JUDICIAL INTERPRETATIONS OF THE CANADIAN 1984 YOUNG OFFENDERS ACT

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ABSTRACT

This thesis attempts to explain changes in juvenile court reasoning from 'personal' to 'social' goals of justice. The introduction of social reasoning into juvenile justice has resulted in legal reform practices which circumscribe the domain of decentralized community youth services, increase the dependency and surveillance of deviant youth, result in harsher measures of punishment, and generally widen the network of social control through the law. The shift from the treatment intervention focus of the Juvenile Delinquents Act to the deterrence and punishment focus of the Young Offenders Act is maintained by incarcerations and a 'downward' sliding tariff of dispositions. The new social control administration formally enters the previously informal social control networks of family, community, and peer relations. Social change options through the law are increasingly centralized in the courts (where youth are concerned) at the expense of the law's potential for mediating decentralized collective change. The new form of social reasoning by which law reform occurs is explicated in order to critique its application for the current legislation and to explore possible use of collective change processes through law. I describe 'social' reasoning as a form of interpretive syllogism with the goal of social good satisfied through individual justice, in contrast to 'personal' reasoning which involves the individual's best interests as a good in itself. Social reasoning, as currently applied in the YOA, utilizes neo-classical rationality and sociological theories that relate actions to a presumed balance of diverse and competing social interests.

My own understanding of the impact of Court interpretations of the YOA are based on in-depth interviews with 10 Youth Court judges in the Vancouver area. I analyze the legislative construction and judicial implementation of the YOA as reflecting a political strategy linked to and grounded in the knowledge relations of experts. Strategies for discipline are consonant with the rationalized practices of social science knowledge, located both in science (the medical model) and in law (sociological jurisprudence). The research findings suggest that 'social' reasoning, which is narrowly centered on legal problems arising from the behaviour of juveniles, pursues forms of crime control directly related to the needs of capital. The YOA is thus viewed as a new discourse (based on power and knowledge relationships) that aims to widen state-social control. Given the relatively narrow jurisprudential horizons of both the legislators who framed the YOA and the judges who apply it, the potential of law for effecting social change is curtailed. I conclude my analysis by suggesting a culturally reflexive approach in which legal reasoning, by a process of reconstructing the interpretive syllogism of law to include commonsense practical reasoning, could become more conducive to community change.

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CHAPTER I:

INTRODUCTION AND HISTORY

This thesis is a study of the legal reasoning used by judges when implementing the Young Offenders Act, (1984). It explores the transformation of social reasoning leading to the creation of the Act. It explicates interpretions of the Act linking forms of social reasoning and the ends of justice as formulated by judges in the Youth Court, by the legislators, by lawyers and by sociological theorists. Social reasoning refers to reasoning about the social good, rather than individual reasoning, or reasoning about what is the good for individuals. The thesis describes and explains how the changing modes of reasoning and content from personal to social reasoning that have taken place within the process of judicial reasoning under the YOA, are reflected in the sentence outcomes in the youth courts.

Outside the internal dialogue, or the changes that ideology goes through as social reasoning, are the ways in which the social structural formations of family, workplace and citizenship are related to social reasoning. The transformation of personal reasoning to social reasoning is strategically located. By mediating between these structural formations, social reasoning thereby becomes useful in legitimating a political and moral social consensus, or maintaining a unified sense of social order. The social reasoning embodied in the new Young Offenders Act is

consonant with the political purposes of the neo-conservative Canadian governments of the 1980s, and of the lobby groups that have allied themselves with the government and to a new popular consensus.

Social reasoning is historically available to the law, in the form of a discourse of universalization. The words and meanings of social reasoning, in provoking words that originated from a similar ideology or based within a language 'family of resemblances' (Wittgenstein, 1953), were also appropriate to law and order groups allied to the legal lobbies at the time of the advent of the Young Offenders Act, (YOA). Since the turn of the century, the law has admitted the strategies of treatment rehabilitation as personal reasoning to the ideologies of universalization. This form of universalization /particularization, where a universal governance was adjusted to admit the particular services of experts[1], was recently enhanced under the YOA, by the discourses of individualization of punishment, and of retribution and deterrence. A new form of social reasoning has emerged. The counter-strategy of restructuring by collectivization with the aim of eradicating the causes of crime has been diminished. The word associations of familialism, which promotes the nuclear family as the ideal family form and as the primary sphere of morality (private morality), struck a familiar chord to both the legal and the law and order

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[1] Foucault discusses the struggles between the legal and psychiatric profession in the trial of Paul Riviere.

lobbies. Crime control through various forms of punishment of individuals, appealed to both groups. The law, as an area of local power relations, has been exploited to maintain surrounding power relations, of social control networks, both formal and informal.

Social control practices resulted in a new administration under the YOA that is not equipped for the 70,000 offenders who come before Canadian courts with "personal troubles and public issues", in C. W. Mills terminology. Instead, by the adoption of social reasoning, the judicial dispositions now benefit the neo-conservative economic emphasis on privatization of services. Specifically, the form of social reasoning in the youth courts is the result of the adaptation of a sociological and social engineering jurisprudence to new principles and practices. By transforming reasoning practices, judges have retained a neo-classical concept of justice with respect to both crime control and welfare notions, one which relies on rational action and social engineering to ensure the production of a 'problem population' (a term used to refer to social control over behaviour or positions threatening to 'social relations of production', Spitzer, 1975). This specific relation between the law under the YOA, as judges have interpreted it, and capital, suggests that juvenile problems exist at a structural level[2]. Deviance is the result of both a crime control response through the juvenile justice system (as

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[2] Spitzer suggests that the emergence of a surplus population - for example, the unemployed, calls into question essential components of capital. The existence of such populations derive from fundamental contradictions in the capitalist mode of production. (Spitzer, 1975:642)

labelling theory assumes) and also of the relations to production which are a stimulus towards criminal actions. With neo-classical justice in place, the stage is set for the appropriate 'pre-conditions for the efficient extraction of surplus value' (Harris & Webb, 1987:30). The debate turns around the 'relative autonomy of the law', in which structural Marxists have argued that state apparatuses are not manipulated at will by the ruling classes. In the case of the YOA implementation, going to the courts was the result of an unstable balance between neo-liberals and neo-conservatives, a concrete event in the history of capitalist social relations.

One aim of this analysis is to show that the law is 'relatively' autonomous from the class interests that seek to control it. This is done by examining the form of the law (social, personal, or collective), as distinct from its content. The form of legal reasoning with an individualistic emphasis, as in case reasoning for both social and personal justifications, can be used more broadly to mediate collective interests. The assumption is that collective community interests are not historically an instrument of capital.

Using epistemological analysis, interpretation is defined as form, and capital relations as content. Outside of the form - content distinction of epistemology, is the domain of ontology, where knowledge relations give both form and substance to power-

relations, which is the prime mover. Power-knowledge relations are the cornerstone of the YOA. Foucault, in Volunte de Savoir ("the Will to Know", McMurrin, 1981) asserts that knowledge is implicated in power relations. If power is expansive in its scope, discursive formations, such as interpretation, theories and policies set limits. Foucault argues that power relations are strategic domains, as opposed to the static domains of knowledge. Epistemology moves to strategy.

The questions I will be asking are: one, how is this reasoning in the B.C. Youth Court and in apposite criminological literature to be linked to economy, politics and family relationships? Two, how does legal reasoning construct these relationships using crime control? Three, does the law provide for the normalization of repression or liberating measures?

In 1984, after 20 years of deliberations, the Canadian legislature introduced the Young Offenders Act (1984), the YOA, to replace the Juvenile Delinquent Act, (1908), the JDA. The debates were long and contentious because of the conflicts between two dominant assumptions about the ends of juvenile justice: social welfare entitlements versus Rights and Responsibilities of citizenship. 'Social Welfare' puts the onus of responsibility for juvenile delinquency on the state, while 'Rights and Responsibilities' holds the youth accountable for his/her crimes. These assumptions guide legal reasoning in B.C. Youth Court

interpretations of state intention, and affect the surrounding social relationships.

In order to understand problems with the YOA, a comparison with the JDA is important. The focal point in the rhetoric of processing young people under the JDA was the concept of 'juvenile delinquent' (Platt, 1969). In distinguishing adults from children, the courts accepted a category of 'delinquent young persons' whom they defined as still requiring socialization that would identify a place according to his/her nature or personality. Personalities were alleged to be maladjusted through faulty parenting, which stood in need of correction. Children could learn from a set of rational principles passed on by experts.

Discipline of children was a special area of overlap between the experts, the Courts, and the family. Under the JDA, in this collective problem area, the treatment values of experts were supported by the Court. The terms 'incorrigible' or 'unmanageable' were referred to in provincial statute provisions relating to children described as being beyond the control of a parent or guardian, or in moral danger. Committal to a training school was, as far as the JDA was concerned, the ultimate sanction or treatment measure.

"The JDA permitted a child to be sent to a training school ni respect to any conduct for which he can be adjudged delinquent, including a simple by-law infraction." (Juvenile Delinquency in Canada, 1965:73)

Sociological consensus theorists (e.g., Durkheim, 1964), subscribed to the view that moral or shared value consensus operates within society. The JDA provided a set of procedures supporting a system of structures and rules that were to be applied to properly socialized individuals. According to the dominant functionalist perspective on consensus, if any of the subsystems failed: welfare, education, community, family, and religion, there was a corresponding dereliction in the juvenile's behaviour. Crime and delinquency required special consideration by means of treatment or reform, according to certain scientific principles. Moral good was obtained by legitimation of private, that is, of family morality, which guided socialization practices, via the legal system which operated according to its own set of propositions and principles. The family often failed in its purposes, especially, as perceived by those groups with a middle-class perspective (Platt, 1977).

At the time of the JDA enactment, sociological jurisprudence began as a school of jurisprudence to adapt sociological functionalism to the 'art and science of law'. According to Roscoe Pound (1942), sanctions inhere in moral duties which he says 'defy public enforcement'. As the JDA came under increased scrutiny, Pound argued that excessive discretion was given to legal agents, such as probation officers, whose capacity to achieve moral ends were questionable. Whereas the legal profession could justify its principles by referring to a process of universal argument or

rationality (a Kantian view) and validate its grounds in 'inalienable rights' (Locke) of the individual, the administrative officials of the JDA constituted particularizing practices with the single purpose of law enforcement. Juveniles, under the JDA, had no 'inalienable rights'. In the ensuing debates over the limitations of the JDA, the Department of Justice committee report (1965) appeared to emphasize the social engineering role of the law. The end of justice was to correct the moral character of the offender.

> "It was recommended that a juvenile court judge should ordinarily receive a specialized program of training, covering such matters as the principles of child psychology and personality development, the prevention and treatment of juvenile delinquent behaviour, juvenile court law and the rules of evidence, and the organization and administration of the juvenile court. Steps should be taken to make appropriate courses of training available to Canadian juvenile court judges." (Recommendation no. 41, 1965:289)

To attain this reformative end, the law was to adopt a 'least interference principle', by permitting universal governance, plus the added advantage of particularizing practices of juvenile discipline expertise. In effect, it was the 'due processes' of law, and the expertise of judges and lawyers, that would exact the 'rehabilitative ideal' (1965:88). This committee was set up to investigate and report on the matter of 'juvenile delinquency in Canada'. The principal policy recommendation was the drafting of

a Canada Young Offenders Act[3] to replace the restrictions of limited provincial jurisdiction that was followed under the JDA.

Because the family assumes the primary tasks of socialization, in order to justify intervention under the JDA, the Court used the parens patriae doctrine: the state as the kindly parent. Under this doctrine, the child has no 'inalienable right', and is granted special legal status as 'befitting a child who is not a criminal, but a misdirected child' requiring 'help and guidance and proper supervision'. These phrases appear in the preamble to the JDA.

The JDA emphasizes treatment rehabilitation, on the basis of a long term juvenile court belief that the family should be the primary agent in delinquency prevention. These practices evolved into diversion and family intervention. In its continuing practices, the law supported a medicalization model for the treatment and rehabilitation of 'sick' families, who often needed to be shored up against the ravages of emotional tension. The JDA dealt with juveniles who had drug and alcohol abuse, sexual and emotional abuse and learning disabilities in their background requiring some kind of treatment plan. The ideal family, which the judges referred to, was the formal 'nuclear' family, rather than the family unit in most common use: extended and single parent

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[3] Hunt, A. (1978) discusses the rise of a sociological movement in law that evolved since the turn of the century from analytic jurisprudence (from Hobbes and Bentham to the jurisprudence of John Austin), sociological jurisprudence (Pound), and the sociology of law (Durkheim and Weber).

families.[4] The legal welfare system accepted socialized costs for group and foster home units, but there was no parallel government financing to delinquent children in their own families, and there was no financial help for an increasing number of unemployed youth. Public panic was generated about the increase in crime rates and the public costs of property crime. At no time, however, was there direct financial help for children on the streets, though some social work service, and short-term group homes were available in limited supply.

The Canadian Parliament in the early 1980's was faced with two major problems in economics and in social control strategies that impinged on youth justice. These problems were foreseen earlier. During the late 1970s, after a long post-war expansion, capitalism in Canada faced a major fiscal crisis due to continuing 'socialization of capital costs'[5] (O'Conner, 1973). In the twenty years prior, there was a burgeoning of state strategies in the form of welfare programs, administratively oriented enforcement practices, and state-supported social-economic organizations (Gough, 1979). As the costs of welfare state administration increased, and therefore contributed to the fiscal crisis,

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[4] Donzelot, G. (1979). Donzelot suggests that the state enters as a form of power relations. These relations legitimate social control of particular kinds of households.

[5] The argument is that the state serves both legitimation and accumulation functions. To perform both services, the state uses two forms of expenditure: social capital, to increase services to increase productivity, and social expenses, to pacify the working population, for example, in welfare payments.

community alternatives were encouraged (Scull, 1977). JDA institutional services were expensive, but it became clear that incorporating professionals into community alternatives also required heavy administration costs.

Explanations and solutions to problems in the domain of economic and social control infrastructures and strategies began to develop around the mid-1960s by several interest groups: by legislators, the media, by lobby groups and by social theorists. During the 1960s, until the enactment of the YOA, the above-named groups classified youth as a problem requiring a more legally coercive solution than that provided for under the JDA. Although the sustained use of coercion threatens the legitimacy of the state, it can be deployed for a limited period of time. Adolescence was discussed as a distinct social group in respect to criminal behaviour (Archambault, 1983). The kind of problem debated in the 1980s, by the legislators, was a problem with youth crime, said to be increasing the costs to the welfare state. Juvenile crime was publicly perceived to be on the increase.

The media targetted youth crime as a major problem, according to critical criminology literature, because of the law-and order-campaigns and 'moral panic' over youth, who were perceived as a 'dangerous class' (Brannigan, in Caputo et al, 1989). Since the mid 1960s, various committees on juvenile delinquency were struck.

One report[6] (1965:279) stated that youthful delinquency in Canada was a national problem that called for a national solution. By the late 1970s, the JDA was considered unable to deal with the youth crime problem given the considerable recidivism despite social work intervention strategies. By this time, the justice department was hearing briefs mainly from lawyers, which argued that the range of sentences under the JDA were considered very narrow.

> "Within this narrow range, it becomes difficult to proportion the penalty on the basis of the nature of the particular anti-social conduct in question. Perhaps still more important, given a change in emphasis from traditional punishment to modern reformative treatment, no tariff of punishments is really satisfactory. It does not follow, of course, that acceptance of what has been called 'the rehabilitative ideal' means that the question of civil liberties can be safely ignored. So beguiling, in fact, is the language of therapy that all the more care must be taken to ensure protection of those liberties. (1965:87-88)

More radical alternatives, involving participatory democracy - the ideal of the enlightenment project - while not implemented in the YOA, were debated during the reform movements of the late 1960s and early 1970s. Children's rights, for example, were considered, with the idea that children should be given the same rights as adults in a democratic state. This impetus came from various countermovements (Cohen, 1985), such as the 'back to justice movement' but its proponents did not have sufficient power to override the political instrumentalism subsequently embodied in the

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6. Juvenile Delinquency in Canada. The Report of the Department of Justice Committe on Juvenile Delinquency. 1965. This committee was originally composed of 4 members from the Department of National Health and Welfare, and the Department of Labour and Justice.

Canadian Young Offenders Act (1984). A child care lobby had grown, but formal legal interests overtook the participatory democratic emphasis.

The debates held in the legislature and by policy-making committees carried on for 20 years. In the absence of negotiation about the ends of justice, the formal and technical instruments of experts - lawyers, who claimed expertise in differentiating the appropriate means - were unable to construct a moral/pragmatic order. Instead, they outlined a set of formal justice 'rules' or 'due process' measures, designed to steer the juvenile through the court process. The goal of the process, they claimed, was social justice, through the protection of both 'rights' and of 'society'.

The law lobby provided the motivation to the courts to proceed with their rights agenda. The grounds for justice and crime control had been in place in B.C. in the last years of the JDA. Even though the dominant model was still the welfare philosophy, the JDA had become rights-oriented in practice. The evolution of these practices into the YOA suggests that a new discourse has emerged.

As social work adopted a more scientific discourse, it accomodated to a more 'amoral' or 'techno-rational' discourse. The assumption that attitudes cause behaviour set positivist programs in place, at the expense of research on structural causes. As

socialized costs, the public administration of social welfare practices were scrutinized by public lobbies, often led by members of the legal profession. The medical model was put into question.

In this emerging neo-liberal perspective, social control is a process carried out through adversarial law and criminal justice. The kind of youth criminal problem said to be occurring, and the need to cut back on the 'welfare state', made changes to the JDA seem necessary. 'Helping' strategies considered during the YOA debates, such as skills training through the Ministries of Education, were seen as even more financially problematic. Moreover, there was no strong education lobby at the time of the YOA debates. The most successful lobby was the legal profession whose theoretical and normative views appeared to resonate with the state's new direction.

Sociological interaction and labelling theories developed around the need to examine the juvenile court for not solving the problem of an increasing number of children in trouble with the law. Most children, such theories argued, engage in 'criminal' behaviour. Juvenile offenders were seen as well-adapted to their own sub-cultural environments. The notion of a 'well-adjusted' child has evaluative dimensions, which implies adjustment to the ideal patriarchal family, rather than to the household in which the child actually lives. Despite counselling, children were not easily remoulded. On the basis of labelling theory, it was argued

that 'no action' is preferable to court processing, (Lemert: "Instead of Court Diversion in juvenile justice", quoted in Binder and Geis, 1971:320). Recidivism was high despite the use of correctional alternatives, Lemert argued. After naming social and personal intervention programs, Lundman concludes: "Nearly all past attempts at delinquency control or prevention have failed" (Lundman, Richard, 1976). Given this history of failure, correctional administrations began to discuss delinquent behaviour with the aim of balancing the economic and humanitarian advantages under JDA programmes. Labelling theories, social formation and social interaction theories addressed criminogenic concerns, and the non-liberalizing effects of punishment and deterrence, but like the legal reformists under the JDA and in the YOA to follow, labellists did not question the structural conditions for social policy arising at this time.

Responding to its own constituency, the Progressive Conservative government of Canada (1980s) shifted its financial backing from the treatment (welfare) superstructure in order to buoy up failing businesses and encourage new ones. It was reluctant to support what Gramscians, like David Held (1984), call the interventionist/collective state, including its welfare programs applying to youth. This interventionist state included both formal and informal networks of social control or intervention practices into the lives of people considered abnormal from the pathological perspective of normal science: medicine, psychology

and psychiatry. Both dependent, delinquent and neglected children up to age 17, in B.C. were treated under the welfare principle of parens patriae by social welfare tactics of supervision and control in 'the best interests of the child'. It was social welfare, education and health services (the welfare state), which were targetted for drastic reductions in order to lessen the financial burden to the state.

The 'liberal pluralist' assumptions of the legislature and of the juvenile justice court come from a normative, intuitively rational, classical position. The assumption is that there are principles that can be shared and rationalized, by a priori rather than a posteriori reasoning found in science. The proponents of this paradigm seek solutions for juveniles not in terms of science, as in social/psychological intervention practice ---the social welfare perspective. Juveniles in trouble with the law could be defined as legal subjects within a criminal act, who have Rights and Responsibilities, issuing from a normative set of ethics or justice.

Paul Havemann (1989), discusses the role of the 'back to justice movement' during the YOA legislative debates in prompting a new ideology for the Canadian state. The objective of the legislators was to find a solution to the growing numbers of problem children (juvenile delinquents), who brought mounting costs to the welfare and justice systems. The JDA, as a 'welfare'

concept was debunked, and the YOA was enacted as a dual-pronged piece of legislation in that it included both rights and crime control emphases. But it also included 'welfare' phrases, the most significant one being a referral to the 'special needs' of young people. Thus, there was a political intention in creating, within the act, a dual-pronged ideology, with remnants of the 'welfare' discourse.

In examining the politics of juvenile control, the proponents of the 'back to justice movement' criticized the discretionary powers of local authorities of the justice and social welfare systems. They argued for the simultaneous construction of welfare and justice, claiming that professional social work interests fostered a monopoly of knowledge over the 'best interests of the child'. Further, they criticized social workers for subjecting an increasing number of juveniles to indeterminate periods of social control.

Such an account did not fully appreciate the history of legal reform. Welfare was not simply an intrusion into the justice system. The history of the justice system shows that there never was a complete classical justice agenda in place. The juvenile justice courts, were set up in middle class terms, in Chicago, to keep poor immigrant children off the streets. In terms of the repressive consequences of welfarism, the 'back to justice movement' and the lawyers who inherited the major committee work

around the YOA construction ignored the meshing of the welfare and justice systems since the time of the commencement of the Juvenile Court, around the turn of the century. Although the 'justice' arguments centre around the need to introduce 'due process' into the juvenile justice system, the question still remains: whose justice is it?

There were two attempts at formulating the YOA. In 1965, social workers participated in the Justice sub-committee on Juvenile Delinquency debates. This group was not much in evidence in 1975, when the first draft of the Act was considered. The social workers did not have much lobby power during the later YOA debates. The legislators refused to prioritize the special needs/welfare philosophy, which gives the state, in the form of the parens patriae, responsibility for the juvenile offender. According to the alternative 'justice' philosophy, the young person is given no fewer rights and responsibilities than an adult. Input from legal officials was dominant in the reports to the House. Rather than negotiate on the ends of justice, the legislators turned to the instruments and rationalities of carrying out justice. This action was accomplished through the policies of the YOA.

In the shift between the JDA and the YOA, social reforms through law are specifically expressed in a policy section of the YOA entitled "Declaration of Principles". The philosophy of the

Act serves as a guide to the intent "for everyone concerned with its administration"[7] as regarding the 'protection of society', the responsibility of youth for their behaviour, accountability in a manner appropriate to their age and maturity, special needs because of dependency, and the rights of due process law consistent with the 'least interference with the individual' principle. The literature on law reform movements (Hunt, 1978) shows that liberal reformers were convinced that the legal system could be reformative to meet the ends of justice. At this time, the YOA legal reform movement did not clearly distinguish the boundaries of the legal system and of social requirements. When the goal of justice was met it was assumed that a significant change originating in the legal system then moved through the system ending with a reformative impact outside the system. The problem with the instrumentalism inherent in the assumption was the very idea of separating society, and the legal system within it.

In April, 1984, the YOA was enacted. The YOA was dual-pronged, including both 'Welfare' and 'Rights and Responsibilities' phrases. The YOA adoption of legal procedures, as with the JDA, was based on overtly moralistic premises, in the notion of rights. Criticisms of the new Act, like the JDA before it, were in the area of the particularizing practices, which override or modify the dominant philosophies. Through political lobbies, advocacy of

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[7]. The Young Offenders Act: Highlight. Department of Justice. Canada. 1988

rights is still considered emancipatory regarding these concerns under the YOA. The question remains, however, about the reality of the social network and new administrative practices which surround the Act.

Politically, in the early 1970s, a child care lobby had grown. With the presence of lawyers, the proponents of 'the back to justice movement' emphasized due process, individual accountability and determinate sentences overriding the notion of children's rights with legal rights per se. The positivist model of social welfare and schooling, based on a concept of normalcy and the ideal functioning of family life, and the resulting administrative practices under the JDA, were not attacked in regards to structural issues of the problem of dependency, neglect and property crime. New debates were raised in the shift between the JDA and the YOA about the 'protection of society', and the 'protection of the victim' with respect to working with the young offender. The questions raised were largely about administrative action, rather than with the philosophy of legal reform per se. Legal professionals continued to monopolize the handling of conflicts. Legal reform used the heuristics of law to generate the hope of social reform through statutory and social policy measures.

The intended legislative solution was related not only to a perceived increase in crime, but to the neo-conservative focus on the vulnerability of the government administration regarding the

greater costs of welfare and community programmes. The informal problem was not direct costs to the state, but with the flexibility and time required to make use of all alternative resources and to give them independent responsibility. By focussing on an administrative tactic of 'accountability', the proponents of the 'back to justice movement' worked against giving decentralized authority to community agencies. The problem of administrative accountability reinforced the need to transpose 'accountability' onto the user.

