beings were free to decide to become criminals. As noted by Mannheim, it is difficult to make an exact definition of "positivism", because several branches of the term states that "[p]ositivism, which, though closely interrelated, are by no means identical." Some of the elements of positivism are: a clear-cut divorce of science and law from morals; a proclamation of the priority of science and existence of invariable social laws; and an interest in civilizations, social laws, stages and types, which shows that positivism is apt to neglect the study of the individual.

The positivists supported a doctrine of determinism, meaning that delinquent behavior could be determined by forces outside the individual's own control. "If criminal behavior was determined by knowable biological or psychological or social conditions, those conditions could be identified and changed, at least at the individual level. When the determining conditions changed, the criminal behavior would abate." To the positivists, crime and delinquency were to be understood as a disease, which could be treated and hopefully cured.

The positivists applied their mind to more propitious and treatment-oriented responses to the behavior of offenders, and of young offenders in particular, in accordance with their beliefs.

130 Mannheim, supra note 125 at 10ff.
131 Ibid.
"The positivist believed in the rule of men, not the rule of law,"133, and "made criminology a part of biology, psychology, psychiatry, and sociology."134

C.3. Summary

In the late 19th century, the social reformers known as child savers realized that the rise of positivism in criminology could provide them with solutions to their concerns about young offenders. The welfare philosophy was constructed largely on the concepts of positivism. In this way, the child savers could both protect the society and reform the young offender. The positivist school largely replaced the classical school and positive criminology contributed the following elements to youth justice:

1. A concept of criminal and troublesome behavior determined by a complex of biological and social causes.
2. The medical analogy of diagnosis and treatment.
3. The idea that all troubled people suffered from basically similar maladies; and
4. the belief in the need for active intervention in people's lives to prevent misbehavior before it occurred.135

Table 2 describes the differences between the classical and positivist approaches to crime control.136

132 Faust & Brantingham, supra note 118 at 3.
133 Ibid.
134 Ibid.
135 Ibid., at 4.
136 Table 2 in C. Ray Jeffery, Crime Prevention through Environmental Design, (Beverly Hills, Calif.: Sage Publications, 1971) at 33.
D. Conclusion

In this section, I have outlined the basis of the developing process of youth justice in the 19\textsuperscript{th} century. Through 19\textsuperscript{th} century legislation, one will be able to understand that conflicting interests were dueling during the social, economic, political and intellectual changes. The thorough examination of these interests will provide the foundation for Section II, which will outline the raison d'\'etre and birth of the Juvenile Delinquents Act.\textsuperscript{137}

Ultimately, welfare philosophy, concern for young offenders and positivism proved highly influential in the drafting of legislation and youth justice philosophy.

\textsuperscript{137} The JDA, supra note 60.
II. THE JDA - PRINCIPLES AND THEORY

The question is not, "What has this child done?"
But, "How can this child be saved?"
W.L. Scott, 1908

A. Early 20th Century Youth Justice

The first legislation in Canada that provided for the establishment of youth courts and a mandatory sentencing to special rehabilitation homes for young offenders was a reality with the Juvenile Delinquents Act.\(^{138}\)

In section II, I will expound the principles and theory behind this unique legislation. It will become clear that the child saving movement had a tremendous influence and impact on the JDA. It is also worth noticing the similarities between the JDA and the new *Youth Criminal Justice Act*.\(^{139}\)

A.1. The Legislation

As stated earlier, the child savers had an enormous impact on legislation prepared at the close of the 19th century. The different branches of the child saving movement were

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\(^{138}\) See generally Penny J. Jones, supra note 14 at 11.
\(^{139}\) Bill C-68, First Presentation. See supra note 1 and Chapter 5.
busy advocating their stance that children were not responsible for their acts and that they should be treated or rehabilitated rather than punished.¹⁴⁰

Social and behavioral sciences assisted progress of the movement. From the turn of the century until the new federal legislation was enacted in 1908, the child savers formed a powerful lobby that attracted many politicians. There was also strong support among the public in general. Consequently, one could argue that a powerful lobby actually prepared the way for youth justice in Canada. The essence of the 1908-legislation is described as follows:

The juvenile court was given exclusive jurisdiction in cases of delinquency, subject to discretion to transfer certain cases to the ordinary courts. Trials were to be conducted summarily, separately, and without publicity, with notification of the hearing going to a parent, guardian, or near relative of the child and to the probation officer.¹⁴¹

In drafting the JDA,

[the reformers undertook the delicate task of attempting to design new procedures which promoted simultaneously the welfare and best interest of the children through a philosophical approach similar to that of the parens patriae doctrine and prevented and controlled the misbehavior of children in a criminal law context.¹⁴²

¹⁴⁰ See Ira M. Schwartz, "The Death of the Parens Patriae Model", in Leschied, Jaffe & Willis, supra note 54 at 146.
¹⁴¹ Leon, supra note 119 at 100.
¹⁴² Ibid., at 72.
The principles of the legislation are clearly stated in the different sections of the JDA. These explain the characteristics of early 20th century youth justice. The objectives of treatment and rehabilitation are apparent in the preamble of the JDA:

Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts...

The separate treatment and the rehabilitative aspect are quite clear. W.L. Scott describes the reform in youth justice philosophy as follows: "The reform which the Act seeks to introduce is marked not alone by a change of procedure or the adoption of new methods, but most of all by the introduction of a new spirit and a new aim." 143

Instead of punishment and repression, the attitude of the youth court was "benignant, paternal, salvatory, and for these reasons more efficiently corrective." 144

Section 31 is the keystone of the JDA:

This Act should be liberally construed to the end that its purpose may be carried out, to wit: 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 a criminal but as a misdireccted and misguided child, and one needing aid, encouragement, help and assistance.

143 Scott, supra note 117 at 894.
Thereby, the JDA conceptualized the youths court's role as that of a surrogate parent.\textsuperscript{145}

The state had a right to intervene in families lives, because "[t]he state, too, has a rights and ought not to stand idly by while children are trained, either by evil example or by neglect, to disobey her laws."\textsuperscript{146}

The legislators adopted the \textit{parens patriae} concept, which determined the spirit of the youth court should always be "that of a wise and kind, though firm and stern father."\textsuperscript{147}

Intervention in the life of the young offenders and the family was considered to be a necessity if the young offender were to be rescued and saved. Consequently, the result was an informal and discretionary system, as Section 14 of the JDA provided that at the trial of a child the proceedings should be as informal as the circumstances permitted.

The youth court was given exclusive jurisdiction in cases of juvenile delinquency\textsuperscript{148}, and all trial were summary.\textsuperscript{149}

The JDA applied to any boy or girl apparently or actually under the age of 16 years.\textsuperscript{150} The legislation did not provide for any specific right of appeal of a transfer hearing.\textsuperscript{151} A transfer to adult court was possible in extraordinary circumstances if the good of the

\textsuperscript{144} Ibid.
\textsuperscript{145} Bolton, et al., supra note 126 at 946.
\textsuperscript{146} Scott, supra note 144 at 894.
\textsuperscript{147} Ibid.
\textsuperscript{148} The JDA, supra note 137, S. 4.
\textsuperscript{149} Ibid., S. 5.
\textsuperscript{150} Ibid. S. 2.
child and the interest of the community demanded it.\textsuperscript{152} Names of the delinquents must not to be published in the press.\textsuperscript{153} A child was a young offender or delinquent when he or she violated any provision of the Criminal Code or any Dominion or Provincial statute, or any by-law or ordinance of any municipality for which violation punishment by fine or imprisonment could be awarded.\textsuperscript{154}

Section 29 is very important in the context of the new \textit{Youth Criminal Justice Act}. Adults could be held responsible for their children's delinquency by a fine or by imprisonment not exceeding one year. The youth court had jurisdiction, and parents could be put on probation like their children. "But if juvenile crime is to be stopped, adult contribution thereto should be put down with a firm hand."\textsuperscript{155}

It is also important to mention that nowhere in the JDA were children's rights mentioned. This would later on become a target for major criticism.\textsuperscript{156}

\subsection*{A.2. Summary}

In drafting the JDA, legislators combined the perceived need for protecting the society and the perceived need for saving, rehabilitating and treating young offenders. The legislation was based on late 19\textsuperscript{th} century welfare philosophy and positivist criminology,

\textsuperscript{151} Ibid., S. 7.
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid., S. 10.
\textsuperscript{154} Ibid., S.2.
\textsuperscript{155} Scott, supra note 147 at 903.
\textsuperscript{156} See L. Beaulieu, "A Comparison of Judicial Roles under the JDA and the YOA" in Leschied, Jaffé & Willis, supra note 140 at 131-135.
and gave judges in youth court much discretionary power to convict young offenders and a mandatory sentencing to rehabilitative homes.\textsuperscript{157}

The underlying philosophy of the JDA was that of the child savers, and the philosophy of child welfare was reflected in the informality that marked the JDA, which had overlap with child welfare legislation. That was given explicit form in Sections 21 (1) and 39 of the JDA. These sections incorporated directly "the provincial statutes governing the child welfare system."\textsuperscript{158} Therefore, young offender cases could be dealt with under the child welfare legislation governed by the provincial government rather than under the criminal justice system.

"Thus it is apparent that the very provisions of the JDA placed the juvenile justice system in a rather complex jurisdictional environment where the shared and concurrent powers of the federal and provincial governments in the area of criminal justice and the exclusive provincial jurisdiction for welfare overlapped."\textsuperscript{159}

The provinces and the child savers had a strong interest in the reform of the youth criminal justice system. Thus, the child savers are responsible not only for the development of the youth justice system but also for the child welfare system and the child welfare legislation.

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\textsuperscript{157} The JDA, supra note 154 at S. 11 & 12.
\textsuperscript{158} Jim Coflin, "The Federal Government's Role in Implementing the Young Offenders Act", in Hudson, Hornick & Burrows, eds., \textit{Justice and the Young Offender in Canada}, (Toronto: Wall & Thompson, 1988) at 38.
\end{flushright}
"If it is environment in childhood that counts in the making of criminals, the true and only way to cope with crime is to improve the environment, when it is capable of improvement, and when that cannot be accomplished, to remove the children to better surroundings."\textsuperscript{160}

B. The Socio-Economic Situation in Early 20\textsuperscript{th} Century

B.1. The Opposition

In the early 20\textsuperscript{th} century different opposition groups rallied to oppose the draft of the JDA. Two particular groups can be discovered:

1. A group that was concerned with the neglect of the rights of children; and
2. a group that argued that the JDA was too lenient on youth crime.\textsuperscript{161}

The first group defended the rights of young offenders, arguing that children should be provided with the same rights as adults, such as the right to counsel, and so forth. The group questioned the informal procedures of the trial and the judges' discretionary power. The latter group consisted mainly of people working with children, such as police officers and magistrates.\textsuperscript{162} With the drafting of the JDA, the members of the

\textsuperscript{159} Ibid. at 39.
\textsuperscript{160} Scott, supra note 155 ibid.
\textsuperscript{161} Leon, supra note 142 at 95.
\textsuperscript{162} Ibid.
group mentioned above were concerned that their work of saving children would be "in jeopardy." 163

The debate between this group and the powerful lobby, that J.J. Kelso administrated, was often heated.

But with the overwhelming acceptance of the proposal of the JDA in the House of Commons and the Senate, the two opposing groups did not have success with their campaign against the JDA. It was not until the 1960s that "Children's Rights" movements gained ground with the neo-classicist approach to youth crime.

B.2. The Continuation of the Child saving Movement

The establishment of the child saving movement in the 19th century continued to be an influential rallying point for social workers, social reformers, women, and business-leaders. A characteristic of the movement in the 20th century would be the growing number of influential women. From late 19th century, it had been evident that child saving was an appropriate forum for women. 164

With the JDA women became even more influential, as they often acted as probation officers. 165 "The question of the sex of the probation officer is an open one. The

163 Ibid.
164 See Platt, supra note 121 at 76.
165 See Scott, supra note 160 at 894-896 where the probation officers duties are described as before trial, at trial, and after trial. Probation was one of the most valuable additions to the youth justice philosophy.
feminine gender is used here because experience has shown hitherto that women, intended by nature for motherhood, are better fitted for the work than men."\textsuperscript{166}

C. The Rise of the Positive School

Positivist principles had proven influential in the drafting of the JDA\textsuperscript{167}, and it continued to be influential in the later 20\textsuperscript{th} century.

As stated by Bolton, "[b]y the 1950s, the whole field of corrections was dominated by behaviorists studying treatment and rehabilitation."\textsuperscript{168} The rise of the positive school of criminology had proven to be a long-lasting acquaintance.

D. Conclusion

In Graham Parker's 1967 article\textsuperscript{169}, he delineates some historical observations of the rise of youth justice in the late 19\textsuperscript{th} century. He calls the 20\textsuperscript{th} century "the century of the child" and quotes from Ellen Key's \textit{The Century of the Child},

\textsuperscript{166} Ibid.
\textsuperscript{167} Bolton, et al., supra note 145 at 946.
\textsuperscript{168} Ibid.
\textsuperscript{169} Parker, supra note 113 ibid.
The next century will be the century of the child, just as this has been the woman's century. When the child gets his rights, morality will be perfected. Then every man will know that he is bound to the life which he has produced with other bonds, than those imposed by society and the laws. You understand that man cannot be released from his duty as father even if he travels around the world; a kingdom can be given and taken away, but not fatherhood.¹⁷⁰

On the legal and socio-economic side, the prophecy proved correct.¹⁷¹ In the late 19th century and early 20th century children were treated as what they were; children/young people, not adults. This entailed a change in their legal and socio-economic status with the help of the positivist school of criminology. The family/fatherhood was important for the child, but "[t]he rights of parents are sacred and ought not to be lightly interfered with, but they may be forfeited by abuse."¹⁷²

The principles and the theories of the perceived need to protect children, prevent crime and protect the society became a part of the JDA.

The JDA included the following key elements:

- Juvenile courts
- Treatment rather than accountability
- Probation/personnel
- *Parens Patriae*-doctrine
- Procedural changes, with no mention of the rights of the children

¹⁷⁰ As cited in "The Lion's Whelp", (1909), at 45.
¹⁷¹ Parker, supra note 169 ibid.
¹⁷² Scott, supra note 166 at 894.
• The welfare-model: Helping to better the welfare of children and protecting society from youth crime and moral degradation.\textsuperscript{173}

Indeed, it became the century of the child.

Chapter 4 will be a description of what happened to the JDA in "the century of the child".

\textsuperscript{173} Bolton, et al., supra note 168 at 944.
CHAPTER 4

THE YOA REVISITED

I. THE ORIGINS AND PROCESS OF REFORM

In Chapter 4, Section I, I will outline the origins and process of reform that led to the YOA in 1984.

A. The Reform of the JDA

A.1. The origins

After the enactment of the JDA in 1908, the work of saving children and securing that juvenile court was created through the necessary provincial legislation. Subsequent to the JDA, only a few, technical amendments got adopted and the JDA remained substantially the same until the YOA was enacted in 1984.\(^{175}\)

Thus, the dispositions of the JDA survived for almost 75 years.

\(^{174}\) Ibid.

\(^{175}\) In 1929 a revised JDA was passed, but only minor amendments appeared.
The *parens patriae* was still the doctrine of the established youth courts and the behavioral sciences dominated the field of corrections until the 1950s. The behavioral sciences were fostered in the universities; therefore the parens patriae doctrine "remained unchallenged as the dominant correctional ideology." In 1962, the Canadian Government made a survey of juvenile delinquency. The *report* was the result of the committee's study, and this became the starting form of the changing process of reforming the youth justice philosophy. In 1970, Bill C-192 was released. The legislative response to the *report* did not last long and the re-evaluation of the reforms continued during the 1970s.

In 1981 Bill C-61 was introduced, and was passed in 1982 as the Young Offenders Act. The Bill was enacted 2 years later.

1962 was the turning point in youth justice philosophy, with the JDA on the political agenda with the *report*. With the institutionalization of criminology and behavioral sciences at the universities, "the number of studies relating to juvenile justice increased markedly." 

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176 F. T. Cullen & K. Gilbert, *Reaffirming Rehabilitation*, (Cincinnati: Anderson, 1982) at 82, where they describe the dominance of rehabilitation as a philosophy in universities and among social workers.
177 Department of Justice, Report of the Department of Justice Committee on Juvenile Delinquency, (Ottawa: Queen's Printer, 1965), as described in Parker, supra note 169 at 754. [hereinafter the *report*]
179 Bolton, et al., supra note 174 at 949.
Consequently; the new researchers started criticizing the values and the philosophy, which were the core, of youth justice. Also, politicians and academics were concerned about the lack of legal rights in the JDA and the discretionary power entrusted to the judges in youth court.\footnote{Two US Supreme Court decisions, Kent v. U.S.\footnote{383 U.S. 541 (1966) [hereinafter Kent]} and In Re Gault\footnote{387 U.S. 1 (1967) [hereinafter Gault]}, discussed on page 72 supported the concern about the lack of legal rights.}

Two US Supreme Court decisions, Kent v. U.S.\footnote{383 U.S. 541 (1966) [hereinafter Kent]} and In Re Gault\footnote{387 U.S. 1 (1967) [hereinafter Gault]}, discussed on page 72 supported the concern about the lack of legal rights.

There where 4 developments in the criticism of the JDA\footnote{Bolton, et al., supra note 179 at 950.},

1. Symbolic interactionism, "labeling theory" and development psychology. This development was scientific in origin.

2. Growth in numbers of academics and professionals who believed in children's rights.

3. Empirical research during the 1970s proved that rehabilitation was not that effective in preventing recidivism; and

4. the development of diversion.

These 4 developments were "adopted as catchwords and used with influential effect by academics and politicians alike throughout the reform process."\footnote{Ibid.} They formed the new approach to and process of youth justice philosophy.

A.2. The Process of Reform
A.2.1. The Report of the Department of Justice Committee on Juvenile Justice, 1965

In 1962, the Department of Justice set up a committee to conduct a survey of juvenile delinquency. The preparation and investigation lasted for 3 years. The conclusion was that youth courts should stay in the youth justice system; though a due process for young offenders and a greater concern for society were recommended. The death of the parens patriae model seemed to be near. The committee thereby chose the approach similar to the approach taken in the United States.

Academics protested against procedural informality in the following years, and the due process movement emerged. The forerunners in this "campaign" in Canada were academics, interest groups and policymakers who had supported the recommendations in the Canadian report.

"These due process advocates sought to implement reforms through legislative change rather than through the courts." The interest in extending legal rights to young offenders found support in the literature. Articles from the 1950s and the 1960s were concerned with the denial of legal safeguards to both young offenders and their

185 Similar committees were appointed in UK, Scotland and the States. As described in Bolton, et al., supra note 184 ibid., the recommendations on youth delinquency varied radically among the countries. But the reports were all very critical about the existing youth justice system.
186 Schwartz, supra note 140.
187 Report of the Governor's Special Study Commission on Juvenile Justice (1960), and President's Commission on Law Enforcement and Administration of Justice, Juvenile Delinquency and Youth Crime (1967).
188 Bolton, et al., supra note 185 at 959.
parents. The due process/legal rights development during the 1960s was not the only factor that made an impact on the reform process of the JDA. Socio-scientific developments also changed the view of the JDA. It stemmed from the development of "symbolic interactionism." According to this theory, cognitive development occurs as an "interplay between the active internal forces and the environment in which the individual lives." Consequently, "according to symbolic interactionists, then, concepts of self are not biologically determined but, rather, change and develop by way of an individual's relations with parents and society." Therefore, "the symbolic interactionists drew a radically different conclusion about possible solutions to the problem of delinquency than the positivists."

Treating children/young offenders as they were under the JDA may prove not to rehabilitate the offenders, but to instead deviate and stigmatize them. Labeling and stigmatizing the offender would have the effect that a young offender's self-image would be under the influence of such labeling, and that the external view of the child might be influenced. How does the community view a 'young offender'? The aspect of due process for young offenders and the aspect of the new socio-scientific theories were both emphasized in the report.

190 Bolton, et al., supra note 188 at 952.
191 Ibid.
192 Ibid.
193 Ibid.
194 Ibid. See also Francis A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal", Journal of Criminal Law, Criminology and Police Science, 50 1959-60, at 226-232, where the author states that rise
A.2.2. Changes in Court

The spirit of reform regarding the JDA was evident also in courtrooms. The procedural informality was therefore also being challenged in youth courts, and a new group of judges began to interpret the JDA from a different perspective. But it was difficult to rule in conflict with the JDA. So, in cases where JDA did not indicate otherwise, some judges followed the procedural guidelines as used in adult courts. Two decisions by the U.S. Supreme Court in the mid-1960s had an impact on the youth court in Canada: Kent and Gault. Each of these decisions emphasized the importance of a due process for young offenders being tried. They were in need of procedural safeguards and had rights like those of adult offenders.

A.2.3. Bill C-192

The Report and its results were being used in the work of drafting a new bill. It was introduced in the House of Commons in the 1970 as Bill C-192. The objectives of the bill reflected the critique from due process advocates and socio-scientific theorists. There were 3 main policy objectives:

1. Redefinition of grounds upon which young offenders could be tried in youth court
2. Modification of age group over which the youth court had jurisdiction; and

of the rehabilitative ideal under the JDA mixed the question of guilt with the issues of treatment and therapy. He states that they should be clearly distinct.
195 Beaulieu, supra note 156 at 153.
196 See supra note 181 and 182.
197 Parker, supra note 177 at 755: "In Gault, the Supreme Court decided that the child's parents must be given adequate notice of the hearing, that the child may be represented by counsel who should have the opportunity to present a case for his client with free access to court records and to cross-examine witnesses."
198 See generally Bolton, et al., supra note 194 at 961.
3. introduction of due process protections

Ad 1) Changes were made to Section 2 of the JDA, redefining 'juvenile delinquency'. The new bill narrowed offences to those contained in the Criminal Code.

Ad 2) There was a modification of the age groups over which the youth court had jurisdiction. Minimum age should be 10 years and maximum age should be raised to 17 years.

Ad 3) A procedural framework was being introduced with defined limits. The parens patriae model died slowly - the discretionary power given to judges in youth court was being limited and the intervention of the state was indeed being questioned.

It is also clear that Canadians were not ready in 1970 to accept the reforms contained in Bill C-192, and the government abandoned the Bill in response to substantial opposition from interest groups, Parliamentarians and the media. Opposition to the Bill was hardened by the general impression that the government had not consulted sufficiently with experts and interest groups in the field after the 1967 federal-provincial conference.199

A.2.4. The Renewed Process and the Canadian Charter of Rights and Freedoms

In 1975, however, the Ministry of the Solicitor General released a report called "Young Persons in Conflict with the Law"200, and this report laid the philosophical and legal foundation for the draft of the YOA. Many of the proposals mentioned in Bill C-192 were reintroduced in the new report and incorporated into the YOA. The change of

199 Ibid.
200 (Ottawa: Communication Division, 1975)
reaction was quite evident, but changes could be found in the new investigations of the in-effectiveness of rehabilitation, the rise of "diversion", and the fact that Canadians in the late 1970s and early 1980s were becoming more conservative and had made a shift in the public mood towards more control of young offenders.201

The approaches used in the reform process were called 'neo-classical' and 'fair', and reintroduced the "battle" between classical and positivists views on how to approach youth crime.

The dissatisfaction with the JDA was deep in the late 1970s and the system was ready for new legislation; the YOA. A paradigmatic revolution had occurred.202

In delineating the reform of the JDA, I will discuss the significance of the *Canadian Charter of Rights and Freedoms*.203 The Charter of Rights emphasizes due process and equal treatment under the law. As the Charter of Rights granted rights to individuals, such as Aboriginal people, women, disabled people, etc., Canada became a "rights-based" society. 204

201 Bolton, et al., supra note 199, ibid.
202 Aultman & Wright, supra note 180 at 22.
204 See Bala, supra note 27 at 49.
"It would be anomalous and surprising to find that, while everyone else in society was receiving more legal protection, young persons were receiving less."\textsuperscript{205} It became clear that the JDA would not withstand challenge under the Charter of Rights. The informality and lack of legal rights of the JDA was inconsistent with the legal protections granted with the Charter of Rights.

The YOA provided the more legalistic approach that was required with the enactment of the Charter of Rights, and "provided much more recognition of legal rights than the JDA..."\textsuperscript{206} For these reasons, the constitutional entrenchment of the Charter of Rights plays a significant role in the renewal process of the JDA.

In Chapter 5 I will delineate what happened with this "paradigmatic revolution" in the 1980s, which led to a political initiative on renewing youth justice. By doing so I hope to be able to prove that the changes originated in the historical, socio-economic, political and legal elements of society.

\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid. at 9.
In Chapter 5, Section I, I will describe the course of events that lead to the tabling of the new Youth Criminal Justice Act on March 11, 1999. I will focus on the House of Commons, Canada, Thirteenth Report of the Standing Committee on Justice and Legal Affairs Renewing Youth Justice and A Strategy for the Renewal of Youth Justice, released May 12, 1998. In Section II, I expound the new Youth Criminal Justice Act, Bill C-68, with a particular focus on the declaration of principle and a comparison of the YOA and the new Youth Criminal Justice Act.

I. TIME FOR RENEWING YOUTH JUSTICE

A. Renewing Youth Justice

At the request of the Minister of Justice in 1994, a Standing Committee on Justice and Legal Affairs conducted a review of the entire youth justice system in Canada. Three years later the Committee handed in its report entitled *Renewing Youth Justice*. This report would later on form the basis of *A Strategy for the Renewal of Youth Justice*, and finally the new *Youth Criminal Justice Act*.

The committee states in the introduction that it was aware when it began the study that many Canadians were critical of the current youth justice system as it found expression in the YOA. Therefore, the study had to deal with this criticism and find possible solutions to the lack of confidence in the youth justice system.

The report came up with several findings and recommendations, which will be described on page 83.

**A.1.1. Guiding Purpose and Principles**

A part of the *Renewing Youth Justice* report deals especially with the abundant criticism of the YOA. The criticism focuses on the guiding principles set out in Section 3 of the YOA, which I have described in Chapter 2:

The Act sets out in extensive details the principles that are to govern both its interpretation and application, without indicating an order of importance and priority. Supporters of this approach say that it reflects a lack of social consensus in this country as to what philosophy should guide the youth justice system.\(^{208}\)

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\(^{207}\) *Renewing Youth Justice*, supra note 3 at 1.
The committee stated that it believed in the importance of explicitness and clearness of the purpose and guiding principles of the youth justice system. The committee found that the current Declaration of Principle did not contain the necessary explicitness and guidance to the actors involved in the youth justice system. The Committee concluded that the YOA did not set out the priority to be accorded to possibly conflicting principles in the legislation. "One of the problems with the present Declaration of Principle contained in section 3 of the Young Offenders Act is that it does not establish obligations to be fulfilled by the different components of the youth justice system."\(^{209}\)

The Committee therefore recommended that the YOA should be amended by replacing the present declaration of principle with a statement of purpose and an enunciation of guiding principles for its implementation in all components of the youth justice system. "The statement of purpose should establish that protection of society is the main goal of criminal law and that protection of society, crime prevention and rehabilitation are mutually reinforcing strategies and values that can be effectively applied and realized in dealing with young offending."\(^{210}\)

The committee provided guidance on the drafting of a new possible statement of purpose and guiding principles by describing principles embodied in legislation in New Zealand, Irish, and Australian legislation.

\(^{208}\) Ibid. at 4.  
\(^{209}\) Ibid. at 6.  
\(^{210}\) Ibid. at 9.
Another guiding principle discussed in Renewing Youth Justice is whether a separate youth justice system should continue to exist or not. The recommendation from the committee was very specific on that issue - the separate youth justice should continue to exist. "Young offenders are different from adult offenders. They are not fully formed people but are at varying stages of the maturation processes, like other adolescents. Their behavior and acts can often be explained by a number of criminogenic risk factors that do not apply to adult offenders."\(^{211}\)

It was important to the committee that young offenders were ensured a different treatment from that of adult offenders.

Another important issue was the dichotomy between rehabilitation and public safety. A dichotomy was made by the media in the discussion about the youth justice issues. The committee suggested that the aim was to protect the society as well as rehabilitate the young offender with necessary assistance and guidance. "The Committee believes that the community is safer if rehabilitation efforts are effective and appropriate."\(^{212}\) Therefore, one of the recommendations from the committee is that the main goal of criminal law and the criminal justice system is to protect the society. According to the committee, reaching that goal is best achieved by effective crime prevention and rehabilitation strategies. These means were also adopted into A Strategy for the Renewal of Youth Justice.

\(^{211}\) Ibid. at 2.

\(^{212}\) Ibid. at 5.
A.1.2. Public Understanding of Youth Justice

The Committee described in detail how opinion polls consistently showed public overestimation of the incidence of violent crime committed by young offenders in Canada and public underestimation of the extent to which youth court judges send convicted young offenders into custody. Public knowledge of the youth justice system is therefore of major importance in order to make the public understand the youth justice philosophy. Consequently, Recommendation 3 stated:

The Committee recommends that the Minister of Justice undertake discussions with provincial and territorial ministers responsible for youth justice to foster, in conjunction with community agencies, comprehensive, multifaceted education campaigns on youth crime, the Young Offenders Act and the youth justice system to be directed at the general public, those who work in the system and those who come into contact with it.  

A.1.3. List of Recommendations

The committee made a list of 14 recommendations to be considered in future work in youth justice:

- A separate youth justice system should be maintained.
- The Young Offenders Act should be amended by replacing the present declaration of principle with a statement of purpose and an enunciation of guiding principles.
- Campaigns on youth crime, the YOA and youth justice system are to be directed at the general public.
- Money from the criminal justice budget should be spent on crime prevention measures.
• There should be a goal of shifting resources away from the custodial institutions and into community-based services in support of children and families.

• These should be renegotiations of the young offenders' cost-sharing agreement.

• The youth justice system should be reformed to accommodate alternatives, such as police cautioning, family group conferencing and circle sentencing.

• Section 69 of the YOA should be strengthened considerably.

• Section 13 of the Criminal Code and the YOA should be amended so as to provide the youth court with jurisdiction to deal with 10 and 11 year old young persons alleged to have committed criminal offences causing death or harm.

• There should be no change in the maximum age.

• There should be an amendment of YOA so that the non-presumptive transfer provisions could be invoked at the post-adjudication, dispositional stage of proceedings.

• An amendment of the YOA should require parents or guardians to attend youth court whenever a notice is sent to a young person. (Parental involvement)

• Youth court judges should be provided with the discretion to allow general publication of the name of a young offender under certain circumstances.

• Section 56 of the YOA should be amended to provide for the exercise of judicial discretion in determining whether statements from young offenders to peace officers or persons in authority should be admitted into evidence against them by youth court.

213 Ibid. at 6.
This list of recommendations proved highly influential in the drafting of *A Strategy for the Renewal of Youth Justice*.

**B. The Renewal of Youth Justice**

**B.1. The Strategy for the Renewal of Youth Justice**

On May 12, 1998, Minister of Justice and Attorney General of Canada Anne McLellan released the government's proposed strategy for renewing youth justice in *A Strategy for the Renewal of Youth Justice*. The report was a response to *Renewing Youth Justice*. The report recognizes that the primary goal and principal objective of youth justice renewal is public protection, as also stated in *Renewing Youth Justice*. As already described in Chapter 1, infra at 1, the report emphasizes the importance of three key directions on which the strategy for the renewal of youth justice is based: prevention, meaningful consequences for youth crime, and intensified rehabilitation.

**B.1.1. A Need for Balance**

The report states that the objective of the strategy is the protection of society by reduction of youth crime. Protection is achieved through crime prevention. The need for balance in the society is therefore addressed as both protection and prevention, a balance that, according to *A Strategy for the Renewal of Youth Justice*, is not encompassed in the current youth justice legislation. Consequently, the need for balance can be achieved by a renewal of the youth justice system, and the governments proposals

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214 Ibid. at 1-3.
promise to proceed on several fronts: prevention, to address the root causes of youth crime; meaningful consequences for youth crime; and rehabilitation, to help young people turn away from crime. It is a strategy that includes reform of youth justice legislation but extends beyond it.\textsuperscript{216} It is also stated in the report that "[a]s Canadians' demands and expectations of their justice system change, governments and judicial institutions must be prepared to respond."\textsuperscript{217} The report claims there is a need for balance because Canadians want to feel safe and secure in their homes and communities.

Is there a need for balance and does the \textit{Strategy for the Renewal of Youth Justice} actually respond to that need? It will be my thesis later on that there might be a need for balance, but that nothing new is about to happen with the new legislation. So why the need for balance?

\textbf{B.1.2. Concerns about the Current Youth Justice System}

According to \textit{A Strategy for the Renewal of Youth Justice}

\[ \text{[t]he youth justice system has three main weaknesses. First, not enough is done to prevent troubled youth from entering a life of crime. Second, the system must improve the way it deals with the most serious, violent youth; not just in terms of sentencing but also in ensuring that these youth provided with the intensive, long-term rehabilitation that is in their and society's interest. Third, the system relies too heavily on custody as a response to the vast majority of non-violent youth when alternative, community-based approaches can do better a job instilling social values such as responsibility and accountability,} \]

\textsuperscript{215} \textit{A Strategy for the Renewal of Youth Justice}, supra note 2 at 2.

\textsuperscript{216} Ibid.

\textsuperscript{217} Ibid. at 3.
helping to right wrongs and ensuring that valuable resources are targeted where they are most needed.\textsuperscript{218}

According to the report, these weaknesses lead to lack of public confidence in the youth justice system, even though the crime statistics shows that youth crime is decreasing. There is also a widespread perceived belief that youth court is too lenient on crime and that longer sentence are necessary. That concern is being addressed particularly in the report as well as in \textit{Renewing Youth Justice, 1997}.

\textbf{B.1.3. Key Directions for the Renewal of Youth Justice}

The three complimentary strategies for resolving the lack of public concern about the YOA have been mentioned before. The report enlarges on these key directions.\textsuperscript{219}

\begin{itemize}
\item Prevention and meaningful alternatives: Prevention can be achieved through community-based crime prevention and by addressing the social conditions associated with the root causes of delinquency. Family Group Conferencing, victim-offender mediation and reconciliation meetings are a few of the suggestions. The government has committed $32 million annually to assist the communities to develop alternative measures.
\item Meaningful consequences for youth crime: achieved by rehabilitation and accountability. The consequences for the crimes will depend on the seriousness of
\end{itemize}

\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid.
the offense and on the particular circumstances of the offender. Firm measures will be taken to protect the public from violent young offenders.

- Rehabilitation and reintegration: These objectives are still an important part of youth justice philosophy to be considered in a successful youth justice system.

B.1.4. Legislative Components

In order to redeem the key directions, legislative components have to be considered. These are described in detail in *A Strategy for the Renewal of Youth Justice*. A new legislative framework is presented as a replacement of the YOA. Furthermore, it is stated that the new legislation is supposed to preserve the effective elements of the current legislation while clarifying the principal objectives of the new youth justice system. A clearer statement of principles and objectives will be present in the new legislation in order to ensure that the rights of young people are protected.²²⁰

I will mention the report's emphasis on parental and public involvement, which was also of great importance to the Standing Committee. It is stated that young offenders need the supportive involvement of their parents, and that the parents should be involved in the youth justice process. But, "[t]here are many reasons why parents may not be involved in the justice system. In some cases, it is a result of family dysfunction, a lack of interest or poor parenting."²²¹ Parental involvement is vital to the legislators. So is the public involvement. Young offenders do not only have a "unique" relationship with their parents, but also with their victims. The role of the victim is therefore being

²²⁰ Ibid, at 1.
²²¹ Ibid at 16.
enhanced in the new legislation with the alternative measures programs allowing victims to be actively involved in the sentencing process.

"Canadians want a youth justice system that protects society and that helps youth avoid crime or turn their lives around if they do become involved in crime. The government's youth justice strategy will accomplish this," Minister McLellan said on May 12, 1998, the day of the release of *A Strategy for the Renewal of Youth Justice*.

Later, my question will be whether the new strategy actually contributes anything but confusion.

**B.1.5. Summary**

Both the *Renewing Youth Justice* and *A Strategy for the Renewal of Youth Justice* clearly reveal the philosophy behind the process of renewing youth justice. The reports describe the main weaknesses of the current legislation and display solutions for how to deal effectively with young offenders. The list of recommendations outlined in *Renewing Youth Justice* has formed the basis for the government's proposed strategy for renewing youth justice, which becomes clear when reading through the 1998 report.

However, in *Renewing Youth Justice*, the Standing Committee has outlined the perceived need for public protection from the young offenders. A part of the report is dedicated to describing the importance of public knowledge about youth crime. That part is only implemented in the 1998-report to a certain extent.
The proposals are comprised of a need for clearer principal objectives and the underlining of a youth justice system that protects the public and encourages young offenders to become law-abiding citizens. The new legislation is supposed to be "a multifaceted, co-operative strategy for the renewal of youth justice to protect the public", and "a strategy that includes reform for our youth justice legislation but extends beyond it."\textsuperscript{222}

In Section II, I will delineate what happened when theory was put into practice with the \textit{Youth Criminal Justice Act}.

II. THE YOUTH CRIMINAL JUSTICE ACT

This section will consist of press conference material and press releases in connection with the release of the \textit{Youth Criminal Justice Act}. Furthermore, I will describe the new Bill C-68 and compare it to the YOA.

A. Much Ado About a New Bill

A.1. Press Conference on the Youth Criminal Justice Act\textsuperscript{223}

\textsuperscript{222} Ibid. at 2.
\textsuperscript{223} http://www.canada.justice.gc.ca/News/Discours/s110399_en.htmlIn
On March 11, 1999, Minister of Justice and Attorney General of Canada, Anne McLellan, held a press conference on the new Bill C-68. She stated that the release of *A Strategy for the Renewal of Youth Justice* was the result of fifteen years of experience that had shown that Canada's youth justice system is not working as well as it should in many significant areas.

Furthermore, she explained that the Government of Canada began the process of youth justice renewal last June when the National Crime Prevention Program was launched. "Since then, several millions of dollars have been invested in community-based crime prevention initiatives across the country — dealing at the front end with the root causes of crime, with a special focus on youth at risk."²²⁴

The tabling of the *Youth Criminal Justice Act* is the next key step in the evolution of youth justice

With the legislation I am tabling today, Canadians are being sent a clear message that a new youth justice regime will be established. The new legislation reflects, in its preamble and principles, the message Canadians want from their youth justice system: that it is there, first and foremost, to protect society. That it foster values such as respect for others and their property. That it insist on accountability and that it provide both violent and non-violent young offenders with consequences that are meaningful and that are proportionate to the seriousness of the offence. That it be a youth justice system that is inclusive, that engages Canadians in the response to youth crime and that does a better job of responding to the needs of victims. And also, because Canadians are not mean-spirited, that it be a system that offers hope to youth, that gives youth who get in trouble with the law a chance to turn their lives around — for their sake and for the sake of their families and their communities.²²⁵

²²¹ Ibid.
²²⁵ Ibid.
The press conference also introduced the important changes that were initiated with *Renewing Youth Justice* in 1997, which will be further discussed in Section B. It is emphasized that the new Act is consistent with the Strategy released in May 1998 and, as a result of the extensive consultations that have taken place, Bill C-68 reflects a balanced, common-sense and effective approach to youth justice.\(^{226}\)

The Government's Youth Justice Strategy opens the door to greater public and professional involvement in dealing with youth crime, and I urge Canadians to get involved. The introduction today of the *Youth Criminal Justice Act* marks an important turning point for Canada's youth justice system. It is our collective challenge to make sure we succeed.\(^{227}\)

A.2. The Press' Comments

The coverage of the release of the *Youth Criminal Justice Act* has been intense. From my perspective, the subject of youth justice matters is still controversial and the media is determined to cover all aspects of a planned new youth justice philosophy. What about the *Youth Criminal Justice Act* caught the media's attention?

"New Act would Jail Parents for Children's Crimes".\(^{228}\) The *National Post* covered the new act 5 days before its actual release. The article was on the front page and most of it is concerned with the fact that parental neglect can be an indictable offence and punishable by up to two years' prison time, and that the new act is going to get tougher

\(^{226}\) Ibid.
\(^{227}\) Ibid.
on crime. Others changes to the YOA are only mentioned in a subordinate clause. The article also states that the imposition of tough penalties is the result of efforts by victim's rights crusaders.

The day after the release of the new act the headlines were as follows: "Crime Bill aims to Reduce Rate of Incarceration"; "For Victims of Violence, seeing will be believing"; "Canada tops at jailing Youth, Official says"; and "Youth-crime Bill a Canny Balance". The articles describe the new legislation as a "something-for-everyone strategy". The articles deal with the political side of the reform process, "McLellan tries to steal Political Middle Ground on Justice from Reform"; and the actual reform-process trying to describe the changes to the YOA, that has almost been discredited from the implementation process. Journalist Edward Greenspon states in his article that McLellan wants to get tougher on the most violent of offenders and more liberal towards mere wayward youth.

These extracts from newspaper articles indicate that the new *Youth Criminal Justice Act* will get a lot of attention in the near future.

**B. The New Youth Criminal Justice Act**

In this section I will outline the major changes in the new legislation with respect to young offenders.

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B.1. Declaration of Principle

Section 3, the "Declaration of Principle", is intended to guide judicial interpretation of the Youth Criminal Justice Act.\(^{230}\)

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\(^{230}\) s.3 The following principles apply in this Act:

(a) the principal goal of the youth criminal justice system is to protect the public by
   (i) preventing crime by addressing the circumstances underlying a young person's offending behaviour,
   (ii) ensuring that a young person is subject to meaningful consequences for his or her offence, and
   (iii) rehabilitating young persons who commit offences and reintegrating them into society;
(b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:
   (i) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
   (ii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected, and
   (iii) a greater emphasis on rehabilitation and reintegration;
(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
   (i) reinforce respect for societal values,
   (ii) encourage the repair of harm done to victims and the community,
   (iii) be meaningful for the individual young person and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
   (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of young persons with special requirements; and
(d) special considerations apply in respect of proceedings against young persons and, in particular,
   (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
   (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
   (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
   (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.
The paramount goal is protection of society and the public. (Section 3 (1)(a)). That is achieved through crime prevention, ensuring meaningful consequences for the range of youth crime and rehabilitation, (Section 3 (1) (i, ii and iii)). Another core principle is separate treatment from adult offenders, (Section 3 (1) (b)). The youth justice system should emphasize accountability, enhanced procedural rights and intensified rehabilitation. Within the limits of fair and proportionate accountability, measures to deal with youth crime should address the offending behavior of the youth, repair harm done to victims and society, reinforce respect for societal values, respect gender, ethnic and linguistic differences, involve the family and be responsive to the circumstances of youth with special requirements. Furthermore, due process rights are emphasized, as well as the parents' and victims' role in the youth justice system. The role of the victim, particularly, is underscored in Section 3 (1) (d) (ii and iii). In Section C.2., I will discuss the statement that the new declaration of principle has "sent a clear message that a new youth justice regime will be established."  

B.2. Children's' Rights

Under the new Youth Criminal Justice Act, due process for young offenders is still important. The same protections outlined in the YOA, which prevent any discretionary power in the process, are also repeated in the new Act.

B.3. Other Changes

At the press conference held on March 11, 1999, the Minister of Justice outlined the following provisions:232

- allow an adult sentence for any youth 14 years old or more who is convicted of an offence punishable by more than two years in jail, if the Crown applies and the court finds it appropriate in the circumstances;

- expand the offences for which a young person convicted of an offence would be presumed to receive an adult sentence from murder, attempted murder, manslaughter and aggravated sexual assault to include a new category of a pattern of serious violent offences;

- lower the age for youth who are presumed to receive an adult sentence for the above offences to include 14- and 15-year-olds;

- permit the publication of names of all youth who receive an adult sentence. Publication of the names of 14- to 17-year-olds who receive a youth sentence for murder, attempted murder, manslaughter, aggravated sexual assault or repeat serious violent offences will also be permitted;

- allow the Crown greater discretion in seeking adult sentences and publication of offenders' names;

- create a special sentence for serious violent offenders who suffer from mental illness, psychological disorder or emotional disturbance that will include an individualized plan for custodial treatment and intensive control and supervision;

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• promote a constructive role for victims and communities, including ensuring they receive the information they need and have opportunities to be involved in the youth justice system;

• give the courts more discretion to receive as evidence voluntary statements by youth to police;

• require all periods of custody to be followed by a period of controlled supervision in the community to support safe and effective reintegration;

• permit tougher penalties for adults who wilfully fail to comply with an undertaking made to the court to properly supervise youth who have been denied bail and placed in their care. This responds to a proposal made by Chuck Cadman, M.P. (Surrey North) in a private member’s bill;

• permit the provinces to require young people or their parents to pay for their legal counsel in cases where they are fully capable of paying;

• allow for and encourage the use of a full range of community-based sentences and effective alternatives to the justice system for youth who commit non-violent offences; and

• recognize the principles of the United Nation Convention on the Rights of the Child, to which Canada is a signatory.

These provisions are being described as major changes to the YOA, but as I will argue in Section C.2., the changes might not be as significant as is stated and could easily create confusion instead of clarity.
B.4. Sentencing

The purpose and principles of sentencing are outlined in Part 4, Section 37ff. of the *Youth Criminal Justice Act*. The main purpose is still to protect the society. The sentencing principles ensure that consequences for young people who commit crimes will be in proportion to the seriousness of the offence. "This principle of proportionality represents a major restructuring of the system. Sentences that fit the seriousness of an offence will have more meaning to youth and will encourage accountability." \(^\text{233}\)

In the sentencing process, new provisions will be made in order to: \(^\text{234}\)

- expand the offences for which a youth is expected to be given an adult sentence to include a pattern of convictions for serious, violent offences;
- extend the group of offenders who are expected to receive an adult sentence to include 14- and 15-year olds;
- create an intensive custody sentence for the most high-risk youth who are repeat violent offenders or have committed murder, attempted murder, manslaughter, or aggravated sexual assault;
- permit victim impact statements to be introduced in youth court;
- where appropriate, encourage community-based sentences such as compensation or restitution to the victim or community; and
- add a number of other sentencing options to deal with the full range of youth crime, including intensive support and supervision and imposing conditions that the youth would have to meet in the community.

Again, in Section C.2. I will question the clarity and functionality of these new provisions.

C. A Comparison of Some Provisions of the YOA and the Youth Criminal Justice Act

In this section I will delineate a comparison of the YOA and the Youth Criminal Justice Act. The comparison will be two-fold: From the politicians' point of view and my own point of view.