The legal profession uses a model that is based on representation of opposing parties in order to resolve and prevent conflicts through banning the use of privileged communication within the court system. It is important that the parties can control each other. Judges have a high degree of agreement concerning interpretation of norms as well as agreement concerning evidence. For the reason of uniformity of approach, the profession can be typified as universalizing by implementing a 'just' position from which to proceed with legal reform. The basic model of healers, on the other hand, is not one of opposing parties. Each party has to be helped to attain health. In order for the medical model to work, treatment personnel must have easy access to community programmes. Due to the onset of a financial crisis, the government was reluctant to put more money into decentralized kinds of programmes.

With the presence of lawyers in a number of cases, new practices developed in juvenile court paralleling a negotiated and administrative justice system. The use of plea-bargaining began to be used, a practice that evolved in adult criminal work. Two important influences encouraged the use of counsel: one of them is class-based, as middle-class children were being charged in an increasing number of narcotics offenses. The other influence was noted in the USA, as a race-related concern, as blacks in ghettos faced serious assault charges connected with resisting arrest. The court had become a specialized agency for crime control, with the larger social problems of young people referred back to community and government agencies for treatment planning and resource control. But it is here that funding was cut. Debates on the justice system were based on legalistic values (Nejelski: 1976), including the seriousness of the crime, and prior recognition by the law-enforcement agencies. The stimulus for policy development did not seek to transcend the instrument and object relationships of class, race and gender. Structural relationships are central to the explanation and policy regarding variable participation in crime.

The YOA was considered to be the right solution to the government administration's legitimation problems. The solution involved sending the debate to the courts. To avoid extremes, policy makers tend to develop policies that conflate several models (S. Asquith, 1983:8). In the YOA, since both rights and needs-

orientation are written into the Act (Thomson, 1983:27), if the political pendulum swings the other way, from the 'criminal code for children' view to the 'needs-orientation' provision, then the Act continues as an agent of the collective state. The alleged ideal, however, does not consider the actual working of the Act, through its interpretations and practices. The flexibility of the YOA underestimates the problems inherent in the lack of priority assumptions underlined in the Act. The Act can be discretionary with no points of bureaucratic resolution. The prevailing ideology depends on how each youth court determines priorities, and on the kinds of constraints each reflects.

The YOA was also considered the right solution by juvenile justice proponents who argued that as criminal law, the major purpose of administering juvenile law should be "firstly, to protect society from the effects of crime committed by youth (Prevention of Crime and Treatment of Offenders", unpublished (1984:1). The new laws stressed the need to hold the young person 'responsible' for the illegal behaviour. There were no social reasonings given for the term 'responsible'. That task of interpretation is left to the Youth Court judges.

Under the operations of the YOA, equality before the law is theoretically present in the Declaration of Principles and in the right to due process. Young persons are not to be held accountable in the same way as adults; in this phrase, the parens patriae

principle is still in place. Young people still require supervision, discipline and control, and also have special needs: they are now seen legally to need guidance. They have rights and freedoms through the Canadian Charter of Rights, including due process, a right to be heard and participate. They are to be removed from parents' homes only when parental supervision is inappropriate. The parent is required to attend the hearings. There was some concern about a net-widening of the justice system, that mandatorily includes parents and peers in a system of legal administration. Parents are caught up in an antagonistic approach between the family and the state by a concept of justice which suggests the transposition of 'guilt' or responsibility onto either family or individual. Under the JDA, there was some collective responsibility for problems of youth crime.

Under supervision, the young offender will not necessarily be involved in a formal court hearing, but will have to make amends in some other or alternate way, for example to apologize to the victim and pay for damages caused. Although these programmes have been used in part under JDA, there are more formal constraint measures in the YOA. There are no detentions without good reason, nor are there unconditional releases. Bailbond or custody in juvenile centres remain the disposition of the court. No publication of identity is made, and identifying documents used for court purposes, are required to be destroyed on a disposition of innocence.

These legal rights are aimed at equalizing young people before the law. In practice, Wardell (quoted in Currie and Maclean, 1986:141) argues that the Act has been used in an even more repressive way than under the JDA. There are more young people coming before the juvenile courts for minor offenses than previously, and more youth are being repressively treated through incarceration. Since 1984, Canadian statistics show an increase in YOA convictions since the JDA was replaced. After one year under the YOA Act, 50% more children were being admitted to sentenced custody; now, five years later, the figures reach nearly 100% more than under the pre-YOA numbers. More resources have been put in place under the new Act than formerly under the JDA. Judges are disposing more youth to custody with few programs related to emotional and sexual abuse, alcohol and drug problems, violent home backgrounds and learning disorders. Why has the shift in emphasis on rights and freedoms become more repressive?

The concept of rights is built upon the political discourses of the individual, rather than of a collective group, and projects an individualizing, atomizing social world. It is necessary to consider the 'politics of rights' in the state's intention to justify a shift in policy. I suggest that there is a link between the legislative endorsement of rights and the emergence of a new discourse. The link is found in changing strategies of social control over the youth population.

A limited legalization of the political process of youth justice in Canada creates new forms of power relations. My argument is that the social reasoning in the YOA is the means used by the state to expand its power relations, and to alter, but not transform, the dependency of youth on the state. Introducting legal reasoning into juvenile justice has resulted in reform practices invading the domain of decentralized community services and widening the network of social control through the law.

Several stages of new discursive practices are indicated. The legislators and policy-makers intended to introduce crime control measures because of a state financial crisis in Canada in the late 1970s. The solution to cutting back on the costs of the welfare state required new legislation, ending the JDA. The means employed was 'rights' legislation to usher the shift in policy through the courts.

The YOA itself, is deemed a successful piece of legislation. However, problems continue to mount and amendments are discussed. Persons sentenced under YOA are monopolizing facilities set up for Family and Child Service Act wards. Since the problem of youth crime has not disappeared, many new centers are being built at this time. Sentences appear to be longer under the YOA than under the Criminal Code. Statistics on the apparent increase in youth crime are used as pressure for more control measures. Since the resources are in place, it appears that problems administering the

YOA are due to problems of interpretation. Resources can be used repressively, for incarceration, or to build communities. Collective goals, actions, and discourse does not separate or emphasize the individual or the social world but is based on a continuum. The theme of legal reasoning operates within a behaviourist, legal paradigm. Although not represented in the YOA, the theme of community change overrides the anomalies of the individual and the collective, or systems within society which can transcend it to judge. The YOA can swing back to more decentralized responsibility if the focus of legal reasoning is collective, rather than social or personal. Understanding hermeneutics in the YOA is a first step, a means of eliciting practices of interpretation. In order to criticize the YOA, it is also important to ground the application and interpretations of the courts in the politics of social reasoning.

As a matter of principle, the YOA was based on the assumption that formal intervention in the life of the young person, under the authority of the criminal law is valid reason for legal rights to be extended from adults to young persons. Despite separation of adults and juveniles in the justice system, elements of criminal proceedings were not avoided; (for example, deterrence, punishment, and detention), but were in fact sought after, as in Re Gault, 1967. Legal representation was proposed and examined on the basis that legal precedent had already been set in case law under the JDA

giving argument or decisions favouring due process protections (Catton and Leon, 1977:330).

The role of duty counsel in the adversarial position where child - parent conflicts arise was unclear. The position under the JDA of amicus curiae was seen as mediatory, advising all participants, and an 'unsatisfactory' court position. Private lawyers experienced less role conflict when representing the young offender as client. The absence of a clear prosecutor was satisfied by an underlying informal process.

Since 'rights' were now considered as part of the child's best interest, there was a need for effective communication with the child. As lawyers could be retained to 'explain' legal terms to the child, legal representation was made mandatory. The role of youth worker was also provided in the YOA to assist the young person in learning about his/her rights.

By formalizing 'diversion' in law, the questions of reducing discretionary practices, and of 'widening the net' were raised as continuing the informality of the JDA court practices. It was, however, considered sufficient to focus attention on the provision of legal safeguards through 'due process'. The diversion practices were built in under the Alternative Measures provisions. The screening process was thought to be coercive (Catton and Leon:120) but policy-makers constructed it as the best way to protect the

'public interest'. Screening agencies would therefore have the duty of protecting legal rights.

The new YOA legislation empowered the youth court judges to impose definite sentences up to a three year maximum. Under the 'rights' agenda it was argued that young people should know at the outset the nature and length of the penalty they would receive. The argument turned against indefinite sentencing which had been allowed previously in order to establish an effective treatment plan as required by the 'welfare' concept. 'Crime control' and 'rights' are both built into the the YOA by its range of dispositions. Emphasis on the former revolves around formal court procedings, fines and custodial provisions; the focus on 'rights' or justice favours enforcement of probation and community service orders. The YOA turns on the argument of maintaining a healthy "balance between the protection of society and the maintenance of the juvenile justice concept" (The Young Offenders Act Highlights, Department of Justice, Canada, 1988). In the resulting dispositions, the judges' reasoning has established the bureaucratic values of enforcement provisions using court operating procedures and practices of legal reform. The question is whether the 'rights' philosophy is deeply embedded in these practices, as the YOA suggests, or whether the judges require a dominant philosophy to 'protect rights' versus 'protect society' in order to emphasize the optional nature of the Court in its dispositions.

The YOA was seen as the solution to problems with due process or 'rights', and for the control of crime. It is not a clearly defined area for these rights and responsibilities as both philosophical and administrative contradictions have developed within its jurisdiction of competency. It is not equipped to handle really violent offenders because of the problem of raising juveniles to adult court, and other age-graded distinctions. Basically, it was conceived as a solution to a political problem. A focus on rights and responsibilities deals more generally with property issues, rather than structural problems of the life-syles of children.

Neither the legal nor the welfare system have strongly defended borders of expertise to handle the logic of care or of control applied to middle-range age groups of children (Abercrombie, 198). There are no clear definitions within the statute. Expansionist logic of both areas of 'rights' and of 'needs' shows up the contradictions of expertise. Sexually and physically abused children of 16 are now left out of care resources, in practice, as younger children are given caseload priority. Similar grey areas are defined for criminal behaviour for children under 12.

The B.C. government has requested privatized services. Predictably, the added cost of the uniformly higher age has added to the cost burden of provincial administrations, which previously

dealt with children over 17 as adult criminals. Implementing the Act has increased most provincial legal costs, and strained existing custody facilities. There is added scope for privatized capital through the use of containment resources for recidivists, and the advantage of capital and professional returns through the use of widely ranging dispositions to be considered in the question of why the YOA, during a provincial administrative crisis, is responding to particular social interests. It does not address the structural causes of youth crime because in its terms this is not necessary. The judges are not prepared to deal with the causes of crime that involve young persons. To understand the interpretations that judges seem to be applying to the Act is to examine the specific power of the law as being strategically placed in relation to other groups, and in being 'geared to producing specific power relations'. (Sumner, 1979:293)

One of the problems that has been incurred by young offenders is that pre-trial detention is 'longer than necessary', as young offenders await counsel. Once an arrest has occurred, there is a long delay. Youths have a right to be represented by counsel, or for counsel to be retained by order of the Attorney General if the young offender is not personally able to consult with a lawyer before making a statement to police. The question is whether youth are being advised of their rights or 'fully appreciate' these rights (Smith, T. 1985). Legal aide officials are often provided who are para-legals or law students. The legal aide system can

bring on delays in coming to trial, to the young person who has a financial problem.

Another concern raised in the literature, is the level of understanding lawyers have regarding the YOA. Often there is only a brief time for counsel to interview their clients. Crown prosecutors may now have the required time of training, but they have problems with keeping up to statistical averages and in meeting time restraints. The same problem occurs with youth court judges.

The intent of the Act was to provide an authentic and appropriate youth justice system. But there are variations in compliance with the system according to jurisdictions, and legal philosophy of the judges. Indications are that the Act is being interpreted differently by different judges, and differently by the same judge. Children are being treated differently for different crimes: as adults for murder, if the Crown chooses to raise them to adult court, and as children for theft. Directives have been sent to Attorneys-General urging applications be made to transfer to higher courts all serious offences for which the three year sentence may not be appropriate. It is important to examine the general criteria and legal culture in which these distinctions are made.

There has been a call for sentencing guidelines (Canadian Sentencing Commission Report). Discretionary sentencing and plea bargaining is considered normal. This differential mode of interpretation is important and it is necessary to come to terms with it. It is important to understand the reasons given for the sentences, and the social meaning and knowledge/power relations involved in the sense of normalcy which enters into the interpretations of the Act.

I would argue that there is no basis in social rights and responsiblities that is without contradiction, and of course there is no moral consensus. Alisdair MacIntyre (1984) suggests that when there is no moral consensus, then a notion of rights has no grounds that can be universally acclaimed. The notion of rights without a parallel one of duties is opaque, and can therefore be repressive. The point of this study is to explicate how power is sustained through the notion of rights. The central professions of welfare and law have the power and knowledge to extend the juvenile justice court jurisdiction, by their interpretations of the YOA, based on their own practical reasoning within this statute. Since there are conflicting struggles over the use of care and youth control, ambiguity results. Any substantive goal of child development is ambiguous or disciplinary. The law is not necessarily liberal, even from a 'rights' position, in ameliorating the repressive aspects of capitalist social relations. To talk about amending the act, by increasing the term of incarceration for

severe offenses, is to miss the fundamental problem of interpretation of the YOA, the lack of prioratization since its inception, and the power relations that ground specific interpretations.

There are many social problems and questions raised by the YOA. For example, what is done under the YOA about the labour surplus population of young offenders? In effect, treatment no longer is able to induce discipline with a workplace advantage. There is still the problem of greater numbers of youth who are available for work, who do not need to be treated or rehabilitated. Youth offenders are a marginal, passive population, however, who can still be disciplined and rehabilitated. What social reasons do judges give for their apparently class-based deliberations? Bourgeois law does not generally serve non-propertied interests (Rusche and Kirchheimer, 1939). Platt (1977:xx) states that the justice system, in the US Progressive Era (1890-1920) was instrumental in devising new forms of social control to protect the power of middle and upper class privileges. The question here is, what is the form of judicial reasoning used under the YOA to account for socio-political relations, rather than to address their structural inequalities? The professional groups involved have their own biases, especially with regard to the role of the family, and conflict resolution by community participants, as a practical alternative, as in alternative dispute resolution, is excluded as a realistic possibility.

Social theory projects forms of rationality in suggesting solutions. In Kantian philosophy, in which the legal system can be seen as a synthetic mode of rationality, (and principles of justice a knowledge/interest, according to Habermas), only rationality can be projected into history to attain the absolute principle of justice as doing one's duty. In Habermasian social theory logic, knowledge-constituted interests, framed around a principle of justice, result in the creation of groups and individual subjectivity. "Youth in trouble with the law" is a distinct group. Given the scope of the Act over the life-worlds of youth, and the widening net, interpretations of judges become very important. Habermas was searching for a discourse ethics that could be universally acclaimed. Such a universal point of reference rather than the particular ones, such as the care of 'sick' or 'bad' children, could be required to amend the 'pathology' focus of justice administration. Even without a strong individual citizen and no 'universal pragmatics', as defined, to guide deliberations, modes of rationality themselves require examination. The YOA becomes a new discourse.

In widening social networks of control, professionals, from probation to legal aide, and now including the family, become the core mediating unit between the state and the young person for maintenance and surveillance (Zaretsky, 1976). Problems with administration, outlined above, revolve around the fundamental problem of interpretation of the YOA.

A hegemonic interpretation based upon legal interests could be expected to demonstrate three levels of social reasoning regarding the youth population. First, judicial cultural levels are represented by bourgeois values and interpretations of youth criminal behaviour. Second, lower-class and minority group cultural levels to which the youth belongs are also subject to legal interpretations. Third, the peer group influence and groups to which the youth belongs, including the family network, are drawn into the expanding legal/welfare network. If rights are constituted outside the legal system, the youth's reference groups have no effect in constitututing these rights (Fitz, 1981). Traditional relationships, such as that between victim and youth, lawyer and client are areas of interest pursued by legal professionals in a language only the legal professionals entirely understand.

The approach to young offenders that the YOA takes is one of balancing key principles. But, under the YOA, there are indications that the Act is being differentially interpreted. Interpretations are grounded in historical epochs, and vary in their method of grasping the present. This thesis supports a concern for discourses, rather than psychological behaviour and motives, aims and expectations of judges, legislators and policy-makers, except as these enter into historiographic descriptions (Jones, 1983). There are general criteria that judges seem to be

applying to interpreting the Act. Understanding these should enter into the discussions of amending the Act.

Under the YOA, judges are limited to three of four possible interpretations, because these variants stress the individual representation of the world rather than the collective one. The three interpretations are Justice, Crime Control, and Welfare. As instruments of segments of class and state, they are political intentions, in the form of rationalities, and are separate from commonsense. The fourth interpetation, Community Change is not represented in the YOA. One reason for this lack is the instrumentalism, objectivism (subject and object, individual and society, law and society are dichotomized instead of being seen as concrete products of a social process) and ethnocentrism of legalistic theory and practice.

The first form, justice, is based on the notion of individual right to self-determination. Quoting from the Department of Justice national policy for young offenders report:

> Young people have the same rights as adults to due process of law and fair and equal treatment, including all the rights stated in the Canadian Charter of Rights and Freedoms and in the 1960 Bill of Rights. To protect their rights and freedoms, and in view of their particular needs and circumstances, young people should have special rights and guarantees....Young people have the right to participate in deliberations that affect them. Young people have a right to the least interference with their freedom that is compatible with the protection of society, their own needs and their families' interests, and young people have a right to be informed of their rights and freedoms. (1988.3)

The second form is crime control, which itself balances two principles. First, young people are to be held responsible for their behaviour "and should be held accountable in a manner appropriate to their age and maturity". Second, the principle of 'protection of society' is applied. "Society has a right to protection from illegal behaviour and a responsibility to prevent criminal conduct by young persons."

Third, is the Welfare principle, slightly modified to include 'guidance and assistance' to the former dominant philosophy of 'best interests of the young person', under the JDA.

> Young people have special needs because they are dependents of varying levels of development and maturity. In view of society's right to protection and these special needs, young people may require not only supervision, discipline and control but also guidance and assistance in recognition of this, the Act declares that...alternative measures to the formal court process, or no measures at all, should be considered for the young offender, as long as such solution is consistent with the protection of society; young offenders should be removed from their families only when continued parental supervision is inappropriate. The Act recognizes the resonsibility of parents for the care and supervision of their children. Parents will be encouraged and, if necessary, required to take an active part in proceedings that involve their children.

If all judges know what the YOA intends, and remain faithful to the balance of these principles, more equitable administration might be adopted. There are two ways in which this problem of interpretation needs to be pursued, if amendments to the YOA are to be helpful. The first way, is to understand the general criteria by means of a hermeneutic method, for the content of the legal rules and principles, that the judges use when applying the YOA.

Attention must be paid to the form, as well as the content of legal rules, in order to assess the problem of the 'relative autonomy' of the law and the boundaries of the legal order. The second is to describe the political grounding for implementation in Youth Court judicial interpretations, by means of Foucauldian analytics (lines of interconnection). To assess the impact of the YOA, Foucauldian analytics goes beyond the assumption of a 'gap approach' between law and society, and goes also beyond studies of top down social change. This thesis is an attempt to understand the bases of these various interpretations through direct observation of youth courts, from literature, and from in-depth interviews with youth court judges.

CHAPTER II.

RESEARCH TASKS AND METHOD

A. METHOD:

In order to elicit the general criteria for social reasoning used in judicial case interpretations of the YOA, I have chosen a method, hermeneutics, which is closest to legal reasoning itself. I differentiate these rationalities on the basis of the reflexivity of their mode of interpretation. Legal interpretation is reasoning derivative of a set of beliefs or normative starting assumptions incorporated into deliberations and conclusions. Hermeneutics, is a more holistic method based on reflexive practices rather than on assessments of beliefs or presuppositions. It strives to understand the context in which legal concepts are constructed (given meaning) and expressed.

Hermeneutics suits a rationalist's world of shared meaning or discourse. Discourse and expression are clearly dichotomized, because of the ideational substance (ideas/material) of this world. The most common basis of agreement is language. The basis of community is a common 'hermeneutic circle' of meaning. The most general or holistic interpretation is used to understand particular circumstances. Hermeneutics is the method to best understand the judicial context because it reveals its practices, and the language used to describe them. Interpretive structures or contexts include: practical reasoning, contextualized practices, and

traditions. The hermeneutic method accounts for initial 'prejudices' or 'preunderstandings' as people appropriate these for future use.

Hermeneutics, (and sociological jusrisprudence similarly,) are always future looking, not past looking; they are purposive, as they interpret text and action in the YOA regarding the legislation and specific application. An interpretive turn in legal theorizng is distinguished from most jurisprudential literature. Writers of jurisprudence in the 20th Century apply two theories of behaviour to the law (Hunt, 1978): analytical and sociological jurisprudence. The first assumes that the proper application of formal legal principles follows practically if used by competent practitioners. The nature of law is ethical and descriptive for those who apply it correctly. Reform, therefore, comes through legislation, and the social engineering of law. In sociological jurisprudence, there is a causal relationship established between natural social processes and the application of the law. Rational practitioners use descriptive and explanatory theories of sociology to explain their decisions and legal practices. Utility of law is not determined by reference to the logical reason of abstract law, but by its social consequences (Pound, 1910). The judge must know the consequences of alternative decisions he/she might want to make. With knowledge of sociology, the judge subscribes to taking account of the social order. Using these methods is strictly in order to produce social consequences which can be assessed in the

future. Jurists assess actions as good or bad based on certain intended, proper social behaviour. If there are jurists of both schools, I can ascertain in my interview schedule how they assess the nature of law and its application in the YOA, and under the JDA. My interview schedule, which engaged youth court judges, following hermeneutic principles of locating meaning, pursued an understanding of the JDA-YOA differences.

Judges' decisions are embedded within legal tradition, whose interpretive community changes over time. Interpretation of judge's reasoning, is one method of pursuing the differences between the JDA-YOA, assessing the claims and incongruities of the judges' reasoning, and current problems with the new statute. Within the legal tradition, rules and weights of argument enter into legal reasoning. In addition to interpretation, therefore, descriptive and prescriptive analyses of the tradition enter into the findings and discussion of legal rationality.

Interpretive contexts demand examination and explication that include individual rational processes. Hermeneutics is a method used for eliciting legal reasoning under the YOA because it offers an interpretation of experiential meaning, which is itself partly constructed by self-interpretation. Its holistic impulse is subjective as well as rational. Interpretations continue to offer insights to reveal more of the context. The aim is not to uncover universal assumptions, but rather to explicate contexts.

Since judges use existing contradictory philosophies of justice in their legal logic, an interpretive analysis must include processes of the use of these philosophies, and of the legal logic required for their understanding. By searching for the practical foundations of these political philosophies, as has already been noted above, we go 'deeper' into the legal context. In the first chapter, I examined political logic as the political intention of the government to invoke the allegiance of its constituency through ideational legitimation. In this chapter, I examine its judicial interpretations in their practical contexts by prescribing a method. A hermeneutic approach to the YOA takes the research to the deepest common meaning that accounts for its perspectives.

Since judges politicize their decisions regardless of proper or formal standards - - norms and principles which competent judges recognize in their legal tradition - - it is important to clear up the confusion about the nature and causes of legal reasoning. Theories of legal reasoning include ethical choices, and causal theories of social behaviour. They also include the descriptive bases in which they operate. Interpretation, however, is the prime method used to assess the application of the YOA. This method allows the critical community to understand the mode of reasoning by its general criteria. These criteria are: first, the meaning of the familiar words, as they change over time - - for instance, the meaning of 'delinquent' or 'rehabilitation' under both the JDA and the YOA, and the additional words and associations now pursued

by a discourse of action and consequences - - for example, 'deterrence', 'accountability' and 'rights'; second, precedent decisions or case reasoning are important as they enter into the tradition. These decisions give special consideration to individuals and anticipate consistency of meaning from the legislation. In chapter 1, I examined the legislative intent and the ends of justice in the YOA as having three domains, none of which has priority. Within the Canadian political context, it is, also, important to recognize the application of the YOA in dispositions; third, judges reason from principle. A hermeneutic approach takes into consideration the importance and meaning of prior decisions and the significance judges believe is offered by formal standards or rules imposed on them as officials in the judicial system.

In interviews with judges, attention was paid to the meaning of these words, when the old and new words were stated. Meaning and the word association under each of the acts reveal the social background of these terms. Interpretation of word meanings is the first criteria used to decipher the differences between JDA and the YOA. The second criterion, the significance of precedent and principle, are revealed through the interview schedule (Appendix A), in question number four: to which of the principles do you give priority, and, how do you decide on the dominant sentencing philosophy? The second two-part question indicates that there is a positive and purposive state to be achieved in the application of

the YOA. The interview schedule then proceeded with a case description and disposition. The case presentation was followed by questions that revealed the 'facts' (see attached schedule for question no. 6), the 'legal reasoning' in the initial judges' decision (question 7), and the interview judges' critique of this reasoning. The point of this part of the interview was to obtain information and interpretive material on their principles of punishment. It continued with question 8, a description of different possible legal principles. Question 9 referred to some possible incongruencies in the theories of punishment of each of the two acts. Question 10, was directed to the possibilities of other provisions in the act which could obtain to sentencing, apart from the legal principles and precedent decisions.