C.1. The Politicians' Comparison

<table>
<thead>
<tr>
<th>DECLARATION OF PRINCIPLE</th>
<th>Youth Criminal Justice Act</th>
<th>Young Offenders Act</th>
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<tbody>
<tr>
<td></td>
<td>• Provides clear statement of goal and principles underlying the Act and youth justice system.</td>
<td>• Contains some of the same themes as the YCJA.</td>
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<tr>
<td></td>
<td>• Includes specific principles to guide police, prosecutors, judges and others at various stages of process.</td>
<td>• Lacks clarity:</td>
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<tr>
<td></td>
<td>• Highlights protection of society, accountability, social values, proportionality of sentences, rehabilitation and reintegration, protections for rights of youth and respect</td>
<td>• does not identify the principal goal of the system;</td>
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<tr>
<td></td>
<td></td>
<td>• contains inconsistent and competing principles; and</td>
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<td></td>
<td></td>
<td>• is not supplemented by more specific principles at the various stages of the youth justice process.</td>
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</tbody>
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234 Ibid.
| MEASURES OUTSIDE THE COURT PROCESS | due victims. | • Encourages measures other than court proceedings when adequate to hold a young person accountable.  
• Authorizes use of warnings, police cautions, referrals to community programs, and cautions by prosecutors.  
• Sets out objectives, such as encouraging repair of harm done to victims, and provides guidance on use. | • Permits alternative measures but does not authorize police and prosecutorial discretion to use other types of alternatives to the court process.  
• Provides much less guidance on appropriate use of alternatives and what their objectives should be. |
| YOUTH SENTENCES | Purpose and Principles:  
• Clearly describes purpose of youth sentences: to hold youth accountable.  
• Includes other specific principles, including need for proportionate sentences and importance of rehabilitation.  
Sentencing Options:  
• New options added to encourage use of non-custody sentences where appropriate and support reintegration.  
• Creates intensive custody and supervision order for serious violent offenders. | Purpose and Principles:  
• No statement of purpose of sentencing.  
• Inconsistent and competing principles.  
Sentencing Options:  
• No requirement for community supervision following custody.  
• Does not permit YCJA options like reprimand, intensive support and supervision, or custody and supervision order for serious violent offenders. |
| ADULT SENTENCES | • Youth justice courts empowered to impose adult sentences, eliminating transfer | • Lengthy transfer hearing prior to trial.  
• Age limit for presumptive offences |
<table>
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<tr>
<th><strong>hearing.</strong></th>
<th>16.</th>
<th><strong>• Pattern of serious repeat offences not subject to adult sentences.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>• Age limit lowered to 14 for presumption of adult sentences.</strong></td>
<td><strong>• Pattern of serious repeat offences not subject to adult sentences.</strong></td>
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<tr>
<td><strong>• Presumptive offences extended to include pattern of repeat, violent offences.</strong></td>
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<tr>
<th><strong>PUBLICATION</strong></th>
<th></th>
<th><strong>• Prohibits publication if young person has received a youth sentence, even if convicted of a presumptive offence.</strong></th>
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<tbody>
<tr>
<td><strong>Permitted if:</strong></td>
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<tr>
<td><strong>• an adult sentence is imposed;</strong></td>
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<tr>
<td><strong>• a youth sentence is imposed for a presumptive offence unless the judge decides publication is inappropriate; or</strong></td>
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<tr>
<td><strong>• youth is dangerous and at large.</strong></td>
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<table>
<thead>
<tr>
<th><strong>VICTIMS</strong></th>
<th></th>
<th><strong>• No mention of victims in principles.</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>• Concerns of victims recognized in principles of Act (first time in federal legislation).</strong></td>
<td><strong>• No formal recognition of victims’ role.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>• Victims have right to access to youth records.</strong></td>
<td><strong>• No formal recognition of victims’ role.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>• Role in formal and informal community-based measures encouraged.</strong></td>
<td><strong>• No formal recognition of victims’ role.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>• Establishes right of victims to information on extrajudicial measures.</strong></td>
<td><strong>• No formal recognition of victims’ role.</strong></td>
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</table>

<table>
<thead>
<tr>
<th><strong>VOLUNTARY STATEMENTS TO POLICE</strong></th>
<th></th>
<th><strong>Any violation of statutory protections prevents a statement from being admitted into evidence.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>• Can be admitted into evidence, despite technical violations of the statutory protections for young persons.</strong></td>
<td><strong>Any violation of statutory protections prevents a statement from being admitted into evidence.</strong></td>
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<tr>
<th><strong>INVOLVING PARTNERS (CONFERENCES)</strong></th>
<th></th>
<th><strong>• No provision.</strong></th>
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<tbody>
<tr>
<td><strong>• Allows advisory groups or &quot;conferences&quot; to</strong></td>
<td><strong>• No provision.</strong></td>
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</table>
advise police officer, judge or other decision-maker under the Act.
- May include parents of the young person, victim, community agencies or professionals.
- Conferences can advise on:
  - appropriate informal measures;
  - conditions for release from pretrial detention;
  - appropriate sentences; and
  - reintegration plans.

| CUSTODY AND REINTEGRATION | • Provincial and territorial corrections officials have more discretion to determine custody issues, resulting in more efficiency.
- All youth with custody sentences will also serve period of supervision in community.
- Youth can be returned to custody through misbehaviour. | • Custody level determined at time of sentencing by the youth court.
- Decisions to transfer to a different custody level also made exclusively by youth court.
- Most youth with custody sentence released directly into the community, without supervision or support. |

This comparison of the YOA and the *Youth Criminal Justice Act* gives one the impression that the *Youth Criminal Justice Act* differs dramatically from the YOA.
C.2. My Comparison

In this section I will address the differences mentioned above and compare them to both the criticism raised against the YOA and the statements made about the *Youth Criminal Justice Act*. The report entitled *A Strategy for the Renewal of Youth Justice* outlines the main criticisms made against the YOA and also describes why we, according to the politicians, are in need of new legislation.

C.2.1. Declaration of Principle

*A Strategy for the Renewal of Youth Justice* states that the principles set out in the YOA are not clear and sometimes even appear to compete with one another.\(^{236}\) With a new statement of principles the Minister of Justice intended to send a clear and precise statement of the principles and the objectives.

Does the new Section 3 redeem the promise of predictability and clearness?

From my perspective, the new Section 3 does not add any clearness to the guiding principles. Minister of Justice Anne McLellan wanted to send the Canadians a clear message with the new legislation. "The proposed legislation contains a preamble and Declaration of Principle that make clear the purpose of the youth justice system."\(^{237}\)

\(^{236}\) *A Strategy for the Renewal of Youth Justice*, supra note 2 at 2.

Looking first of all at length of the new section, the "old" Section 3 consisted of 10 items while the new Section 3 consists of 4 sections with 15! subsections. That is a considerable extension. From my point of view, it is difficult to overestimate the importance of simplicity and cleanness in a section that requires a lot of reading. A declaration of principle should, in my opinion, be instrumental, in the sense that it should be helpful and of assistance to the people who read the legislation.

Secondly, the new act states that the principal goal of the youth criminal justice system is to both "protect the public" and to "rehabilitate young persons who commit offences and reintegrate them into society." The act also states that the criminal justice system for young persons must "be separate from that of adults because of their reduced level of maturity", but also that the young persons should be accountable for their offences. Furthermore, Section 3 mentions that the consequences for the young offender should be "meaningful" without further elaboration on the matter, (Section 3 (1)(a)(ii)), and that the measures taken against young persons who commit offences should be meaningful for the individual young person, (Section 3 (1)(c)(iii)). The new Section 3 is, in my opinion, full of ambiguities and contradictions. This is further evident in Table 3. There, it is mentioned under the new Act that Section 3 contains specific guidelines for the actors involved in a process against a young person at various stages. It also "highlights protection of society, accountability, social values, proportionality of sentences, rehabilitation and reintegration, protections for rights of youth and respect due
victims.\textsuperscript{238} If the new declaration of principle is supposed to give a clear statement, it is of no use to put in specific guidelines for the different actors.

Thirdly, another criticism can be raised against the new Section 3. As in the YOA, youth justice philosophies get mixed. The new section mentions protection of the public and accountability of the young offender, but also mentions reintegration in society. It is emphasized that we must look at the offender's underlying behavior. But we must also look at the seriousness of the offence, and let the young offender be accountable. These philosophies embrace both the child welfare model and the due process model - the clash between the classical and positivist school of criminology. My conclusion must be that the new Section 3 is not clear, precise and predictable. Indeed, it is full of contradictions and competing philosophies. I would go so far as to say that the new Section 3 is, to a great extent, a paraphrase of the "old" Section 3 under the YOA. Again, look at Table 3. It even declares that the "old" Section 3 contains some of the same themes as the \textit{Youth Criminal Justice Act}. Indeed, it does. Section 3 under the new \textit{Youth Criminal Justice Act} is still a "catch-it-all" statement; perhaps even more than under the YOA. There is "something-for-everyone."\textsuperscript{239} Even the victim's role of importance is outlined in the Section 3.

\section*{C.2.2. Alternative Measures}

The new act emphasizes the importance of measures outside the court process. These measures were known as Alternative Measures under the YOA. The provisions under the

\footnotesize
\textsuperscript{238} See table 3.
\textsuperscript{239} See supra note 229.
Youth Criminal Justice Act are very instructive and encourage the use of measures outside court proceedings. These measures already existed in a limited form under the YOA (Section 4) and could be widely used as diversion from the court proceedings. The new legislation wants to encourage community-based sentences where appropriate, such as compensation or restitution to the victim, community service or probation. These sentences were also possible with Section 4 under the YOA. Therefore, my conclusion must be that the measures outside of court proceedings were as much a possibility within Section 4 under the YOA. The use of measures outside the court proceedings has merely become more descriptive under the Youth Criminal Justice Act.

C.2.3. Other Changes

In my comparison I will describe three major changes brought about by the Youth Criminal Justice Act and describe my conclusion regarding these matters. The first change is the possibility of adult sentences. The new Youth Justice Criminal Act emphasizes that youth justice courts are empowered to impose adult sentences, eliminating transfer hearings, that the age limit should be lowered to 14 for presumption of adult sentences; and that presumptive offences should be extended to include patterns of repeat, violent offences. My conclusion must be that the adult sentences are considered to be one of the ways to hold young offenders accountable. As described by Beaulieu, the transfer provision was adopted in 1908 under the JDA and it survived into the YOA. "The extent of its use has, in my estimation, always been a barometer of the level of confidence in the youth-justice system." If that is the case, our belief in the

240 Beaulieu, supra note 195 at 132.
youth justice system has decreased a lot with the new provision for imposing adult sentences.

Another change is the publication of names of a young convicted offender. This had been prohibited in both the JDA and the YOA, but is now permitted under certain circumstances. It is quite clear that the Minister of Justice has chosen to follow the recommendation made by the Standing Committee in 1997. The debate about publication is surrounded by two legitimate and competing values: the need to encourage rehabilitation by avoiding the negative effect of publicity on the youth versus the need for greater openness and transparency in the justice system, which contributes to public confidence in an open and accountable justice system.²⁴¹ By allowing publication, the Minister of Justice has considered the public and victims' need to be the most important factor. In that case, rehabilitation and reintegration can be difficult for a young offender. Furthermore, the young offender receives a punishment and a possibility of getting his or her name published.

The last change I want to mention relates to the serious, violent and repeat offenders. Some of the changes for those offenders have been mentioned above, and they include an intensive custody sentence for the most high-risk youth who are repeat violent offenders or have been convicted of the most serious, violent offences. These measures are intended for offenders with extreme psychological, mental or emotional illness or disturbances.²⁴²

Sentences for these young offenders are getting tougher, and originate from the perceived belief in protecting the public from young offenders with a troubled behavior-pattern.

C.3. Conclusion

In this chapter I have tried to delineate the differences and similarities between the YOA and the *Youth Criminal Justice Act*. I have described the politicians' perception of the new legislation and my own perception. From the analysis done by comparing the two Acts, my conclusion is that the *Youth Criminal Justice Act* does not provide the youth justice system with anything that it did not have under the YOA. Only few changes in Section c.2.3. mention some differences, but they also express lack of confidence in the youth justice system.

In Chapter 6 I will enlarge on other significant changes within the youth justice philosophy. I will focus on the shift of paradigms in youth justice philosophy with a referral to the change model developed by Thomas Kuhn in the 1960's.\(^{243}\)

\(^{243}\) Kuhn, supra note 8.
CHAPTER 6

PARADIGM SHIFTS IN YOUTH JUSTICE:

PARADIGMS AND PARADOXES

I have argued in Chapters 2 to 5 that a shift in youth justice philosophy seems to have occurred with the enactment of the YOA in 1984. My conclusion has been that the shift in youth justice philosophy is based on historical, socio-economic, political and intellectual changes. The interaction between these changes led to legal changes.

In Chapter 6 I will enlarge on the shifting of youth justice philosophy by analyzing this shift with reference to the change model developed by Thomas Kuhn in the 1960's, as Kuhn's model of change has proven to have a widespread impact on not only science-dominated areas but also other academic areas, such as political science, history and religion. As described on page 3, Aultman & Wright adopted Kuhn's theory into the field of law, and Chapter 6 will continue in the spirit of this article. I thereby hope to continue the evaluation of change in youth justice that Aultman & Wright commenced in 1982, and be able to describe changes in youth justice philosophy from a scientific perspective as well.

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244 Ibid.
Chapter 6 will consist of a description of Thomas Kuhn's model, a discussion of the possible changes in youth justice philosophy with the JDA and the YOA, a discussion of the possible change in youth justice philosophy with the Youth Criminal Justice Act, and an analysis of the paradoxes in using the theory of paradigms. I thereby hope to be able to fulfill the main tasks as described by Kuhn in a metaphorical sense:

Concerned with scientific development, the historian then appears to have two main tasks. On the one hand, he must determine by what man and at what time each contemporary scientific fact, law, and theory was discovered and invented. On the other, he must describe and explain the congeries of error, myth, and superstition that have inhibited the more rapid accumulation of the constituents of the modern science text.247

Chapters 2 to 5 have described the evolution of the legislation in the context of young offenders, and also described the myths and problems regarding youth justice legislation. Now, the task is to configure this information into a scientific explanation of changes in youth justice philosophy.

I. KUHN'S MODEL OF CHANGE

A. Definition of Paradigm

246 Aultman & Wrigth, supra note 202.
247 Kuhn, supra note 244 at 3.
In order to describe paradigm shifts in youth justice philosophy, I have to define a "paradigm". I will expound the academics' definition of the term "paradigm". Kuhn defines paradigms as "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." Kuhn uses the term "paradigm" to suggest that some accepted examples of actual scientific practice provide models from which spring particular coherent traditions of scientific research. Or, as suggested by Aultman & Wright: "Kuhn is simply suggesting that we use the term "paradigm" to denote the currently accepted approach within a discipline for addressing the issues with which that particular discipline is concerned."

What is interesting is that Kuhn explicitly states that the concept of paradigms will often be a substitute for a variety of familiar notions. Kuhn delineates these notions. Let me examine two of these notions that will be important to my analysis of paradigm shifts in youth justice philosophy: acquisition of a paradigm is a sign of maturity in the development of any given scientific field, and to be accepted as a paradigm, a theory must seem better than its competitors, but need not explain all the facts with which it can be confronted.

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248 Ibid. at x.
249 Ibid. at 10.
250 Aultman & Wright, supra note 246 at 14.
251 Kuhn, supra note 249 at 11.
252 Ibid. at 17.
Other academics have tried to find better definitions. The critique has been that Kuhn's use of the term "paradigm" is too loose and variable. But as stated in Gary Gutting's book: "In my reading, however, I have found Kuhn surprisingly consistent and precise in his use of this key term." As Gutting clearly notes, Kuhn explicitly states that the term "paradigm" may refer to one or more items or rules. Despite some ambiguities in the use of the term, Gutting concludes "at the heart of his analysis is always the idea that all these rules are relevant to the practice of science only to the extent that they are embodied in some concrete scientific achievement and that this achievement is not reducible to the rules implicit in it." Ritzer offers another definition of the "knotty concept of paradigm", which is also described in Aultman & Wright's article:

A paradigm is a fundamental image of the subject matter within a science. It serves to define what should be studied, what questions should be asked, and what rules should be followed in interpreting the answers obtained. The paradigm is the broadest unit of consensus within a science and serves to differentiate one scientific community (or subcommunity) from another. It subsumes, defines, and interrelates the exemplars, theories, and methods and instruments that exist within it.

Thereby, Ritzer dismisses Kuhn's own use of the term "paradigm" as "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community." In relation to discussing paradigm shifts in youth justice philosophy it is

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254 Gutting, supra note 245 at 1.
255 Ibid.
257 Ibid. at 5.
important to recognize these various definitions of the term "paradigm" in order to provide an effective starting point for explanations of paradigm shifts.  

B. The Nature of Normal Science

Kuhn elaborates a great deal on the articulation of "normal science", describing it as a puzzle-solving process. Kuhn states that because a paradigm is "at the start largely a promise of success discoverable in selected and still incomplete examples" , the paradigm "is an object for further articulation and specification under new and more stringent conditions". As described in Section A, paradigms provide models from which spring particular coherent traditions of scientific research, and that is what Kuhn calls "normal science". "Normal science", to Kuhn means, "research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice." It should now be clear that paradigms and normal science are closely related.

"Normal science" consists largely of "mopping-up operations", depending on the actualization of the promise of the paradigm "by extending the knowledge of those facts that the paradigm displays as particularly revealing, by increasing the extent of the

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258 Aultman & Wright, supra note 250 at 14.
259 Kuhn, supra note 252 at 23 ff.
260 Ibid.
261 Ibid. at 10.
262 Ibid.
match between those facts and the paradigm's predictions, and by further articulation of the paradigm itself.  

Ritzer defines "normal science" as the "period of accumulation of knowledge in which scientists work and expand the reigning paradigm." The period of "normal science" is entered when "a specific paradigm has gained hegemony within a science." Ritzer claims that the activities within the "normal science" period are subsumed under what Kuhn calls "puzzle solving", as described above, and he finds that this expression is "a trademark of normal science." The achievements of "normal science" are recorded in textbooks. "Most of the life of a science is spent in periods of normal science." The production of normal science is therefore an important tool in the discussion of youth justice philosophy + its paradigms.

C. Anomaly and the Emergence of Scientific Discoveries

From time to time there is a deviation from the common rule, and that is known as an "anomaly". That will happen in normal science. Kuhn defines "anomaly" through his attempt to explain the discovery of new and unsuspected phenomena. He states that

\[\text{\footnotesize\textsuperscript{261}}\text{Ibid. at 24. See generally Dudley Shapere, "The Structure of Scientific Revolutions" in Gary Gutting, ed., supra note 255 at 27.}\]
\[\text{\footnotesize\textsuperscript{262}}\text{Ritzer, supra note 257 at 4.}\]
\[\text{\footnotesize\textsuperscript{263}}\text{Ibid. at 7.}\]
\[\text{\footnotesize\textsuperscript{264}}\text{Ibid. at 8.}\]
\[\text{\footnotesize\textsuperscript{265}}\text{Ibid.}\]
\[\text{\footnotesize\textsuperscript{266}}\text{Ibid}\]
\[\text{\footnotesize\textsuperscript{267}}\text{Ibid.}\]
\[\text{\footnotesize\textsuperscript{268}}\text{Ibid.}\]
\[\text{\footnotesize\textsuperscript{269}}\text{Aultman & Wright, supra note 258 at 15.}\]
[d]iscovery commences with the awareness of anomaly, i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or less extended exploration of the area of anomaly. And it closes only when the paradigm theory has been adjusted so that the anomalous has become the expected.²⁷⁰

Ritzer describes anomalies as findings that are uncovered and are at variance with a dominant paradigm in the normal science.²⁷¹ These findings appear to play a key role in the advent of scientific revolutions²⁷², and produce "the tradition-shattering complements to the tradition-bound activity of normal science."²⁷³ Kuhn also states that awareness of anomaly plays a role in the emergence of new phenomena. Therefore, this awareness is prerequisite to all acceptable changes of theory²⁷⁴, and precipitates a crisis.

D. Crisis and the Response

As mentioned above, some of these anomalies cause shifts in paradigms and crisis, and it can therefore be said that these shifts are a result of the invention of new theories.²⁷⁵ Kuhn states that the emergence of an anomaly (new theory) is generally preceded by a period of pronounced professional insecurity, but that scientists do not renounce the dominant paradigm that has led them into a crisis, and they do not treat anomalies as counter-instances.²⁷⁶ Scientists will try to assimilate the anomaly into the structure of

²⁷⁰ Kuhn, supra note 263 at 52-53.
²⁷¹ Ritzer, supra note 268 at 9.
²⁷² Ibid.
²⁷³ Kuhn, supra note 270 at 6.
²⁷⁴ Ibid. at 67.
²⁷⁵ Ibid. at 66.
²⁷⁶ Ibid. at 77.
the dominant paradigm, and "will devise numerous articulations and ad hoc modifications" of the normal science theory\textsuperscript{277}, because "there is no such thing as research without counter-instances."\textsuperscript{278} Anomaly can therefore lead to modifications of a dominant paradigm.

Kuhn's conclusion is that "if an anomaly is to evoke crisis, it must usually be more than just an anomaly."\textsuperscript{279} So even though a persistent and recognized anomaly does not always induce a crisis, some anomalies call into question "explicit and fundamental generalizations of the paradigm."\textsuperscript{280}

When a paradigm is being questioned and there is a loosening of the rules in normal science, which leads to crisis, this crisis can be resolved or closed with the emergence of a new candidate for a paradigm based on a new theory. Therefore, "[t]he decision to reject one paradigm is always simultaneously the decision to accept another, and the judgement leading to that decision involves the comparison of both paradigms with nature and with each other."\textsuperscript{281}

Consequently, the response to anomalies has more than one solution in accordance with Kuhn's theory:

\textsuperscript{277} Ibid. at 78.
\textsuperscript{278} Ibid. at 79.
\textsuperscript{279} Ibid. at 82.
\textsuperscript{280} Ibid.
\textsuperscript{281} Ibid. at 77.
1) When a theory has achieved dominant paradigmatic status, "it is not discarded simply because it does not exhibit empirical fit." The response to this situation can be modifications to the dominant paradigm; and
2) a theory -and thereby a paradigm- is only rejected when another theory is created which is "deemed to be preferable." And then we have a paradigm shift.

Ritzer describes the same pattern in the occurrence of anomalies, but argues that "[a] new paradigm, in order to emerge, must have a number of other characteristics in addition to its perceived ability to explain anomalies", and "the new paradigm must be different from its predecessor in the sense that it seems to explain demonstrably more than the one before it."

Ritzer also states that the crisis occurs as the number of anomalies increases, and "it becomes more and more difficult to accommodate these anomalies within the existing paradigm." If the paradigm does not stand up to this challenge, a scientific revolution might occur. What is interesting in Ritzer's book is the omission of Kuhn's analysis of the emergence of new theory, which seems to be of great importance in Kuhn's book. The role of new theory will also be of importance in my analysis of paradigm shifts in youth justice philosophy.

E. The Nature and Necessity of Scientific Revolutions

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282 Aultman & Wright, supra note 269 at 15.
283 Ibid.
284 Ritzer, supra note 272 at 9.
Finally, another relevant element of Kuhn's theory is the nature of revolutions, which often will lead to a replacement of the dominant paradigm.

When it is determined that anomalies have led to a crisis, the possible response can be a scientific revolution, as described in Section D. Kuhn defines scientific revolutions as "those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one." But scientific revolution is more complex than just a replacement of a paradigm. Kuhn makes a parallel between political and scientific revolutions in order to describe his argument.

Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. In much the same way, scientific revolutions are inaugurated by a growing sense that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way. In both political and scientific development the sense of malfunction that can lead to crisis is prerequisite to revolution.