Judges are not able to assert the clear meaning of the law of the legislators, because the YOA was not written with a dominant philosophical viewpoint. In interviews with judges, I assess how problems arise from lack of priorization of these principles. Some of the intent of the legislators, as suggested above, are historically evident, although judges ethically refrain from examining reports and statements of the legislators. An interview should establish whether the judges break the rule about reading secondary sources, and what they say about the legislative intent. Do they see themselves as mechanically giving specific application to the YOA, or is judicial reasoning indeterminate and open-ended? Question 11, and several subquestions, ask about the matter of

uniformity of decisions. If the legislative intent is to balance principles and purposes of youth justice, what is the purpose of legal practices, which is usually to consider practical rationality and practical deliberations? How is practical rationality to be balanced? Does the judicial profession offer a means of self-policing, and as well, is there a means for externally verifiable and critical examination? The purpose of the interview schedule, to explicate judges' interpretations of their practical reasoning, is presented in chapter 3, as findings from questions 1 - 3, 6-11. The constraints that bind them, revealed by questions 4, 5, and 12 to 14, will be presented in chapter 4.

Interpretation is one method used in this thesis because it examines language and experience as use determined from an inside or action/analytic perspective.[1] In positivism, in ethical social reasoning, as in hermeneutics, there is a separation of reason and action which seems to be a vital focus of the Enlightenment (Goldman: 1968:5). Paradigmatic study, the method produced by epistemology and science is one of these Enlightenment modes of rationality. Hermeneutic rationality is one form, focusing on achieving individual clarity. In summary, interpretation requires

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[1] Wittgenstein's action/analytic world is philosophical, language-based behaviour, operating according to use and action. There is an analytic distinction for comparing language as a 'form of life', and a human ontology operating from a passive 'private mind' with its input and output through sensory data in a world of social facts (positivism). The method of an open, evaluative historical hermeneutics, is distinct from clinical psychology or positivism, by these criteria. Wittgenstein sets about to study our collective 'forms of life', which are holistically structured.

an object of study which must be coherent.[2] In the final analysis, however, it is discourses, or the collective structures of language that form the resulting practices. Hermeneutic rationality, as well as judicial and administrative rationality, take place in a context of rational practice that has a line of connection, or genealogy (Foucault, 1976). Interpretation also, therefore, requires a focus on its grounds, that is, on a discourse analysis resulting from the hermeneutics of interviews.

By means of a hermeneutic interpretation between the judges of the Youth Court in Vancouver and the lower mainland, and myself, I have tried to merge our horizons during interview sessions. In the interview sessions, it was important to be 'critically hermeneutic', that is, not to use language as a form of domination to impose or structure the interview according to my own perspective. I attempted to learn if the judges had experienced my interpretations of the YOA assumptions. The point and purpose of the hermeneutic methodological starting point is to construct 'rationality' as a standard for judging the world, by referring to an understanding of tradition as a set of possibilities for future action.

There is no infinite set of values, or good <u>per se</u>, but limited resources for meaningful action (Rabinow, 1987). The

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[2] in other words, make "sense distinguishable from its expression, which is for or by a subject" (Taylor, 1987:35).

Canadian legal tradition is enmeshed in ongoing interpretation. Appropriation of this tradition, under the JDA, was its consistent adherence to positive reductions of social science positions. The YOA reclaimed an historically earlier utilitarian/retributivist traditional legal foundation. These foundational assumptions arise in the legal philosophies of justice, crime control and welfare. Practices, and practical rationality enter into examination within the interview. Interpretation allows for appropriation through confronting new historical situations within judicial justice, such as the acceleration of legal administrative practices. The point of the interview schedule is to locate the enhanced power of the state to punish or control by using more socially rationalized practices.

Rational/legal and hermeneutic practices themselves stand in need of deconstructive analysis. State expansion, in the action/analytic perspective of the thesis, is grounded in discourses for controlling populations. Specific discourses are implicated in the above philosophies of social control practices. Using the example of youth populations suggests that youth were cared for and controlled by the collective state under the JDA (1908). The sociology of the 'welfare state' with its institutions of social control in the form of normal, delinquent, or dependent children includes both formal and informal networks of control. State control has now become further specified by removing collective dependency. Under the YOA (1984), youth offender

justice is created by another state, one that disciplines its members to cooperate in the economy. It practices further the expansion of continuous atomizing and fragmenting processes. Older collective action systems are colonized by legal administration. Newer ones are not generated by a form of individual rationality, but by a form of counterpower (for Foucault, on counterpower, I note the implications of counterpower in chapter 6) or collective practice. There is a political logic to state intention that draws on the utilitarian, retributivist or positivist foundational beliefs of its constituents and of its judges.

The first legal philosophy of juvenile justice, in the YOA, espoused by the law lobbies, was the 'justice' approach to crime. In the justice philosophy, the 'natural rights of the child' are primary, although more minimally conceived than in the adult criminal court. The YOA refers to the 'special needs of the child'. The notion of justice here is that all like cases should be treated alike in order to stand up to the Charter of Rights. The basis for making relevant difference claims is an assessment of the nature of the offense, rather than the offender, so that youths are assessed by a standard definition. Under the YOA, the young offender must be between 12 and 18, and, where the context requires:

> "includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act. (section 2(b), YOA)"

Mitigation is no longer based on social advantage or personal circumstances. The propositions of the justice agenda are:

1. proportionality of punishment to crime;
2. determinate sentences;
3. an end to judicial and administrative discretion;
4. an end to disparity of sentencing;
5. protection of rights through 'due process'. (Hudson, B, 1987)

Subsumed under a 'rights'/responsibility' perspective, is a 'just desserts' philosophy of punishment. Social control is effected by allowing the offender to undo the damage caused, through reparation, restitution, repayment and reconciliation. The main thrust is retribution, rather than reform in its former meaning of rehabilitation through treatment. Each case is considered as a representation of the social contract based on individual accountability or sovereignty, with a right and just articulation of punishment. Deterrent effects depend on punishment being fitted to the crime, so that the prospective offender can know the likely cost of crime and be deterred by it. In this sense, 'reform' adopts the Hegelian connotation of 'changing the moral character' of the offender, an ethical rather than de facto theory of behaviour.

The justice agenda assumes that practices in administrative and judicial systems follow from the emplacement of justice assumptions. For example, the claim is that the expansion of state control is the side-effect of welfarism, therefore 'least interference' ought to be adopted in order that the proper principles of law will surface. The notion of formal justice, as

a combination of prescriptive and descriptive tenets of law, is built on the assumption that practical decision-making in existing institutions is not causally linked to practical reasoning. It is important to reconcile empirically the beliefs of youth court judges with the justice 'model'. A model is a standard that is or may be made, or something already existing. Studies of systems of administration show that the logic of official interpetation is grounded in levels of bureacratic recognition; these based on interpretive changes over time ((Handelman and Leyton, 1978). The formal 'justice' model may not fit all the youth court judges' practical reasoning. The interview schedule, therefore, directs questions to the judges' systematic experience. Question 1, asks for judges' descriptions and prescriptions of their experiences under both acts; and question 2, discovers the appropriateness and preferences of precedent and principles and evokes the weight they gave to particular differences between the acts. Questions 4 and 5 repeat the intention of eliciting how and why dominant philosophies and case precedents have appeared in an apparently 'balanced' worldview.

The second philosophy of the YOA is 'crime control'. In crime control, the utilitarian principles of deterrence are strongly represented. There is an assumption by law and order lobbies of the 'natural rights of society' or social accountability. This assumption gives priority to maintaining the security of an economic/political/moral order based on the family as the primary

unit. A youth, seen as a miniature adult, decides to enter freely into a criminal activity, from which he, and others like him, must be deterred because criminal activity jeopardizes the social order. He must be disciplined and deterred in order to protect society. This utilitarian theory of punishment holds that an act of punishing is justified only if the act produces good. There are three factors which the crime control exponent considers in assessing the rightness of punishing the young offender (based on Hospers, 1971:305-4). First, in considering the future welfare of the offender, punishment is assessed according to its deterrent effect (specific deterrence). Second, the crime control philosophy considers not only the deterrent effect on the offender, but on others in society (general deterrence). Third, the crime control utilitarian will consider the protection of society. Even if punishment does not do the offenders any good, they must be isolated from the rest of society in order to protect society from future acts which they would engage in if they were free.

As in the justice philosophy, sovereignty is grounded in the individual. Rather than seen as expressive, as in treatment rehabilitation, the individual is required to follow a set of prescriptions. In 'crime control' justice, the enforcers have dominance, whereas in the 'justice' philosophy, the individual 'contracts' with the justice system to apply the set of principles to his/her actions. Crime control justifications for using maximal opportunities for protection are social defense and deterrence with

minimal appeal procedures for the offender. Custodial recommendations are given to those offenders who breach the law, especially when they are unwilling to take advantage of expert assistance. In contradistinction to both the justice and the crime control philosophy, community-orientation is stronger and sovereign in the community change philosophy. The active force of collective groups in the community was hardly the dominant ideology of law and order corrections.

With the development of a corrections philosophy, "the 'ideology' of decarceration is a necessary feature" (Harris and Webb, 1986), and has an incarcerative impact. Sentencing options available to the courts increase the power they exert over marginal offenders. They provoke future infractions in matters of discipline in offenders, which in turn, becomes a means to legitimize the accelerated use of custodial sanctions (Harris and Webb, 1986:164). Community corrections develop alongside, not instead of, institutions linking social control to state institutions. In crime control assumptions, custodial recommenations are given to those offenders who are involved in serious crimes. The greater detection of middle to low range offenders is the result of engaging more experts to detect, classify, and process all range of offenders, as law and society relationships become more disciplinary.

The crime control philosophy allows the offender to undo the damage he/she has caused (as in the restitution focus of justice), while at the same time, integrating the offender back into the 'community' (as in the treatment philosophy). Crime control invokes the return to family, school, and neighbourhood by using the existing control processes and "appealing to a vision" (Cohen, 1985) of what the real family, school or community should look like. The institutions are expected to change to fit the model. In asking question 9 and its subsections, regarding control and care incongruencies, these questions largely deal with a corrections philosophy.

The historical development of the treatment/rehabilitation approach (JDA) leading to youth punishment (YOA) has been outlined in chapter 1. The JDA rehabilitation emphasis was a nurturing one, focussing on the social welfare philosophy of keeping children in their homes and introducing treatment intervention strategies. There is an argument for the state, in the form of the juvenile court, to surrender its residual powers to punish young offenders and to be concerned principally with their welfare. In this model, delinquent youths are perceived as 'victims' of the community and family through a set of socialization experiences that strayed from the idealized form. Once the delinquent becomes a victim, he or she is deemed 'sick' and in need of treatment. The social costs of treatment are born by the family and the community. Sovereignty lies in the subject as a 'self' or 'consciouness', who

had lost a state of grace or essential, ascribed status in the community and needed to be rehabilitated according to social norms, and at the expense of the community. The law is an application of intervention processes used to maintain social order and rationality by the application of positivist language which the delinquent and his family would follow. The concepts and theorizing of the social sciences are implicated in correcting the pathologies of the family. The welfare philosophy of the JDA and its remnants in the YOA fit under the rubric of positivism.

Both the JDA and the YOA omit the collective change philosophy. The traditions of positivism, just deserts, and utilitarianism are posed against traditions of community change or social good, as they appear in the social world. In collective change assumptions, control is seen as the central purpose of the juvenile justice system. Changes in practice at all levels of the justice system are therefore necessary for radically different outcomes to occur. Welfare is seen as a strategy of power, a means of investigating families, of controlling non-delinquent children, and a means of expanding the power of the state. In this philosophy, the YOA is merely and only an amendment to the power of the juvenile court. To remove control of youth by the justice system, a notion of collective social good is invoked as the source for both the welfare of youth and for addressing the causes of crime. 'Collective' rather than 'individualizing' forces is seen as a meaningful term signifying the return to full participation

rather than isolated, specifically constructed models of what a good community and social order should look like. This sense of community is an achieved and discursive one of resistance, rhetoric, and moral/pragmatic reasoning.

My method of capturing the YOA by hermeneutics, through its interpetations by judges, is simply the basis for a discourse analysis. Use determination includes current understandings of rational legal practices of the YOA. The genealogy of these practices points to the link between power and knowledge relations (discourses) for control of the youth population.

I have reviewed the literature on law and social control, on state theorizing, on sociology of knowledge, sociology of legal reform and law, theories of punishment, and read the JDA and YOA, and judgments regarding the YOA in Bala and Lilles (1984, 1986). See attached bibliography. This work has helped in formulating a background of 'preunderstandings' for the foundational assumptions of the YOA. By understanding these as rational practices, I trace their effect as historical practices of social control.

I have developed an interview schedule that has been applied to ten judges involved in the lower (Youth) court interpretation of the Act, in the Vancouver lower mainland. Their answers to my questions illustrate how each of the foregoing 'correctional' philosophies has acquired a dominance because of their reasoning in

the sentencing of the youth court judges. The following information was extracted, utilizing the instrument of the research interview:

B. TASKS:

1. The first point of the research was to try to uncover each of the judge's assumptions and constraints, and to elicit the form of reasoning they use to interpret the act in the way they do. I am asserting that their interpretations are built first, on major moral premises (philosophy), and second, on particular social reasons for accepting these (sociology). I have tried to uncover empirically, how these perspectives interact. In principle, I have located an interconnection between power and knowledge in ideas and their context. Foucault (1970) claims that the human sciences and philosophy are instrumental in political logic. Further understanding of the discourse of the YOA policy, as the implementation of accelerating rational social practices, requires an empirical analysis because the three philosophies have social contexts.

Second, I asked judges how they respond to a fourth philosophy, of community change and collective control. In asking why this discourse would or would not work, I am interpeting their arguments as impediments to implementing this ideology as a 'form of life'.

Practical reasoning proceeds from general assumptions of morality to the practical matter of determining the right way to act in a specific context. Rather than describing or inventing a fixed set of rules of morality clearly and universally discernible, judicial reasoning invokes a political logic in moving from major premises to minor ones. I mean by major premises the foundational principles of political logic, the theoretical reasons given for believing or reflecting on an action. Most of the interview concerns locating major premises, as the youth court judges interpret the Act.

In my research, interpreting general assumptions within the YOA involves understanding a specific historical context from which its principles were framed, and in which the concepts of offender, victim and crime spring. The hermeneutic task is to correlate the four assumptions as stated: justice, crime control, welfare and community change, with those of the youth court judges. In order to track their understanding of the intentions of the Act at this juncture, my reading of the sociological perspectives on the judges' interpretations fuse with their views of the sentencing disposition section, and of the Declaration of Principles. An exercise in hermeneutic fusion seeks to uncover common ground.

The application of experience and rationality to practical matters from normative major premises follows sequentially in particular cases by the practical syllogism outlined above

(Broadie, 1976). The first step in the research logic will be accomplished by revealing the existence of, or consciousness of, the philosophy (social interest and ideology); and second, to evince the institutional constraints imposed by socio-historical contingency (the 'discourses'). The legislators and policy-makers in enacting the YOA returned to a wider, foundational or classical philosophy of liberalism because of its greater acceptability to its constituency. In effect, they continued to evoke a myth of the utility of the utilitarian state, in order to supplant the former welfare concept.

Making a dichotomous distinction between reason and action is usually based on separating experience and reflection, theory and practice, and is not an absolute distinction. Gadamer, Foucault and Wittgenstein fuse the elements by relating rationality and action in the context of practical reason and interpretation. The hermeneutics of political logic argues that reason is concretely and historically dynamic, not absolute. My task as a sociologist is to bring out the role of ideology, or of prejudice (as Gadamer's defines 'traditions') in their social location as discourses, and to offer critique.[3] There is the element of prejudice and ideology in practical reasoning. One can liken this reasoning to 'good sense'; in other words, it is based on action and experience. Finally, through discourse deconstruction, I have

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[3] Gadamer identifies prejudice as the cornerstone of his particular theory of hermeneutic understanding.

chosen to adapt Foucault in order to locate power and knowledge relations within the political and practical syllogism.

A minor premise is the next step of the practical syllogism which grasps what is necessary or appropriate to a particular situation. The final step of deliberating and concluding on the right course of action that the youth should have taken and ought to take in the future defines the 'criminal' act and its context, and the relationship to the 'victim'. These definitions construe a relationship to 'society', the family, state and workplace, the 'good of all', 'noncriminal activity', and 'the law'. I am suggesting that they form part of four legal philosophies discussed previously. The aim in this part of the thesis project is to reveal how these four philosophies: justice, crime control, welfare and community change guide the formation of social reasoning.

A major premise involves a "principle of action", which states that a particular event is good for particular persons, for 'society', and for 'the law'. The minor premise becomes a statement based on perception. The problem is not one of fitting the major premises, as preconceived notions, to a situation, but of seeing in the situation, what is appropriate to be done (in the perspective of the agent, Broadie, 1976:26). From the perspective of the judge, rather than the youth, I would assume that the criterion for good action becomes a social construction of the

young offender. Judges construe the youth's "pattern of reasoning", of his/her guilty mind (mens rea) as a "reasonable man" would act in the circumstance (a comparison could be made here between "guilty" (classical utilitarian justice) or "sound" mind (in positivist social welfare).

Normative interpretations that jurists typically make assume that there is criminal intent, and either a conscious or a determinate meaning when the values that underlie state interest are transgressed. Jurists justify their interpretations, of relative and foundational beliefs about statutes, while seeking the "correct" perspective in order to understand, interpret, judge, and criticize. I aim to expose their interpretations of the YOA, by asking if legal debate about values, relationships and interest is deterministic or subjective. That is: the basis of subjectivity is social ideology and interests; and, determinism is a consistent reflection from a fixed or dogmatic perspective. Is there flexibility in legal debate for the "situatedness of social location" (Gadamer), or for the "meaning" contexts of ordinary life forms (Wittgenstein)?

I am looking at the possibilities within linguisticality (how judges use language and how language uses them), for semantic, aesthetic, rhetorical shifts in meaning which do not rely on these philosophies of "human essence". Essentialism refers to some formative belief in human nature. Both the classical justice

perspective and the positivist perspective (social welfare/treatment), draw on the Enlightenment tradition of freeing the "human mind" of its particular ties to history and culture, of transcending particularity by grounding its method in "human essence", or in the certainty of scientific rationality. There is a dualism between rationality and the collective structures of language which is based on how the subject lives these meanings. Understanding of differences in forms of life in the legal context, begins with the rational construction of the social location of unemployed youths, who require discipline in a society of work. Interpretation flows from assumptions about the effect of individuals on criminal practices. 'Offenders' are individuals rather than social processes, just as they are the outcome of legal action. Judges might assume 'new' meanings, only if they are involved in collective social change. Under the YOA, they simply deduce 'right' (classical justice) meanings or perhaps 'sound' meanings (positivist/welfare perspectives) as applied to juvenile action.

As my primary assumption, social action in respect to the YOA is defined either as moral or instrumental action. The former is attributed to practical reason (Broadie, 1976), to speech (Arendt, Habermas) and to good understanding (Gadamer, 1974). As I will be interpreting rationality, its outcome as social action is not located merely within normative assumptions, as liberal pluralism argues (a "discourse"), but in cultural rationalities, in the rules

and structures for collective communication. I agree with Althusser that any set of assumptions requires a grounding in an external metatheory, but not from an absolute rationality (the positivist certainty of science) or absolutist framework (the notion of human essence).

It is usually argued that there are two kinds of criteria for assessing social policy based on the access and consent of those to whom it applies. The first is procedural or formal (the judicial process), which concerns the institutional structure, organizational functioning, and political and ideological interaction. The second is substantive, regarding the justness of the policy. It is the relationship between these criteria that leads to our assessment of the policy. In problematic cases, (Pitkin, 1966), where formal and substantive policy are only partially just, then it begins to be a matter of metatheory, of the position we take regarding the social order, that determines our evaluation of the policy. The experiential basis for a sense of justice has an interpretive basis. Agreements are already made, though not necessarily visible, expressed, and validated.

The YOA is grounded in several historical intentions. In discussing these intentions tautologically as ideologies, one is required to take a stance. From a sociological perspective, this thesis therefore, requires a critique of the confluence of discourses of rights, responsibilities and welfare based on their

common meaning and of their outcome in imposing a wide range of penal and other sanctions. The thesis's hermeneutic requirement is to locate the judicial institution, by its constraints and practices. The assumptions in the legal institutions' ideologies and traditions, are critiqued by the way their form of reasoning connects to all surrounding participants. Rationality of legal administration is itself grounded in a particular form of social reasoning. Within the four philosophies: justice, crime control, welfare and community change, and alongside or outside of them, in juvenile justice practices, discourses continue to evolve or modify their original intent.

2. The second task of the research (to elicit major premises) focuses on the possibility of categorical or global interpretation of the Declaration of Principles, (Appendix B), section 3 (1), as against section 3 (2), which states that the act is to be "liberally construed". Judges have been asked in the first task if they perceive the Declaration of Principles in section three (1) as internally consistent or categorically differentiable, and the basis for their overall assessments. The purpose of construal in either way determines the basic logic of the practical application. The next task determines the meaning of section 3 (2) which appears to state that the Declaration of Principles is mandatory throughout the YOA construal. What legal philosophy is incorporated throughout the text? Do the provisions which follow Section 3 (1) reflect them or what is the relationship between section 3 (1) and

the provisions? The information from tasks one and two provide the general reasoning for my discussion of the the creation of power relations in their social networks.

3. In a study done by Reid and Reitsma-Street, in 1984, using the same four assumptions of state intention: justice, crime control, welfare and community change, I will compare the judges' interpretations of the YOA with a content analysis of the YOA interpretations offered by a group of college students. This third task will serve as a discourse analysis of the phrases contained within the Declaration of Principles. One assumption is that the act in section 3 (1) is ambiguous internally; intentionally, it is a mask for social control. On the level of practices, ambiguity results from transpositions of forms of life. Ambiguity also results from the 'normalization' process of rehabilitating or guiding young offenders.

4. The fourth task of the research deals with judicial justification for action, distinguishing internal coherence for a set of beliefs (coherence theory), and foundational logic. The latter theory implies a set of foundational principles and their deductive and derivative assumptions. By internal coherence, I mean, the outcome of reasoning which assumes that if any individual statement contradicts others, then the entire text is subject to reframing in order to justify coherence of a set of beliefs. Are the youth judges attempting to achieve such a degree of coherence

that this reasoning influences the justifications for their deliberations? Such a mode of reasoning I construe as relativism, without jeopardizing the universal distinction between the concepts of rationality and relativism. I would speculate that one of the outcomes of justification based on relativism as a pattern of reasoning, would be the instrumental rationality of the YOA as a relativist instrument of policy. On the other hand, articulating a "particularistic" or "universalistic" text, assumes that judges focus on the act by reconstructing it by means of the foundational theory approach. In the latter, if the act is to be "liberally construed", it will serve as revealing a "statement" or a "philosophy" about youth control for the times, upon which general and traditional assumptions would rest. Judges will be asked to comment on section 3 (2), the "liberal construction" of the Act, as against the stress of particular other sections.

In the interview, judges will be asked to interpret particular sections of the Act to identify those that are mandatory, utterly negotiable, or optional as to how these provisions reflect the Declaration. They will be asked whether particular sections which have a global reference to these four assumptions are dominant in each provision. I discuss the process of priorizing the principles in each provision. Judges have been asked about the primary status of the provisions of the YOA, selected on the basis of their contradictions and problems which lead to the replacement of the

JDA act. The social construction of the young offender is also located in the sentencing provisions sections 20 to 26.

5. In the final tasks, I will seek the minor premises, deliberations and conclusions of judges' arguments using the YOA. Following Aristotelian logic of the Practical Syllogism (Broadie, 27), we have a discourse on method for judicial philosophy. Syllogisms are a holistic method of relating the 'hermeneutic circle' of wholes to parts. The premises must be the form of the conclusion, if the form of the actions exists in what it informs. We understand an action (a conclusion) by knowing the premises which express the cause of the conclusion; the relation is logical, not psychological in character. The judicial discourse is rational for the practical purposes at hand.

However, judges' deliberations are ideologically fixed as the result of social location (interests, values and relationships). They are also always the result of the moral foundations of the premises. The moral argument in the work of a judge who struggles to find a meaning in the plurality of conflicting sections of the act and its resulting judgments, is best understood in the interpretive perspective. In this method, we elicit principles internal to the premises and the social/historical purposes for which they were constructed, as the researcher 'understands' them.

The research will try to reveal the link between social and moral actions by a hermeneutic method. The research project also aims to deconstruct the interpretive mode using the concept of discourses. The separability of social psychological logic, from historiological logic is identified in Jones, (1983). Using discourse analysis, our research project will attempt to identify empirically, the construction of "social location", and reconstruct the "discourses" of jurisprudence from the particular social locations of judges. By deconstructing the interpretive pattern of reasoning, from their historiological assumptions in formal and sociological jurisprudence, we can identify the meaning of "offender", "victim", "crime", and the basis for these constructions in discourses.

We have been assuming judicial reasoning will socially locate (construct) particular cases and judgments for different purposes, using any of the major assumptions that best fit these particular circumstances. In order to reach an understanding of the sentencing dispositions (the conclusion of the syllogistic argument), I interviewed judges for their analysis of a particular case. The path of interpretation in its specifications and variations is necessarily plural and dependent on socially created meanings established in law. The attempt at social criticism in this project is a matter of interpreting the inclusion or not of youth and other contenders in a conflicting situation, who have

been previously excluded (as readers of the 'text'), in democratic processes of deliberation.

The assumption that judges use practical reasoning is that they follow the form of the practical syllogism. Practical reasoning aims at devising a structure for moral ends. Judicial reasoning strays from practical reasoning by arguing a posteriori, from minor premises, such as the information from the case description and from the court appearance. From these premises, a major premiss is derived, and from these premises, judicial outcome or ends that should obtain. Legal reasoning, by using this instrumental form of argumentation, extends beyond the domain of common sense and practicality. Legal reasoning is constructed political reasoning based on individualism, rather than practical commonsense.

6. Using the interviews, the next task will be to reach an understanding of the sentencing dispositions in order to conduct a discourse analysis of legal action. I will ask each judge to review their ratio decidendi (legal reasoning) in cases surrounding the issues in the fourth task. Here it may be assumed that the trial court judges in 1989, who have considered the YOA intentions of 1984, have now studied the appellate court judgements and shaped their dispositions accordingly.

Recent dispositional decisions of the highest courts in Canada are significant in view of the original two-pronged approach to decisions under the YOA philosophy. Reviews (Leschied and Jaffe, 1986) note that statistically, in the early use of the YOA, youth court judges took a punitive approach to dispositions under the YOA (crime control). Recent appellate decisions, however, indicate that dispositions under the YOA are to be individualized as guidance and 'rehabilitation'. Custody is only to be ordered "when all else fails". Young offender dispositions in the lower mainland of B.C. are recognizing "limited accountability" and generally greater "amenability to treatment". What does 'treatment' mean, currently? There might be a claim here for state intention in resolving the dual-pronged wording in the statute by allowing the ultimate resolution to come from the Court of Appeal. Such a claim is background to the thesis statement that discursive practices are being affected by the YOA, and that a normalizing social reasoning is used in the discourse. The question asked here is: what is the social reasoning and how does it permit the YOA to become a new discourse?

From reading recent appellate court decisions and from the results of interviews, I examine my finding in a discourse analysis (analytics), using discourse in the Foucauldian sense of power/knowledge relations. These are socially located in the justice system and widen its scope of power and knowledge relations.

7. The Youth court judges discuss the constraints on their decision-making, in the form of institutions, community feedback, court decisions, family, the economy and their own social control mechanisms. I will elaborate on the social networks that are being drawn into the judicial interpretations of the YOA.

8. I begin with personal background items that pertain to the overall aims of the study, and follow by a summary of the general arguments and reasons for their use of the Act, and for recommendations regarding it. The purpose of the research is to understand the judges' experiential and rational changes over the course of their judicial careers, the social/judicial criticisms of acts, judgements, and constraints of their social location. Ideological construction is masked even when explicating the historiographic starting point. Examination for the purpose of critical hermeneutics (Thompson, 1981), regarding structures of domination, are still needed, if changes to the Act are to come about.

I have included my interview schedule in Appendix A. Over a period of three months, I interviewed ten of a possible twenty judges who sit in the Youth Courts in the Lower Mainland, B.C. Contacts for the interviews were established first by means of a letter, included in Addendix C. There was a follow-up with a phone call, which proceeded in roughly similar fashion to the example in Addendix D. Twenty judges sit in the lower mainland administrative

jurisdictions but I had difficulties in attaining full cooperation. Initially, my contact person, or 'gatekeeper' was the Chief Administrative judge of the Vancouver Family and Youth Court Division. His reluctance to help recruit judges for my interviews, based on his concern for public attention to a judicial collective voice in the press, made it necessary for me to contact each judge on an individual basis. I was able to meet for at least one and one-half hours with ten judges, including at least one judge from each of the judicial administrative units in the lower mainland.

Apart from the media attention problem, other judges expressed 'time constraints', or left word through secretaries that they were simply 'unavailable'. Three of the judges stated that their opinion 'does not count'.

> We are bound [as lower court judges], by the legislation, case precedence and whatever decisions I make are reviewed yb higher courts, so my opinion doesn't count.
>
> I am responsible for my statements in court. This is what I do. What I say out of court is irrelevant.

One of the other judges gave roughly the same message. Two of the other judges were "not interested in giving interviews", with such rationales as "judges keep their opinions close to the chest". "I do not like to sit down to discuss my attitudes".

All of the interviews were in the judges' chambers in each of the lower mainland youth court divisions; only two of them were not tape-recorded for transcription. For these two, I kept notes and reconstructed them later in the day or during the evening. I gave

each of the judges a form requesting their consent for interview, and for recording. This form is attached as Addendix E. The interviews were semi-structured, with some open-ended areas in the sense that the judges were undirected beyond the scope of the general question. When I realized that a question was not prompting judges to elaborate on their opinions in areas that concerned me, I redirected their attention.

In addition to the in-depth interviews with these judges, I visited the Youth Courts in process. The visits were unstructured with no attempt to construct a formal problematic. The interviews provided the required information. Case readings in the Appelate Court added to my information on the direction and general scope of judicial interpretation. For the case study that I included in the interview schedule, I corresponded with the lower court judge in Ontario to obtain the original transcript of the case, and to learn the subsequent legal history of that young offender.

CHAPTER III:

SOCIAL REASONING

In this chapter, I will present judges' strategic reasoning using 'justice', 'welfare', 'crime control', and 'community control' concepts, as the most general meaning of youth justice and its practices. In the following chapter, I will show, by the form of reasoning used, that legal reasoning in itself serves to reinforce surrounding power and knowledge relations. The form of resulting social control is different from the control under the JDA, which worked through rehabilitative groups of professionals. In the YOA discourse, the purposes of punishment -- to change the moral character (reform the offender), to achieve retribution through accountability, to deter and to rehabilitate - - are all served.

The purpose of the final two chapters of the thesis is to provide a theoretical critique of the social reasoning that Youth Court Judges use to expand the state/social network. The shift in the discourse from rehabilitation to reformism suggests that a more centralized state (social control, which utilizes the 'least interference principle'), will actually intervene more repressively in the lives of deviant people, now specified as legally delinquent. The indication is, that by following a neo-classical perspective on deviance, the Youth Court judges are implicated in state-social control expansion. This claim requires an

understanding of the different forms of reasoning inherent in particular discourses.

3.1.0 Treatment as a rational agenda

In order to understand the social reasons and the transformation of reasoning under the YOA, I asked the judges to compare their experience with both Acts. With the exception of one, all the judges have had considerable experience with both these Acts. The average experience on the bench is 15 years, generally served throughout the Province. Which of the Acts do the the judges prefer and why? In all cases, but one, they had been practicing under the treatment approach for some time. The first two questions of the interview schedule are aimed at eliciting personal background items, and directed to understand changes in reasoning during the course of the interviewees' careers in the juvenile justice courts.

All of the judges debunked the YOA as a 'welfare' concept with a treatment intention. Treatment is not equivalent to helping the young person.

> "I would rather have obtained a little more, if we could have, of the old philosophy under the JDA, of higher priorities to trying to help the young person, but we don't have it. Well, it's not totally missing. but the priority is no longer trying to help the young person but due process, and protection of society.

Judges state that treatment does not work because recidivism remains. Treatment/rehabilitation is, after all, involuntary,

which therefore defeats its real purpose. With the establishment of a 'justice' agenda, the issue of voluntarism becomes inconsequential with the inculcation of a 'just' system of punishment: that is, the inculcation of a rational means of deterrence, retribution and restitution. The supposition of choice of treatment is irrelevant in the YOA because behavioural outcome depends on a new form of rationality:

> "You might get a very mentally ill, seriously mentally ill young person, who is a violent offender of great danger to society and to himself, let's say, and we are powerless to try to get him treatment if he does not consent or agree to the treatment. So there you are."

Under the JDA, the courts were to treat the children as if they were the parent: the parens patriae doctrine. Voluntarism, of course, is not an issue between parents and children, as it is between government wards and officials. Rehabilitation of families was a rational effort directed to improving the relations between parents and children by intervening in the family unit, according to a deductive principle: 'repressiveness', 'acting out', 'personality', 'pathological family' in need of treatment. Under the JDA, the social service administration was given the mandate to place 'difficult' children out of their homes, legitimizing their choices to the courts according to the concept of a 'sick' family. A concept of a 'normal' family was reified by placing children in quasi-family settings, such as foster and group homes. With a 'crime control' emphasis, judges see unremitting parental failure, and the need for discipline. The aim is to reform the moral character of the offender under the YOA.

"hs. Is the YOA a route for treatment?

judge. Yes, in terms of the probation order, ordering an apology, and community service work orders. In these instances, the youth may realize his self-worth. It can happen."

"hs. Is this how the YOA becomes a route for treatment?

"judge. It doesn't. Generally, kids are rational, but have a wrong sense of values, and need to get the message."

3.1.1. Treatment under the YOA dispositions.

Rehabilitating the child does not imply treating the child under judicial order, as it did under the JDA, or dealing with the causes of the crime. Under section 20, a finding of guilt is a prerequisite for rehabilitation treatment or asking for a pre-disposition report, or for any representations made on behalf of the youth. The YOA allows youths to decide if they want to be treated for any problems. Formerly, the collective state rather than the youth and families were responsible for costs of further training, health plan benefits and supervision. In the ethics of achieving rehabilitation through the law, judges use a division of labour. However, even if the parents, the lawyers and judge wanted to set up a treatment plan, the young person can refuse:

"We should leave the mental health and behavioural problems to those forums that are able to deal with them. Or rather, should more suitably deal with them... "

There has to be a clear link between:

"the disposition, the kid and the offense. If there were a concern for treatment, the Mental Health Act should be involved. If there is a concern about that, the child should be apprehended."

But apprehension in the 'interests of the child' is not in their jurisdiction:

> "I would hesitate to even consider treatment ... because it's a specialized field.
>
> hs. Right. So, there seems to be a lack of mechanisms for referral to social services here under the YOA. Do you think this compromises the treatment potential?
>
> judge. I don't know. I don't think there would be anything to prevent the probation officer from establishing some kind of contact with the social welfare office.
>
> hs. You wouldn't do that yourself under the YOA?
>
> judge. Not unless there was some reason in the psychological assessment.
>
> hs. Did that indicate that this should be done, and never was?
>
> judge. Yes. There would be probation terms that the 'p.o.' and the social services office, MSSH, or whatever they call themselves these days. That they work together to provide supervision.
>
> hs. If that were already in the treatment plan, devised, say between the services, it could happen. If it was not set up ahead of time by the probation officer, it would not likely happen?
>
> judge. No. I don't think so. No.

Another judge states:

> "I will often, I was going to say "throw in" and it's almost like that, a term that the youth take such counselling as directed. That's the only thing I can think of. I wouldn't make a treatment order or containment type treatment order as part of a probation order, but I might throw in something about counselling. I say "throw in", being somewhat facetious. And sometimes it amounts to that. I give the probation officer as much power as I can in dealing with the young person."

Again, two other judges state their own limitations under the YOA:

> "You can't force it. I don't know whether you should be able to. But sometimes judges are able to get, through the efforts of the probation service, to get families to agree with these

things. It's all done voluntarily without a court order because there are no means of giving a court order.

hs. Does the lack of mechanisms for referral to the social welfare administration compromise the treatment potential?

judge. Well, there are not any formal mechanisms, but they are just a phone call away, and I have phoned them a couple of times. But I am not sure I have any business doing that. Its a difficult situation. In our adversarial system, it isn't appropriate that I inititiate proceedings under the F & CS.

hs. Then, you don't see the YOA as a route for treatment as such?

judge. No, it is for treatment if you can relate it to their criminal activity, but not if it can't be related to their criminal activity, and the criminal offence they have committed."

3.1.2. Justice

According to the judges, the JDA would not have stood up to the Charter of Rights. According to all the judges, the child has to be expected to be accountable, keeping in mind that he is young, and therefore also "may need some form of rehabilitation". Some remnant of belief in explaining behaviour as the result of natural social laws or processes is a left-over from the 'welfare' perspective, but, the main thrust is deterrence and retribution, not treatment. Deterrent effects depend on punishment being fitted to the crime, so that the prospective offender can know the likely cost of the crime and be deterred by it.

"I don't think we are very effective as I have emphasized a couple of times. Maybe I'm pessimistic, but I don't see myself as a social worker, or as a psychologist. I see myself as somebody who has got a fairly limited role to play and that is to rap on the knuckles somebody who hasn't behaved properly. Let somebody else worry about the long-term. But of course, we always get involved in the long-term in any event. We do. We are asked to do certain things that will

> guide the kid over a period of time. When I said I am being pessimistic, as I have said several times, I think when we are really successful it is because we have happened to hit on the right disposition in the right time in the kid's life. The kid is ready to respond to that sort of thing - whatever it is that you have done. Or, he is just going to mature regardless of what you do to him. So, I don't know if we have that much of a role to play, I really don't. I know the expectation out there is that we do. And I know that sometimes the expectation is dashed by some of the things that we do, for good reason. But, I still remember the days when these Courts were municipally controlled, and when mayors wanted to see their communities run the way they wanted to and using the judge as their mouthpiece. The counsel is supposed to do that. That isn't the way it is anymore, and thank the Lord. Because they don't have the background or the knowledge to really understand. All they see is the surface sludge, the bad stuff that's going on but they don't see, very well anyway, the approaches to the cures for that. I'm not saying we see them all, but we see them a lot better than the counsellors.

If punishment is intended by the dominant dispositions in section 20 of the YOA (the sentencing provisions), what are these social reasons? Assuming that treatment does not work because it is involuntary, the judges give their reasons for punishment using a rational man principle, one of the strongest features in jurisprudence. By viewing the offender as responsible, he is made accountable for his actions. Retribution is not the result. The utilitarian principle of justice applies here because the rational man prefers to eliminate the painful effects of irrational behaviour.

> "hs. When one person goes through the process at all, the others who accompany him, too, become the subjects of surveillance when they might otherwise not be. But having an alternate measures section, where maybe nothing will be done here, has this some effect on the young person?
>
> judge. It might encourage them to commit offenses because they know they are entitled to one shot at the alternate measures. I'd be surprised if it encourages people to commit offenses.

> I think most people when they commit offenses, aren't thinking about the consequences that much -especially the first time around. They always assume they are not going to get caught. Not that I am going to get caught but that I am going to get an easy punishment".

Legal rationality is created for youths who in their normal lives are emotional, according to the judges, living at the expense of reason.

As one judge stated, police feel that the act, like the JDA, gives the child too much protection. They have more difficulty now preparing a case for court and extracting confessions. The judges feel that the YOA merely protects juveniles' rights. This process does slow things down, and judges feel the delay jeopardizes the 'reasonable man' doctrine. "Children are required to deal with an event that happened way in the past". As children's sense of time is more immediate, they lose the point and purpose of the legal process.

> "It's completely counterproductive if what you are trying to do is teach kids that there is a direct connection between what they do and the consequences of what they do."

The social construction of the 'rational child' makes an appearance. The judges prefer the shift in emphasis away from <u>parens patriae</u> as limiting a child's sense of 'responsibility' or 'moral duty'. In the JDA, rationality is applied through a rational concept of intervention, to diminish the strong emotive force in the personal situation. The YOA assumes 'rationality' in persons from the outset, or can through its procedures and outcome establish rationality through commensurate punishments or by

setting up a cost-benefit ratio developed internally in some individuals. With children, the judge questions the "degree to which he is in control over what he is doing." They "look at some method to reform this sort of behaviour in a non-criminalized sort of way."

All of the judges stated they preferred the YOA for its 'justice' perspective, although as I explain later, three of them did not find significant differences because of the similarities in the practical application. The reason which all three judges give for the similarity is their local interest in rehabilitation as a reformist principle, compared with the focus of most other jurisdictions across Canada.

For only one judge, the YOA appeared to have the same focus and philosophy as the JDA: rehabilitation as treatment rather than reform. In affirming a 'treatment' agenda, this judge considered the need for indefinite probation orders similar to the indefinite sentences of the JDA, but he liked the concept of accountability for young people. Clearly, with rights, he decided, youth are less likely to be "treated as victims", as they were under the JDA. Therefore, his philosophy is closest to the justice perspective in embracing the idea of "consequences".

> "If they decide to continue with their anti-social behaviour, they are now more aware of the consequences through being more involved in the judicial process".

3.1.3. Crime Control.

One judge gave only a statement about the JDA, as he had never worked with that Act. He thought that the YOA was primarily "criminological", dealing strictly with the control of crime, as compared with 'sociological' - - a social reformist intent. In

that sense he felt that the YOA is limited by what he called its "social level", where a treatment focus is needed. What he means by "treatment", however, is a specific crime control measure: "I wanted to lock her up for six months, not to punish her but to get some control over the situation." In this interpretation, he felt the YOA was unduly "punitive and limiting".

> "All I can do is to punish her proportionate to the offense she has committed (shoplifting), which would bring "a bit of probation and some community work and a bit of supervision".

He felt that the "ideal solution" for a "young girl who disappeared on us in that situation" would be to give more control than the parents were able to provide because she was a drug-addict and was deteriorating each time she came to court. This judge described his dominant sentencing philosophy as "rehabilitative", using non-custodial rehabilitation when the situation warranted and justifying custody as rehabilitative rather than punitive. The aim of custody is specific deterrence, to "impress on him not to do it again". In the case of young persons, custody is also in some cases rehabilitative: "they have a good school program in some custodial centres". It was not important for the judge to ask about the dynamics of care in custody centres, because he views the interrelations more in terms of specific programs than 'treatment', meaning 'involuntary nurturance of the personality'. Athough for this judge, it appears that the rehabilitation focus is primary, the total focus is on bringing young people into a controlling environment: "If our controls were effective, then you wouldn't have the behaviour problem". Rehabilitation is limited to

"rehabilitating him from committing criminal activities": "I'm a criminal judge in the Youth Court". That is his expertise: much "as I would like to, I can't rehabiltiate... unless it is rehabilitating him from criminality. So that's what rehabilitation is". He doesn't think the YOA is a route for treatment. His notion of rehabilitation is an articulation at the practical level of a political law and order ideology.

All the judges felt that the YOA merely focusses the options as "any law does in this sort of work" by limiting the response in order to control crime. "It focusses attention on a spectrum" of punishment options, set out in the Act. Technically speaking, under the JDA, any sentence would be possible, if the facility were available.

> "In other words you could incarcerate for sociological or treatment reasons, as opposed to legal reasons. Now this Act has become more legal oriented, ...it says, now we are having responsive sentencing".
>
> It points away from treatment orders as such, except under specific treatment order provisions".

The YOA "doesn't add to the measure of response that you have got." They all see the YOA as in some way limited, especially, in the area of the three year maximum sentence and the duration of probation orders. The youth court judges used phrases like "tariffs", that indicate that the YOA is a set of state-endorsed punishment schedules. The justice/crime control reasoning concedes more coercive power to the state than the JDA, as suits its neo-classical social reasoning.

Most of the judges found the previous system under the JDA "extremely loose". It created responsibility for the judges that was far beyond what would be reasonable". The concentration on the 'reasonable man' as a classical concept, refers either to punishment, in its responsiveness to a just solution, or as a crime control measure to make up for family failure in deterring individuals. Second, the JDA in creating only delinquencies, and in its restrictive disposition process, really:

> "tied the courts hands, if the Court wanted to be more imaginative, more wide-ranging in the sentencing. The YOA has created a system whereby the youth has a very specific position before the Court. ...(the youth) has specific protections against abuses and it has also given the Court much greater scope in how to dispose of youth problems."

The key word here is "focus", rather than "limit". This judge sees focussing as responsiveness. Coercive limits are seen as a necessary feature of the judicial process, in the classical perspective. Yet sentencing still remains an arbitrary consideration. Though 'due process' is made a visible and fixed logic, an instrumental rationality, this is not the case with the disposition: "that's up to the judge". From the perspective of the social creation of criminal and noncriminal, the 'person' is not the body and its needs, but 'actions and their discourses', by way of a legal, arbitrary process used to maintain order.

3.1.4. Collective Reasons: community control

Only one judge referred to the possibility and justifications for community law. He had travelled extensively throughout the interior and northern B.C. communities. Under the JDA, he said,

the law was more responsive to community needs. He sometimes took his whole court to a single trial. By the time he had arrived, the community had already solved the problem. "From what the people told me, [they successfully solved the problem themselves instead of waiting because] the judge and the court staff were all there especially for the young fellow." The community had alternately decided to solve its own problem. In their understanding, the justice system was based on a philosophy of controlling individuals and would use its force to do so. Yet, their dispute resolution was not so strictly administrative.

This judge refers to lay judges, and how the 'established legal system' and the media were complaining about the quality of justice that was handed out by the then so-called 'lay judges'. This judge was appointed to replace them.

> "There was quite an article in the paper about yours truly coming to deliver justice. As if they never had any before. Anyway, you know how newspapers go."

Although a notorious maverick, he does not:

> "really notice a big difference... I found that the focus is still the same. Or the philosophy is still the same. That the paramount consideration is the rehabilitation of young offenders." ...(by means of incarceration, in his view.)

One of the other judges also refers to community justice, from his experiences in the northern part of B.C. before coming to the lower mainland. The community shows its involvment in the form of letter-writing or through information in the pre-sentence report

done by the youth court worker. This experience, however, lacks the collective force of community justice.

> "hs. Do you, as well, call in neighbours, members of the family, who are interested?
>
> judge. That's the Chinese system, isn't it?
>
> hs. That's right. Its also true in northern Canada, as well.
>
> judge. That may be. We don't so much, no. Oh, I might get it in the pre-sentence report. The probation officer might have some input from the neighbourhood, but not much. Or the employer, or aunts or uncles, or something like that. Or they might give evidence in sentencing, I suppose, but it's rare. It could happen. I should say one more thing. For example, we get some in the sentence proceeding in the form of letters from people in the community, who say that this is otherwise a splendid young man, who works hard, and is otherwise a good person.
>
> hs. Does that happen sometimes, often, or rarely? Do you find that you can attend to the commonsense dealings of people who are involved with the young offender?
>
> judge. Oh, yes. Often, that is something that we would take into consideration. You get that both in the YOA and in adult court. There are occasions where you get that kind of feedback from people in the community. A good example, is sentencing in a very small community in the north. It was an absolutely horrendous act of a person committing a sexual assault, and an assault causing bodily harm on a seventy-one year old, blind Indian woman. It was just an appalling thing. I received letters from people in the community. And from the daughters of this accused which said that this is totally out of character for him. He is the type of person in the community that if you have a problem you would go to. He gives you the shirt off his back. He is kindly, he is gentle. That is his reputation in the community. His daughters said, "mum left us when we were babies, and he looked after us. He has been a real dad to us." And as much as I was able to I took that into consideration. Yes, sometimes you do."

3.2.1. Appropriateness of the YOA for 'Due Process' Reasons.

The YOA does not prevent judges, generally from doing what is appropriate, they say. Yet, 'due process' can interfere with the

ability to understand the childrens' background and 'best interests'. One of the judges finds the YOA overly technical: for example section 56, on confessions. The YOA uses an older discourse than adult courts do, as a way of making the juvenile court a more serious process in coercing the 'mind', at the expense of understanding the whole person and circumstances. In the JDA most of the work was done by means of confessions. If a young person was caught he would usually plead guilty.

> "The police officer would ride around with him in a car and he would point out all the places he committed crimes. With due process, even street kids ask for a lawyer because they are advised to do this."

One of the judges, however, said that in his court very few kids, when pressed, felt this need to ask for a lawyer. Due process is a new addition to juvenile justice, ensuring legal forms and values. Yet some judges were concerned that legal language required a lawyers's expertise for 'translation' at the expense of obtaining a more comprehensive backgound information to serve the childrens's needs. Lawyers are used, instead of the more direct input of juvenile and family's working class values and of their participation. The YOA language, as all the judges agreed, is very legalistic.