A pre-revolutionary stage, namely the stage in which new theory is being explored, is crucial to Kuhn's theory. Thus, the first step is to recognize that the dominant paradigm has ceased to be effective. The second step is suggested to be the necessity for competing factions to exist before a revolution can be initiated. Kuhn states that "a

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282 Ibid.
283 Kuhn, supra note 281 at 91.
284 Ibid.
285 Aultman & Wright, supra note 283 at 16.
new theory does not have to conflict with any of its predecessors”, and that "the new theory might be simply a higher-level theory than those known before"\textsuperscript{289}, but as anomalies continue to attack the dominant paradigm, eventually a conflict must occur between the "paradigm that discloses anomaly and the one that later renders the anomaly law-like."\textsuperscript{290} The choice between two paradigms constitutes the nature of revolution, and the invention of new theories. Kuhn claims that there are only three types of phenomena about which new theory might be developed.\textsuperscript{291}

1. Phenomena already well explained by existing paradigms.
2. Phenomena whose nature is indicated by existing paradigms but whose details can be understood only through further theory, and
3. The recognized anomalies whose characteristic feature is their stubborn refusal to be assimilated to existing paradigms. This type alone gives rise to new theories.

Then the revolution occurs, followed by a paradigm shift. "The normal-scientific tradition that emerges from a scientific revolution is not incompatible but often actually incommensurable with that which has gone before."\textsuperscript{292} The importance of revolutions is described by Kuhn to be the changes of worldview.\textsuperscript{293} That means that a paradigm shift makes scientists see their work and the world of their research differently than before.

\textsuperscript{289} Kuhn, supra note 287 at 94.
\textsuperscript{290} Ibid. at 96.
\textsuperscript{291} Ibid.
\textsuperscript{292} Ibid. at 102.
\textsuperscript{293} Ibid. at 110.
Kuhn states that in order to close scientific revolutions, one has to understand that revolutions of nature have been invisible in the sense that there is a tendency, after the revolution, to make the history of science look linear or cumulative. This is exemplified by the impact of textbook presentations upon the image of scientific development. At the start, the new emerging paradigm may have few supporters, but the support will increase as the fight continues. "Gradually the number of experiments, instruments, articles, and books based upon the paradigm will multiply." Then the scientific revolution will be closed.

Is there progress through revolution?

"In its normal state, then, a scientific community is an immensely efficient instrument for solving the problems or puzzles that its paradigms define. Furthermore, the result of solving those problems must inevitably be progress." Ritzer offers a simplified description of the Kuhnian concept of the necessity for revolutions: "A crisis stage occurs if these anomalies mount, which ultimately may end in a revolution." Thereby, Ritzer gives no recognition to the fact that "anomalies may not subsequently result in revolution nor to the fact that when they do, the process involves a development of new theory prior to the revolutionary state.

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294 Ibid. at 138.
295 Ibid. at 158.
296 Ibid. at 165.
297 Ritzer, supra note 285 at 5.
As stated by Aultman & Wright, Ritzer assumes that the new paradigm, which replaces the dominant paradigm, is "born out of revolutions." Aultman & Wright find evidence for their statement in the following argument made by Ritzer:

The reigning paradigm is overthrown and a new one takes place at the centre of the science. A new reigning paradigm is born. The stage is set for the cycle to repeat itself. It is during the period of revolution that great changes in science take place.

Therefore, a state of crisis does not need to end with the revolutionary overthrow of the existing paradigm, because it may be brought to an end with the solution of the "crisis-provoking problem" on the basis of the existing paradigm. But if there is no "shelter" from the existing paradigm, a crisis may occur.

New theory and revolutions are therefore important ingredients in paradigm shifts.

298 Aultman & Wright, supra note 288 at 16.
299 Ibid
300 Ritzer, supra note 297 ibid. [hereinafter diagram 1]
301 Alan E. Musgrave, "Kuhn's Second Thoughts" in Gary Gutting, supra note 263 at 43ff.
F. Depiction of the Change Process in Paradigm shifts

Ritzer represented Kuhn's model of scientific changes as follows:\textsuperscript{302}:

\[
\text{Paradigm I} \Rightarrow \text{Normal Science} \Rightarrow \text{Anomalies} \Rightarrow \text{Crisis} \Rightarrow \text{Revolution} \Rightarrow \text{Paradigm II}
\]

This description suggests that anomalies occur within normal science creating a crisis, which leads to revolution and ultimately the emergence of a new paradigm. But as described above, Kuhn actually offers other occurrences in the changing process:\textsuperscript{303}

\[
\text{Paradigm I} \Rightarrow \text{Normal Science} \Rightarrow \text{Anomalies} \Rightarrow \text{Modifications of Paradigm}
\]

\[
\text{OR}
\]

\[
\text{Paradigm I} \Rightarrow \text{Normal Science} \Rightarrow \text{Anomalies} \Rightarrow \text{Crisis} \Rightarrow \text{New Theory} \Rightarrow \text{Revolution} \Rightarrow \text{Paradigm II}
\]

\textsuperscript{302} Ritzer, supra note 297 at 3.
\textsuperscript{303} Aultman & Wright, supra note 299 at 17. [hereinafter diagram 2]
I agree with Aultman & Wright's concluding statement that the above diagram is a more accurate translation of Kuhn's perspective in that it notes that "anomalies may result in activities of paradigm modification rather than leading automatically to the stage of crisis which involves paradigm change. The diagram also acknowledges the role played by new theory in turning a stage crisis into a revolution by a competitive faction."  

I will use the interpretation described in Diagram 2 in my analysis of changes in youth justice philosophy.

II. THE "REFORMATIVE" PARADIGM

Having described Thomas Kuhn's theory of paradigm shifts leads me to the next step in my analysis of youth justice philosophy in Canada: Actually utilizing Kuhn's scientific perspective on changes in paradigms.

This section will consist of a description of the "reformative" paradigm that has been a part of youth justice philosophy since the youth justice system was initiated in 1908 with the enactment of the JDA, as described in Chapter 3, Section II. I intend to describe this paradigm in the context of Kuhn's model of change. It will be my thesis that changes in youth justice philosophy are compatible with Kuhn's model.

304 Ibid.
305 Ibid. The term "reformative paradigm" is used in Aultman & Wright's article at 19.
A. The Philosophy under the JDA

Aultman & Wright have characterized the philosophy under the JDA as "reformative". The rise of youth justice philosophy and the reformative paradigm was developed in the 19th century in Canada. As described in Chapter 3, the historical aspects of youth justice delinquency legislation demonstrate that concern for children and youth has existed for a long time. But why do Aultman & Wright call the philosophy "reformative"?

The explanation is found in their description of the youth court and the *parens patriae* doctrine, which was implemented with the enactment of JDA in 1908. Aultman & Wright are aware that the philosophy under the JDA has been called numerous names, but they make a persuasive argument, in my opinion, regarding the importance of maintaining the term "reformative".

"What is described in the present writing as the "reformative paradigm" is a theme synonymous with what has been termed by some as the "rehabilitative ideal." I will discuss the "rehabilitative ideal" later.

The creation of youth court had been under way for several years before its implementation in the beginning of the 20th century. The whole society was involved in

306 Ibid.
the concern for children. Volunteer organizations and individuals were intensely concerned with youth problems in the increasingly industrialized society. The paramount goals for both organizations and individuals were to improve youth welfare and to control youth behavior.  

Leon described it as follows

The concern for children without parents, and more specifically, without fathers, was also extended to children with 'inadequate' parents. Dr. Charles Duncombe, an early advocate of prison reform in Canada, was distressed by the number of Toronto children in 1836 with a "ragged and uncleanly appearance", using "vile language", and displaying "idle and miserable habits". Their misbehavior was due to a lack of control, with the blame being placed on their parents, who were "too poor, or too degenerate to provide them with clothing fit for them to be seen in school; and know not where to place them in order that they may find employment, or better cared for...  

This statement reveals both the cultural diversities in society and the importance of controlling youth behavior patterns. It also shows that welfare-philosophy was known even before the enactment of the JDA in 1908. As I concluded in Chapter 3, the development in 19th century legislation in the context of young offenders was based on a welfare-model. The concern for young people and their behavior made it clear that it was not so much a question of the young offender's accountability for his or her

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307 Ibid. at 19.
308 See e.g. An Act to Amend the Law Relating to Apprentices and Minors, 1851, 14 & 15 Vict., c. 11 (Can.) and An Act to Incorporate the Boy's Industrial School of the Gore Toronto, 1862, 25 Vict., c. 82 (Can.).
309 Leon, supra note 70 at 75ff, with citations from L. Johnson, History of the County of Ontario, 1615-1875 (Whitby, Ont.: Corporation of the County of Whitby, 1973) at 158.
behavior as much as a question about how to treat, control, care for and rehabilitate the young offender.

So, in the 19th century problems with youth had been recognized and were considered to be overwhelming. It was the general assumption among politicians and social reformers that youth living in the city were very much in need of guidance from parents and the educational system in order to survive as non-criminal subjects in the cities.

If it is environment in childhood that counts in the making of criminals, the true and only way to cope with crime is to improve the environment, and when that cannot be accomplished, to remove the children to better surroundings. \(^{310}\)

Urban disenchantment and changes in the family units made the challenge of steering the youth toward socially acceptable modes of behavior more pressing than before. Different factions used extensive political and financial power to implement their reforms regarding the protection of society and the reformation of the young offender.

Thus, in the beginning of the 20th century there was a public perception that society needed protection from young offenders and that a reform of the young offenders was needed. This belief was in accordance with the positivist school of criminology, as described supra in Chapter 3.

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\(^{310}\) Scott, supra note 172 ibid.
The purpose of creating the youth court system must be considered in the context mentioned above. Until the beginning of the 20th century there had been no legal machinery by which young offenders could be handled. The youth court was, therefore, the legal response to the problem of young offenders. This was in keeping with the social tendencies: "the increase in the complexity of social relationships, the growth of humanitarianism, and the rise of social sciences."\textsuperscript{311} Because of the growing acceptance of public responsibility for the protection and care of children, there was a need for such legal machinery as the youth court. The youth court was given exclusive jurisdiction in cases of delinquency, and trials were to be conducted summarily, separately, and without publicity.

But because the purpose of the youth court was to reform the young offenders, an informal method for handling these offenders was another characteristic of the youth court. In drafting the JDA,

\begin{quote}
[\textit{t}he reformers undertook the delicate task of attempting to design new procedures which promoted simultaneously the welfare and best interest of the children through a philosophical approach similar to that of the \textit{parens patriae} doctrine and prevented and controlled the misbehavior of children in a criminal law context.\textsuperscript{312}
\end{quote}

I have elaborated on the \textit{parens patriae} doctrine in Chapter 3, and will therefore only mention that the discretionary power given to the youth court under the JDA allowed the

\textsuperscript{311} Robert G. Caldwell, supra note 189 at 494.
\textsuperscript{312} Leon, supra note 309 at 72.
court to intervene in the life of the young offender and of his or her family if necessary. Thereby, the JDA conceptualized the youth court's role as that of a surrogate parent.\footnote{\textit{Bolton, et al., supra note 199 at 946.}}

The tendency in youth justice philosophy can therefore be summarized in the following sentence from Caldwell:

\begin{quote}
The resulting tendency has been to picture juvenile delinquency as symptomatic of some underlying emotional condition, which must be diagnosed by means of the concepts of the concepts and techniques of psychiatry, psychology, and social work, and for which treatment, not punishment, must be administered through the efforts of a team of psychiatrists, psychologists, and social workers. Surprisingly enough, the legal profession, also, has contributed to this tendency through important court decisions regarding the juvenile court that have stressed its social service functions and minimized its legal characteristics.\footnote{\textit{Caldwell, supra note 311 at 497.}}
\end{quote}

With the JDA the emphasis on the treatment of the individual was increased, and this, ironically, led to a decrease of the young offenders' rights within the criminal justice system because "the implied intent of dispositions under this philosophy was not to punish or pursue revenge, but to rehabilitate in the most current and successful fashion."\footnote{\textit{Aultman & Wright, supra note 307 at 18.}}

The role of the youth court was described by academics in the early 20\textsuperscript{th} century in the following way: the attitude of the youth court was supposed to be "benignant, paternal,
salvatory, and for these reasons more efficiently corrective"\textsuperscript{316}, and the spirit of youth court should also be "that of a wise and kind, though firm and stern father."\textsuperscript{317}

Because the role of the youth court was portrayed, in this manner, the young offenders were not accorded a due process protection in the form of traditional rights when being accused in the criminal justice system. The reason could be the one suggested by Aultman & Wright: "The reasoning behind such denial is the contention that the child does not need to be protected from his/her protectors."\textsuperscript{318}

It can be summarized that the underlying themes of the youth court have been the ones delineated by Caldwell: the superior rights of the state (the right to intervene, for example), individualization of justice (the recognition that people are different and should be treated differently), the status of delinquency ("something less than crime"), non-criminal procedure (in order to give primary consideration to the interests of the child), and a remedial, preventive and non-punitive purpose (in order to save the child and to prevent him from becoming a criminal).\textsuperscript{319}

Let me elaborate on the term "rehabilitative ideal", as mentioned on page 124. It is evident that the term is itself a complex of ideas, but Francis A. Allen articulates the modern expression of the term as being:\textsuperscript{320}

\textsuperscript{316} Scott, supra note 310 at 894.
\textsuperscript{317} Ibid.
\textsuperscript{318} See supra note 315 ibid.
\textsuperscript{319} Caldwell, supra note 314 at 499.
• That human behavior is the product of antecedent causes and that knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. The modern spin on the term "rehabilitative ideal" is therefore the rise of scientific disciplines concerned with the study of the antecedents of human behavior, and

• That measures employed to treat the convicted offender should serve a therapeutic function and that measure should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfaction and in the interest of social defense. Again, the modern spin on the term "rehabilitative ideal" is the evaluation of treatment to the highest level of concern in the field of criminal justice.

It has to be understood that youth justice philosophy and the "rehabilitative ideal" are closely connected to the positivist criminology, emerging at the end of the 19th century.

The positive criminology contributed the following elements to youth justice:

1. A concept of criminal and troublesome behavior determined by a complex of biological and social causes.

2. The medical analogy of diagnosis and treatment.

3. The idea that all troubled people suffered from basically similar maladies; and

Francis A. Allen, supra note 194 at 226-227.
4. The belief in the need for active intervention in people's lives to prevent misbehavior before it occurred.\textsuperscript{321}

This positivistic aspect of the "reformative paradigm" leads to an "interest in causes of delinquent behavior with an underlying belief that delinquency is a type of social phenomenon distinct from non-delinquent behavior.

How is the description of the "reformative paradigm" consistent with Kuhn's theory of paradigm shifts?

\textbf{B. Normal Science}

Let me brush up Kuhn's definition of normal science: "Normal science", according to Kuhn, is "research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice."\textsuperscript{322}

In the context of the "reformative paradigm", normal science will mean research based on past achievements that a scientific community acknowledges. Research in the early 20\textsuperscript{th} century was directed towards two general concerns. From my description of the historical evolution of youth justice philosophy\textsuperscript{323} and the youth court\textsuperscript{324} it should be

\textsuperscript{321} Faust & Brantingham, supra note 136 at 4.  
\textsuperscript{322} Kuhn, supra note 296 at 10.  
\textsuperscript{323} See supra Chapter 3.
evident that scientists in the late 19th and early 20th century were conducting research in the field of causes of delinquent behavior in the society. Within this tradition, research scientists tried to assess why young people especially would be more likely than others to commit crimes. Another area of research within the "reformative paradigm" was the issue of treatment and how to design special treatment-programs in order rehabilitate the offender.

This research (achievements) was acknowledged within the legal community, and would therefore supply the 19th century's legislative measures concerning with the perceived need to protect children from themselves or their dysfunctional families and the need to protect the society from the children. The interests of the research mentioned above weighed much more in the political debate than research on civil rights and legal protection of the young offender. Jeffery noted this in the following statement:

If we follow the positive school, we place emphasis on scientific determinism, the rehabilitation of the criminal and the protection of society. We have not found a way to rehabilitate the offender after the offence occurred, and the rehabilitative ideal has meant sacrificing individual rights as well as reducing the effectiveness of criminal law.325

C. Anomaly

324 See page 127ff.
As described earlier, the youth justice philosophy under the JDA survived for almost 75 years, and it was not until the 1950s that "anomalies" started to occur, in the sense that a growing dissatisfaction with the JDA became more and more visible. As is also explained earlier in this thesis, the dissatisfaction was mainly substantiated by the failure of scientific results within the theory of the "reformative paradigm". The dominant paradigm had not been able to provide answers to the correct approach towards reforming criminals. Francis Allen describes this as the debasement of the rehabilitative ideal. An explanation could be that "[t]he real significance of an idea as it evolves in actual practice may be quite different from that intended by those who conceived it and gave it initial support." Allen has also called attention to the fact that "experience has demonstrated that, in practice, there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitating rather than therapeutic in character".  

Another important factor in the discontent with the JDA was the lack of civil rights and due process protection for young offenders in conflict with the criminal justice system. During the 1950s and the 1960s it became more and more apparent that the rehabilitative ideal was often "accompanied by attitudes and measures that conflict, sometimes seriously, with the values of individual liberty and volition." Therefore, a study of the youth justice system in the 20th century especially regarding the JDA "is most fundamentally a study in the exercise of political power". But it is worth pointing out

326 Allen, supra note 320 at 229.
327 Ibid.
328 Ibid.
330 Ibid.
that exercise of political power must be considered in the context of socio-economic, intellectual and social changes.\textsuperscript{331}

If we look at Kuhn's definition of anomaly, I think it is safe to conclude that anomalies have occurred, because the solutions offered within the framework of the JDA no longer provided adequate answers to the questions raised.

Kuhn states that "[d]iscovery commences with the awareness of anomaly, i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or less extended exploration of the area of anomaly."\textsuperscript{332}

**D. Modifications of a Dominant Paradigm or Crisis**

As noted earlier, paradigmatic revolutions do not always follow in the wake of anomalies. What happened to the "reformative paradigm"? Did the anomalies lead to modifications of the dominant paradigm, or did a crisis occur?

The anomalies were not dangerously close to creating a revolution until the late 1960s. Until then, the research was directed towards attempts to explain delinquent behavior. The various research projects often recognized the ineffectiveness of treatment-models

\textsuperscript{331} As described supra in Chapter 3.  
\textsuperscript{332} Kuhn, supra note 322 at 52-53.
in rehabilitating offenders\textsuperscript{333}, and each of these projects had a solution for reforming the offender. These attempts were considered to be modifications of the "reformative paradigm" as they tried to answer the questions raised by the anomalies within the dominant paradigm.

But events in 1970 led to a change in the status of the anomalies. "The failures of normal science within this paradigm were not given dramatization until the 1970s."\textsuperscript{334} More and more negative findings could not continue to be applied as modifications to the "reformative paradigm". Critiques of the dominant paradigm would not tolerate the anomalies as modifications. Because of the overwhelming criticism of the dominant paradigm, the scientific enterprises of the "reformative paradigm" reached a state of crisis.\textsuperscript{335} Aultman & Wright give the following explanation of why the crisis stage was reached, and pay particular attention to two factors:\textsuperscript{336}

- The increased visibility of anomaly in the "reformative paradigm", and
- The reduced tolerance for positivistic anomalies.

In accordance with Kuhn's theory of paradigm shifts, the role of new theory is important in the response to crises, and is inevitable in the emergence of a paradigmatic revolution.

\textsuperscript{333} See generally Allen, supra note 330.
\textsuperscript{334} Aultman & Wright, supra note 325 at 21.
\textsuperscript{335} Ibid. at 22.
\textsuperscript{336} Ibid.
The role of new theory emerged with a perspective which Aultman & Wright described as the "fairness paradigm".\textsuperscript{337}

E. The "Fairness Paradigm"

The new theory consists of two separate perspectives on youth justice, which are connected ideologically.\textsuperscript{338}

In Chapter 4, I describe the reform-process of the JDA, and the "fairness paradigm" is closely related to this reform-process. The first perspective on youth justice philosophy was initiated by politicians' and academics' concern about the lack of legal rights within the JDA and the discretionary power entrusted to the judges in youth court. Two US Supreme Court decisions, \textit{Kent v. U.S.}\textsuperscript{339} and \textit{In Re Gault}\textsuperscript{340} supported the concern about the lack of legal rights.

The second perspective emerged in the 1960s, and was mainly the academics' contribution to the critique of the JDA. I have already mentioned Francis Allen's article; allow me to refer to it again as it reveals the other perspective of the "fairness paradigm". Academics called attention to the fact that there was an unintended consequence of the application of the rehabilitative ideal in the JDA.

\textsuperscript{337} Ibid.
\textsuperscript{338} Ibid.
\textsuperscript{339} 383 U.S. 541 (1966).
"Surprisingly enough, the rehabilitative ideal has often led to increased severity of penal measures." Allen claims that this tendency may be seen in the operation of the youth court, because the youth court is "authorized to intervene punitively in many situations in which the conduct, were it committed by an adult, would be wholly ignored by the law or would subject the adult to the mildest sanctions." Therefore, there was a tendency for the rehabilitative ideal to encourage increasingly long periods of incarceration for the purpose of reforming the offender.

Allen also stated that the "reformative paradigm" led to a narrowing of scientific interests. The "reformative paradigm" dictated which questions were to be investigated, "with the result that many matters of equal or even greater importance have been ignored or cursorily examined." This has led to a lack of concern for the idea of deterrence, and Allen calls attention to the fact that "[i]t must surely be apparent that criminal law has a general preventive function to perform in the interests of public order and of security of life, limb, and possessions." This set of ideas presented by Allen in 1960 was adopted by other academics in the 1970s, and can be seen as reminiscent of the classical principles. The arguments by these academics have been called 'neo-classical.'

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340 387 U.S 1 (1967).
341 Allen, supra note 333 at 229.
342 Ibid.
343 Ibid. at 227.
344 Ibid.
345 Ibid.
347 Aultman & Wright, supra note 338 at 22.
towards guidelines and more determinate sentences, the increase of legal protection for young offenders and the importance of earlier classical principles.\(^{348}\)

The two perspectives outline the new theory in accordance with Kuhn's theory. As stated by Aultman & Wright: "It is important to explore these trends because if a paradigm revolution is completed, many more facets of the broad procedural network of juvenile justice would require change than yet have been affected."\(^{349}\)

Having described the "fairness paradigm" it can be concluded that anomalies led to a crisis in youth justice philosophy, and that two perspectives in particular could be taken into consideration as "new theory".

It can also be concluded that the term "fairness paradigm" refers to the attention paid to the issue of "fairness" in the two described perspectives; "fairness" in the sense that young offenders should be assured a due process when involved in a criminal justice conflict and that they should not be subjected to longer sentences for the purpose of rehabilitation.

Aultman & Wright's article was written in 1982, two years before the enactment of the YOA. Consequently, their article had to conclude that a paradigmatic revolution was not the response to the crisis that set in with the "fairness paradigm". "A paradigmatic revolution would require a restructuring of the legal order, modification of informal

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\(^{348}\) See the description of the classical school of criminology, Chapter 3, section I, C.1.

\(^{349}\) Aultman & Wright, supra note 347 at 23.
procedure, and the establishment of various mechanisms for ensuring total adherence to fairness concerns.\textsuperscript{350} This had not yet happened in 1982. They claimed that the "fairness paradigm" had not been sufficiently conclusive and persuasive to result in a revolution.

Aside: Reflecting on the discussion of "new theory" in Kuhn's model of change, Aultman & Wright recognize that in the discussion of paradigm shifts in the youth justice philosophy, "the term "theory" must necessarily be used very loosely. The usefulness of the concept is in its representation of a cohesive and interrelated set of ideas or philosophical constructs."\textsuperscript{351} Also in this chapter, I will discuss the paradoxes in and the barriers to using Kuhn's model of paradigm shift.

F. Revolution and Conclusion

Significant changes happened between 1982 and 1984. The role of the new theory as described in the "fairness paradigm" outgrew the "reformative paradigm", and in 1984 the YOA was enacted.

As noted earlier, Aultman & Wright concluded that "[a] paradigmatic revolution would require a restructuring of the legal order, modification of informal procedure, and the establishment of various mechanisms for ensuring total adherence to fairness

\textsuperscript{350} Ibid.
\textsuperscript{351} Ibid.
concerns.” In light of this quotation I will refer to my analysis of the reform-process of the JDA. A restructuring of the legal order - the JDA - had been under way for more than 20 years; in 1962, the Canadian Government conducted a survey regarding juvenile delinquency. The report was the result of the survey, and this became the starting point for reforming the youth justice philosophy.

Consequently, the enactment of the YOA in 1984 started a restructuring of the legal order, and the first step of the revolution began.

The next step suggested by Aultman & Wright is modification of informal procedure that was a major part of the JDA and the basis for the procedure in youth court. Reading through the various sections of the YOA makes it clear that informal procedures in youth court have been abandoned and replaced by more strict regulations on how to proceed. Section 14 of the original JDA, which stated that at the trial of a child the proceedings should be as informal as the circumstances permitted, was eradicated. Another dramatization of the crisis and new theory had occurred. (See Diagram 2).

According to Aultman & Wright, the last step needed to create a revolution in the context of Kuhn's model of change is the establishment of various mechanisms for ensuring total adherence to fairness concerns. From my perspective, this is a rather bland statement, primarily because fairness concerns is a rather ambiguous term, and secondly because it is used differently by advocates from the due-process movement and

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352 Ibid.
353 See supra note 177.
the neo-classical movement, as described in. But various mechanisms were established to ensure "fairness concerns". This is mostly evident in the Declaration of Principle in Section 3 under the YOA and the subsequent sections on children's rights and freedoms.

The political environment was very supportive of the legal framework that the YOA represented, and the federal government therefore maintained a facade of unanimity. That further ensured the consideration of "fairness concerns". In my opinion, the enactment of the YOA with its descriptive sections on children's rights and freedoms and its guidance on judicial interpretation in the Declaration of Principle is the clearest example of the "establishment of various mechanisms for ensuring total adherence to fairness concerns".354

Aultman & Wright state that "[t]he "fairness paradigm" does not pretend to have the answers to the causes of delinquency and the need for effective treatment methods, but rather it substitutes the different sets of concerns."355 According to Kuhn, a new paradigm does not need to have all the answers to problems raised in the wake of the old dominant paradigm.

Therefore, when Kuhn defines scientific revolutions as "those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one"356, and I compare this definition to Aultman & Wright's

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354 See supra note 352 ibid.  
355 Ibid. at 23.  
356 Kuhn, supra note 332 at 91.
interpretation of this model in a youth justice philosophy setting, I will have to conclude that a paradigmatic revolution occurred in 1984 with the enactment of the YOA.

In conclusion it can be noted that in line with the political, socio-economic and intellectual changes that were happening in society, scientific changes also occurred in youth justice philosophy.

III. THE FAIRNESS PARADIGM AND NORMAL SCIENCE, OR, PARADIGM II

A. Normal Science

Normal science enterprises under the "fairness paradigm" are specifically directed toward the analysis of two important concerns, as noted earlier.

First, the YOA contains a catalogue of the most fundamental and basic rights that a young person has when in conflict with the criminal youth justice system. The "fairness paradigm" is therefore concerned with extending legal rights to young offenders. Procedural safeguards attained crucial importance in the YOA. Furthermore, the legislation formalizes many of the procedures that are to be followed in various proceedings.
Secondly, the issue of the neo-classical approach toward young offenders created an area for research within the tradition of the "fairness paradigm", as already described by Francis Allen in 1960 on page 133.

The YOA created a scientific milieu, that according to Kuhn, consisted of the actualization of the promise of the 'fairness paradigm' "by extending the knowledge of those facts that the paradigm displays as particularly revealing, by increasing the extent of the match between those facts and the paradigm's predictions, and by further articulation of the paradigm itself."

Research within the "fairness paradigm" will, according to Kuhn, often lead to the discovery of new and unsuspected phenomena, which will be named anomalies.

B. Anomaly

With a reference to my description of the critique of the YOA in Chapter 2, Section II, it soon became clear that the YOA failed to deliver the results hoped for by politicians and others involved in the reform process. The YOA was exposed to abundant criticism almost from the time of its enactment in 1984, and the failure of scientific results, such as a coherent and predictable legislative framework for young offenders, made it clear that the YOA could not give the required support to the "fairness paradigm". The growing dissatisfaction with paradigm II, or the new dominant paradigm, made

\[357\] Ibid. at 24.
researchers in the field of law explore other ideologies of legality and justice in the context of young offenders. That is consistent with Kuhn's model of change.

Due to the failure or the anomalies of the "fairness paradigm", normal science wanted to provide answers to critical questions that the paradigm had raised. This is especially apparent in *Renewing Youth Justice* and *A Strategy for the Renewal of Youth Justice*. Academics and politicians were eager to comply with the criticism raised against the YOA.

Following Kuhn's model of change, anomalies will lead either to modifications of the dominant paradigm and/or crisis.

**C. Modifications of the "Fairness Paradigm" or Crisis**

As already stated by Aultman & Wright, "anomalies do not necessarily lead to paradigmatic revolutions; nor do they have a direct causal impact upon the ultimate appearance of a revolution."358

As noted earlier in Diagram 2, anomalies can lead either to modification of the dominant paradigm and/or crisis. As described in Section B, anomalies within the tradition of the "fairness paradigm" were a reaction to the bias that many critics of the YOA had called attention to. Were the reactions - or anomalies - so persistent that they could precipitate

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358 Aultman & Wright, supra note 355 at 21.
a crisis? Or, to use an expression used by Kuhn, was the character of the anomalies so stubborn that it could have a direct impact "upon the ultimate appearance of a revolution"?359

Some of the problems with the "fairness paradigm" demonstrated that the term "fairness" did not apply very well to the dominant paradigm. Thus, what scientifically and theoretically seems to be advisable input to a legislative framework in the context of young offenders may not always work in practice.

Renewing Youth Justice and A Strategy for the Renewal of Youth Justice made an effort to convince the public, the academics and the politicians themselves that the time had come for a paradigm shift in Canadian youth justice philosophy, and they expounded that 'readiness' in Bill C-68, the Youth Criminal Justice Act, which was mainly a response to the public's lack of confidence in the YOA.

As noted earlier, Minister of Justice Anne McLellan stated on the day of the release of the Bill C-68: "We are responding to calls for necessary changes to the law, but we are doing much more than that. Our new youth justice strategy looks beyond legislation and even the youth justice system itself to explore ways to society as a whole can address youth crime and associated factors such as poverty and child abuse."360

But did the new youth justice actually create a new paradigm shift?

359 Ibid.
360 A Strategy for the Renewal of Youth Justice, supra note 2 at 1.
D. The "Clearness Paradigm"

A new perspective emerged which I have chosen to describe as the "clearness paradigm". The term refers to several statements made by academics and politicians indicating, that the YOA lacks clearness and predictability, most notable in the Declaration of Principle, Section 3.

I am using the "clearness paradigm" term only to describe the intended paradigm shift in the context of young offenders, and not to suggest that a new paradigm actually has been born through revolution. It will become apparent that the "clearness paradigm" is merely a hypothesis rather than reality.

The "clearness paradigm" consists of three rather separate bodies of ideology. The first describes the renewed philosophy in the youth justice system, and consists of a new Declaration of Principle that is clearer and more predictable, according to the politicians. The legislators acknowledged that in order to make the youth justice philosophy more transparent, the legislative framework had to be more clear and predictable. This argument is, in my opinion, comparable to the neo-classical approach to the criminal justice system.

The second element is an emphasis on "meaningful consequences" for young offenders. I have noted earlier that "meaningful consequences" will lead to harsher sentences for a
certain group of young offenders; namely, the repeat violent offenders. Thereby, politicians try to respond to the perceived public belief that the YOA is "too soft on crime".

The third element is a rephrasing of the *parens patriae* doctrine. As noted earlier, the federal government emphasizes the importance of measures outside the courtroom. This is clearly reminiscent of the alternative measures described in Section 4 under the YOA, which is known as the "old paternalism" section.361

This catalogue of the various aspects of the "new" youth justice philosophy represented in the *Youth Criminal Justice Act* clearly reveals the fact that the "clearness paradigm" is a mixture of the philosophy chosen within the tradition of the "reformative paradigm" and the "fairness paradigm", respectively.

It can be concluded that the anomalies emerging within the tradition of the "fairness paradigm" did not lead to the discovery of new and unsuspected phenomena,362 and are therefore only counter-instance to the dominant paradigm.

Consequently, the anomalies within the "fairness paradigm" are modifications of the dominant paradigm", and will in my opinion not evoke a crisis that will lead to a paradigmatic revolution.

361 Beaulieu, supra note 240 at 138.
362 Aultman & Wright, supra note 359 at 15.
The "clearness paradigm" will remain a hypothesis.

E. Conclusion

Kuhn states that awareness of anomaly plays a role in the emergence of new sorts of phenomena. He claims that scientists will try to assimilate the anomaly into the structure of the dominant paradigm, and "will devise numerous articulations and ad hoc modifications" of the normal science theory.

This happened with the anomalies emerging within the tradition of the "fairness paradigm". The anomalies question the "fairness paradigm", but do not have any new answers to provide, and are therefore not influential to an occurrence of crisis in accordance with Kuhn's model of change. What is particularly interesting is the fact that legal changes have been made to try to provoke a paradigmatic revolution. This proves that legal changes are not the only answer in paradigmatic revolutions, but that a complete restructuring of the legal order would have to happen. The legal changes proposed in the Youth Criminal Justice Act do not restructure the legal order.

In my introduction to Section I, subsection A, I expounded two important notions in the definition of a paradigm. These were:

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363 Kuhn, supra note 357 at 77.
364 Ibid. at 78.
• Acquisition of a paradigm is a sign of maturity in the development of any given scientific field\(^{365}\), and

• To be accepted as a paradigm, a theory must seem better than its competitors, but need not explain all the facts with which it can be confronted.\(^{366}\)

If one compare the reform of the process of youth justice philosophy to the process of reform in paradigms, I think it can be concluded that the *Youth Criminal Justice Act* did not have enough time to evolve as a new theory. As noted earlier, the Act was not a result of intellectual, socio-economic and historical changes, and the end-result was a legal response that made no legal changes. This situation is compatible with Kuhn's model of change.

Consequently, it is not time to acquit the "fairness paradigm", and the philosophy behind the *Youth Criminal Justice Act* does not seem better than its competitor, the philosophy behind the YOA.

\(^{365}\) Ibid. at 11.

\(^{366}\) Ibid. at 17.
IV. PARADIGMS AND PARADOXES

In this section I will discuss the paradoxes and barriers in using the theory of changes in paradigms. Section IV will consist of several academics' theories regarding Kuhn's model of change, and will especially analyse how habits of mind can govern scientific beliefs such as paradigm shifts. 367

A. Kuhn's Reservation on Paradigms

Kuhn was aware that the use of paradigms might entail paradoxes. Using Kuhn's model of change in this chapter will naturally lead me to delineate Kuhn's comments on his reservations regarding paradigm shifts.

As noted earlier, Aultman & Wright warned "that in the discussion of a shift in juvenile paradigms, the term "theory" must necessarily be used very loosely." 368 And Kuhn himself was aware of the danger in over-theorizing the model of change within paradigms.

In his book, Kuhn draws a parallel between political and scientific development, and he describes one aspect of the parallelism in the following way:

367 Margolis, supra note 15.
368 Aultman & Wright, supra note 362 at 22.
Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. In much the same way, scientific revolutions are inaugurated by a growing sense that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way. In both political and scientific development the sense of malfunction that can lead to crisis is prerequisite to revolution.\(^{369}\)

But Kuhn states that the parallel has a second aspect. He describes the political revolution's aim to change political institutions in ways that those institutions themselves prohibit.\(^{370}\) "Their success therefore necessitates the partial relinquishment of one set of institutions in favor of another, and in the interim, society is not fully governed by institutions at all."\(^{371}\)

In his description of the emerging of revolutions within the political tradition, Kuhn calls attention to the fact that revolutions have had a vital role in the evolution of political institutions, and that revolution is about a reconstruction of society in a new institutional framework. The political institutions might not respond in a predictable way, because political institutions have various constellations. At that point, the society is divided into competitors, "one seeking to defend the old institutional constellation, the others seeking to institute some new one."\(^{372}\) Kuhn therefore acknowledges that the political

\(^{369}\) Kuhn, supra note 366 at 56.  
\(^{370}\) Ibid. at 92.  
\(^{371}\) Ibid.  
\(^{372}\) Ibid.
institutions themselves can be insurmountable obstacles not sympathetic to paradigm shifts. Because they differ about the institutional matrix within which political change is to be achieved and evaluated, because they acknowledge no supra-institutional framework for the adjudication of revolutionary difference, the parties to a revolutionary conflict must finally resort to the techniques of mass persuasion, often including force. Though revolutions have had a vital role in the evolution of political institutions, that role depends upon their partially extrapoliitical or extrainstitutional events.\textsuperscript{373}

A little further in his book, Kuhn claims that "[i]f authority alone, and particularly if non-professional authority, were the arbiter of paradigm debates the outcome of those debates might still be revolution, but it would not be \textit{scientific} revolution\textsuperscript{374} because "[t]he very existence of science depends upon vesting the power to choose between paradigms in the members of a special kind of community."\textsuperscript{375} Let me refer to the conclusion in Chapter 5: I concluded that a paradigmatic revolution did not occur with the \textit{Youth Criminal Justice Act}, because the Act was merely political lip service rather than reality. Kuhn's explanation could be that because authority alone (the politicians), were the "arbiters" of legal changes in the new Act, they would not be able to succeed because other factors have to be involved in the process, as explained in Chapter 3.

At the end of his book, Kuhn raises the question of why paradigm changes should produce an instrument more perfect than those previously known, in order to answer the

\textsuperscript{373} Ibid.
\textsuperscript{374} Ibid. at 166.
question: "What must nature, including man, be like in order that science be possible at all"? Kuhn's conclusion is that this question is still an open one, and that his description of the development and structure of scientific revolutions is his attempt to contribute to answering questions within science.

"Any conception of nature compatible with the growth of science by proof is compatible with the evolutionary view of science developed here. Since this view is also compatible with close observations of scientific life, there are strong arguments for employing it in attempts to solve the host of problems that still remain."

B. The Academics' Reservation

This section will consist of a discussion of several academics' concern and critique of Kuhn's model of change.

Gary Gutting elaborates on the central concept of Kuhn's theory, which is the definition of the paradigm. Gutting states that "[a]lmost all commentators agree that Kuhn's use of this concept is extremely loose and variable." He examines the history of science, and reflects that Kuhn's book and his theory of paradigm shifts could have become a paradigm of the interpretation of the results attained by that history, but concludes "historians of science are not currently very interested in general interpretative

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375 Ibid.
376 Ibid. at 172.
377 Ibid.
schemata.” But Gutting’s major concern is the "puzzle-solving" process within the tradition of normal science.\footnote{Gutting, supra note 301 at 1.}

But where is the failure that makes it so difficult to distinguish art and science on a Kuhnian analysis? My suspicion is that it lies in one of Kuhn's central assertions about science that we have not yet discussed: his claim, put forward in the concluding chapter of *The Structure of Scientific Revolutions*, that puzzle-solving rather than truth is the primary aim of science.\footnote{Gutting, supra note 379 at 16.}

Dudley Shapere followed Gutting's discussion of scientific revolution and the history of science. Shapere analyses the perplexities that are generated by Kuhn's view that paradigms cannot, in general, be formulated adequately.\footnote{Shapere, supra note 263 at 30.} Shapere has problems with the lack of clearness in Kuhn's theory, as described in the following sentence where he elaborates on the term "meaning" used by Kuhn: "Kuhn has offered us no clear analysis of "meaning" or, more specifically, no criterion of change of meaning; consequently it is not clear why he classifies such changes as changes of meaning rather than, for example, as changes of application."\footnote{Ibid, at 34.}

Ian Barbour analyzes paradigms in science\footnote{Ian Barbour, "Paradigms in Science and Religion", in Gutting, supra note 381 at 223ff.} and summarizes the four major points of criticism raised against Kuhn's theory.

There have been criticisms:\footnote{Ibid at 34.}
1) of the definition of "normal science",
2) of the definition of "scientific revolutions". Critics have questioned the sharp contrast between normal and revolutionary science that Kuhn delineates in his book,
3) of the paradigm-dependence of observations, and
4) of the paradigm-dependence of criteria.

These are some of the major concerns delineated by academics' critique of Kuhn's model of change.

Yet, all academics acknowledge Kuhn's contribution and effort to explain paradigm shifts, and they claim that Kuhn's theory of changes has had a wider academic influence than any other book in the field.386

C. Political Reservations

This third, and final, section of my description of paradigms and paradoxes will consist of a description of the barriers that could impede the political progress of paradigm shifts. Kuhn has described how the institutional matrix in which political change is to be achieved and evaluated can be a hindrance to evoking a revolution or a paradigm shift.

Therefore, political changes may be developed through a slow process or not at all.387

385 Ibid. at 226.
386 Gutting, supra note 381 at v.
It should be evident by my analysis of youth justice philosophy that political changes occur when socio-economic, historical and intellectual changes have interacted. Therefore, these changes will have an effect on political theories. Consequently, the process of reform is slow, which is apparent as only one paradigmatic revolution regarding youth justice has occurred since the beginning of the 20th century.

As noted above, the causes for this delay in "revolutions" can be found in the institutional matrix within the political tradition. The political theory and agenda in Canada has not had a tradition of "crisis" or "revolutions". In my opinion, this is partly due to the fact that Canada has become more and more conservative in areas related to youth justice. As noted earlier, the public is yearning for harsher punishment of young offenders, as the politicians try to reinforce restorative justice philosophy in the youth justice system. There are simply too many barriers to break down to create a crisis or revolution.

Another kind of political barrier that a paradigmatic crisis will have to surmount is the governing of scientific beliefs by habits of mind. Margolis states that the habits-of-mind claim implies the possibility of the paradigm shifts and that a particular, identifiable habit of mind is critical to the emergence of the new theory evolved from crisis. The habit of mind can be stronger within political institutions, because the

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387 In Chapter 7 I will try to look behind the rhetoric of the Youth Criminal Justice Act and see if the approach toward crime-solutions has become more restorative than with the YOA.
389 Margolis, supra note 367.
390 Ibid. at 3.
political matrix needs to consent to accepting a new theory. "It is the robustness of the habits of mind that block the path to the new idea, relative to the habits of mind that help the new idea, given the evidence and argument available to support it." Margolis elaborates on the term 'habit-of-mind', and explains that a new theory or crisis has to break through two barriers: first, the new theory must be so strong that it can weaken an existing theory and thereby "make a previously robustly entrenched habit of mind vulnerable." Secondly, the new theory has to have "striking breakthrough effects".

Consequently, the habit-of-mind also has to be taken in consideration when we are discussing political reservations regarding Kuhn's model of change as it can "govern scientific beliefs."

V. CONCLUSION

In this chapter I enlarged on the shifting of youth justice philosophy with reference to the change model developed by Thomas Kuhn, and it was my intention to continue the evaluation of change within youth justice philosophy which Aultman & Wright commenced in 1982.

After a description of Kuhn's theory on paradigm shifts, I delineated the tradition within the "reformative" paradigm that has been a part of youth justice philosophy since the

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391 Ibid. at 31.
392 Ibid. at 38.
393 Ibid. at 39.
enactment of the JDA in 1908. I then used Kuhn's model of change to evaluate the development of youth justice philosophy up until 1984 when the YOA was enacted. The YOA was created within the tradition of the "fairness paradigm".

After analyzing the underlying values of the "fairness paradigm" I concluded that a paradigmatic revolution occurred in 1984 with the enactment of the YOA.

According to Kuhn's model of change, anomalies will automatically evolve within normal science. That also happened within the "fairness paradigm", which has been exposed to abundant criticism. The anomalies consisted, to a certain extend, of discontent with the YOA, and a replacement has been tabled - the *Youth Criminal Justice Act*. The replacement promises to provide the answers to problems with young offenders in the criminal justice system and to extend beyond the youth justice philosophy itself.

Following Kuhn's model of change makes it obvious that the *Youth Criminal Justice Act* has not evolved new theory and consequently is not a threat to the existing dominant paradigm. The anomalies were not "stubborn" enough to fight the dominant paradigm, and do therefore not operate as predicted by Kuhn:

- Acquisition of a paradigm is a sign of maturity in the development of any given scientific field\(^\text{394}\), and

\(^{394}\) Supra note 365.
• To be accepted as a paradigm, a theory must seem better than its competitors, but need not explain all the facts with which it can be confronted.\(^{395}\)

As a conclusion, it can be noted that in line with the political, socio-economic and intellectual changes that happened in society in the 1960s and the 1970s, scientific changes also occurred in youth justice philosophy. These factors were not permitted with the legal change of the YOA till the *Youth Criminal Justice Act*. Therefore, a paradigmatic revolution did not occur with the new Bill C-68.

In Section IV I presented several paradoxes of the theory on paradigms, as I find it important to expound both the positive and negative aspects of the theory of paradigm shifts. I have analyzed the reservations regarding Kuhn's model of change. I have described the reservations made by Kuhn himself in his own work. Academics have also been concerned with Kuhn's theory and have critiqued it. The lack of clarity in Kuhn's work has been particularly criticized. I also felt that political reservations had to be presented in order to explain why so few revolutions happen in Canadian youth justice philosophy. It seems as if there is no tradition for crisis in Canadian political science, which could be influenced by political theory. Another reason could be the barriers created by habit-of-mind.

It can be concluded that even though Kuhn has had a widespread impact on academic and political areas, it is important to be aware of both the paradigms and the paradoxes.

\(^{395}\) Supra note 366.
In Chapter 7 I will examine some of the statements made by the politicians which indicate that politicians try to reinforce restorative justice philosophy in the youth justice system. In light of Chapter 6 I will try to look behind the politicians' rhetoric in the debate on the new *Youth Criminal Justice Act* and analyze if there are simply too many barriers to break down to create a crisis or revolution. That could be a hindrance to reinforce restorative principles in Canadian youth justice philosophy.
CHAPTER 7

RESTORATIVE JUSTICE AND THE YOUTH CRIMINAL JUSTICE ACT

In this chapter, divided into two sections, I will explore the potential impact of restorative principles on the Youth Criminal Justice Act, and expound the existing alternative measures that are available when young offenders are in conflict with the criminal justice system. I will examine some of the statements made by the politicians that indicate that politicians try to reinforce restorative justice philosophy in the youth justice system.

Therefore, this chapter on restorative justice and youth justice philosophy will round off my discussion of the new Youth Criminal Justice Act and Canadian youth justice philosophy, as discussed in the previous 6 chapters. Thereby, I will go beyond the terms of the legislation, and I hope to provide a useful insight into the rhetoric behind the new Act, and to encompass all aspects of youth justice philosophy in my discussion.