3.2.2. Focus on the Legal Subject as Accountable in the Crime Control and Justice Philosophies.

The major reason for preferring the YOA is 'accountability', as the judges maintain. The young person who has "committed a crime is more accountable for his behavior than previously was the

case under the JDA". To whom is the youth accountable? Under the YOA, the judges feel they are not forced to respond to community pressure. Yet, they state, the Act makes "better sense in present day circumstances". In the public media, there is a suggestion that courts are hamstrung by the YOA, because they don't have the leeway to do what is necessary with very difficult cases. The entire Act is somehow deficient. In one particular case reported in the media (McLeans, 1989) the problem arose from a misreading of the Act. A seventeen year old youth was arrested for murder and sentenced under the YOA instead of being raised to adult court where the Criminal Code applies. Crown counsel thought that under the YOA a finding of 'not guilty by reason of insanity' was available. It is not. He did not request the Court to raise the case to adult court.

The question of accountability is nevertheless problematic. The judges are constrained by the legislature, which determines, under the YOA, the spectrum and tariffs on sentences. Revisions proceed according to legislative committee guidelines, which determine who is to be punished, and for how long.

Except for the restrictive three year sentence, and the need for longer probation orders, as enhancing accountability, all the judges think that the YOA has made "things immeasurably better". "We have got rid of treatment and are now focussing on responsibility and special needs."

The added feature of containment is considered to be an advantage, because it protects the public. It is seen as a useful period of time for a youth to achieve rehabilitation, and "an opportunity for them to come to terms with the limits that society places on everybody." The judges, responding to their 'justice' philosophy, have some reservations about locking up an accused "as quickly as I might, which characterized the JDA." There do have to be "compelling reasons". Generally, they did not like the industrial school tactics used under the JDA because no 'compelling reasons' were required. Containment was a common tactic with a long history; it was very useful when a quasi-family setting broke down. Youths are now constructed as 'reasonable people', and when the 'unreasonable' judge sentenced them indefinitely, they could not construct the experience as a learning one, with a rehabilitative focus. The judges understood that a child would construct it as a punitive one only. In the crime control philosophy, it lacked the construction of 'reform as rehabilitation', of using the opportunity to assess rationally the social utility of decreasing crime. 'Time' done was not part of the hedonistic, crime control calculus under which the reasonable person operates. For reasons of 'protection of society' against the incorrigible, as a utilitarian principle, delinquents had to pay their dues. If the utilitarian deterrent principle did not work, at least society would be protected. In fact, under the JDA, "kids were coming out even worse than they went in".

Judges today are more hopeful about using punishment to reform, and not simply as an accompaniment to treatment. They are still not quite sure about the resources to which they send the kids. As they see it, it is the legal procedure that is important in ensuring justice, not only the disposition. Expert testimony is important as a part of due process, in ensuring that the classification of delinquency will be taken seriously. Community service has a more 'serious' or tougher definition, and programming because it is used to stop criminality, a stronger value than solving the personal problem of deviant behaviour.

By highlighting the individual and the 'least interference principle', judges use 'protection of society' and individual delinquency to understand the particular circumstances where accountability is legitimated: in an institution, by an expert field worker, or in his legal family. The legal net is strengthened and the legal subject is constructed from a domain that masks the wider context where it is ideally supposed that citizenship issues; that is, in the community where the youth resides, or is homeless.

3.2.3. Personal Assumptions.

The interview question asked, "how has your experience as a youth court judge affected your personal assumptions about the dispositions toward young offenders?" All of the judges felt that personal, emotional opinion, and beliefs are not a valid measure of

justice. The implication for law is, as one judge, with a Cartesian view of separating the self and the world, states: "I don't have personal assumptions. I proceed according to law." In querying this position, I asked:

> hs. Alright. And in your interpretations of it, as you read the law. Are there no understandings that have come through from your training as a lawyer, or your practice as a judge, or from your personal philosophy about the treatment of young people. Do you see these as affecting you by having a piece of legislation like the YOA?
>
> judge. Personal views don't matter when you proceed with the law.
>
> hs. And your interpretations of it?
>
> judge. Yes.

In a different vein, another judge states:

> "I don't think there is any judge who is sitting in any division of any court in this country who is completely devoid of personal biases, prejudices, approaches to the world."

He believes, however, that personal attitudes are so glaringly obvious to other judges, and the Appelate Court, that they will be exposed, so they usually do not predicate the decisions that are made. The law has the same long-term hope of rationality as has been attributed to science. If it is the Act that decides the judgments, and if personal assumptions are in conflict with what the statute says, "then you just get buried".

3.3.1. Moral Assumptions, community values and individual needs.

In a more expressive view of law and the world, one judge states that the law rationally shapes attitudes, but "does not lead

attitudes". According to one judge, there has really been no change at all in the world of crime, since the YOA came into effect, or in the measures that need to be taken against it. People are rational, given the guiding hand of the law:

> "Attitudes are a developmental issue. People hold certain attitudes, which persist for lengthy periods, then perhaps change into other things."

But the law is formative in rational calculation: "dispositions restrict or expand in their ability to perfect certain attitudes."

The law is seen to be a rationally reformative process, in that reform is to be effected through a scale of punishment. Since the moral attitude that is most in focus, according to the ten judges, is 'responsibility', and 'special needs', there is an emphasis on guilt and developing the moral character through direct coercion and confrontation with the law. "We have got rid of treatment and are now focussing on responsibility and special needs". For the majority of judges who see only practical differences between the YOA and the JDA, they do not see that the YOA deals with morality as such, with the values of community or their reflection in the court. Neither severity of punishment, nor the seriousness of the crime is seen as a moral issue arising in the Court because the concern is with the character of the offender.

> "The procedures have changed and we have weeded out status offenses. The difference between the Acts is that the YOA deals only with criminal code kinds of offenses. Moral conduct doesn't come into the Court. Different provinces show differences around the seriousness with which they regard

> certain offenses. In Ontario, for example, the courts are quite hard on drinking offenses.
>
> hs. And in Alberta, on drug charges. In Quebec, there are strained relations with courts and probation services.
>
> judge. They are hard in Alberta on everything. Both Acts have emphasized repetitive bad behaviour."

In my interpretation, the Court's concern is on moral character and social utility. Punishment, under the YOA, incapacitates or restricts conduct, deters, and rehabilitates offenders for the sake of the 'social order', therefore social reasons are given in justification.

The preservation of the social order may require that judges re-order priorities of 'justice', community values, or individual needs, in favour of requiring a 'tariff' for crimes. In this sense the individual, community morality, and the law are distinct phenomena.

3.3.2. Legal Culture.

A minority of the judges saw no changes in their own assumptions over the course of nearly two decades - the usual experience on the bench. Dispositions reflect "the culture you grew up in, so to speak, in your professional life that gauged how you felt about it". For these judges, the JDA "had a lot of flexibility built into it". Only the names and processes are slightly different now. "The YOA presents differences, and I am conscious of them, but I can't see that this results in a practical difference." The only judge who continued in an extreme positivist

stance, regarded law as a process with procedures and enforcement problems, which would affect the development of the youths' personality. He saw changes under the new Act, but these were only nominal differences.

> "Its called different things. For example, community work service orders is an independent order, apart from attaching it to a probation order; what we really did was tantamount to the same things. So, essentially, there is no difference in terms of dispositions, or very little anyway."

For those who saw practical differences, they also did not think that there were major philosophical changes, only a "refocussing". The practical differences, however, make a difference in the goals of the community and penal system, and of the nature of social rehabilitation or reform.

The judges respect for their legal culture is grounded in the knowlege relations of legal subjectivity, whereby the self is made a subject under the auspices of legal theory and practice. In contrast, social control determined by positivist science and its professionals, locates subjectivity in transforming, rather than reforming, the individual. To quote one of the judges:

> "In my philosophy, the liberty of the subject is dominant. That is my dominant assumption. In this country, it is everything, like an instinct. The PCA and the JDA are civil liberties documents. Law is a set of rules that protect as well as impinge on liberties. My [Metatheory] is: [one,] liberty. [Two.] What is a 'reasonable doubt', and [three], the infringement of rights under the Charter. This same attitude set, I see as a scope broadened and refocussed by experience from teachings since law school. [Four]. The protection of the Law. It limits the state power over the individual.
>
> hs. Interpetation of the law is interesting, as the basis of communication is interpretation.

> judge. (Agreeing on interpretation), the issue is who is inside and who is outside the debate. Politicians are outside. The debate changes over time. With education and experience, total reactivity is impossible. I have learned to make up my own mind and display the correct attitude."

Currently, legal subjectivity is a construction of rational reformism. The law interposes rationality in social relations which are structurally relative to personality, state coercion or interests. Legal relations fit into existing structural realities: the family, work, and citizenship relations which have a 'disciplinary' focus. Legal culture is geared to making control of deviants a substitute for social reforms, even though the rhetoric now used in the courts is social in nature. If judges believe in a formal or proper justice, as the above-quoted description suggests, some of them express a concern for the de facto situation in the courts.

3.4.0. Causes of Youth Crime.

In response to the question, "what causes young people to commit crimes, in your opinion", most of the judges expressed an inability to state clearly what caused crime, in adults or in children. Two of the judges referred back to the early pathological perspective.

> "I seem to have concluded then, as I would now, that basically it's problems in the home... that strikes right at the root of the development of the young person... alienation or rejection of young people... some form of psychological rejection, often by the mother, as I read in some report this morning, and if the child reacts to that or acts out to use that term... that's what psychologists or psychiatrists seem to say. I can just say as a juvenile court judge, the common

> thread seems to be with many, many of these young people that they come from backgrounds that were not enviable at all."

The pathological perspective maintains the significance of socialization problems. This same judge states,

> "a child that is wanted picks up either directly or indirectly basically a good value system and certain fundamental values, which we regard as basic values. I think the rest flows from that. I think a lot of delinquency tends to be in the form of anger or attention-seeking."

The last part of this statement exemplifies the pathological perspective. The second judge to use the positivist perspective states the cause of crime as:

> "Inadequate parenting from day one. Inadequacy is divided into many areas, including no fault on the part of the parents because of pressures on young people through modern communication. It is a hard job to raise children. I look at the inadequate modelling of parents on certain children, and on the environmental temptations which these children face, from peer pressure, because of the inadequacy of the parent.
>
> hs. Do you see lack of parental control, and schooling control on young people as a factor?
>
> judge. I do not see control as the issue, rather let's talk about the guiding rather than the controlling function of parents.
>
> hs. Do you see a difference between offenders and non-offenders?
>
> judge. There is no difference. Unsatisfactory behaviour results from poor parenting, but some children do not get caught. The offenders need a change of environment and new rules, so they can make choices.

The societal reaction school of deviancy is part of the notion that there is a plurality of factors related to crime. Labelling "affects your own self-perception. It affects the perception others have of you and limits your options in the future". But

labelling as a perspective on reforming structural inequalities does not address the conditions generating these inequalities. The labelling perspective does not clarify the grounds for power relations.

> "hs. Do you see the labelling factors as influencing the young offender? When he is caught he is labelled an offender by the law enforcers and the courts.
>
> judge. In any field labelling is a problem. For those who label, it takes some discipline in dealing with some individuals to act rationally. I am not saying that labelling is a significant factor, but it is detrimental to both the youth and the enforcer. It is naive to think that some youth, just because they have good support at home, and whose parents are satisfactory in any way, such as coming to Court, will make amends. There are some children whose environment is so gross, it is unbelievable that they somehow manage to conduct themselves well.

Another judge also accepts the labelling perspective:

> "We are using essentially a criminal machinery, whether the procedure, and so forth follows the criminal code and we find young people guilty or not guilty. And once found guilty, I often wonder what affect that may have in stigmatizing them in the future. I wonder how they ever break out of that."

Another one of the judges thought that because a lack of self-esteem was at the root of every youth's problems, rehabilitation under the pathological explanation was still a good reason for intervention:

> "It (lack of self-esteem) may come from something under the surface. No amount of peer pressure or lack of control is going to lead them into committing a criminal offense that would result in their being in my Court if they have self-esteem. That's what it comes down to."

Along similar lines another judge states:

> "Maybe because some people if they are rejected, it seems to perhaps induce in them, well, 'I'll show you' sort of philosophy. You can show people in many ways, one of which is to commit crime. The other way is to be successful."

The continuance of the rehabilitation perspective under the pathological perspective, in believing that poor parenting causes criminality, leads to a brand of social control that moves away from collective responsibility. In crime control thinking, institutions such as the family are the center of society and need to change in order to develop the right attitude to parenting. The lack of parental authority requires increased authority of the law as a means to protect 'society'. According to one judge:

> "The JDA uncovered a poor show of parents. They lacked control and ability to discipline children. The problem is in the socialization of youths... They need to learn the constraints to put on themselves."

According to another judge:

> "I think that parental attitudes have a lot to do with the development of the psychological or emotional approach to the limits that society has on you. It requires a certain amount of awareness of opposing rights." (There was a) "need for change in the approach to juvenile delinquents".
> The YOA is better because it:
>
> "was more in response to the demands of society that the YOA came into being."
>
> Another judge describes himself as a maverick:
>
> "in my view, 29% of all crime by young offenders occurs with adopted children... Perhaps they have a lack of personal or historical place in the world. Foster or placed children have the same difficulties to a diminishing degree."

For most of the judges, every case had to be addressed on its own merits. "You see children who have had all kinds of problems in life who are not before the courts". "It's because they had the ability to cope with that particular problem in that particular environment that they live in." We need:

> "the kind of control that deals with the needs of that particular child. Whether the child has emotional problems or academic problems or learning problems. (Crime is caused by)...every thing under the sun: greed, ignorance of the law, stupidity".

Both pathological and classical justice perspectives address personal and social factors as the cause of crime --"there are very few cases of real, organized crime". However, in neo-classical legal reform, the law is more an art of judgment, in understandings of criminal intention, not of criminal behaviour; of findings of guilt, rather than of deviancy as such. Addressing the problem of the phenomenon of crime was not their professional intention.

For all of the judges, personality and social reasons in the form of lack of opportunities are stated as causes. Following the 'justice' perspective, the judges believe that underlying factors reveal that crime occurs when individual rights are thwarted. Structural reasons per se, are not given, except to indicate specific conditions for crime, as in offering a critique of social policy itself, or where principles and practices begin to diverge, which therefore needs to be examined. In practice, part of the inequalities that youth face in daily life is the very close scrutiny of social control systems. Social histories are still quite evident as part of the art of sentencing. These histories make up 'the facts', as minor premises of legal logic.

For two dissenting judges, a structural reason, poverty, was given as the limiting condition for youths resorting to crime but

only within the context of normative problems of transmitting family morals, rather than as a structural problem to be addressed per se. One of the judges did blame the judicial system for dealing more leniently with children in privileged positions. But he did not address the underlying structural issues of why this problem should be dealt with, or the conditions for the inequalities of poverty to be eradicated. Several of the judges felt there was:

> "a lot more cause associated with poverty, ...but I get some young persons who are very well off and have all of the benefits. I think he (some of the youths) just wanted some excitment".

All of the judges were concerned about the transmission of morals as an issue of crime control in three spheres: family, school and community. They did not themselves feel empowered to get to the root causes of crime as that is the concern, they felt, of the experts or of the legislature. Although the 'public' often expected them to deal with the causes of crime, they said they either didn't know enough about it, or they didn't have the resources to do anything other than deal with the offenses. Deterrence, generally of the youths' peers, by punishments, or specifically deterrence of the offender by reform rehabilitation, was their primary concern. There was no reductive conclusion that the kid was 'acting out some repressive family conditions' which was often used as reason under the JDA.

> "I think that the basic truth is some kind of maladjustment that they have made to authority, starting probably with the parents, the schools, the police. And I am surprised there is

> not more... And this is not only amongst underprivileged families; some of them are from well-to-do families. I suppose there are, in our society, a lot of criminal acts committed; for example, stealing from a company by adults".

There are strong indications here of the use of law as a mediating agent. In their sociology of reform through jurisprudence, the judges prescribe themselves as social agents for moral reform of criminals, but not available to the democratic process through the courts.

Some disillusionment is expressed at the lack of agreement about the causes of crime. But one judge denied such agreement was possible, except through the art of law for dealing with the effects of crime, because there was no simple etiology of crime. He emphatically denied that the treatment rehabilitation notions of repressive acting-out were explanatory, or that lack of enforcement procedures caused crime. The judges proceeded with the hope that the kind of intervention provided by the Courts will work. The law itself is sufficient to dissuade potential youth offenders: "ignorance of the law and total stupidity", meaning that "the kid just hasn't a clue what is going on". "But it's usually the kind of thing which is spur of the moment as it were," and the youth might benefit by being drawn into the legal net as a way of confronting what society expected of him.

I asked the judges if they looked at the social effect of underlying biological factors. Usually the answer was "I would not touch the subject of biological factors." Most of them use the

concept of learning disabilities as the only area where pathological/scientific logic pertains. Often the issue is addressed as an underlying biological factor with a socially negative effect. Two of the judges were quite adamant about the 'abnormalizing' social effect created by learning disabilities.

Following the question on the etiology of crime, I asked if the YOA identifies or reflects what they have stated as the reasons or causes for why young people commit crimes. None of the judges believed the courts are able to alter the initial conditions for the causes of crime, although they are critical of tactics associated with parental and other particular 'socializing' units.

> "The YOA is not a curative Act. Nor is it preventive, except perhaps, for youth court committees. They play a small part. The whole of society's actions: the media, education, have to be dealt with to address the reasons for why young people commit crimes."

Judges are not 'connected critics' who can speak in collective terms, of values that they would try to install to replace current ones. The judges all maintain that the causes of crime lie with the "transmission of values", in "cultural problems" or in "social break-up", not in the values themselves. One judge, who took the most conservative crime control position, stated that certain counter-culture values would threaten normal ones, unless controls were adopted by social units, but his position would allow him only to deter the young persons, by "attempting to change the young person's respect for community values." His position was not

connected directly with attempts to change values, but to 'normalize' the young offender. Most of the judges adopted a liberal stance of balancing 'rights' with 'responsibilities'.

> "The YOA leaves that (causes) aside and merely deals with the question of how courts should deal with those who find themselves in this position, regardless of why they got there, and how Courts should weigh that child's development against the protection of the society around the child, but not why."

Dealing with causes is "far beyond this court". Their sociological jurisprudence is concerned with issues of legalistic social control, which is related to a presumed mediation by law, for the purpose of balancing different social interests in society. Social reasoning is related to 'the least interference in the lives of juveniles', thereby prohibiting personal reasoning, in favour of reform practices of law and legal practitioners. This form of reasoning is restricted to legal problems arising from the behaviour of juveniles, in order to control crime on behalf of different social interests. The relatively narrow horizon of social reasoning seeks to accomplish moral reform and to change the respect of youths toward community values. The individual emphasis in personal reasoning likewise curtails the potential of law to effect collective change. Several of the judges feel that the YOA is a "machinery for rights" (due legal process), and for "flexible sentences". Judges are well aware of their limited options to change society.

> "Society expects the courts to solve all these serious problems. The court just can't. All it does is reflect a standard of behaviour that is acceptable to the community. That is the aspect of deterrence. It is hoped that every so

often the penalty that is handed out will indicate to society that this is the kind of acceptable behaviour that you are expected to be involved in. But to expect the courts to suddenly change society and instill greater morals, understanding and respect for each other is asking something of the court which it can't do."

"The YOA only provides mechanisms. The socialization process is different: it's a cultural problem. The YOA is a machinery for rights. They should lower the age to 17".

hs. Can't you raise the youth to adult court?

judge. The Crown needs to initiate raising the child to adult court. I must find out if the child can then be sent back to youth court for sentencing. [starts to read the YOA].

hs. Can jurisdictions change?

judge. I think so. (reading) There should be a court for young people, as in the JDA system. Children at 16 can be quite sophisticated criminals. The age is too high. The good thing about the YOA, is that the range of sentences are flexible. If the child is sophisticated, you can fine up to $1000.00. Now, I am sure you would not want to pay that yourself. The part about the sophisticated child is that he should be in adult court.

All of the judges stated clearly that the YOA was a 'criminological' statute, that was not set up to deal with the causes of crime. Three of the ten judges did state that the YOA reflected and identified the causes in a very qualified way. In one case, a judge said that the Act attempts to ask for some investigation of the child's learning disabilities by recognizing individual needs through assessment reports, (section 13). "But, basically, it's a criminological statute. It deals with crime, as such; its not sociological." Two of these judges felt that the Declaration was written to focus emphasis on reforming the young persons themselves, as opposed to using them as examples for deterrence. But, as to reflecting causes in the YOA, "Well, I

don't think it identifies them." The second judge, said the YOA reflects causes in a very general way, by giving the amount of leeway it does for probation orders. "But it never deals with the causes themselves." Another judge stated:

> "Well, it provides the machinery to deal with it. It's not designed to eliminate the causes. All it's designed to do is deal with lawbreakers, to deal with children, and in some way that would help their rehabilitation by whatever processes the community is prepared to make available."

As well as through the mechanisms of open probation orders, the YOA was presumed to deal with causes indirectly through specific deterrence, in making the punishments or programs specific to the offender. Indeed, more programs have been made available to 'youth in trouble with the law' than to the 'juvenile delinquent' under the JDA. They do see the YOA as having the means to 'normalize' the young persons ex post facto through moral reform.

> "It does not deal with causes, but how the acts of the offender might be dealt with. It begins after the fact. It does not control future activities but attempts to change the young person's respect for community values. It does not deal entirely with consequences, but when caught as they occur, something is done about them. Each of us is unique. For some children, merely a finger wagged at them is enough; others need a prompt significant response, even to locking them up with no questions asked."

3.6.0. The Ideal Case.

There is an inconsistency between various means of conceptualizing the phenomena of legal rationality. In the preceeding chapter, the form of legal reasoning and practical

reasoning were represented by a syllogism of major and minor premises followed by a deduction leading to action. It suggested that practical reasoning begins with a normative notion in the major premise. The major premise, for instance, might be the notion of the ends of justice being 'rehabilitation'. Yet in legal reasoning, minor premises, precedent case examples, or facts, determine which reasoning and principle to apply. A normalizing, heuristic reasoning takes place. For instance, if a youth is very young, then the principle normative attitude of rehabilitation is often but not always invoked. In fact, in the following case example, we see a wide range of sentences resulting from one situation. In legal pluralism, there is no universal agreement about which facts or principles to apply. The heuristic element of law on the part of experienced practitioners who internalize the complex rules of law, takes over as they achieve expertise. Yet the liberal ideology, from the judges' statements above, appears ultimately to lend itself to a law and order reckoning, because of the Rights and Responsibilities combination.

Legal reasoning represents an attempt to endow the syllogism, as a classically postulated form of reasoning, with a coherent and substantive content for the neo-conservative state. First, it identifies a legal subject with the 'universal' subject and the ends of justice with the whole body of social good. Second, it links its goal to the well-being of the individual subjects

(Foucault, 1981). We may look now at a deeper analysis of legal reasoning through a case example from the Ontario Courts.

In one of the interview questions, a case example was offered for critique. The example was set out in Bala and Lilles, (1987), The Young Offenders Service as follows:

> Here is an abstract from a case in the Ontario Family Court in August, 1987. The case is also summarized in the Young Offenders Service (Bala and Lilles, 1987), as applicable to cases for youth under 14. It illustrates the processes of legal reasoning and some of the constraints on legal decision-making under the YOA.

A black youth, aged 13, recently arrived from Jamaica with his father, who had lost interest in him. There are no other immediate relatives in Canada. He was apprehended by the Ministry of Social Services and placed in a group home exclusively for children from the islands. In the pre-sentence report, the youth worker depicts the youth as functionally illiterate but able to grasp concepts. He appears to be undersocialized in terms of his values, and according to the presiding judge, he presented himself as a youth who is saying "I don't care". He has come from a background where there was no one to care extensively or adequately for him. The youth claims that there are people for him to go to in Jamaica, but the court did not ask for confirmation of this information. While in the group home he "escaped custody" and three times broke into the house next door. On one of these occasions he pulled out a knife and cut a seat. The recommendation of the staff director of this home was that the youth required a period of time in closed custody.

He was convicted of escaping lawful custody and two other offences of break and enter. The youth court judge committed him to 12 months of secure custody on the charge of escaping custody, and to 12 months of open custody plus six months of probation on the other charges. The secure custodial disposition was imposed for the protection of society and the security of other people's property in that the youth was likely to escape from any other place. In a secure setting, the youth could receive help. In an unusual exercise of "judicial notice", the provincial judge recounted his favourable impressions from a visit to places of secure custody, finding them a "superb place" for the youth because at times there is a high staff-to-inmate ratio for educational opportunities, a director who is a trained psychologist, and a positive peer culture system. The duration of secure custody was dictated by: the uncertainty as to the amount of time the youth

needed to straighten out; the duration of an academic year; and the relative ease with which the youth could apply to have the duration modified on review.