I. RETRIBUTIVE VERSUS RESTORATIVE
A. RETRIBUTIVE JUSTICE

In Section I of this chapter, I will delineate the difference between retributive and restorative justice. It is necessary to define these theories in order to understand the underlying value of alternative measures. Furthermore, I hope to give a useful insight into problems that the criminal justice system is struggling with, such as: Should we implement retributive or restorative principles?

Society is calling for severe punishment of young offenders, and people want to be secure in their communities and at home. Due to the abundant controversy the YOA has generated, its critique has become an integral part of A Strategy for the Renewal of Youth Justice and the Youth Criminal Justice Act. The criticism of the YOA is based on descriptions of the shortfalls of the present legislation with respect to young offenders.396

In Chapters 2 to 6 I have delineated the theoretical structure of youth justice philosophy and criminal justice in Canada, and it is evident that the JDA, the YOA, and also the Youth Criminal Justice Act are pieces of legislation established in retributive principles. In order to understand the raison d'être of such a statement I will have to delineate the underlying theory of retribution.

What is "retribution"?

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396 Please refer to Chapter 2 and Chapter 5. In these chapters the YOA and the Youth Criminal Justice Act are described in detail.
Retribution in criminal justice, in its broadest context, refers to "punishment based on the theory which bears its name and based strictly on the fact that every crime demands payment in form of punishment." 397

Retribution is also considered to be one of the oldest responses to deviant behaviour - retribution meaning punishment for the sake of punishment or revenge. 398

Another view, put forth by Immanuel Kant, among others, claims that 'retribution' is a moral framework encompassing a theory of justice that demands punishment of a transgressor because a common sense of justice demands it. 399 Faust & Brantingham suggest that the theory of retribution has as its basic tenets the following:

1. the criminal act must be a voluntary and morally wrong act;
2. punishment must fit the offence; and
3. punishment must represent a return of suffering to the wrongdoer for his morally wrong act. 400

According to the retributive theory of justice, there is no place in criminal law for negligence, strict liability, or other doctrines by which responsibility is separated from the mental state of the offender. *Mens rea*, or the mental condition of the criminal at the time of the crime, is crucial to this philosophy, and any excusing condition such as infancy, accident, mistake, or insanity served to negate

397 Black's Law Dictionary 914 (Abridged 6th edition)
398 Rogers & Mays, supra note 129 at 391-392.
399 Faust & Brantingham, supra note 321 at 7.
criminal responsibility. Since the retributive theory looks backward to the mental state of the defendant, not forward to his future behaviour, there is no place for a discussion of retribution in a theory of crime control. 401

And yet, as described in the previous chapters, the principles of retribution have been adopted as an underlying theory of legislation through decades and used as crime control, even though several scholars claim that retribution is ineffectual in the battle to control crime. 402

Therefore, retributive criminal justice ideology is based on the idea "that punishment makes sure that wrongdoers suffer in proportion to their moral iniquity and thereby give up any unfair advantage over others their wrongdoing may have won over them", and "[t]he retributive theory of punishment, speaking very generally, is a theory that seeks to justify punishment, not in terms of social utility, but in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, justice, and respect for moral autonomy." 403

Jeffrie G. Murphy's closing argument on retributivism is as follows:

"Thus the retributivist seeks, not primarily for the socially useful punishment, but for the just punishment, the punishment that the criminal (given his wrongdoing) deserves

401 Ibid. at 8.
402 Ibid.
or *merits*, the punishment that the society has a *right* to inflict and the criminal a *right* to demand.\(^{404}\)

In 1990, Dr. Howard Zehr defined retributive justice as follows:

> Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame, and administers pain in a contest between the offender and the State directed by systematic rules.\(^{405}\)

A former Ph. D. student at Cambridge University, Sveinn A. Thorvaldson, has described retribution as follows:

> This aim postulates that an offender should be punished in accord with what he is considered to deserve. What he ‘deserves’ is determined by the extent of ‘harm’ to others entailed in the offence and the extent to which he is deemed to have intended to cause the harm, his wilfulness or his moral ‘wickedness’.\(^{406}\)

The definitions mentioned above are instrumental in providing a useful insight into the underlying principles of Canadian youth justice philosophy. The criminal justice system has worked by these definitions for years. The result is a formal and legalistic setting for criminal proceedings. Questions often asked in retributive justice are: 1) which law has been broken, 2) what the offender did; and 3) what the offender deserves.

\(^{404}\) Ibid. at 21
In discussing sentencing under the YOA - and whether the Act embodies a retributive philosophy - I will delineate principles of sentencing as described in the Supreme Court of Canada decision R. v. M. (J.J.), and the provisions for review of disposition, as described in Sections 28ff. of the YOA.

In R. v. M. (J. J.) the Supreme Court of Canada settled some controversial issues regarding sentencing young offenders under the YOA. The Supreme Court upheld a two-year sentence of open custody that was imposed on M. (J.J.) for property-related offences. The Court concluded that "each disposition should strive to recognize and balance the interests of society and young offenders," and that "[i]n the long run society is best protected by the reformation and rehabilitation of a young offender."

The dispositions established under Sections 20 and 24 range from an absolute discharge to a form of custody. As previously mentioned in Chapter 2, Section 3 of the YOA "is designed to balance a social welfare approach to sentencing with the competing value of public safety."

The approach taken by the Youth Court and the Supreme Court of Canada in the case of R. v. M. (J.J.) is that the goals and objectives of sentencing young offenders are reform

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408 See Jones, supra note 14 at 61, 74 and 98, and Bala, supra note 206 at 50.
409 At 493.
410 At 492.
and rehabilitation as well as protection of society. The Supreme Court of Canada also emphasized the special needs pertaining to young offenders, and diminished the importance of general deterrence and the principle of proportionality between the offence and the punishment. The Supreme Court of Canada stated that the principle of proportionality is of greater significance for adult offenders than for young offenders.

While *R. v. M. (J. J.*) required "a balancing or compromise approach to ameliorate the effects of a strict application of either philosophy, it is ironical that M. (J.J.) likely received a longer sentence than an adult in the same circumstances otherwise would..."^{412}, based on the fact that M. (J.J.) came from a dysfunctional family.

I agree with Jones' conclusion that "[i]n this way, helping and punishing are often confusing cross-purposes in the mind of the young being sentenced."

In this leading case, the young offender's special needs resulted in a longer punishment. The Supreme Court of Canada stated that 'reform' and 'rehabilitation' of the young offender is best for society.

These terms have functioned in a retributive setting for many years.

Another example is the review procedures described in Section 28ff. of the YOA. There are no automatic reductions of a youth sentence in contrast to the legislation that operates to reduce an adult offender's sentence.

Section 28 of the YOA provides the legal framework regarding release from custody before the contemplation of a sentence for young offenders.

^{411} Jones, ibid. at 70.
Section 28 outlines review procedures, including but not limited to, mandatory review (Section 28 (1)), optional review (Section 28 (3)), the grounds for review (Section 28 (4)), and additional information (Section 28 (8)). The review provisions are very detailed. Once the young offender is sent into custody, the provincial correctional staff decides where the young offenders should be placed. The provincial officials have the authority to transfer the young offender from open to secure custody facilities. (Section 24.2. (11)), and vice-versa (section 24.2. (10)).

The grounds for optional review include circumstances where:

- sufficient progress by the young offender justifies a change
- circumstances are changed materially
- new services or programs are available
- there are more opportunities for rehabilitation within the community; or
- the youth court considers other grounds appropriate.

Bala suggests that "[t]he review provisions are intended to give youths in custody an incentive to "mend their ways" by participating in rehabilitative programs and changing their behaviour and attitude."413 ‘Rehabilitation' and 'reform' of the young offender may

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412 Ibid. at 18.
413 Bala, supra note 408 at 248.
also determine the length of the custodial sentence. Once the young offender has been sent into custody, he/she is dependent on a decision based on the grounds mentioned in Section 28 (4) whether he or she can get a reduced sentence. As mentioned above, that is not the case with adult offenders. The result can be a longer sentence if the young offender is not willing to for example participate in rehabilitation programs. This is the characteristic of a criminal justice system that is functioning in a retributive setting.

However, there is another aspect to be considered with respect to review procedures.

Section 28 (4) states that the youth court can take into consideration that the opportunity for rehabilitation of the young offender is greater in community. This is in line with the intention behind Section 4 of the YOA, and the philosophy of restorative justice, as I will discuss later on.

Section 28 (17)(c)(ii) outlines the procedure for a conditional-supervision option in review cases. A young offender who is to be released from custody can be placed on "conditional supervision", where there is a wider authorization for probation staff to monitor the young offender in the community. "There is ample evidence that the period following release from custody is vitally important for the long-term rehabilitation of young offenders who have been placed in custody."\(^{414}\) Bala concludes, that conditional supervision might have a positive effect on the young offender's chance of re-offending, because the young offender is more likely to reintegrate in society successfully with the supervision.

\(^{414}\) Ibid. at 250.
"This makes the custody-review and conditional-supervision provisions of the YOA highly significant for the protection of society in the long run."\textsuperscript{415} The provisions use a terminology based on both retribution and restorative justice philosophy. The Act therefore sends out mixed signals concerning the underlying sentencing rationales of the Act. From my point of view, Sections 24 and 28 describe the ambivalence within the YOA.

In many ways, the YOA embodies a retributive philosophy. But it is also evident that the Act is trying to reconcile itself with a new philosophy, as I will describe in Section C and D.

The criminal justice system, having functioned in a retributive setting for many years, has shown shortcomings. This is reflected in the criminal statistics, which demonstrate that, despite a decrease in youth crime, young offenders keep offending.\textsuperscript{416} It is also reflected in the criminal justice system’s way of dealing with victims. The current system relegates the victim to the role of 'witness', thus denying the victim's true role. The system focuses on the relevant legal facts of the offender’s actions. Consequently, the victim is not allowed to talk about the impact the offence had on him or her, and many victims feel alienated within the current system.

These aspects of retributive justice have been recognized in \textit{A Strategy for the Renewal of Youth Justice} and the \textit{Youth Criminal Justice Act} to a further extent than under the current legislation - the YOA. Nevertheless, Section 4 under the YOA expresses the

\textsuperscript{415} Ibid.
importance of alternative measures, and outlines the legal framework for programs for alternative measures, and is therefore to be considered the first attempt at reconsidering retribution.

The principles of retribution have changed during the past 3 decades, and academics have focused on and turned to the principles of restorative justice in order to deal with young offenders in conflict with the criminal justice system. Next, I will offer an explanation of the lack of confidence in the theory of retribution shared by academics in order to understand the new strategy for youth justice philosophy.

B. RESTORATIVE JUSTICE

The restorative justice theory has a strong rhetoric, as will be made clear in this section.

In order to illustrate the parameters of restorative justice theory I have to refer to some definitions of the term 'restorative justice'.

Restorative justice, in its broadest context, refers to "[a]n equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred...An act of making good or giving an equivalent for or restoring something to the rightful owner." \(^{417}\)

\(^{416}\) Please refer to Table 1 on page 5.
Rogers & Mays describe restorative justice as: "[c]onceptually, restitution is the act of restoration or making well by offering the approximate value of any loss or damage to the victim. Restitution is used by some juvenile court judges as an alternative to, or as a condition of, probation. It may be used also in diversionary programs."\(^{418}\)

Tony Marshall defines restorative justice as

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\ldots a\ way\ of\ dealing\ with\ victims\ and\ offenders\ by\ focusing\ on\ the\ settlement\ of\ conflicts\ arising\ from\ crime\ and\ resolving\ the\ underlying\ problems\ which\ cause\ it.\ It\ is\ also,\ more\ widely,\ a\ way\ of\ dealing\ with\ crime\ generally\ in\ a\ rational\ problem\ solving\ way.\ Central\ to\ restorative\ justice\ is\ recognition\ of\ the\ community,\ rather\ than\ criminal\ justice\ agencies,\ as\ the\ prime\ site\ of\ crime\ control.\(^{419}\)
\]

Wright describes the aims of restorative justice as being support and reparation for the victim, with mediation being used if necessary; reparation to the victim or the community; and co-operation in rehabilitation by the offender, with limited use of restrictions and detention.\(^{420}\)

Gustafson and Bergen delimit restorative justice theory negatively:

\(^{417}\) Black's Law Dictionary 910 (Abridged 6\textsuperscript{th} Edition).
\(^{418}\) Rogers & Mays, supra note 398 at 573.
Restorative justice is a philosophy; a value-based approach which needs, in part, to be defined by what it is not, or at least in contrast to retributive justice, its antithesis. Restorative justice is not a program. Restorative justice is not to be equated with diversion. Restorative justice is not about escape from responsibility, natural consequences or sanctions. Restorative justice is not limited in its applicability to minor or first time offenses. Restorative justice is not "soft on crime" (in fact, some offenders find their experience of taking responsibility in a face-to-face encounter with their victims to be the most difficult thing they have ever done). Restorative justice has little to do with technique, and a great deal to do with human relationships. Those who view crime from a restorative justice perspective see crime as harm done which creates a branch, a "rent" in the fabric of the community.\footnote{Promising Models in Restorative Justice at 5-6.}

In *Changing Lenses*, restorative justice is described in the following way:

> Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.\footnote{Zehr, supra note 405 at 181}

Instead of asking "Which law has been broken?", restorative justice asks "Who has been hurt?". Instead of asking "What does the offender deserve?", restorative justice asks "What can be done to repair or restore the relationship?".

Restorative justice is about holding offenders accountable for their actions, in the sense that the offender must understand what he or she has done, and then take full responsibility.\footnote{John Hogarth, "The Principles of Sentencing: Ouimet Revisited", in *Sentencing: Cases and Materials for Law 510* (Vancouver: University of British Columbia, 1992)}
Dr. Mark Umbreit has also elaborated on the concept of accountability with respect to young offenders:

The definition of accountability in the restorative justice paradigm is based on the recognition that when an offense occurs, the offender incurs an obligation to the victim. This definition of accountability has both a cognitive meaning (understanding impact of their behavior on the victim) and a behavioral meaning (taking action to make things right).\(^{424}\)

In structural terms, Umbreit describes accountability within retributive and restorative paradigms as follows:\(^{425}\)

<table>
<thead>
<tr>
<th>RETRIBUTIVE ACCOUNTABILITY</th>
<th>RESTORATIVE ACCOUNTABILITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wrongs create guilt</td>
<td>Wrongs create liabilities and obligations</td>
</tr>
<tr>
<td>Guilt absolute, either/or</td>
<td>Degrees of responsibility</td>
</tr>
<tr>
<td>Guilt indelible</td>
<td>Guilt removable through repentance and reparation</td>
</tr>
<tr>
<td>Debt is abstract</td>
<td>Debt is concrete</td>
</tr>
<tr>
<td>Debt paid by taking punishment</td>
<td>Debt paid by making right</td>
</tr>
<tr>
<td>&quot;Debt&quot; owed to society in the abstract</td>
<td>Debt owed to victim first</td>
</tr>
<tr>
<td>Accountability is taking one's &quot;medicine&quot;</td>
<td>Accountability is taking responsibility</td>
</tr>
<tr>
<td>Assumes behaviour chosen freely</td>
<td>Recognizes differences between potential and actual realization of human freedom</td>
</tr>
<tr>
<td>Free will or social determination</td>
<td>Recognizes role of social context of choices without denying personal responsibilities</td>
</tr>
</tbody>
</table>

Therefore, it is important to understand that both victim and offender are expected to participate actively, rather than passively, in the restorative justice system.

C. FROM RETRIBUTIVE TO RESTORATIVE?

As noted in Chapter 3, *The historical evolution of youth justice*, the description of earlier legislation in youth justice matters clearly reveals that the criminal justice system has, up till now, been firmly established in retributive principles.

Also noted earlier, an opening within the legislative framework, the YOA, has appeared in Section 4(1)\(^426\), which outlines instances in which alternative measures can be used. In order to delineate the change from retributive to restorative justice theory, allow me to expand upon Sections 3 and 4 under the YOA:

The YOA recognizes that young offenders have special needs and that because of their age, they cannot be held accountable in the same way as adult offenders would be. But section 3(1) and section 4 under the YOA state that the young offender should bear responsibility for his or her contraventions towards society, towards the victim, and towards him/herself. As a means of placing responsibility, Section 4 under the YOA expresses the importance of alternative measures, and thereby outlines the legal framework for programs for alternative measures.

\(^{425}\) Table 5 is described in the same article as mentioned supra note 424.
As described in Section 4, alternative measures are methods other than prosecution in youth court of dealing with youths who have committed offences. Some of these programs are known as "diversion". Some of the programs in Section 4 under the YOA are offered on a pre-trial basis, which means that the program can be completed before a charge is laid in youth court. Some of the program models for alternative measures are based on post-charge. As described in Section 4 (c), the young offender must fully and freely consent to participate in the alternative measures program, which is also a prerequisite for participation in the mediation process. Also, the young offender must accept responsibility for his or her act.

The majority of cases referred to victim-offender mediation are first time, non-violent, minor offences. The provincial authorities responsible for juvenile correction establish the eligibility criteria for referral to alternative measures. Some jurisdictions allow young repeat offenders to enter a victim-offender mediation program, but "[m]ost do not accept cases that involve violent or persistent antisocial behaviour patterns on the part of the youth." In most jurisdictions, the referrals are based upon either the characteristics of the offender or the offence. Only the Attorney General can authorize alternative measures programs, according to Section 4(1) under the YOA. Furthermore, there must

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426 See for a further description of section 3 and 4 of the YOA; Chapter 2.
428 See generally K. Pate and D. Peachey, "Face to Face: Victim-Offender Mediation under the Young Offenders Act", in Hudson, Hornick & Burrows, eds., *Justice and the Young Offender in Canada* (Toronto: Wall & Thompson, 1988).
429 Ibid.
be sufficient evidence to proceed with the prosecution of the offence, and law must not in any way bar the prosecution of the offence. Once the case is referred, a new process begins, which will be described on page 184ff.

In *A Strategy for the Renewal of Youth Justice* and with the *Youth Criminal Justice Act*, the door towards restorative seems to have been opened even more. Let me summarize the intentions behind the new youth justice strategy:

As already mentioned, the *Strategy for the Renewal of Youth Justice* emphasizes the importance of three areas related to youth crime:

- Promoting crime prevention and effective alternatives to the formal youth justice system.
- Ensuring that youth crime is met with meaningful consequences; and
- Emphasizing rehabilitation and reintegration.

These three areas related to youth crime have proven important in the drafting of the *Youth Criminal Justice Act*. This is quite evident when one looks at the news regarding the Act, released on the Department of Justice web-site on the day of the tabling. (Please refer to Table 3 on page 99).

As effective alternatives to the formal youth court, the Act encourages measures other than court proceedings when adequate to hold a young person accountable; authorizes the use of warnings, police cautions, referrals to community programs, and cautions by
prosecutors; and sets out objectives, such as encouraging repair of harm done to victims, providing guidance on use.

Ensuring that youth crime is met with meaningful consequences and emphasizing rehabilitation and reintegration is also inscribed in the new Act.⁴³⁰

Youth sentences should include purpose and principles that clearly describe the purpose of youth sentences as a need to hold youth accountable. This includes other specific principles, such as the need for proportionate sentences and the importance of rehabilitation. An example of meaningful consequences is the sentencing options that add new options to encourage use of non-custody sentences where appropriate and support reintegration.

Another important aspect of the new Act is the acknowledgement of victim's concerns, which for the first time in federal legislation is recognized in principle. The victims will have the right to access youth records, and they are encouraged to play a role in formal and informal community-based measures. The Act also establishes the right of victims to information about extrajudicial measures. That will, according to the policymakers, ensure meaningful consequences for the young offenders and their reintegration into the community.

Reintegration is also ensured by involving partners, who may include parents of the young person, the victim, community agencies or professionals, to "conferences" on the
young offender's case. The act allows advisory groups or "conferences" to advise the police officer, judge or other decision-maker under the Act on appropriate informal measures, conditions for release from pre-trial detention, appropriate sentences, and reintegration plans.

The new approach is an alternative, community-based range of programs. The new legislation will put a stronger emphasis on the development of a full range of alternatives to custody, which emphasize the young offender's responsibility to the victim and community.

**D. THE COST-SHARING ASPECT OF THE CANADIAN SYSTEM OF YOUTH JUSTICE**

On page 23, I mentioned the cost-sharing aspect of the implementation of the YOA. The cost-sharing agreements between the federal and the provincial governments have made the implementation of the YOA very difficult. The implementation of alternative measures mentioned in Section 4 of the YOA have been exposed to debate, and have proven difficult to implement. I will examine the federal government's role in implementing young offender legislation to determine the reason for these difficulties.

One of the key-aspects of the Canadian system of youth justice is that the federal government has jurisdiction and broad power to enact legislation in the area of youth

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430 Please refer to Table 3 described on page 99.
justice and young offenders. The provincial governments have jurisdiction to administer justice, and can therefore influence the implementation of the legislation. That means that the provincial governments have to pay for "all of the legal, judicial, correctional, and social services required for youths."\textsuperscript{431} By entering in cost-sharing agreements, funds provided by the federal government have funded some of the provincial programs. This financial arrangement is vulnerable in the sense that it is highly dependent on the cooperation of the provincial governments. The YOA added more items to the list of cost-shareable items. These included: post-adjudication detention, alternative measures, bail-supervision programs, probation and predisposition reports.

"However, because the federal contribution was determined by how much the provinces and the territories would spend on various programs, nearly three-quarters of the federal contribution was directed to custody and custodial programming, which resulted in proportionately less federal support for provinces with lower custody rates."\textsuperscript{432}

As noted on p. 23, federal funding was frozen at $156 million in 1989. This has led to a fall in overall federal share of eligible provincial costs to an average of approximately 30\%\textsuperscript{433}

The implementation and cost-sharing of youth justice legislation is important to the discussion of the YOA and restorative justice. Provincial politicians are unable, unwilling and ill prepared to pay the increase of costs a new philosophy might introduce.

\textsuperscript{431} Bala, supra note 415 at 12. See also Jim Coflin, supra note 159 at 37ff.
\textsuperscript{432} Renewing Youth Justice, supra note 3 at 6.
"The federal government has provided some financial support for young offenders services, but the amounts are diminishing while federal conditions for providing funds are increasing. This problem was acknowledged in *Renewing Youth Justice*: "we realize that negotiating cost-sharing agreements when federal financial support has diminished over the past several years is a major challenge. A priority in the negotiation will be to encourage the development of a wide range of alternatives to courts and incarceration." Extra federal funding is planned being spent on assisting with start-up costs for new programs in the provinces. The recommendation described in *Renewing Youth Justice* was supported in *A Strategy for the Renewal of Youth Justice*.

I do not believe that the *Youth Criminal Justice Act* actually constitutes a substantial change. The changes are to be found *beyond* the rhetoric of the legislation and *behind* the terms of the Act. These changes lay in the implementation and the new cost-sharing agreements relating to the new Act. This is where the *Youth Criminal Justice Act* can constitute a further advance, and introduce restorative justice.

A key-aspect of the new *Youth Criminal Justice Act* is the flexibility for provinces in choosing options in areas that allow them to address the unique needs and problems in their community, particularly in reintegration programs. It is expected that federal funding of such programs will ensure provincial governments support the implementation of the Act.

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433 Ibid.
434 Bala, supra note 431 at 13.
Additional federal resources will support provincial investments in new community-based programs. It is obvious that the implementation of the new Act involves partners at every level of the federal and provincial governments, and within the community.