Most of the judges considered the same range of facts: age, first offense, the unusual nature of the crime, developmental problems, cultural factors, emotional state, escape custody, the availability and nature of the range of resources. For those judges who emphasized the fact that the boy escaped custody, rather than his social/psychological 'problems', their reasoning was based on the 'protection of society' principle. They saw long-term custody as rehabilitative. Reinforcing the boy's social bonds in Jamaica, was the sentence outcome of this concern. Failing this possibility, incarceration was required:

> "In looking at treatment in the traditional sense, custody is treatment if it rehabilitates by applying consequences to him for life. For some kids, they learn from having their finger in the fire. This is not crime and punishment nor retribution, but to effect an end to the benefit of the child. I don't presume that least is best. I focus on responsibilities: "protection of society" is my principle, not "rights". This Act has come the closest to saying there are responsibilities. Don't think that "Protection of society" results in using only the custody options. The threat to use custody, itself, has an effect. I don't use hollow words. If I say, 'you are going to jail next time', I'll send them there."

At the other end of the scale, those who focused on the social situation of the offender, as their prime facts, looked at the 'least interference principle' in their reasoning, with jail as the last resort. The help that was appropriate was short term custody

and probation. There was a tendency to accept heuristic intervention strategy as a normalizing process:

> "I understand why you are into this, and it's not normal".

> "What you say is "In your interests, what I will try to do is to rearrange the factors which are a problem for you." Now if it means some period of so-called punishment to get in line to affect that result, then its true. The reason behind certain sentences may be different. The judge here chose the crime and punishment model, didn't he? What I am talking about here is the application of a model. That isn't the way to go about it."

Little attention here is directed to advocating changing the social causes, and thereby restructuring the conditions of life as a means to effect the ends of justice. The reasoning used is a normalizing law which suggests that judges are attempting to reform individuals by heuristically applying formal law, the weight of argument, precedent, and case reasoning.

Normalization tactics fall within a conceptualization of non-criminalized reform and responsibility. In the case example, the offense of escaping custody is downplayed for several of the judges. Normalizing intervention proceeds as personal help and reform. But "there is certainly a limit on what you can do to improve the quality of life." The ends of justice as the goal for these YOA case decisions is, therefore, the 'least interference principle', rather than quality of life.

> "Well, its a goal you always strive for, but its limited what you can do under the YOA. In some of the cases you have to hope that the Superintendent of the Family and Child Services will step in, and remedy any problems. I don't know if that could have been done in this case. There is certainly a limit on what you can do to improve the quality of life."

There is a limit to rectifying the causes of crime, although many of the judges indicate that they are more concerned with the causes of crime than with disposing on the basis of the consequences of the criminal activities:

> "My main concern is the causes, but I am limited as to how far I can go. As I say, the punishment has to fit the crime as they say. It's stated right there in the Act that the punishment we give them can not be any more than would be appropriate for an adult."

In this reasoning, the main focus is on crime and punishment, within a modified classical justice assumption of reform of individuals.

A few of the judges, however, did not question the principle basis of the reasoning. They were more concerned with the practical disposition outcome. To do otherwise, they state, would not be practical reasoning:

> "hs. Should a different legal principle or principles have been applied? If so, why?
>
> judge. We [the other judge and I] are both acting according to the same principle, but I don't think he should use the state resources. I think he is wrong in his disposition. Courts are not in a position to deal with causes. That is the job of the social worker or the community. The Courts deal with the offender."

Dealing with psychiatric causes of crime is definitely not available under the YOA, as all of the judges concur:

> "You shouldn't use the custody option to try and solve a social problem. That has been dealt with by the courts many times this year. The court is not entitled to impose a custodial sentence out of proportion to the facts of the offense, merely because of the offender's serious psychiatric

problems, you see. That was dealt with by the Ontario Court of Appeal."

Using the crime and punishment philosophy of justice and crime control leads to both the use of the 'protection of society' principle and the 'least interference' principle. The ends of justice are substantially met by the means available. In the case at hand, the judges all agreed that the original judge was too harsh, nor did they concur that jail was an ideal place, which follows out of the reasoning of public protection that the Ontario judge used. On the other hand, the original judge felt that while the child was in secure containment, and in open custody, he would receive some help. The judges all felt that the original judge should have had more assurance that help would be given. They are sometimes uncertain about the resources, and their uncertainty colours their dispositions. Such an opinion was evident when they answered the interview question, "will the need for custody reconcile with the probable need for treatment? The judges answered that such a statement is based on "an assumption which we hope is correct."

In summary, one youth court judge abstained from offering any critique of the case study. Four of nine judges who gave their opinion, favoured the 'rights' or 'least interference principle'. The remaining five judges preferred the 'protection of society' doctrine, with one of these judges strongly favouring a more

decided balance between the principles of justice and crime control.

3.6.1. Legal Reasoning as social reasoning.

The previous chapter showed that legal forms of reasoning differed from practical reasoning, suggesting the prevalence of a commonsense, practical attitude. Legal reasoning and practical reasoning are similar in using the classical syllogistic form. The major and minor premises of legal reasoning, in yielding their conclusion or disposition, are experienced by the judges to be formal and proper to their social location in the youth courts. The reasoning of commonsense, even if it is guided by common traditions, or 'forms of life', is overtly political, unlike both formal, analytical jurisprudence, and sociological jurisprudence, which assume a naturalistic (based on an assumption of a natural social order) attitude. Both forms of jurisprudence, analytical and sociological, consider the proper place of judges in a consensual social order. These normative assumptions merge within the heuristics of law. The reasoning of both analytical and sociological jurisprudence, in attempting to fit judicial decisions into a consensual social order, understands this order as a 'correct' one. Within the legal form of argument, there is a normative social ethic, which is recognized by judges as political. But there is also an overriding orientation to case by case reasoning, which is thought to result in the 'correct' disposition, if the proper attitude is reflected. Judicial reasoning

historically represents a philosophy of theoretical certainty and a concern to achieve practical results. In discussing the dominant assumptions in the YOA, of their own major and minor premises, the judges invariably elicited an understanding of practical reasoning in case law reasoning. Asked if they were concerned with disparities in sentences, they gave more detail about the blending of political, theoretical and practical reasoning. One judge stated:

> Yes, I am concerned with disparities if identical facts were treated differently. But if the difference is in law, then there should be differences and similarities because there are differences in persons, between communities, and over time. I am more concerned with uniformity, with uniform sentences.

Proficient social experts, such as judges, those who heuristically and intuitively assess the facts, and in the process decide how to render a decision, create complex combinations of normative, theoretical, and particular case reasoning, giving a kind of certainty and assurance to legal decisions. The processes of professional judgment, resting on weight of values and rules of procedure, merge with the normative and dominant assumptions of the YOA, and the intuitions of judges. The application of the YOA, as presented in the preceding chapter is a blending of Rights and Responsibilities philosophies, which in their contexts are used as models for 'justice and crime control', the political goals. These philosophies are not simply models of action for these judges; legal reasoning is more than inference from legal rules and policies. It is appropriate action springing from legal

heuristics: intuition and involvement in normative legislative principles, legal facts, case precedent, and judicial experience.

3.6.2. Summary

Four legal control strategies in which judges are implicated were presented: justice, crime control, welfare, and community change. The first two strategies feature 'social' and 'personal' reasoning and highlight the individual, the 'protection of society', the least interference doctrine, and delinquency. 'Welfare' is attached to this form of reasoning by word association. The form of law involved in social reasoning exposes the particularistic, personal attitudes of personal reasoning. Using sociological jurisprudence in the reform of individuals, judges attempt to adjust individual's values. Social reasoning spuriously identifies a legal subject with the 'universal' subject and the ends of justice with the collective social good; moreover, social reasoning does not address the wider community, which is the aim of community change law. Both social and personal reasoning employ a narrow individualizing syllogism which omits commonsense practical interpretive syllogisms and precludes a 'community' focus.

Legal decisions are political in that they invoke specific power relations from their social location. The simple antithetical assumptions of welfare and justice, as proposed by lobby groups and by the legislators, does not account for the

practical or political adaptations of legal reasoning. In this chapter, I presented judges' intentions in creating a crime control goal, as one that fits a modified classical justice philosophy. In the next chapter, I show that law/rehabilitation/reform produces and enhances its own rational social relations.

CHAPTER IV:

POWER/KNOWLEDGE RELATIONS

The Youth Court is one example of how social reasoning aligns political interests: state, economy and family interests, restructures power relations, relates and instrumentalizes them without transforming the structures themselves. In the preceding chapter, I showed that justice and crime control blending appears to result in an overemphasis on the utilitarian 'protection of society', and reform of individuals. This chapter takes a closer look at specific political relations that have been developed both for the offender and for those surrounding the justice administration under the YOA. The first section examines the normalization process for the offender. In the next section, I examine judges' interpretations of dominant sentencing philosophy, and how they arrive at one despite the legislators' intention of balancing principles. In the subsequent section, I discuss the practical outcome of the trial, i.e., the dispositions. Finally, I explicate the rational social relations which act as constraints on sentencing.

4.1.1. Legal Reasoning as normalization strategy.

All of the Youth Court judges talk in some way about case reasoning, about looking for an appropriate sentence according to the needs of the case at hand, their attitude and the influencing philosophies of the YOA, especially the Declaration of Principles.

Legal reasoning, is not considered a determinate form of knowledge relations, but it is not estranged from disciplinary relations. In the YOA, there are no social connotations spelled out in the interpretation section of the Act. A young person is characterized by age: 12-18; and, "where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act." (YOA, section 2.[1]). However, particular social associations of the young offenders do enter the practical application in sentencing.

Often within the form of social reasoning which the judges describe is an implied form of 'personal knowledge'. This knowledge means a direct knowledge of the young person on trial. Two of the judges emphasized that this kind of knowledge is the most effective: "I try to talk to him as a young person", "I always try to make some kind of assessment myself".[1] The judges all express the need to find out why this youth is different from the normal ones, so that he can be "put on a track". They presume to know what is normal for youth 'in general'.

One judge states:

> "It's basically the object...to get him on a track of some kind that will keep him from screwing up. He will make

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[1] The reasoning is far from a Communicative Acton System, as Habermasian discourse ethics implies, nor is it the kind of 'personal knowledge', as an immediate sensorary reproduction of the person, which Bertrand Russell's analysis implies.

> mistakes like everyone else will. But, he won't make such serious ones that he will be arrested, jailed, and brought to Court. The probation officer comes back after the expiration of the order with: this young man has done well. He is now living on his own. He has a full time job. He is planning to go back to school, but wants to get some money together at the moment. He is sharing an apartment with a very responsible kid of about 19 who has also got a job and everything is so good we just don't think we need to supervise him anymore. Would you terminate probation? I think that's a successful probation. But that's only because I happen to sentence that kid at about the time when he was ready to go out into the world and make do. I don't think anything I did had anything to do with it. Sometimes it might have.

Here is a judge's description of a 'normal' youth, as one who makes rational decisions about the particular social situations in which normalcy is located: in full time work and potential for advancement, in the responsibilites of citizenship, and in idealized family relations (connoted by an independence move of sharing an apartment with another resposible youth).

Many of the judges stated how the dominant need for rehabilitation is the need to normalize.

> "Often you get a young person, or any person with a horrendous background, but the judge may be disposed to believing, for whatever reason, that for once this person seems to be getting their life on track, and that another jail sentence would just knock them back. And if they can be encouraged at the right moment then the Court does something favourable towards them, that's often the case where you might emphasize rehabilitation, as opposed to 'protection of society'. There is no hard and fast rule."

The judges relate the importance of personal contact and their own relationship to the child as part of this definition. But in the courtroom, the judge expects the child to be 'respectful' of judicial status. Their impressions of the child, and of his or her

family are part of their assessment. So too, is the normal respect granted to the judiciary:

> "I look at the community relationship to the child by the courtroom dynamics. I can see everything from the bench. In this case the kid was sitting beside his lawyer below the bar at a table for counsel. He was wearing a T-shirt which said, "I am so happy to be here, I could shit." His father was giving his testimony from the witness box, to prove age. After he left the box, he more or less had a choice about where to go: he could have joined his son, or sat up front behind counsel table. He took his seat at the back of the courtroom, behind his son. There was no contact this way, you see. So I addressed him, "How do you explain what happened that your son was spending his Saturday nights breaking windows?" He answered that there was nothing in the community to do for kids and that's why they got into trouble. Well, I have seen many communities with plenty of recreational facilities, and lots of trouble there too. So, I answered him that in his area the environment was a recreational paradise. It had hunting, hiking and lots of fishing possibilities. People come from all over the world to spend time here. "Do you ever take your kid out there, do things with him?" Parents are models for kids. They need that.
>
> hs. Tell me more about the courtroom dynamics. As you see them.
>
> judge. The dynamics in the courtroom are very important to me. They tell a lot about the people involved. The appearance of the child is very important. His clothes, attitude, his emotional state. If he is frightened or just doesn't care. This kid was testing me with his clothes. I told the father to take his son out of the courtroom and come back again with him dressed differently. I expect to see good deportment in the courtroom.

4.2.1. Dominant Sentence Philosophy.

To establish a dominant sentencing philosophy, in a statute that claims not to prioritize depends on a legalistic stance. What is important is the attitude of the judge, and the formal legalistic case requirements:

> "It depends on the nature of the offense, the age of the child, the circumstances surrounding the child's life. You have to look at the whole thing. Everything has to be looked

> at, the kind of sentencing, the magnitude of your sentencing, and the various means of sentencing which you impose. The Act gives you a fairly wide range of things you can do."

The judge invokes the network of surrounding power relations in stating that how successful they will be depends on whether "the community is willing to give you the resources." But, as far as sentencing goes:..."I have the dominant sentencing philosophy of rehabilitation." Rehabilitation, as discussed in the preceding chapter, is for crime control purposes, rather than for special treatment needs, and it is aimed at the offense rather than at the needs or interests of the offender.

4.2.2. How do judges decide on the dominant philosophy.

In order to get at the second task outlined in chapter 2, I asked the judges to identify the dominant philosophies in the Act, and whether the Act was intended to balance principles. Is the Act, then, consistent in the use of these principles, and how do judges decide which is the most dominant sentencing philosophy?

> "I follow the Act and the higher Court decisions and apply what is realistic and practical. I look to the kind of application which is most appropriate. The Act is internally consistent. The philosophy has shifted to the shoulders of the child against the JDA, which placed responsibility on the shoulders of the community.
>
> hs. How do you decide which is the most dominant sentencing philosophy?
>
> judge. I don't run the youth through hoops, I decide on whatever is appropriate, then I consider the child, next the victim and finally, the community at large.

According to another judge:

> judge: "What the statute does, as I said quite a while ago, is that it focuses. O.K. You come to an issue, a sentencing

problem with an attitude. You know that when you hear the case what your attitude towards it is, and you know, then, what disposition you might turn, and what the statute does, is it focuses your attention to a set of options that are considered appropriate. You can't apply your total range of views on the subject, you have to focus it on what is possible. The Act is an influencing process more than a guiding process. It's an influence on the normal attitudes that you bring to the case."

"You come to a sentencing problem with an attitude, You know that when you hear the case what your attitude to it is. When, you get to disposition, then your sort of reflective process takes over and you start to think about this case, and what this case means to you and you can't separate yourself from the rest of the community, you can't separate yourself from this child's family, the child. So you look at this constellation of features, and come up with, in your mind, a sort of possible range of dispositions. ...Now, once you sort of figure out where you are, then you look at the statute to try and say, now under these conditions what is reasonable and what is possible, what am I to rank here as an element of first priority as far as the law is concerned and to judge whether your reasoning is out of whack with the statute."

hs. How do you decide which is the dominant sentencing philosophy?

judge. I don't have to make this decision. My sentencing is based on three things: [first], the background of the offender, the nature of the offence. I use guidelines from section 3. Second, I use precedent, and third, I use my experience last, but not least.

All of the judges felt that the priority of the Act was to balance principles, rather than establish a clear paramountcy. In task 3 of chapter 2, we considered inconsistencies in the subsection of section 2, the Declaration of Principles. Logically there are several principles revealed to a reading broken down by phrases (Reid & Reitsma Street, 1984, Appendix F). Several of the judges perceived inconsistencies.

"There is some inconsistency. On the one hand it gives freedoms in a general way, and on the other, it takes them

away in specific areas, according to detailed things. This is true, too, in the Charter.

hs. Is there a global focus?

judge: The YOA attends to both special needs and to responsibilities. You have to take this into account in sentencing - the responsibilities the youth has to society."

Despite the sense of balancing principles, several of the judges say that there is a tendency towards using the 'protection of society' or 'accountability' as dominant.

> "There is no paramountcy set out in any particular thought contained in section 3, but 'protection of society' is referred to in more than one of the subsections, which stops short of saying that 'protection of society' is of paramount consideration. The word must departs from the usual work usage, which has a guiding emphasis, according to one judge, in referring to subsection (b). First of all, subsection (a) says that the young person is accountable for his behaviour, although not always necessarily to the same degree as for an adult. And then subsection (b) says that 'society must be afforded the necessary protection from illegal behaviour.' Now, one kind of interesting thing to bear in mind is the word 'must'. It is the only place in the entire act where the word 'must' is used, which suggests to me something of a compelling intent. Again, stopping short of saying the protection of society is paramount, but trying to emphasize, I think, the importance of society. Subsection (f), in the application of this Act, the 'rights and freedoms of the young persons' includes the right to the least interference with freedom that is consistent with the 'protection of society'. Again, it's subject to the 'protection of society'.
>
> I am trying to apply the principles set out in section 3, [the Declaration of principles]."

This judge states that he makes his decision on the dominant principle, according to the circumstances of the case, and the section of dispositions that are available under section 20. Yet his focus on 'protection of society' is evident. Another judge states:

> "Generally, our Courts of Appeal in the YOA say you are to focus on rehabilitation and protection to a lesser extent.

And that's as far as I go. I don't go into these Declaration of Principles.

hs. So, you don't make an issue of the internal consistency of the YOA, or try to remedy for the inconsistencies?

judge. Never even think about it. No. There are a couple of things you have to consider from time to time. One of the principles is 'you shouldn't be punished more than an adult would be'. Right. So, that principle comes to the forefront if a youth worker says that for this shoplifting act he should go to a residential treatment centre for a month and a half. Well, really, that is effectively like going to jail for a month and a half, and an adult wouldn't get a month and a half in jail. So that is one principle. Another principle is that they have all of the rights in the Charter of Rights and Freedoms. And then, as you move through the Act, you see that really they have rights beyond that so you have to consider that specifically and how it applies. As far as sentencing goes, that seems to be the focus of what you are doing, I just examine it on the level I outline.

hs. So you decide on the dominant sentencing philosophy?

judge. Well, I sort of have a dominant sentencing philosophy of rehabilitation".

With another judge, the dominant focus in his thinking is 'due process' rights:

Yes, I think to some extent, but then it's a matter of priorities, and I'm gradually coming to realize that our society sets due process up as a high priority. You know, just as with our Charter of Rights. You may have seen that case on the news about the guy that confessed to the setting of the PCB fire in Montreal, and you know, he was found not guilty and the Supreme Court judge ended up directing a verdict of Not Guilty and chastising the police in the way they handled the investigation and the interrogation. You see, the reason for that is, I don't question the Supreme Court judge, but the message I get from that is that due process law and the rights set out in our Charter may be more important, are more important than the particular Act or crime and I have some trouble with that. But it's a fact of life, and I'm trying to do what I must legally and properly do. But you know, what it sometimes amounts to is somebody that we know is guilty and perhaps is dangerous and violent and we have to let him go. Knowing full well that someone else is going to be the next victim because they are entitled to this

due process and the protection of these laws, but that's the way it is. That is the priorities that our society has set up. That's a little bit disturbing sometimes.

Several of the judges who tried to emphasize the need to balance principles, also thought to give a necessary focus to 'accountability'and 'protection of society'.

Well, the Act lists several, the rights of the young offender are a given. And that will be duly emphasized. But basically, there is a balance it seems to me between 'protection of the public', on the one hand, and the 'rehabilitation' or the assisting of the young person, on the other. All criminal law, fundamentally, is for the protection of society. That is a given. In any dealing, not only with young offenders, but in any criminal process, it seems to be it is always an effort to balance the needs of society with the needs of the offender. Because they are often quite opposite to one another. For example, the best way to adequately protect society is to incarcerate this person for as long as possible. But that, we would all clearly understand would be at the expense of that person's rehabilitation. So you balance it, and from there you afford the maximum protection of society, and yet at the same time, the maximum effort at rehabilitating the young person. Often, if you can't rehabilitate you can protect society. You try to achieve that.

One of the judges did, however, think that the general thrust of the Act stresses accountability. It is expected that children will be told that they must be accountable for their acts, which entails a form of moral reform to be carried out in the Youth Court.

"Parents are obliged to tell the children that they must be accountable for their acts. But keeping in mind that they are children, and that consequently they have needs for rehabilitation. Well, I suppose there would be an inconsistency if you develop a blanket series of concepts without realizing you must apply these principles with each individual child, according to the child's needs. You must remember that when you are dealing with children you have to

> keep in mind that they are children and that consequently, the aspects of sentencing must be necessary for their needs.

In summary, establishing the dominant sentencing philosophy depends on the case requirements and on the available resources. Legal administration is invoked and expanded to include the judges, the lawyers, the youth workers and the legal aid system, while the social service network is diminished in the YOA context. As well, correctional alternatives under the JDA have continued under the YOA, and are available in their indeterminate form should the judges attach a treatment order in sentencing to probation.

All of the judges felt that the young offender was not really different from other young persons. They accept a concept of normalcy, and normalizing law. Through the use of expert testimony, the creation of files and social histories, youth are assessed, and disciplined. As they get older, the young persons either stop their criminal behaviour, grow out of it, or learn that the law counts.

> "Many children come before the courts for their one and only offence because they are children, kids. They mature. But it's only a once in a lifetime thing. There is a lot of that. Then there is that other very large middle group, where they do a large amount of crime. Then suddenly, they become adults and they begin to change. Don't ask me why."

Some young persons, however, become recidivists:

> "you see more violence as they get older, more drug problems, as addiction escalates. They are the repeaters, the ones you see continually, and then you can foresee they are just going to end up in the penitentiary."

Most of the judges could not really say that their intervention works. They rely on the law itself or the youth's ability to "mature", or become wiser (more rational) in judging their own responsibilities. Youths make mistakes, and sometimes need only confrontation with the legal system to return to normalcy. Little control is needed for the first time offender. It is important to save the harsher punishments and costly community resources for the small group of offenders, the recidivists, often described as the 'third time offender'. In the classical perspective, the judges adopt the view that young people are rational actors, who learn from their slip-ups. Policy itself is rational in maximizing deterrence by targeting the small groups of recidivists. The courts let its clients know what to expect from subsequent appearances and conviction. Youth, being rationally hedonistic, will balance the pleasure of the profits of crime against the pain of punishment.

> "We always, all of us have some degree of choice, no matter how severely we have been dealt with, either by heredity or environment."

Since the family, as the primary socialization unit, was faulted across the board, the best tactics for dealing with the problem ranged across the three mainstream perspectives. One of the problems of family, the issue of "child abuse", was considered by two of the judges. For them, the best (most rational) remedy was to 'get control of the situation', either by 'open or secure custody', rather than by peer interaction intervention or

'treatment'. They expressed considerable disillusionment with the 'soft social work approach'.

The tactic most often prescribed in dispositions was 'probation work'. Positions here varied. At one extreme, this service was considered a 'soft' one, like social work, with the youth subjecting his/her worker to 'bad faith'. At the other extreme, another judge re-introduced the parens patriae concept by allowing the probation order to be indeterminate, until the child was able to prove his responsibility, as determined by the court. Under the YOA, focus can shift from judicial indeterminancy to a corrections service, probationary indeterminancy. The medical discourse here, however, was not allowed. None of the judges had considered attaching a treatment agenda to the probation order, although some probation officers request that a treatment agenda be included in their mandate.

4.3.1. Practical outcome: the trial.

Most of the judges appreciated the distinction between the trial and the sentencing procedures. The judges see the trial process itself as rehabilitative by due process. The offender will benefit by developing his/her character in line with legal expectations. In both phases of the case, neo-classical justice and crime control rational relations are dominant, even if the orientation is towards the "paramount consideration" of rehabilitation.

The trial process, which the YOA has brought about, is basically similar to adult court procedures. Through enhancing legal reform of youth, the judges' class and social interests remain entrenched in professional self-interest within the courtroom.

> judge. ...Another problem is the delay problem. TIme lag means a lot to kids because sanctions lose their effect. It is particularly important for the trial to take place quickly. And for behaviour to be dealt with earlier.
>
> hs. What can you do in your court to speed things up?
>
> judge. I can't. The system can't speed things up. And its destructive to kids. First, there is a need to prove age, and often the parent or even the kid is not there. Then a lawyer must be obtained, and most kids want one. Look at my schedule. I am booked up to June already.
>
> hs. The YOA is a crime control Act. Would you agree with that?
>
> judge. Yes. There is a criminogenic age, from 16 to 23, then kids grow out of it."

For this judge, therefore, it is important to control crime for the 'protection of society' and to install 'justice', meaning 'due process rights' into the trial. By classifying the youth population through positivist principles, as in age characterization, the judge reinforces a normalizing and administrating process, although it is one which he sees has practical flaws. Within positivist reasoning, the enforcement problems are problematic, but the trial process itself, if carried out 'correctly', would be reformative.

4.3.2. Practical Outcome: The Sentences as an Ideal.

The youth court judges have a very pragmatic view of the ideal sentence. All of them state that the ideal sentence is attained "when I don't see the child back in my courtroom". The ideal is enmeshed in the legal process itself: "I do what is necessary to be done", rather than in personal success, as is usually found in the civil adversarial ideal which puts one person against another. The test of pragmatism or appropriateness for the particular youth is an aspect of appropriateness 'for youth, in general'.

> "We have seen a transition (since the JDA), because we are dealing with what is appropriate for youth. Kids come back to me and I know their history. That's how I work."

All of the judges, then, use a form of social reasoning with a practical component. In chapter II, I showed that this form of reasoning is connected to classical moral and social reasons, which result in a disposition. In this chapter, I elicit the power/knowledge relations that are the grounds for these reasons.

4.4.1. Containment

Judges interpret the sentence section of the YOA, section 20, according to the 'discourse of penality': that is, that punishment is the result of sentence and not, as in the treatment philosophy, merely an accompaniment to the treatment disposition. "And there is the added part that did not use to be there (under the JDA). That is that they could be put into containment for a period of time. I think that is used occasionally".

> "hs. I was wondering, in your experience throughout the province if there is more of a focus on containment, as an aspect of rehabilitation, in different areas of the province.

Do you think there are regional differences,coming out of B.C., in regards to the use of the YOA dispositions?

"I don't think I could give you a competent answer to that", one judge stated. Another judge, however says, that what B.C. has done is refer to a couple of cases from Ontario and from Saskatchewan, and said, "we are going to do it differently" (in regard to the use of general deterrence in custody sentences), using incarceration as a last resort. He gives his reasons, why the "vast majority of the judges"... "do what the Act requires them to do, and that is rely on incarceration as an absolute last resort".

"hs. There has been a fifty percent increase in custody dispositions as compared with JDA.

judge. Oh. I think a really clear distinction has to be made between judges going "now we got him", and a necessary increase in incarceration after the JDA, because the JDA was extremely weak in that regard. Unless provincial legislation provides for training schools and things like that, judges simply didn't send anybody, so you are bound to get an increase because there are some kids who should be in custody, in the end. Because it's the absence of anything else that can be usefully done to protect society and also to help the kid. And also the Act at that time required that it should be in the child's best interests, and all the rest of it, which is nonsense. No kid is going to say "I think I want to go to jail because its going to be better for me there". Nor could anyone say objectively about the child, 'it's in his best interests to go to jail'. It's a punishment process. And it was so weak under the JDA, that it wouldn't be at all surprising to see a substantial increase in incarceration after the YOA came into force. What would be an appropriate percentage, I don't know. I think that fifty percent is too high. So I agree that we are really doing it. But I also think that it's a very strong reflection of something that was there as a need. There was a need there for more incarceration of youths, and so we have been doing it.

hs. Interesting. I find a gap in the literature in this matter of the judges' interpretations of this very problem.

> judge. Oh, the interpretations of that section requiring, 'being in the best interests of the youth.' Yes, it had to do with raising him to adult court as well as sending him away under some custodial disposition, and both of them served, it says 'in the best interests of the child', to be tried as an adult when he was fourteen years old. I don't think that anyone could objectively say that it's so. They have done away with that in the YOA."

The social reason given by all the judges for the use of custody dispositions then is a social need to 'protect society', and 'rehabilitate youth'. What is apparent from the interview text is the overemphasis on 'protection of society' (crime control), against justice 'rights' and 'needs'.

All of the judges focus on the practical differences between the Acts due to an increase in resources under the YOA. Yet the social reason given for custody dispositions is the continuing need for rehabilitation. The judges explain the social reasons that are now attached to rehabilitation as the need for the 'protection of society', and 'accountability': crime control and justice philosophies. Instead of creating a 'healthy balance' between the principles, social reasons judges give in the YOA are just a matter of emphasis.

> "Even though the JDA was a so-called "welfare" concept, the question of custody in this province became a very serious problem. Because to use the idea of the industrial home or jail, Brannon Lake became a disgraceful thing. Kids were being sent there and were coming out far worse than before they went there. Kids were being sent there who should never have been sent there. So, the government reacted very strenuously and wouldn't allow judges to send anybody to jail. So you went to the other extreme.
>
> hs. They closed the institutions.

> judge. Then the other situation developed where you had to try and deal with children in other ways other than jail. This was the beginning of the idea of community works service and that sort of thing that developed - because of necessity. They had to devise some kind of punishment to instill the idea of accountability. So along comes the YOA. It tried to steer a middle course between these two extremes. First of all it started off with the need to protect society, and that the young people had to be accountable, although in a different way than adults. But still keeping in mind that they are still children and that there should be rehabilitation available, and there should be resources available to assist these children. For whatever may be the problem they are facing."

What is this middle ground that the YOA was required to steer? There appeared to be considerable variation in the YOA dispositions. All of the judges use containment in order to incapacitate young offenders, as a sentencing principle: "first, for the protection of society and the rehabilitation of children, which is an issue in protection". The second principle of sentence is general deterrence. They see this as "the need to impress other kids in that peer group". According to most of the judges, "I would put rehabilitation as the first principle when circumstances were appropriate".

> There are two reasons for custody, as several judges state:
>
> One, when the kid can't exist within the community because all other options are closed by his own conduct, and the offence is so repugnant. The second reason is for punishment. Neither option is a treatment option. Custody settings in B.C. are not superb, so children are only sent there if there is good reason. Secure custody is essentially for security risks, while open custody is an alternative to confinement.

The social reason given for custody is that youth will learn there are consequences for acts, and by fearing custody, will stop committing further offences. The next best tactic is to inculcate skills in a contained environment. "You get more rehabilitation the more open the settings". Containment comes in two forms: open and closed; open custody has minimal security, as compared with maximal, closed custody settings. The closed custody setting is conceived, by the most conservative judge, as a 'short, sharp shock" effect, or as an incapacitating 'holding facility'. "Custody is punishment, that is what it is assigned for", and "we, basically for humanitarian reasons, add to this aspect of custody, schooling and counselling, employment training." 'Open custody' is placement in an institution that is devised to keep the child secure, but to give him the feeling that he is living in a community, and that he can change his life style, but "I have always been a little pessimistic that you can motivate a child in a jail. The primary thing in their life is to get out." As for open custody, it's "worth studying as a worthwhile option."

4.4.2. Care as an Element in Custody

The disadvantages of custody, according to the judges, come not from peer problems or socialization problems, but:

> "from a lack of good continuous staff and from a short supply of probation officers. Poor resources result in too much time in custody, especially in open custody, because of the lack of probation officers. He should be placed for some months in closed, not open custody, but enough time in closed custody to set up a program, then transferred to open custody and on to probation."

Knowing the details of care received is problematic, so they do as "best as I can". Basically, use of a resource is made on the recommendation of the probation officer. There is a mixture of trust for some of the judges in the use of probation officers as youth experts, but a sense of distrust in some of the other judges because of the 'soft approach' used. The reality of the 'soft' probation officer may prove to be a myth as often as not.

According to the judges, custody is not necessarily "good for anyone", but "sometimes it is necessary." Treatment facilities for youth in B.C. are much deplored by several judges. "This province has an outrageous history of not providing for the treatment of troubled adolescents. And I don't hesitate to say that." The kind of treatment promoted in custody is drug and alcohol treatment by withdrawal, and some amount of drug-related counselling. The rehabilitation component involves changing of attitudes, so that punishment is either feared, or coincides with a time in the youth's life that he is "maturing" and says "soon as I get out of here, I am not going to do that anymore". But the only sure reason for sentencing to custody, open or closed, is to protect society. If a child has a pattern of running away, he needs a secure community and for the 'protection of society' should be in custody. With many judges, there is a strong emphasis on the hope that the child will mature, which means becoming more rational in calculating the costs of his delinquency.

4.4.3. Deterrence and Recidivism.

In B.C. courts, general deterrence is acceptable. The specific deterrence principle of 'crime control' is primary. General deterrence is subsidiary. "The message is out to kids in the community". Sentencing depends not on needs, but on "what offence the young person has committed... to help the young offender from committing repeat offences".

> "Certainly in adult court, anti-social conduct is becoming out of proportion in the community. We have to deal with this judicially. In youth court we have to treat youth individually as well. But, it would fly in the face of the Court of Appeal, if I promoted general deterrence. Even in those cases, individual considerations would be the basis of sentencing".

All of the judges use general deterrence for recidivists, who are mainly young persons with special needs, children who have been candidates for treatment intervention under the JDA.

> You see a kid come by and its his second time around and he has also got a history of being diverted. He is also really out of control. Its a good idea to warn him at the outset. So you understand there is a certain sequence in the law, and we go through it slowly. We will see what we can do with probation, with curfews, with community works service, with this, that, and the other thing. For instance, I say: 'But you understand that at the end, if you are just screwing up and coming back here all the time, the only thing left will be to send you to jail. But you have to understand that that's at the end of the line, so why don't you start thinking about that right now'. I do that fairly often. For a great many of them it doesn't matter. They are going to run the string to the end because they have to. It's just part of what they are. They have to see it through before they grow up. But for some of them, I suppose, it works.

For such a youth, the judge might not be overly concerned with deterrence, knowing there is nothing that he can do to him, "more than he is already punishing himself. But I, of course, might have to be concerned with deterring others."

For recidivists, the children who were not amenable to treatment under the JDA, "the need for treatment, guidance and punishment is greater than in the first instance." One judge states "you try to get through to them, that if they keep committing this offense, they are going to get longer and longer prison terms... up to the maximum sentence." Only one of the judges felt that "general deterrence is not your prime responsibility", nevertheless "you just keep struggling and hoping that something happens, something clicks...you just wonder if what you are doing is very useful. But what you see is so seldom the case."

From statements some of the judges made, it appears that when the 'special needs' or 'specific deterrence' concerns of youth are considered, then sentences are both extreme and long-term. An example one judge gave was of a youth who had great troubles at home and was trying to survive on the streets. "The kid is charged with a criminal act, in order to get him off the street." He was given a long sentence in custody, rather than an extra-custodial sentence.

General and specific deterrence are seen as interrelated:

> "One comes down to the other. The real issue is the socialization of children. When you give a particular sentence, the kid reacts to the nature and severity of the disposition, so several instances of the same crime will come up together. For instance, if the sentences for smoking pot go down, then more kids come up on these charges. You give a large fine, and the kid will come back because he can't pay, being too unskilled. If he can't pay he will go to another

> jurisdiction where he will be able to get the money for pot. General deterrence is involved. In school, I remember how this worked. If one kid is bad, then he is transferred out. I was impressed with how quickly this worked."

4.4.4. Formula or tariff.

All ten judges dispose of their cases under the guidance of section 20, the possible sentence dispositions. They do not read these sentences as formulaic. Instead they talk about a 'tariff', rather than a formula per se. The goal of sentencing has shifted since 1984. Past offenses under the JDA were explained by the pathological nature of the offender, who becomes subject to treatment. The offender now discovers that punishment fits his/her crime, according to the justice philosophy.

> And you have problems when you have co-accused who committed the same offense and you look at them and you say, gee, you know, in this case really though they have done exactly the same thing, because of their different backgrounds, on an objective level, when they really deserve totally different treatment, then you have to be very careful there because then you very much embitter the other one who gets the harsher treatment, and in that case you might have to adjust the sentence downward for the one who would normally get a higher punishment. Just so the perception is right.

Although none of the judges read the YOA as providing a perfect formula for the sentences dealing with juvenile crime, it provides, in their view, for a 'graduated response', according to the nature of the offense. "The YOA prescribes that we not jump through hoops, but dispose according to a sequence of dispositions." They claim they start with a minimal fine for most offenses, except those which create 'risks on the community', for sex offenses, or for kids whose:

> "motivation can be identified by a profit and loss scale of greed. These kids benefit by classic determinism. With these problems there is no deterrence to proceed. But there are no such cases in this Court. I shift my response according to the facts in a case".

Classical determinism is their form of reasoning for these cases; for other offences the 'graduated response' of law reform is usually applied. This form of reasoning suggests a more modified classical justice perspective. One judge states that he won't apply the formula if it doesn't work the second time around. "The next logical step is to get off the scale, although to persist would be more emotionally satisfying."

Treatment is indicated by the "type of things that are amenable to treatment". Relations of intervention take the form of a probation order most often. The application of the pathological perspective is not spelled out, nor is it indicated in the YOA by 'special needs'. Again the statement is made that the YOA changes the procedures and emphasizes the Charter of Rights. For most of the judges, the 16-18 years of the YOA debates in legislative committees, to which some of them contributed, was the period in which they sat in Juvenile Court. The Rights agenda was in place before the YOA was ratified.

> "By and large there isn't a whole lot of change in dealing with young people. I guess maybe somebody sat down and wrote it as a formula for dealing with juvenile crime."

Yet the sentences may vary widely depending on the jurisdiction, as indicated in accounts of court reports in Bala and

Lilles, (1987). All the judges favoured this kind of flexibility because there are "too many variables that must be considered that go into the making of the disposition." One judge, in agreeing with this statement, also recognized "that you have to watch for any undue risks in the community". The reasoning behind each suggested sentence tends to vary greatly. Although Rights and Responsibilities are to be balanced, (which is the stated intention of the Act in the first place), the judges' responses to the case example in chapter 3 show that they give the principles different weights in their legal reasoning.

4.5.1. Constraints in Sentencing

In the foregoing analysis, social reasoning, including forms and grounds of legal reasoning, have been examined as constrained by established power relations. The following section elicits the specific power relations which the courts bring into effect, using their interpretations of the YOA. One of the cadre of experts utilized is probation officers:

> "Definitely, I have to know [detail about the resource I send kids]. If I think the young person doesn't know about it, or anyone else doesn't, I'll ask the probation officers to explain. You know, if they say we will recommend you go to Homely Cottage, or the House of Concord or something, they say, 'O.K., buy that'. I say, 'What's the regime there now - explain it to everyone.' Or if, I don't know, they say, 'we want you to go to Spring Lake Range, and I say, 'What is it? And where is it? And what goes on there?'"
>
> "Some of our youth workers and probation officers are just such great people that they make the system work."
>
> hs. Do you think they tend to be too flexible and easy on the young offenders?

judge. I wouldn't fault our probation officers and youth officers at all. They just do a tremendously good job. The problem is, I suppose, throughout society. There may be necessary restrictions on money. That's the sad part. In spite of that, however, such good results are achieved that it is good to be part of this work, and even more in the field that you were working in, the protection of children. Oh, boy. That really helps keep me going because I think there is close to a ninety percent success rate, where we felt there was going to be trouble".

The devotion of youth workers helps. I am not so concerned with the lack of social work support because they are too lenient. There must be consequences for behaviour. Probation officers can give support. There is a need for control and that is best done by youth workers. There is a need for rehabilitation of kids because of their particular problem. When they are in custody, they can be inspired by the youth workers on the staff.

Lawyers are a more important part of the new regime of power under the YOA, than under the JDA, and replace social workers:

"The lawyer and the judges can speak to the child , and for the child. It adds to the process, because all that can be said is said, since the child won't speak for himself. There are now better presentations for youth through counsel. Dialogue with the judge is possible and takes place over a period of time. The judge uses a personal approach on any subject. Personal with the people involved: the Crown, defense. There is a degree of flexibility in the process, if encouraged, and a dialogue can occur if the judge sets the tone.

Likewise, the administrative system, its officers, and the courtroom participants could restrict judges' options under the YOA:

"I can not do everything I might see that would be effective because of time constraints; if I have time I will talk with all the children.

hs. Has the emphasis on due process rights and legalism impeded your ability to communicate with the accused, as you did under the JDA?

judge. Yes. To the extent that my time is more constrained. I used to see kids with their parents in chambers.

hs. What else has changed in the new Act?

judge. There are still some status offenses in effect under the provincial YOA, however, the Provincial YOA is not prosecuted now.

hs. What about time constraints? What is the problem?

judge. The court set-up is geared to statistics. I have a schedule to follow. For first appearances, I have ten minutes for each child. The first eight minutes is taken up with proof of age, then the plea is entered. In the court you have to be fast, and you have to be right. For this process, you work on your intuition. There is then two minutes to talk to the youth. Sometimes, court staff are not there, or the parents fail to show up, or perhaps the kid. Time is lost here. Thirteen cases in the morning is the norm. I try to split things up, to hurry through earlier work, so that I can do more with the troubled kid, the shoplifter, who needs to talk. There is pressure on the system, and on the judge. We have to produce. The statistics are the objective indication that you are doing something, but this is mechanical. A good judge will deal with 20 case in a morning, and 24 is even better. If the court is down, as a result of your attention, efficiency and hard work, then you are suspect. After all you are getting paid for this down time. Yet you might just have anticipated just such a troubled kid, the right moment to deal with the real issues. More adjournments follow because duty counsel has to be retained, and more adjournments again to get the particulars.

hs. What about these large numbers of kids that come through the courts?

judge. Numbers are a big problem. We are not part of the socialization system as a result of the system. The statistics business is a problem. This comes from the chief judge's office. Here the standards are set for these numbers. Of course, this doesn't indicate the intensity of the case. They don't prove the case. They simply work on efficiency. Each court has different statistical set-ups. If you do see twenty kids in the morning as a good judge will do, you can't really do anything. I don't even take notes. The best situation would be six cases in the morning and six in the afternoon.

hs. Have you seen it done any better?

judge. Well, yes. I was in Whatcom county once. The judge had the entire family around a table, and he mediated between all of them. The process took at least twenty minutes".

Another judge states:

"Judge: What the options are under section 20? I don't have any constraints from people in Court, sitting in there glaring at me. Mothers against drunk drivers or something? They shouldn't be a constraint.

hs. In the larger sphere then. Not in the courtroom but in the society at large, are there resources available?

judge. Well, that's a constraint, sure.

hs. The community: feelings among the community about the 'peeping tom', perhaps? What about the effects of the economy?

judge. Feelings in the community shouldn't be an influence. Sometimes if, lets say, you have a rash of break and enterings around here. With adults you start giving him your sentences to try to head it off. With young persons, I shouldn't emphasize general deterrence, but on the other hand, if there are a bunch of break-and-enterings going on, and the young persons in the community become aware of that and get the perception that its easy, and 'I can get away with it, too', and this sort of thing. Then, in the case of each young person: you should examine it carefully to see if he is caught up in this trend and whether you have to be maybe a little heavier with this young person than you would have been with the same kid two years ago. If he had been brought under a B & E and you had the impression it was just an isolated incident, but now he is caught up under peer pressure and this sort of thing. To that extent, developments in the community have some effect, but I don't think the hue and cry in the community in general make your sentences lower".

The Court of Appeal is especially important as a power relation, according to traditional rules regarding legal expertise. Yet the local youth courts stress a gap between their judgments and the appeal process. "It's a long way to the Court of Appeal from the Youth Courts".

"There is a part of it which is recipe-like and that is where you have a court of Appeal judgement, which specifically

> categorizes a kind of case that will bind you. O.K. So you have to exclude that sort of fact example [sic] because the Court of Appeal says in robbery cases there will be jail. The Court of Appeal says that in incest cases there will be jail. There isn't much good in attempting to give probation and then, you know that you will be reversed on appeal, to jail, so to that extent your philosophical process and psychological process is much more restricted, which in youth work is very seldom the case. Very seldom the case because there hasn't been, in fact, real direction given in actual examples. The Court of Appeal is actually confused about what to do with the few cases, as is everyone else that is in this area. O.K. There is no real help there."

> There needs to be more supervision by the Court of Appeal. More scrutiny at the appeal process. Defence and Crown review of the judges interpretation of the fact situation and outside limits, in order to come to reasonable limits. Custody as a tool for first offenders. More interpretation is needed. I am imagining that the Court of Appeal will understand. It's no good to have a Court of Appeal if the Court doesn't understand and have the right attitude and information. This is just judge crap-shooting. It is legal judging as to reasonableness which the Court of Appeal needs.

Judges themselves feel professional constraints are important in minimizing disparities in sentencing. Yearly conferences and monthly seminars act as mechanisms to reduce disparities.

> Education is the best way to minimize disparities. Do they understand the problem and why the child is there? The community attitude is to lock up the child. The community stands by the judge and condemns and punishes. Do the judges understand these dynamics, for example, with sexual assault on women? Judges used to be harsh towards women as provoking assault. This is not so now. There are a lot of informal meetings - at least once every two months. The judges rank as a priority, their own education. Most judges feel that reading helps their education."

> "Mainly, reading cases and lawyers will try as much as possible to read the cases as they go by and when the case is heard in court, the lawyers give you an idea where the sentence should fit in. That's always the intention - making sure the sentence fits into the cases.

hs. Reading case law, the literature, conferencing, informal meetings with your peer judges?

judge. Yes, we always talk about our cases over coffee. I just had a case where the guy did this, and this is the sentence they gave him. What do you think? Unfortunately, there is sometimes too much shop-talk. You know, I went to lunch... its just the same as with lawyers... they always talk about their cases. I went to lunch with three or four other judges, yesterday and I was thinking as we finished the lunch that all we had done was talk about our cases. You work on them all morning, you talk about them for an hour at lunch time and then you go back and do them again. But there is an educational component.

hs. um.hmm.

judge. It does, I think, give some consistency in philosophy and in what the actual sentences are that result from it."

"We have had sentencing exercises at some of our seminars. Being a new boy, I have been interested in the exercises. I am quite surprised that if you get one hundred judges all working on the same fact pattern for an hour or two you would come up with ninety of them almost evolving exactly the same sentences. You get one or two wild, who have tripled the sentence, but, generally, there is certainly no more disparity than there would be in an other human endeavor, like working on a mathematical problem or something."

hs. Are some mechanisms to minimize disparities, perhaps by conferences, by informal meetings?

judge: "We have informal meetings and educational seminars. We operate with the principle that then there is some concern about your decision. Then older, more experienced judges are called by telephone. We have informal conferencing in regards the interpretations of the Act. We meet twice a year, at a general meeting. Nobody says, "you are out of line". No judge is supervised in his authority."

judge. yes. Computers may help a little bit, believe it or not, although I don't believe in the damn things myself. But, for example,in Surrey they now have computer terminals. So, if I want to sentence somebody, I can type in the key words for a particular sentence, and particular offence, and out will pour various decisions in a sentencing range, which may help somewhat. In some areas it may help, but judges will consult one another as to a particular sentence sometimes. On some things, a second offense, break-and-enter, is a good example, we can talk about the Young Offenders, the Adult Court situation, where the range of options is from a day in

jail and probation, to life imprisonment. Judges in Canada have a tremendous amount of discretion, that for example, in jurisdictions in the US do not exist. We have a lot of discretion in terms of how we deal with people. You hope. As I have often said, it's hard enough to be consistent with my brother judges. My concern, though is also to be consistent with myself, which is hard.

Judges emphasize the significance of legal heuristic knowlege, but they also acknowledge the importance of 'personality' in their sociological jurisprudence.

hs. Do personalities of the judges matter?

judge. (Goes to the bookshelf). Here is a quote from Judge Cardoza. "In the long run, there is no guarantee of justice, except the personality of the judge.

judge. I am a judge because of my learning skill. This can be enhanced by conferences, but at the end of the day, you want people who are sympathetic to the family and to the youth.

hs. I hear that you have access to computer statistics about case decisions, numbers of dispositions by category and volume.

judge. Here is an example. [Shows a printout with a disposition readout, for adults. Most of them were for custody disposition].

hs. What kind of mechanisms are needed?

judge. There is a need for a unified family court, using the F. & C.S, The Family Relations Act, and the YOA. This has to be removed from commercial and criminal work. On the bench you develop an in-home expertise that can be used to bring people together. You see who talks to whom. Some judges in their courtroom work will not interface with other court personnel, e.g., the probation officer. He is a legal purist. I don't agree. The lower court cannot do the job this way. Fortunately, this judge likes family law. His nature, is to be abstract, talk about cases as objects.

hs. Tell about some of the styles.

judge. There is a wide variety of styles, but we are similar in that we all have legal training. We are fortunate in B.C. that the judicial council selects the judges. They were the

invention of Dave Barrett's time, consisting of three judges, three lawyers, and three lay people. Even then there are some duds. It is important to weed out the power-trippers. They make for a poorer court, for poorer people with poorer property to dispute over.

hs. Have you seen it done differently?

judge. In some jurisdictions, judges are selected just because they are women.

hs. I know about radical jurisprudence; and I heard about what is going on at Harvard from Warren Kennedy.

judge. Yes. In France they do it differently. Judges go to judges' school, then become justices of the peace, proceed to county court, and juis d'instruction.

hs. What are the most significant constraints that you face in your deliberations; other institutions, community, the Court of Appeal? How do you respond to those constraints with respect to sentencing youths?

judge. The biggest problem is time. As to the Court of Appeal, the judges set up the facts for the record in such a way that they are interpreted by the Court of Appeal the way they want them to be read. By repeating certain facts, for the record, you determine whether the case is to go to the Court of Appeal or not. It's a long way to the Court of Appeal from Youth Court.