Therefore, "[t]he federal government will also make additional resources available to support implementation of the Youth Justice Strategy and review its cost-sharing agreements with the provinces and territories to ensure stability and equity." \(^{436}\)

The federal government thereby hopes to ease the implementation of the *Youth Criminal Justice Act*. The Minister of Justice has delineated the financial funding:

> The Youth Justice Strategy will be implemented in close co-operation with the provinces and territories. New resources were allocated in the 1999-2000 Federal Budget ($206 million over the first three years) to support provincial and territorial efforts to meet the objectives of the Strategy and to provide greater stability and equity in federal funding. \(^{437}\)

The federal government has promised a significant shift in resources from custodial institutions to community-based services and it is negotiating new financial agreements that will reflect the importance of restorative justice.

This shift in resources and cost-sharing agreements reflect another important objective of the *Youth Criminal Justice Act* - namely crime prevention through social development.

\(^{435}\) *Renewing Youth Justice*, supra note 432 at 8.


Section 3 (1)(a) of the YOA recognizes the importance of a crime-prevention strategy based on social development. However, as noted above, the federal funding did not specifically financially support restorative justice initiatives. It is therefore argued that the strategy behind the *Youth Criminal Justice Act* is linked to other federal, provincial and territorial initiatives, such as the National Strategy on Community Safety and Crime Prevention and the National Children's Agenda, both of which address the broader factors linked to youth crime. The Safer Communities Initiative is administered by the National Crime Prevention Centre, and was launched in 1998 as part of the national strategy. "This initiative is aimed at developing community-based responses to crime, with a particular emphasis on children and youth, Aboriginal people and women. The government has committed $32 million annually to assist communities across Canada in developing programs and partnerships that will help prevent crime."

The strategy behind the *Youth Criminal Justice Act* also supports the National Children's Agenda and the involvement of a broad range of organizations that work with young people. The strategy behind the terms of the new Act attempts to address the broader factors in youth crime, and thereby indirectly restorative justice philosophy. The answer to a successful implementation of the new Act is additional federal funding, re-negotiation of cost-sharing agreements, and co-operation between the youth criminal justice system and other child welfare organizations.

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438 Ibid. at 2.
439 Ibid. at 1.
Even though it is my conclusion that the new Act does not constitute a substantial change in terms of the legislation, the federal government has decided to approach youth justice in a different way. This approach might constitute a further advance in the system of Canadian youth justice.

II. ALTERNATIVE MEASURES

In this section, I will delineate the options available within the criminal justice system that encourage measures other than traditional court proceedings. In order to understand the process of alternative measures, I will have to delineate the principles in the process of mediation. These principles are generally usable in dealing with young offenders in an informal setting, such as victim-offender mediation.

I will expound the theories and principles behind alternative measures such as mediation (victim-offender mediation in particular), Family Group Conferences, Victim-Offender Reconciliation Programs, and Circle Sentencing. The description will also contain a survey of the most common programs of alternative measures used throughout Canada. In Section C, I will look at mediation and the future.

A. PRINCIPLES OF MEDIATION

A.1. The Principles
Since the principles of mediation not are the major topic of this thesis, I will be brief regarding these matters.

What is 'mediation'?

Mediation is a "[p]rivate, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties."\(^ {440} \)

Originally, mediation and alternative dispute resolution were private methods of resolving disputes in private law matters, but they have in the last decade attracted interest in the area of criminal law.

The idea behind mediation is to bring disputing people together.\(^ {441} \) The participants undergo the mediation process on a voluntary basis, and the mediator, who is a neutral third party, has certain tools and techniques (known as micro-skills) to help the disputing parties to reach an agreement. For example, the technique may consist of a special way of questioning and active listening in order to find the parties' underlying interests. Mediation is flexible, voluntary and effective. The mediator must strive to equalize the participant's skill at bargaining, and to solve the problem of asymmetrical personal powers.\(^ {442} \)

\(^{441}\) Chupp, supra note 427 at 68.
Furthermore, it is of great importance that the mediator understands the disparities between the parties. These disparities reflect the cultural context of the parties. The disparity between the parties might consist of age, wealth, education, social standing, language, and so forth.\textsuperscript{443}

The mediator should use objective criteria to find a fair solution.\textsuperscript{444} Objective fairness is not the only factor. The mediator should also pay attention to and understand the parties' interests. If the subjective fairness is addressed, the parties will be compelled to reach an agreement. The control of the outcome of the mediation is high, as the parties are negotiating face to face. Especially in victim-offender mediation, where the offender is a juvenile, the tools and techniques mentioned above might be used successfully.\textsuperscript{445} In these cases mediation offers a situation in which both parties can profit from an agreement - a so-called "win-win" situation.

### A.2. The Role of the Mediator

In this section, I will examine the precautions a mediator should take before facilitating a case involving a young offender. These precautions will also be of great importance in dealing with young offenders in cases other than victim-offender mediation.

\textsuperscript{443} Ibid. at 211.
\textsuperscript{445} See also infra Section I, A.2. In this Section, I describe the mediation process, and I hope to provide useful insight into the above-mentioned tools and techniques.
The mediator conducts the 'intake' procedures. 'Intake' means identifying and screening the case. The mediator analyses the case beforehand to identify the cultural context and the underlying interests of the parties. As mentioned in Section I, Section A.1., the cultural context consists of disparity in age, language, education, social standing, wealth, etc., and is also reflected in the victim's and offender's skill at bargaining. It is important that the mediator acknowledge the cultural context, because it might lead to an imbalance of power between the parties. Understanding the cultural context will help to inform the mediator about whether there is anger or hostility between the parties, and whether this will hinder a meeting.

In victim-offender mediation in the context of a young offender, determination of guilt is not the focus. The mediation will therefore be interest-based, rather than value-based. The mediator needs to consider in advance what he or she is going to do, what he or she will wear, what attitude she or he will take with the various participants, and what words are to be spoken at the beginning to get the proceedings started. These factors are especially important in victim-offender mediation because the tension between the parties is often high. Consequently, the mediator must prepare his or her role.\footnote{See Judge Lindsay G. Arthur, "A Manual for Mediators", Juvenile and family Court Journal, (Spring 1995)/Vol. 46, No. 2, at 63-73.}

When the administrative process of screening is finished, the mediator will have preliminary meetings with the offender and the victim. Often the mediator will start by introducing the mediation process. Then, the mediator will listen to the parties' stories. In the preliminary session, the participants are allowed to express themselves and they
have a chance to be heard. After the introductionary stage, the mediator can suggest a joint meeting.

Some programs use role-play to prepare the young offenders to meet their victims, in order to minimize the anxiety the offender might experience. It is important to understand that mediation in criminal cases is quite different from the average Alternative Dispute Resolution-process. In victim-offender mediation, the participants do not know each other beforehand.

In the joint meeting, the mediator starts the process by explaining his or her role, and describing the communication patterns and the behavioural guidelines for the meeting. An informal seating arrangement, an informal opening, and informal conversation might be appropriate when a young offender is involved. The informality is used to build trust and to encourage the parties to let their guard down.

The mediator has certain tools and techniques to use in the mediation-process, as mentioned in Section I, A.1.

After the opening, the mediator encourages the parties to exchange information about the offence and to express their feelings. At the end of the mediation meeting, the victim should understand why the young offender acted as he did, and the offender

447 See supra note 446 ibid.
should understand the impact the offence has had on the victim. Finally, the parties might negotiate about the young offender's role in restoring the matter.

An agreement may include a written or personal apology, restitution, personal service work hours (similar to community service), or participation in educational programs designated as Alternative Measures Programs.

### A.3. Reconciliation

The meeting between victim and offender is often referred to as a 'reconciliation meeting'. In the mediation meeting, there is space for reconciliation; this means that feelings should be expressed, and a greater understanding between the parties can be gained.

As Mark Chupps explains:

> Reconciliation comes about as the offender realize for the first time the human consequences of her or his actions, the personal fear, trauma, loss, and anger that has resulted, and when the victim begins to see the offender as a person, rather than some violent monster he or she has conjured up.\(^{449}\)

It is important that reconciliation not be forced upon the parties. The mediator will, however, ask the participants to express themselves freely. Mark Chupp describes the impact of reconciliation as being "based largely on breaking down stereotypes and the victim and offender arriving at a new understanding of each other."\(^{450}\)

\(^{449}\) Chupp, supra note 441 at 63.

\(^{450}\) Ibid.
The mediator cannot impose settlements, but can assist the participants in settling their own agreement. This agreement must be fair in a subjective and objective sense, and must be reasonable, in order to "make it right" to the victim.451

Throughout the whole process, the disputants have the ability to control the decision-making process.

B. ALTERNATIVE MEASURES

In this section, I will expound the theories and principles behind alternative measures such as Mediation (victim-offender mediation in particular), Family Group Conferences, Victim-Offender Reconciliation Programs, and Circle Sentencing.

B.1. The Kitchener Experiment452

In section B.I, I will describe the evolution of mediation, starting with the Kitchener experiment. The Kitchener experiment is recognized as the forerunner of victim-offender mediation; therefore, I consider the description to be significant.

Victim-offender mediation was initiated in 1974 in Kitchener, Ontario, in the "Elmira Case". The case involved two intoxicated teenagers who had vandalized property

451 Zehr, supra note 422 at 78
belonging to 22 victims. The judge asked the young offenders to meet with and arrange to compensate each of the victims, after the suggestion of the young offenders' probation officer, Mark Yantzi. He reasoned that having to personally face their victims might have some therapeutic value for the young offenders. The concept gained enormous popularity because of the positive reactions from both victims and offenders.

That was the beginning of victim-offender reconciliation programs.

What are the characteristics of the victim-offender mediation process?

- Offenders meet with their victims face to face.
- The parties' interests are identified, in contrast to court proceedings.
- Both offender and victim are allowed to exchange information about the offence.
- Both victim and offender have an impact on the resolution of the matter.
- They negotiate some kind of restitution.

The probation officer in Kitchener, Mark Yantzi, had worked as a volunteer in a program sponsored by the Mennonite Central Committee (MCC). This committee has a strong pacifist tradition, and one of its main goals is to reconcile relationships. Consequently, the Kitchener project is based on the MCC’s aims and philosophies regarding reconciliation. Victim and offender must make peace and restore their relationship. The Kitchener project expanded, and developed to become an official program. Since 1975 it has been of significant importance, and has been known as VORP.
B.2. VORP

VORP stands for Victim-Offender Reconciliation Programme. VORP was also initiated by Mennonite reformers in Canada and the States. In 1975, the program was made official, and the most important goals of VORP were, and are, 'reconciliation' and 'alternatives to incapacitation'. Again, reconciliation means restoring the relationship between the victim and the offender. VORP is based on a Christian theological foundation, and on the results of the Kitchener project.

During the '70s and the '80s, VORP expanded and became a huge success. Similar programs developed from the VORP model. VORP is now operated by the Fraser Region Community Justice Initiatives Association (Langley, B.C.), the Edmonton Victim Offender Mediation Project, Victim Young Offender Reconciliation Program (Calgary), Saskatoon Mediation Services, Winnipeg Mediation Services, Community Justice Initiatives (Kitchener, Ontario), Windsor and Downesview (Ontario& Moncton, New Brunswick), and by the John Howard Society (Newfoundland and Labrador).

The purpose of the program is to bring the victim and the offender together with a trained mediator to achieve a resolution which is satisfactory to both parties to the criminal event. The reconciliation seeks to:

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• identify crime that can be successfully dealt with within the community;
• involve community members in work with problems that normally lead into the criminal justice process;
• facilitate the reaching of agreements between victims and offenders regarding restitution;
• assist offenders in directing payment of their "debt to society" to their victims (How to make things right),
• effect reconciliation and understanding between victims and offenders.

It is important to understand that the mediator is required to take a training course in mediation technique. It is a 36-hour-long course which includes basis resolution skills in victim-offender mediation, VORP philosophy, and role playing. VORP has now certified its mediators at one of three levels - Level I, Level II, or Senior Mediator - depending on their mediation experience and attendance of training courses.

B.3. Family Group Conferencing (FGC)\textsuperscript{455}

FGC was originally developed in New Zealand and there is a long history of the concept, which is rooted in the traditional ways of the Maoris. In 1989, New Zealand passed the Children, Young Persons and Their Families Act, which departed radically from previous law.


It placed primary responsibility with extended families for making decisions about what was to be done with their children and young people who had come to official notice. Families were to have the assistance of the police, in the case of young offenders, the child protection service, in the case of children in need of care and protection, and any others the family wished to be present at the meeting.  

In short, the FGC is designed to acknowledge that the primary role in caring for and protecting young offenders lies within the family, and to increase family participation in the decision-making process with respect to young offenders. In a family group conference only the relevant people are participating, and the setting is informal. The victim and the offender both participate actively, as they do in victim-offender mediation. The difference is the parental involvement. In FGC, the family of the young offender has the possibility of obtaining a better understanding of why the offence occurred and what plan should be made to minimize the chance that the offender will re-offend.

The conference is also very similar to mediation meetings. Here, too, it is important to recognize the power that lies in shaming the offender in order to produce outcomes. This is one of the attributes of restorative justice. A conference normally progresses through the following steps:

- Introductions of parties present, and their roles;
- An explanation of the procedure by the co-ordinator;

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456 Ibid.
457 Please refer to Section I, A.1.
458 Promising Models in Restorative Justice at 34-35.
• A presentation of the summary of facts for the offence by the police;
• An opportunity for the offender to comment on the accuracy of the police statement;
• An opportunity for the victim (or victim's representative) to present his or her view if the offender admits to the offence;
• A general discussion of possible outcomes;
• A discussion of options among the offender's family (usually in a private 'caucus');
• The formulation of a plan, response or outcome by the offender's family;
• General negotiation concerning the terms and acceptability of the plan proposed;
• Statement of agreement from the enforcement agency and victim;
• Recording of the agreed plan;
• Conclusion and adjournment of the meeting.

B.3.1. FGC in Canada

FGC has been implemented in Canada. In the 1990s the FGC emerged in B.C., and was a result of Aboriginal advocacy based on the results from New Zealand.

An evaluation of family group decision-making in Canada was made in 1996. The evaluation was based on preliminary findings from the Family Group Decision-making Project that was a trial implementation of family group conferencing in three culturally distinct regions of the Canadian province of Newfoundland and Labrador. The project focused on family violence and operated with a federal grant. The purpose of the evaluation was to hopefully show that family group conferences could challenge child
welfare thinking "that focuses on the individual failings of caregivers and, as a result, can promote a communal sense of responsibility for child and family well-being."\textsuperscript{460}

The conferences in this project mentioned above, strove to set up standards for caring, family shame, caring confrontation, supports for caring, and finally, family pride.

According to the statements made by Minister of Justice Anne McLellan on the occasion of the release of the \textit{Youth Criminal Justice Act}, family group conferences are intended to become an important part of the alternatives to traditional court proceedings.\textsuperscript{461}

\textbf{B.4. Circle Sentencing}

Aboriginal community circles (peacemaking, healing and sentencing) are examples of what communities can do to challenge the assumption that incarceration is the only currency in which an offender's obligations can be paid, and of a situation in which restorative values are shared by the stakeholders.\textsuperscript{462}

Judge Barry Stuart has elaborated on the impact that the formal criminal justice system might have on communities.\textsuperscript{463} He claims that the formal criminal justice system disempowers communities and undermines conflict resolution skills within

\textsuperscript{459} Joan Pennel & Gale Burford, "Attending to Context: Family Group Decision-making in Canada" in J. Hudson et al., supra note 455 at 206ff.
\textsuperscript{460} Ibid. at 207.
\textsuperscript{461} Please refer to Chapter 5 and table 3 on page 99.
\textsuperscript{462} Promising Models in Restorative Justice at 45.
\textsuperscript{463} Judge Barry Stuart, "Circle Sentencing: Mediation and Consensus: Turning Swords into Ploughshares" in Accord, June 1995, at 48-51. For further information, see also Casebook in Law 479, Chapter 14.
Judge Barry Stuart focuses on aspects of the Circle Sentencing Hearing which describe the use of consensus and mediation principles. The community is of great importance in circle sentencing, as the community is a part of the sentencing process. Despite the many different Circle processes, some similarities may be outlined:

- Each community has established requirements governing acceptance into the Circle.
- Preconditions for entering the Circle include an acceptance of responsibility by the offender, a plea of guilty, a connection to the community, a desire for rehabilitation, concrete steps toward rehabilitation, support within the community for the offender, and the input of the victim.
- The circle sentencing deals with all kind of offences, even serious crimes.
- The Circle is open to all, but the victim, the offender, Elders, and people with mediation skills have to participate. All parties in attendance have an influence on the process.
- The hearing starts with a welcome, a prayer, introductions and explanations, all to promote a sense of working together to find a solution in a manner that respects all participants.

The most important differences in Circle Sentencing flow from empowering the offender, the victim and particularly the community to take primary responsibility for advancing their interests, to take ownership of the process, and to
From my perspective, Circle Sentencing goes beyond restorative justice. Circle Sentencing is about how the community should deal with its own members. The offender is a part of the community, and in order to seek the best solution, the community has to deal with the offender as an equal member. To me, the most significant indicators that Circle Sentencing goes beyond restorative justice are: 1) The participants: There are very rarely Justice professionals attending the circle sentencing; and 2) The process is not about shaming the offender, which can produce both positive and negative outcomes. In my opinion, Circle Sentencing is superior to the shaming process. In Circle Sentencing, one defines oneself through the community, and the community defines itself through how it deals with its outsiders.

The use of Circle Sentencing Hearings have raised a number of concerns, including:

- Apparent insufficient attention to power imbalances;
- The possibility of powerful families stacking the circles so as to "fix" the outcomes and potentially render vulnerable victims even more vulnerable;
- That the process is too "soft on crime"; that offenders who commit crimes against the person have to be punished (and punishment, in such cases seems to mean one thing: sent out of the community to serve long terms in prison); and
- That "circles take too long a time."

464 Ibid.
465 As described in Section II, shaming is one of the attributes of restorative justice.
Critics have raised these concerns not only about Circle Sentencing, but also about other restorative justice initiatives.

Yet again, from the statements made by Minister of Justice Anne McLellan on the occasion of the release of the *Youth Criminal Justice Act*, Circle Sentencing Hearings are intended to become an important part of the alternative measures used in youth criminal justice.\footnote{467}

### B.5. A Survey of Victim-Offender Mediation Programs

Since the proclamation of the YOA, more than 30 mediation and reconciliation programs have been established in Canada.\footnote{468} All the programs encourage young persons who have committed offences to be accountable for their actions, in the sense that the young offender must understand what he or she did, and then take full responsibility for the crime.

The 30 programs are not completely identical in their underlying aims and philosophies. However, a common theme seems to be the desire to increase a young offender’s sense of responsibility and accountability, and to have other positive effects on the young offender’s behaviour.\footnote{469} The approach varies from program to program. The programs

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\footnote{466} *Promising Models in restorative Justice* at 45.
\footnote{467} Please refer to Chapter 5 and table 3 on page 99.
\footnote{468} See K. Pate & D. Peachey, supra note 429 at 104-121.
\footnote{469} A. & P. Schneider, "Policy Expectations and Program Realities in Juvenile Restitution", in Hudson & Galaway, eds., *Victims, Offenders and Alternative Sanctions*, (Toronto: Lexington Books, 1980). See also John Harding "Reconciling Mediation with Criminal Justice", in Wright & Galaway, supra note 453 at 31 ff.
also vary in number, in the training of the mediators, and in the extent of the involvement of victims and parents of offenders.

The goals of diverting selected cases from the legal system, fostering reconciliation and conflict resolution within the community, promoting restitution and dramatically reworking the criminal justice system are both competing and converging forces in growing popularity of victim-offender reconciliation programs for young offenders.\textsuperscript{470}

In the "Directory of Canadian Dispute Resolution Programs"\textsuperscript{471}, an analysis concludes that of the 28 programs currently documented, 16 programs were established after the YOA came into effect. (Please refer to sections 3 and 4 under the YOA, which provide the legislative framework).

Evidently, mediation programs seem to be of great importance in dealing with young offenders. Some of the programs are pre-trial alternatives to court, and their goal is to divert the young offenders from entering the criminal justice system. This is in contrast to post-trial sentencing alternatives. (Performed by \textit{i.e.}, VORP).\textsuperscript{472}

Most of the programs are operated by non-profit, voluntary organizations, and only a few are administrated directly by provincial government departments and private organizations.

\textsuperscript{470} Pate & Peachey supra note 468 ibid.  
\textsuperscript{471} Peachey & Skeen, eds., (Kitchener: Network for Community Justice and Conflict Resolution, 1988)  
\textsuperscript{472} See Bullington, et al., "A Critique of Diversionary Juvenile Justice", in Crime and Delinquency, January 1978, at 59-71. The authors claim "that the atmosphere of juvenile justice systems today is charged with...diversion", and they argue that diversion might be potentially dangerous, and argue against expansion of diversionary juvenile justice. The development of diversionary service has proved otherwise, since diversion is a major political topic.
Besides VORP and FGC, I also have to mention a few other programs, such as the Community Dispute Resolutions Programs (CDRP). This program operates in a number of jurisdictions. The goal is to settle conflicts in the local community with minimal involvement of police and without the involvement of the criminal justice system. In order to prevent disputes and to pursue a cost-efficient resource, the use of mediation has been very popular. According to *Promising Models in Restorative Justice*, the feedback from the RCMP and Crown Counsel considered CDRP to be an effective, community-based crime preventive program.

Another program is VOMP. VOMP stands for Victim-Offender Mediation Program. It is run by the Fraser Region Community Justice Initiatives Association in Langley, B.C.. The program offers mediation in cases of serious crime, and the goal is to promote the healing of both parties involved in the crime. The program allows participants to discuss any relevant issues.\(^{473}\)

Also to be mentioned is Restorative Resolutions operated by the John Howard Society of Manitoba. This program also offers a community-based alternative to incarceration. According to its statement in the Interim report, 1994\(^{474}\), the program promotes restorative justice by providing an opportunity for offenders to be accountable to the

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\(^{473}\) See *Evaluation of the Victim Offender Mediation Project, Langley, B.C. Final Report for Solicitor General Canada* (Tim Roberts, March 1995). The evaluation of the Langley Project reported strong support from both victims and offenders. Also, the criminal justice system responded with strong support.

\(^{474}\) Described in *Promising Models in Restorative Justice*, at 40 ff.
community, encouraging victim participation, addressing public safety and promoting peace.

B.6. Evaluation of the Programs

All programs in Canada monitor agreements until their terms have been fulfilled.\textsuperscript{475} Pursuant to Sections 4 and 5 of the YOA, youth court shall dismiss any charges against the young offender when the young person has totally complied with the terms and conditions of the alternative measures.

An automatic evaluation is built into the system, whether the programs are pre-trial or post-trial programs.

What about the evaluation of the quality of these programs? I have touched upon some of the concerns raised against restorative justice theory. As this thesis is concerned with youth justice philosophy, I will not be able to fully address all the problems regarding restorative justice, but will only mention the key elements of the criticism.

The problem with responding to this criticism is the increasing, albeit low, volume of evaluation of programs that provides alternatives to traditional juvenile justice system procedures.\textsuperscript{476}

\textsuperscript{475} See Pate & Peachey supra note 470 at 118.
\textsuperscript{476} As noted by David Shichor & Dale Sechrest, "A Comparison of mediated and non-mediated juvenile offender cases in California" Juvenile and Family Court (Spring 1998)/Vol. 49, No. 2 at 38.
"In order to further examine the performance of these programs more in depth studies are needed. These studies should look at future behaviour of the juveniles, victim satisfaction with mediation, referral agencies' options/attitudes toward the program, impact on community relations, and cost-benefits."\(^{477}\)

Only then will we be able to fully understand the effect that restorative justice theory might have on our society, and to respond to the criticism raised against the restorative theory.

C. MEDIATION AND THE FUTURE

C.1. Mediation - Qui Bono?

One should understand that there is enormous ambivalence among the population as to how young offenders should be dealt with. To what extent should society and community be punitive or benign? It is all about identifying the forms of justice that people desire.\(^{478}\)

C.1.1. What does mediation do for victims?

Taking part in a mediation meeting asks a lot of a victim, primarily because the victim has to participate actively in the process, and thereby have the ability to control the outcome of the decision-making. The victim is allowed to express his or her feelings.

\(^{477}\) Ibid.
and talk about the impact the offence had on him or her, rather than being used solely as a witness. The victim has a say in the process and might therefore experience the healing process, which is of significant importance in victim-offender mediation, more effectively. This effect might be a result of mediation's identification of the underlying interests of both parties. Some scholars are concerned that the victim might feel pressured to take part in mediation, and wonder whether the mediator can compensate for an imbalance of power between the parties.\(^{479}\) I do not think these concerns are of significant importance. The mediator is trained to deal with these situations. A good mediator will know how to balance the asymmetrical personal powers between the parties. The mediator can always stop the meeting if the imbalance of power between the parties is too pronounced. Furthermore, I think it is important to understand that very often the offender is the one who feels inferior at these meeting.\(^ {480}\)

**C.1.2. What does mediation do for the offender?**

The offender receives the opportunity to make good the wrong done. Also, the offender plays an active role in the mediation meeting. The offender will be able to exchange information about the offence, and to be a part of the decision-making process. In this way, the offender will be able to take full responsibility for his or her actions. In the mediation meeting, the young offender avoids stigmatization, which is often a part of the proceeding in youth court. Like the victim, the offender might experience and

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\(^{478}\) See Peachey, "Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire", in supra note 452 at 551ff. In this essay Peachey describes forms of justice, such as restitution, compensation, retribution, and forgiveness, as ways to restore relationships and justice.

\(^{479}\) See Helen Reeves and Mark Chupp, supra note 450 at 44ff. and at 56ff.

\(^{480}\) See Christopher Moore, supra note 443 in general.
understand the healing process more effectively than in the formal system. In mediation, the offender is also compelled to show true remorse.

For the offender, as for the victim, there might be pitfalls. The offender may feel forced to participate in the program, and might feel that mediation is more demanding than punishment. The latter concern is difficult to discuss. Regarding the first concern, I rely on the mediator to deal with the asymmetrical personal powers. If the mediator fears that the young offender has been forced to participate, the mediator should end the meeting.

C.1.3. What does mediation do for the community?

Mediation can contribute to the prevention of crime, which automatically decrease crime rates. This has been acknowledged by the Department of Justice in A Strategy for the Renewal of Youth Justice. The report states that the involvement of the community is regarded as an important feature of alternative measures such as mediation. However, if the members of the community are to participate in "restoring relationships" between offenders and victims, we will have to teach the community that the form of justice they should desire is restorative justice. The community should take partial responsibility for the occurrence of crime. This seems to be the paramount goal for politicians; also, as stated in A Strategy for the Renewal of Youth Justice: "The new youth justice legislation will put a stronger emphasis on the development of a full range of
alternatives to custody for young offenders that emphasize responsibility to the victim and community."

The *Youth Criminal Justice Act* also acknowledges this.

**III. CONCLUSION**

In this chapter, I have looked at mediation and measures other than court proceedings in the context of young offenders and their victims.

I have surveyed the theory of youth justice in Canada in order to provide a useful insight into the regulatory framework with respect to young offenders and youth justice philosophy. I have also delineated the importance of the cost-sharing aspect of the Canadian youth justice system.

The legislative framework has introduced the term 'alternative measures' (Section 4 under the YOA), and consequently the step from retributive to restorative justice, which is reflected in the theory and principles of alternative measures.

Most of the programs mentioned in Section B. are possible under the YOA. But the programs are likely to develop under the *Youth Criminal Justice Act* if the federal government funds them. As mentioned above, the federal government has made that

\[^{481}\text{See supra note 1 ibid.}\]
promise. The provincial governments are more likely to innovate and implement new restorative, community-based programs with additional funds from the federal government.

The *Youth Criminal Justice Act* consists largely of rhetoric, as I will conclude in Chapter 8.

However, from my point of view, it is important to understand that even though the new Act does not add much to the current legislation which could not already be achieved with Section 4 under the YOA, it is evident, when one looks beyond the rhetoric, that the *intention* is to expand the use of restorative principles in Canadian youth justice philosophy. The politicians have started paying attention to a theory that might change the adversarial youth justice system. This is emphasized by the federal government's promise of shifts of resources and re-negotiation of cost-sharing agreements between the federal and the provincial governments.

Therefore, I feel that a description of the evolution of alternative measures and a description of the principles would be appropriate, especially as victim-offender mediation programs increased after the enactment of the YOA. Also, I wanted to show the dynamics of the different programs within mediation, because these programs have constructed an alternative vision of justice, as Circle Sentencing clearly shows, and because these programs are likely to develop under the *Youth Criminal Justice Act*. 
In structural terms, the restorative models at various stages in criminal and community stages are outlined in Table 6.  

COS: Circle of Support; VORP: Victim Offender Mediation Program for Serious Crime; FGC: Family Group Conferencing; VORP: Victim Offender Reconciliation Program; CDRP: Community Dispute Resolution Program

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482 Table 6: Community Justice Initiatives Association as described in Promising Models in Restorative Justice at 22.
With *A Strategy for the Renewal of Youth Justice and the Youth Criminal Justice Act*, it seems as if the politicians are seeking to play a progressive part in the deconstructing of the adversarial criminal justice system.

The new Act encourages measures other than court proceedings, when adequate to hold a young person accountable; authorizes use of warnings, police cautions, referrals to community programs, and cautions by prosecutors; and sets out objectives, such as encouraging repair of harm done to victims, and provides guidance on use.

Other intended changes can be found in Table 3 on page 99.
In structural terms, the youth justice system now operating in Canada under the YOA is outlined in Table 7a.\textsuperscript{483}

\textsuperscript{483} Inspired by figure 7.1: Restructured South Australian Juvenile Justice System in Joy Wundersitz and Sue Hetzel, "Family Conferencing for Young Offenders: South Australian Experience" in J. Hudson, et al., supra note 459 at 114.
In structural terms, the youth justice system under the *Youth Criminal Justice Act* is outlined in Table 7b.\(^{484}\)

\(^{484}\) Please compare to Table 3 on page 99.
In my opinion, restorative programs such as mediation could provide a better locus for resolving criminal cases involving young offenders, and it looks as if the politicians are now ready to make a change. It will be interesting to follow the replacement of the YOA with a new Youth Criminal Justice Act:

that will put public protection first and that will command respect, foster values such as accountability and responsibility, and make it clear that criminal behaviour will lead to meaningful consequences;

and

will encourage the development of a full range of community-based sentences and effective alternatives to the justice system for non-violent young offenders that foster respect, emphasize responsibility to the victim and community, help youth understand the impact of their actions, and allow them to see clear connection between the offence and its consequences.\footnote{See supra note 2 ibid.} \footnote{See UN \textit{Standard Minimum Rules for the Administration of Juvenile Justice} (The Beijing Rules), 1985, at art. 5.1: "The juvenile justice system shall emphasize the well-being of the juvenile...." and art. 11.1: "Consideration shall be given...to dealing with juvenile offenders without resorting to formal trial." And The Council of Europe \textit{Recommendation on Social Reactions to Juvenile Delinquency}, 1987, at art. R 20: "the penal system for minors should continue to be characterized by its objective of education and social integration", and the Council encourages "the development of diversion and mediation procedures...in order to prevent minors from entering into the criminal justice system."}

This is also in coherence with international legal standards.\footnote{See supra note 2 ibid.} \footnote{See UN \textit{Standard Minimum Rules for the Administration of Juvenile Justice} (The Beijing Rules), 1985, at art. 5.1: "The juvenile justice system shall emphasize the well-being of the juvenile...." and art. 11.1: "Consideration shall be given...to dealing with juvenile offenders without resorting to formal trial." And The Council of Europe \textit{Recommendation on Social Reactions to Juvenile Delinquency}, 1987, at art. R 20: "the penal system for minors should continue to be characterized by its objective of education and social integration", and the Council encourages "the development of diversion and mediation procedures...in order to prevent minors from entering into the criminal justice system."}

Measures other than court proceedings, such as mediation, can do more than resolve conflicts between parties. Mediation can be about empowerment and recognition, and
consequently be a dynamic mixture between interest-based mediation and transformative mediation.\textsuperscript{487}

\textit{A Strategy for the Renewal of Youth Justice} and the \textit{Youth Criminal Justice Act} use words such as "rehabilitation" and "treatment" in response to youth crime. Those words are firmly established in retributive justice. The report and the new Act also pursue the emphasis on the young offender's role in righting the wrong he or she has done to the victim and community by using words like "accountability" and "responsibility". These concepts are likewise firmly established in restorative justice philosophy.

It will be interesting to see whether the implementation of restorative justice theory in Canadian youth justice philosophy will be a result of retributive or restorative accountability. As noted earlier, the rhetoric in the new Act seems to mix terms that are firmly established in both restorative and retributive justice, respectively.

As long as the dichotomy between these values is not strictly clear, there might not be any substantive difference between retributive and restorative justice, and thereby, between the JDA, YOA, and the \textit{Youth Criminal Justice Act}:

\textsuperscript{487} See J. Folger & R. Bush, \textit{The Promise of Mediation: Responding to conflict Through Empowerment and Recognition} (San Francisco: Jossey-Bass Publishers, 1994). At 84ff. the authors describe the 'transformative mediation' objectives as empowerment and recognition. When disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, empowerment is achieved. When the parties experience an expanded willingness to acknowledge and be responsive to other parties' situation and common human qualities, recognition is achieved. In my opinion, victim-offender mediation should be a mixture of the transformative and the interest-based approach.
Ultimately, the choice of restorative versus retributive accountability is driven by the underlying values related to our understanding of crime and delinquency. Without a strong grounding in restorative justice values, old forms of retributive accountability could take on a new appearance yet lack any substantive difference.\(^{488}\)

The difference is now the federal government's willingness to financially support programs based on restorative justice principles.

\(^{488}\) Mark Umbreit, supra note 425 ibid.
CHAPTER 8

CONCLUSION

My intention in the previous 7 chapters has been to examine the rationale of Canadian youth justice policy. I wanted to explore the reason behind the federal government's recent political initiative and look into whether the government's youth justice strategy will accomplish its goals and make actual alteration to the existing legislation and justice system in the context of young offenders.

Throughout the chapters I stated the importance of historical, political, socio-economic and legal elements in the understanding of youth justice philosophy. The YOA is still the current legislation as I write this thesis, and I conclude in Chapter 2 that a historical as well as an intellectual and political change in the 1960s and 1970s led to a new legislative framework in 1984.

To seek a deeper understanding of the YOA I examined the historical evolution of youth justice philosophy in the 19th and 20th century. Again, socio-economic, political and intellectual changes made an impact on youth justice matters, and led to the 1908 enactment of the JDA.
In Chapter 4 I outlined the process of reforming the JDA.

I think it is safe to conclude that whenever major changes such as The Industrial Revolution, have happened in society, legislative responses automatically occur. In the early 20th century, business leaders wanted to support a laissez-faire policy in order to maintain control. Therefore, in order to maintain control they decided to support the child saving movement, of which the middle-class was the motivating power. The child saving movement wanted a theoretical structure to control young offenders' behavior, and found support in the positivist school of criminology. Pressure was therefore put on politicians as well. A legislative framework was composed - the JDA.

During the 1960s and 1970s new socio-economic changes occurred, and Canada became more conservative. The lack of children's rights under the JDA became a major topic, as did the questioning of the treatment and welfare-model of the YOA. Due process and a focus on the offence and accountability became new issues. A legislative framework was composed - the YOA.

Now, at the end of the 20th century, history is apparently repeating itself. The Minister of Justice has promised us new legislation that will reform youth justice philosophy and even extend beyond it. But the new legislation is negotiated on previous criticism of the YOA and the intellectual, historical and legal aspects are still the same as they were under the YOA. As argued in Chapter 5, the Youth Criminal Justice Act does not provide anything substantially new to the present youth justice philosophy. In fact, the
confusion might just get worse with the new legislation. The guiding principles are still competing and ambiguous, using terms from both the JDA and the YOA. It can be concluded that it is not enough that politicians have a perceived need to address criticism on youth justice matters. The time has to be right and so does the interaction of historical, socio-economic and intellectual changes.

The new Act shows that there still is a perceived need to protect society from young offenders and a perceived need to protect and save young offenders, as was the case at the time the JDA was drafted.

The following conclusion regarding the shift between the JDA and the YOA therefore still exists regarding the new Act:

There are significant indications that a new system of juvenile justice is emerging - a system which can preserve that advancements in the behavioural sciences can be utilized in the treatment of troubled and troublesome youth, but only within a legal framework of justice, that protects the individual rights of such youth and precludes authoritative intervention in their lives without a crucially important reason for doing so.  

The development in the youth justice system clearly reveals that no substantial changes have been made with the Youth Criminal Justice Act, except that it is a little tougher on certain offenders. The new legislation, with all its good intentions, also shows that we do

489 Faust & Brantingham, supra note 402 at 252-259 where they conclude on the juvenile justice system.
not have faith in the youth justice system as the right forum for certain offences and offenders.

Furthermore, I wanted to extend my study beyond the perspectives mentioned above; I also wanted to describe the development in youth justice from a scientific perspective. Chapter 6 includes a description of Kuhn's theory of paradigm shifts, and an analysis of this theory in the context of Canadian youth justice philosophy. Thereby, I extended the evaluation of youth justice philosophy commenced by Aultman & Wright in 1982. It is my conclusion that Kuhn's theory is also highly applicable in the field of law.

In the same chapter, I delineated the paradoxes in Kuhn's theory. This description is important because it points out that Kuhn's theory may be applicable in various areas, but that it cannot be adopted blindly and without questioning.

Finally, it could be suggested that a scientific revolution has occurred with the YOA (and some would say with the Youth Criminal Justice Act). But the end result depends on whether, beyond the theory and the rhetoric of the new Act, real change has occurred.

That politicians seem to firmly believe that the Youth Criminal Justice Act makes an alteration to the current YOA is thought provoking. The changes are few, as described in Chapter 5. Though it may be said no real change has happened with the new Act, when we go beyond the rhetoric, politicians seem eager to implement restorative justice in
Canadian youth justice philosophy. Therefore, in Chapter 7 I have delineated the possible step from a retributive to a restorative justice setting that the new Act initiates.

In order to provide a useful insight to restorative justice, I expounded the various alternative measures available within the YOA.

The step from retributive to restorative justice step has been made possible with a promise from the federal government to re-negotiate cost-sharing agreements between the federal and the provincial governments, and financially fund community-based, restorative programs. It can therefore be concluded that the terms and the rhetoric behind the *Youth Criminal Justice Act* could constitute a further advance than hitherto. However, an uncooperative provincial government could still destroy the federal plans.

I have tried to prove that socio-economic, political, intellectual, historical and scientific perspectives have an impact on legal changes in youth justice philosophy. However, I can only display what seem to be relevant and reasonable arguments in my interpretation of the impact of those perspectives on youth justice theory.

I cannot rigorously prove that I had a grandmother, or that you exist. Since I cannot formally prove even claims that no sane person doubts, I certainly cannot hope to prove a theory, which is about more shadowy stuff than facts, or prove that one theory is better than another. Even an analysis that displays what it takes to be relevant arguments and evidence to explain why some theory displaced another, or ought to displace another, needs to appeal to intuitions about what
looks reasonable and to intuitions about what looks relevant, not to formal proofs. 490

490 Margolis, supra note 393 at 187.
This postscript is intended to show the relevant similarities and differences between issues in Canadian and Danish youth justice legislation and youth justice philosophy. In the 8 Chapters of this thesis, I have analyzed youth justice philosophy in Canada, and tried to demonstrate the importance of historical, socio-economic, political, and intellectual elements of the legal aspect of Canadian youth justice philosophy.

Analyzing the development of Canadian youth justice philosophy made me realize that Canada is in many ways struggling with the same problems as Denmark regarding how to deal effectively with young offenders. Reading academics' and practitioners' contributions to the understanding of youth justice philosophy in Canada made me realize that Canada is considered to be a forerunner in the use of alternative measures when compared to Denmark. Therefore, it is important for me - as a Danish prosecutor - to outline the general conclusions of my analysis of the Canadian youth justice system and philosophy, and compare them to the Danish youth justice system.\footnote{In this postscript I have decided only to focus on Danish criminal law and not the extraordinary criminal law in Greenland, which differs from Danish legislation in many ways. Further information can be obtained from an unpublished thesis by Lene Spang Dyhrberg Nielsen "Udviklingen I det Gronlandske Retsvaesen" (The Development in the Greenlandic Judicial System) (Aarhus University, June 1995)}
Consequently, this postscript is primarily intended for my Danish employer, the Danish Department of Justice. A delineation of the similarities and differences between the youth justice system in the two countries might be important to the Danish system since we are in desperate need of effective measures when it comes to dealing with and sentencing young offenders. Since Canada has a different approach to youth crime, it might outline a new, restorative way of approaching youth crime in Denmark.

The current youth justice system in Denmark is as follows:

- Youth courts do not exist in Denmark despite the fact that the historical element of Danish youth justice is similar to Canadian youth justice philosophy. Young offenders are tried in the same court as adult offenders.

- Denmark does not have specific legislation within the criminal justice system dedicated to young offenders. The Danish 'Straffelov' and 'Retsplejelov' (The Criminal Code and the Code of Proceeds of Crime, respectively) include young offenders. Therefore, Denmark has chosen not to have a separate criminal justice system for the young offenders. In 'Straffeloven' and 'Retsplejeloven', a few sections deal specifically with offenders between the age of 15-18 years. The articles outline in details how and under what circumstances young offenders should be treated different than adult offenders.

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• There is only a limited possibility of using alternative measures in the context of young offenders in the Danish criminal justice system, when compared to Canada. The Canadian legislators have addressed and specified the issue of alternative measures in the YOA and the *Youth Criminal Justice Act*\(^{493}\). Consequently, young offenders in Denmark do not have the opportunity to participate in programs officially designated to be a part of alternative measures and sentencing.

• One of the more interesting political initiatives on youth justice philosophy happened in 1990, when the Danish Folketing (the Danish Parliament) passed a resolution on 'ungdomskontrakter'. (Youth Agreements)\(^{494}\). The regulatory framework is Retsplejelovens (the Code of Proceeds of Crime) section on withdrawing charges against a young offender. The young offender can choose to sign a youth agreement ('ungdomskontrakt'), if the prosecution finds that the young offender meets certain qualifications for signing the agreement. If the young offender meets the requirements, he or she can sign the agreement. By signing the agreement, the young offender commit him- or herself to participate in certain activities, such as, for example, going to work voluntarily every day, dressing formally, no socializing with former 'friends', and so forth. If the young offender successfully completes the agreement, the disposition will not be registered on the criminal record. If the young offender does not successfully complete the agreement, the social services must report the 'break of contract' to the police, and a further process will take place in the formal criminal justice system. The resolution on 'ungdomskontrakter' was enacted

\(^{493}\) Please refer to Chapters 2 and 5.

\(^{494}\) Folketingstidende 1989-90 C sp. 821.
into legislation in 1994. In my work as a prosecutor, I have not yet used 'ungdomskontrakter' in the sentencing process of a young offender, and from my point of view, both prosecution and the judges are reluctant to use this disposition.

- Parallel with 'Straffeloven' (the Danish Criminal Code), is 'Bistandsloven'. (The Danish Social Security Act). The Act sets up a paradigm for young people who are in a turbulent relationship with their parents. Thus, the Social Security Act does not deal with the young people's criminal behavior. A social worker often attends a case involving a young offender (under 18 years old) in order to set up some goals for the offender when the offender is done 'serving his or her time'. It is important to mention the Social Security Act in order to provide a useful insight into Danish legislation in the context of young offenders. But it is also important to remember that the social security system is independent of the criminal justice system.

As noted above, Denmark does not have a tradition of using alternative measures in the sentencing process of young offenders. Yet, from my point of view, Danish politicians have not paid attention to the possible effective usage of alternative measures in the struggle with youth crime and youth sentencing.

The Danish Department of Justice has just recently started paying attention to the theories and principles of victim-offender mediation, but has not been able to implement the theories. But that does not mean that youth crime is not a controversial issue in

Denmark. On the contrary, the political agenda is very much concerned with youth crime and in changing young offenders' criminal behavior pattern.

In Denmark, we have a unified criminal justice system. That means we (the prosecutors, the defense lawyers and the judges) do not have many opportunities to outside the court proceedings.⁴⁹⁶
Within the system described in Table 8, prosecutors have permission to give formal warnings, but only with the consent of the court. The police also have the possibility of giving cautions and warnings, but in that case, no charges are laid against a young offender. The prosecutor also has the possibility of dismissing the charge laid against the young offender before the case gets to court; for example, if there is not enough evidence.

But it is evident from Table 8 that as soon as a charge is laid, the case against a young offender continues within the ambit of the formal criminal justice system.

In my analysis of the Canadian youth justice system, I generally concluded that the historical, political, socio-economic and legal elements in the understanding of youth justice philosophy were of great importance. The Minister of Justice has promised the Canadians a new legislation that will reform youth justice philosophy and even extend beyond it.

I concluded that the new legislation does not provide anything substantially new to the present youth justice philosophy, and that, in fact, the confusion might just get worse with the new legislation. I also stated that even though no real changes have occurred with the new Act, politicians seem eager to implement restorative justice in Canadian youth justice philosophy. In my analysis I delineated the possible step from a retributive to a restorative justice setting that the new Act initiates.

496 Table 8. Please compare to Table 7a and 7b in Chapter 7.
By comparing Table 8, 7a, 7b and 6, it will become clear that, despite its weaknesses, the Canadian youth justice has more string to its bow than the Danish unified system. The development of the Scandinavian youth justice system has been following worldwide development, from the strictly penalizing system to the rehabilitative ideal. The rehabilitative ideal is still the main characteristic of the Scandinavian youth justice system.

It can be said that the intention behind the Danish legislation is to emphasize the well-being of the young offender and to rehabilitate the young person when the sentence is served. But looking at Table 8 shows that the Danish criminal justice system does not emphasize the notion of dealing with young offenders in a separate criminal justice system, and that we in Denmark should consider dealing with young offenders without resorting to formal trial.

Let me once again refer to the UN's *Standard Minimum Rules for the Administration of Juvenile Justice*:

Art. 5.1: "The juvenile justice system shall emphasize the well-being of the juvenile...."

and art. 11.1: "Consideration shall be given...to dealing with juvenile offenders without resorting to formal trial."

According to The Council of Europe *Recommendation on Social Reactions to Juvenile Delinquency*:
Art. R 20: "the penal system for minors should continue to be characterized by its objective of education and social integration", and the Council encourages "the development of diversion and mediation procedures...in order to prevent minors from entering into the criminal justice system."

These are just minimum-rules, but are an important aspect of Canadian youth justice philosophy.

In my opinion, it is therefore highly recommended that Denmark consider taking a closer look at Canadian youth justice philosophy and the Canadian youth justice system in order to proceed past the unified system described in Table 8.

497 Supra note 487.
498 Ibid.
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