More general constraints of government policy are noticed:

judge. The most significant constraint is the practical options. So, there is no lack of will, but there is a lack of ability to implement. This is a matter of government policy.

In regards to community constraints, this is decided by the politicians. For example, for more enforcement rather than putting money into resources. This government is showing real moxie, in the person of Richmond, for spending good money on resources, and money on options. The government is not to be faulted, but community groups, especially federal lobbies and police enforcers, who implement stringently, this has an impact on the Court, because then there is crime categorization and the result could be criminalization and no flexibility. In this instance, there is an effort here, in B.C. The problem is all budgetary; government doesn't have it, but economics is only a factor. It has a lot to do with the priorities of government - where to put their money. Families don't count. This government is doing somewhat better."

Another constraint, apart from legal relations, is the political economy working alongside of the legal system.

> "hs. What about the economy? Is it much of a factor?
>
> judge. The economy affects adults more than children because children are not in the work force anyway. Of course, this means that one of the things that are cut first are the social programmes.
>
> I am aware of problems in the economy that are affecting the resources, such as community work offices. Through privatization they are not as available and with inexperienced staff the turnover is great. Children are affected by the economy in these activities. Poor service is comparable to the price you are paying. This is the price: quality of life for cost effectiveness. I do consider and deal with it. If the resources I want are not available, I go for the next best thing".

Most of the judges are aware they are responding to the restraint practices of the government, even though more resources for crime control are in fact being developed:

> As a practical document, it goes too far from normal incentives. The due process model is overimposed. This hasn't had much impact on decision-making, although the options are more reasonable, but there is an over-response to legalism. In regards to the options, (these provisions) haven't had that much impact, except for taking sentencing out of reasonable limits, as for example, the criteria for custody. Guidance in the YOA is not bad. In regard to mandatory offences, they are unreasonable, but the YOA doesn't do this. Categories are very broad, and don't hamper it. If secure custody is given, it depends on the judge. Secure and open custody open up a wealth of resources, and expand the sentencing options. Therefore the numbers of children processed increases. Open custody sentences should be reviewed as a treatment option. There is no treatment in the Crime and Punishment model, and there is the problem of net-widening, with a lot of directions to send the child. There is some discussion at the federal level about this."
>
> "I wish we had more jails for juveniles. There are only eighty beds here, I think. The problem is to be careful in using them, because for everyone that goes in, another one leaves from the other door.

"hs. What are the most significant constraints that you face in your deliberations?

judge. Judges in this bench are closer to youths than judges in the Appellate Court, because they are more abstract. I respect them, but the trouble is that its the correctional facilities that end up determining the guilt or innocence of the youths. I consider deterrence, background, schooling as related to the sentence, all from submissions, and then I render a decision, which takes all these factors into account. Then, there comes the referral to corrections. The kids butter up the staff to apply for early release. My sentences are watered down. The system doesn't take into account the appropriateness of the total sentencing process. I regard community work in the same way as a constraint. The institutions surrounding the courts, although they claim a role, determine the sentence. I consider that the context outside the justice system is the area which is appropriate to the case, and must be considered.

This judge is aware that the YOA has increaed the numbers of children processed through the courts. He is also aware that the YOA undermines treatment potential, given the lack of resources.

"I hope we effect some changes, but through the Courts alone, I doubt it. In cooperation, or better yet, in concert with social workers, youth workers, and the family unit, it has a chance. We especially need to re-establish the family unit, the trust that has been broken."

"It's too bad that we don't have an enormously wider and richer range of resources. That would go such a long way in helping to resolve many of these problems, and help the young kids. To get some of the young kids into a work situation that's not available. You know, to be able to ship out, and earn good money, you have to work your shift. Or something like army training would be so helpful, but we don't have options like that. And it's against our philosophy in society generally, you don't push kids into work situations they don't want. It seems to me it would be so helpful."

"But resources are one of our great big headaches. For the 16 and one-half years I have been here, it's been I suppose the biggest problem."

"Well, containment is an alternative utilized on occasions for a variety of different reasons. Often, where a youth has committed a serious offense, and a period of incarceration is wanted, he has exhausted all other places to live. For example, he has been in a foster home and can't go back there

for whatever reason. Group homes are not open to him. Various programs may not be open to him, for reasons of him burning his bridges. Often the young person will burn his bridges on those things, and there is really no other place to put these young people, except in a containment setting. I am not saying we send people to containment because there is no where else to put them, but the practicality is that's sometimes the case. There is not an overabundance of resources in this province."

In summary, youths are no longer a victim population in need of a safety net. Young offenders are now subjected to special offender oriented correctional tactics, which define behaviour as individual, problematic, and atomistic. In the YOA application, social rather than personal reasons are stressed as fitting judges' definitions of crime, offender, and of the victim, resulting in new power relations:

"hs. Who is a victim, as you construe the YOA? Is it the traditional victim, the community effected, the youth as the original victim?

judge. It is not the community at large. The YOA is not intended to be seen this way, as a way of opening up the courtroom to all contenders. For example, if we brought in the car insurance people, the parents of the victim of sexual assault, the victims sisters and brothers. From a practical aspect, the larger community would become too nebulous. If anyone in the larger community has something to contest, then this can be done through the Crown office, or through probation or social workers. Their reports can be useful.

"hs. Your first concern is the return to normal of the victim?

judge. Oh, yes, and in society generally, it's a growing concern, the concern for the victim. Working in the Court system, I share that concern."

another judge. "The YOA is a blend of principles. I am concerned with the practical issues of the child, not the principles. Special cases initiates special practitioners: the probation service, lawyers, the appellate court. The issue is that the child should not be in custody, except when

> he is a risk to society. I must look at the consequences, not the principles. Is the child a risk, and would putting him in jail be harmful? The probation worker must be involved because the parents are not able to do their job. There are social issues that I can not even verbalize, such as the history of that family. That is the biggest problem, the social history of the family."
>
> "As to who is a victim, it is the sufferer."
>
> "What in the world is everybody afraid of - that some kid has a legal counsel? The real problem we have with the old Act was the conflict between parents and kids. Mother would stand on one side. Father would stand on the other. And the kid would stand in the middle, like this. And you would be dealing with the kid. It is the parents concern, but it's none of their business. Now what do you want to do? And the father would say, "He wants to plead guilty." And I'd say, "No, I am asking him." Now, the kid can go out and get independent legal advice on what his position is, and he can do so without depending on his parents to afford it. Almost always, it will be the same thing that his parents tell him is the right thing to do. But there are enough times when that lawyer will say, "Your parents, for their own reasons - to avoid embarrassment, to get this over with as quickly as possible because its painful for them, to teach you a lesson, to assist them in their discipling of you, are leading you down the wrong path. This is what we should do". Now, that's worth it. That kind of protection for a child is really worth it, and it's certainly helpful to me."

By drawing the family into the legal network, it is no longer subject to treatment intervention, but disciplined and punished, under the rubric and intention of establishing justice and crime control, and by the heuristic values of law. Within other surrounding social relations, school, work, and citizenship, the family is not represented directly, although legal relations may enter or mediate on behalf of the family. Yet its legal relations are construed within a normalizing discipline. The legal net-widening process creates power and knowledge relations through their individualistic and familialistic emphasis. The neo-classical form of social reasoning uses individuation in order to

reform offenders and protect society. The shift in discourse results in more centralized state control (social control) over juveniles, which has expanded into previously informal areas of social control.

4.6.0. Summary

Legal reasoning is grounded in substantive power and knowledge relations, with the practices of normalization and incarceration. YOA implementation defines who is normal and involves the direct assessment of the judges in this definition. Legislative attitudes and individualizing case requirements of social reasoning determine the dominant legal reasoning. There is an understanding that the YOA intention is to balance principles, but judges respond to inconsistencies with their own dominant philosophy. Judges accept the dominance of rational practices in the surrounding power/knowledge network as a corrective, and as a form around which their interpretations and decisions are constructed. There is a specific and dominant legal construction through the YOA of crime, victim and offender. The YOA is a blend of normative (moral or *a priori*) and normalizing law (due to the intervention and discoveries of social science) which has net-widening capacities that inhibit community change and the growth of informal legal processes.

CHAPTER V:

THEORETICAL LINKAGES

The central focus of this thesis is on the problem of the social control of youth in the period of law reform from the 1960s to the present, during which the YOA was considered, enacted, and enforced. As a result of the centrality of law and the interpretations of the courts in crime control, the collective political process, in reducing the dependency of youth on the state, has failed. Law reform had a long internal dialogue in jurisprudence incorporating "neo-classical jurisprudence", analytical jurisprudence and sociological jurisprudence, as forms of social reasoning. These discourses have merged as a consequence of the law reform movement (Hunt, 1979), resulting in a new discourse (YOA) which encourages retributive justice and punishment.

The YOA application enhances law reform by shifting the strategies of the state from the "welfare/ treatment/ medicalization assumptions" as personal reasoning, the dominant ideology of the JDA, to the social reasoning of the YOA. Social reasoning is adopted by the youth court judges, which maintains a moral consensus. Using social reasoning as the rhetoric of a wider social order induces a normalizing and punitive reaction to deviants. This variant of social reasoning is grounded in concrete practices of normalizing and punitive action towards young persons

who commit deviant acts. The foundation for this rhetoric is legal reasoning and its concrete power relations.

The form of legal reasoning used in the YOA situates youth within a universal interest of justice and law. The court also appeals to a particular model of the family, which socializes youth to arrive at a state of independency on the state. This model rests on the youth achieving 'rational' maturity and 'normal' behaviour in order to justify crime control. Not only the form but the practices associated with the YOA, of normalization and discipline, call for a rationalized system of law and control by means of a specific range of legal sentences. Foucault (1979) links the present network of social control options with the portrayal of the youths' body as 'docile', and the mind as the subject of rationalizing relations. The JDA and the YOA present two rational systems for control: the JDA is based on personal reasoning, the YOA on social reasoning.

My major thesis question is how does the practical/social reasoning of judges operate within the instrumental rationalities of the Act to affect the surrounding social network?

REDUCTIONS:

In the thesis, I examined the YOA as an information strategy related to capital by reduction to:

5.1.1. Class Interest

The legal system is shaped by professional self-interest. There has been a monopoly on practices in services respecting social control, that are rooted in socio-medical, and in legal practice that continues to protect these interests. (Ham and Hill, 1984; Edelman, 1981; Navarro (1978). The claim is that only experts who have knowledge can affect the private lives of youths and are sanctioned to do so. The YOA is advanced as a new middle-class service interest. In this thesis, the issue of law and social control of youth is discussed in relation to the problem of rationality adhered to by legal experts and their practices within administrative systems, such as the criminal justice system. 'Rationalization of social relations' (Spitzer, 1989:187), is reinforced by experts.

Since welfare and justice reflect two cultural 'traces' (Foucault, 1972), they create an arena of instability or discretion which can be filled by experts, with their middle-class knowledge relations. For the experts, the individualization of the sentence means files, information, and interviews, which can be translated and enhanced best by ambiguous middle-class professional knowledge.

The legal relationship between youth offenders and the working class, is depicted through the historical representations of the working class (E. P. Thompson, 1975). Both an instrumental (Pashukanis) and an historical (Thompson) reading of the law and

capitalist relations show working class interests as increasingly represented through the law. By focussing on institutional relations and issues of authority, radical criminologists explain working-class gains as coming at the expense of, and through the coercion and further marginalization of the lumpenproletariat (Taylor, 1973). A reading of ideology extends beyond Marxist class relations and mode of production analysis, to include strategies for response to the problem of 'overproduction' and 'surplus labour'(Chambliss, 1974). Criminalization of youth became the foreground of the YOA, as youth was now considered a 'dangerous class'. Radical criminologists, Taylor et al (1973) contend, that whenever groups, such as youth, are marginal, they tend to be criminalized. The focus of law shifts from coercion of the working class to the means for the creation of another docile population by recycling 19th century values of discipline, valuation, and humanitarianism. We have again arrived at accountability, both for legal subjects and their technicians, who have become their moral therapists.

5.1.2. State Interest

Has the subordination of legal practitioners by the state served to protect the interests of legal-economic administration? In this thesis, I argue that the self-interest of legal-economic administration is produced, secured, and expanded within the YOA.

Using Gramscian notions regarding the hegemonic crisis of the state, some theorists discuss increasing state repression through crisis justice (Havemann,1990). Does the YOA exemplify such a tendency? The legal system can be drawn on to arbitrate in the area of contradiction during a state crisis. A crisis is a period "when a significant rupture in the fundamental processes or institutions which bind the society together are broken" (Hall, 19). The crisis immanent to the formation of the YOA was fiscal, in that the government shifted from a collective Keynesian welfare economics to privatization; the crisis was also political in that the government was responding to an unstable alliance of neo-conservatives and neo-liberals.

The capacity of the state as transformative, using the above theorizing, is based on the problem of social order. But what is the moveable bond that holds the social order together? The sphere is denoted here as the site of ideology, and of discourse. Shifting modalities are necessary in the struggle for leadership and hegemony. The legislature, in enacting the YOA adopted a blending of ideologies: of justice, for the neo-liberals; of moral consensus and of the importance of the family, for the neo-conservatives. The presence of different social contradictions with different origins suggests the need to examine their geneology to appreciate the level affecting micro-power relations. Using social reasoning, the state adopts as rhetoric the protection of, and justice within, a wider social order. The administrative

hegemony accounts for a slippage from the conservative consensus since the war to unstable alliances that are maintained by a new moral consensus found in the discipline and punishment potentials within the YOA. Harris and Webb (1987), provide both a critique of ideology, and an explication of the discourses of micro-power. Is there a state intention to legalize the political process by enacting the YOA, knowing that the courts would uphold crime control? This discussion requires a further reduction to the specific 'power relations' of the law and the courts.

Unemployed youth have been marginalized by the fiscal crisis. The concept of crime control used here inscribes a class characteristic to the YOA. It further suggests the end of collective state action which had promoted social welfare interactionism to appease and contain the working class. The result is now a loss of collectivity as the structural location of capital requires the protection and enhancement of state power for its own purposes. The dominant ideology of the conservative right and of the instability of the new alliances, the structure of privatization of profits, of institutions to support a new group of offenders, and the relocation of the socialization of costs to particular groups under the aegis of "accountability", is endemic to this crisis. As one of the major principles of justice, 'accountability' has been brought to the fore under the YOA. The crisis of capital has brought into play new forces of control by way of punishment that have been a long time developing, especially

in the historical use of jails as forms or models of social production that are now seen as tools for the reconstruction of resistant youth. The lacuna in the sociology literature of legal reformism is the empirical investigation of the discourse of judges who implement the law through their interpretations of it, and in their dispositions around it. The foundations of their rhetoric are the power relations they support.

The increasing rationality of the 'social' gives rise to distinct forms of social control practices and strategies. Capitalist production requires the inclusion of new forms of labour and capitalist relations. The expanding service market, and the executive governments regulate the 'recalcitrant classes' by providing new scope and specificity of power to legalism. The old focus on welfare services and medical discourses have outworn their usefulness, as more scope is directed to the legal profession, especially to legal aide services, and to probation riding on the discourse of criminology and the sociology of law.

Analyses of the state and class interests allow for the gaps of social control strategies that result in bringing forward an even older and revised form of classical justice to the adolescent population. The theoretical focus of the nineteenth century shifts from attempts to analyze legal coercion and intimidation of the working class to secure social order, to a discussion of acquiescence to control by means of mass democratic mechanisms such

as the law. Through administrative tactics such as deinstitutionalization, and institutionalization, if necessary, the law provides a 'solution'. But structural issues are not resolved by instrumental rationalities; they merely contain and manage populations for the creation of surplus value of capital.

Ideas draw upon existing socio/political/economic structures, leaving behind their own formation in the shape of policies. The policy arena is seen as the site where contradictions, silences, and articulations of ideology within discourses are worked out. Using the YOA model for a critique of ideology, I utilize a theory of interpretation of ideology (using the hermeneutics of the interview schedule) mediated by an analysis of structures.

During the crisis of the seventies, the Canadian government introduced the YOA with its dual-pronged objectives: 'protection of the public', and 'the least severe intervention' into the freedom of the youth. The ambiguities inherent in the YOA, suggest that the specific state intention is to use the Court of Appeal, with its sociological and jurisprudential strands of adherence to a shared set of dominant assumptions. These assumptions are that the law is the natural/rational place to resolve conflicts. The bias is ultimately crime control.

5.1.3. Intention

As Habermas (1979) claims, one of the major problems with understanding social relations, explanations and emancipation is to go beyond work relations. We must understand the processes of administrative colonization through relations which "distort communication". Habermas advocates the use of a "universal pragmatic" in the process of achieving consciousness. Forms of 'growing up' might be articulated as a universal pragmatic. It is necessary to achieve agreements about the process of growing up, that have rational, evidential communicative action. By including young offenders, however, there is no universal discourse because these young people in the YOA require the articulations of a collective solidarity of adults, who speak for them. There is a particular nature to this solidarity in the phenomenon of deviancy. Habermas' hermeneutic fails in application to the theoretical implications of the YOA.

Looking at the extension of the Kantian project in Habermas, where rationality is attained by a sociology of knowledge, the principles of justice become a knowledge-constituted interest, resulting in the formation of groups and individual subjectivity. At issue, is the technology for the creation of subjectivity, and particularly, of legal subjectivity. Early Habermasian theory fails to examine the grounds in power for social relations within the criminal justice system. The grounds, he suggests, is purposive rationality, at the expense of discursive ethics. He does not examine the grounding and collective basis for agreements

already made in modern civil society, which are based on common moral experience. I am using social reasoning as these grounds in the YOA, in order to decenter the juvenile justice system by approaching this world without a representative subject.

Distorted communication is an act which is aimed at acceptance within life-worlds. Intentionality is compounded by the 'pragmatic acceptance of interaction' (Baxter,1987). Practical reasoning as a system for the construction of moral/pragmatic goals becomes distortion when it is itself related to political/social reasons for the acceptance of these goals. Power relations are constructed instrumentally (purposive rationality). Goals are not put in place as a communicative task. Habermas's later work focuses on a means to achieve a discursive ethics (Habermas,1981).

5.1.4. Metaphor of Property

According to Fine (1984), protection of 'property' defines both the form and the content of jurisprudence. Christie (1977) argues that conflicts can also be defined as property. Can conflicts and dispute resolution become a democratic right, and a radical alternative within due process considerations, since 'property' has already found a place in bourgeois law? The findings in this thesis suggest that 'rights' for youth, thus far, are restricted to crime control, in respect to property and sanctity, not quality of life.

These reductions are continuous with social control practices and their social/state context. However, these practices for Foucault indicate a system of power in itself. The state expands social control of youth by construing instrumentality into the discourses of sovereignty. Through deconstruction of the 'state', and by examining the intentions of the judges using the YOA towards law, crime, state, and youth control, my theoretical assumption is that the state steps into a crisis with its technical instruments of the subject. These dominant patterns are structured around age and class, denying youth offenders a full exercise of democratic participation. The relations of class and state intentions and metaphor are mere reductions. Inflating 'power' is not another reduction, but explains the grounds for the masking of social structures and their nuclear forms (institutions) which become mechanisms to this intention. In the following sections, I examine linguistic practices as theoretical explanations, and then discuss law and social control as practices related to power or discourses.

5.2.1. Linguistic Practices

The theoretical starting point in this thesis is the process of the effect of linguistic practices in the construal of social reality (Wittgenstein), and of these relations to systems of power (Foucault). Under the YOA, the construal of "offender", and of "victim" is constructed as social reality by means of their use in a family of language games. These language games (knowledge) will

be traced in an action/analysis as they enter the "service" of state policies (power).

Four representations of state power were analyzed over a four year period, since the enactment of the YOA: Justice, Crime Control, Welare and Community Change. My aim was to explicate their transcendence into case law affecting the social location of youth offenders between 12 and 18 years of age. In these representations of systems of power, I locate the dominant knowledge-power relationship in the service of an expanding state in its most recent 'neoconservative' power position, and in the service of legal practititioners' class interests at the expense of collective representation.

According to Gramsci, class and state interests of domination prevail through the processes of sustaining "asymetrical relations of power" by means of ideology (Thompson, J.B, 1984:4). This role of ideology is constituted by linguistic practices (Habermas, 1976).

5.2.2. Social Control

The theory of social control is part of a broad literature discussing net-widening control within the social body (Foucault), hegemonic-net-widening control (Donzelot), and hegemonic control within state theory (Poulantzas). Net-widening in the YOA, refers to the acceleration of numbers of youth who face the law, both

before and after trial. Some theorists talk about the net-widening tendencies of the justice system, or the probabilities for dropping through the holes into regulated positions of judicial calculation for rehabilitiation or resocialization of young offenders. In this thesis, I am defining the state as social control, in order to examine the specific relations of the law, social organization and social control. Social control is linked to economics. The state refers to strategies of social control as they are engendered under the limited conditions and structural realities of capital.

The realm of inquiry is suggested by Spitzer (1979), who looks at the accelerating historical development of 'rationalization of social relations' (1979:187) within capitalist social relations. Spitzer's argument provides the grounding for examining the tendency for the growth of historically repressive measures. His work avoids the classical dichotomy of state and civil society by showing the nature of the integration of these domains through rationality. Within the economy, social control is achieved by rationalizing systems in order to respond strategically to the problems of 'surplus labour' and overproduction. Spitzer discusses the criminal justice system and its forms of crime control as part of the accelerating adminstrative tactics to discipline, to rehabilitate and to achieve the consent of the labouring population. Other theorists discuss the strategies of crime control to normalize deviance through decarceration, and to prevent it through carcerative segregation (Scull, 1979).

Rather than exposing its own interest, or in order to mask itself as empty of interest (value-free), state-social control enacts specific, technical strategies and measures as solutions to perceived delinquent individuals, to maintain certain economic-social interests. Within the shifting ideological cement, there are many strategies for coercive, rational ideologies and their specific power relations. Crime control is closely linked to state development and class relations, but it requires descriptive and specific analyses.

The YOA is one example of the capacity of state-social control to pursue underlying rational power relations behind economic determinants. The YOA is a specific enactment of crime control that can be traced for the rationalization of its process in the Courts. Social reasoning in the YOA is the means used by the state-social control to expand its power relations, and to alter, but not transform, the dependency of youth.

Political alliances, popular, and new hegemonic alliances were integrated in the specific enactment of the YOA. Theoretically, the financial cutbacks on welfare make treatment policy and programs outmoded. The application of the YOA fell to the Youth Courts. Within the YOA and its legal interpretations rest the competing discourses of crime control, justice, and welfare. As we have seen, within the discourse of crime control, the courts dichotomize welfare and justice while priorizing justice. The

courts now support a neo-classical/sociological jurisprudence to effect moral consensus about the nature of youth crime. The Courts' role in crime control provides a new normalizing discipline and punitive action, which ignores structural causes and the collective responsibility for crime.

It is important to examine law as an autonomous entity. Marxists such as Sumner observe that (1979:293),

> "a legal enactment is a hybrid form combining power and knowledge according to the fixed and hallowed procedures for the creation of law by the instituted executors of social power. It originates within legalizing practices which are political in that they are geared to producing specific power relations."

An empirical investigation of the political realities of statutes and the judicial reasons for accepting these is required. Legal reasoning in itself serves to reinforce surrounding power relations.

The problem, then, is more than one of youth repression. It is a study of the instrumental rationalities masking class interests. The problem goes beyond the problem of 'managing' one of capital's crises, on behalf of the ruling class. The point is to address a sociological-moral-political problem: the YOA does not attempt to reconcile an ethic of democratic participation, the goals of youthful interest and distributive justice, with an ethic of state responsibility. Its language is couched in terms of 'accountability', yet the reference is not 'collective

(structural)' responsibility, but 'individual accountability'. In effect the task is ideological in responding to a problem of youthful deviance as a phenomenon requiring social control.

It is important to account for the role of the court and to explain the lack of, or attempts at, counter-hegemonic action by officials within the justice system. The 'social problem approach' (reducing the apparent crime problem to juvenile delinquency) does not deal with the sociology of crime control in its contingent, multi-level application and social organization (Harris and Webb, 1986). The question is partly why the YOA appeared at the time of economic repression and the trend towards privatization. An account of the YOA must also be cognizant of the sociology of legal reasoning.

Under the YOA, officials are to respond to the historical concerns of child care, or 'special needs' and the separation of adults and youth which utilized a threatment philosophy under the JDA. This central issue of care is blended with the justice and crime control philosophy of punishment and protection of society. These contradictions were meant to be resolved in the YOA by destigmatizing certain youths, and applying legislation to all youth. However, delinquency legislation continued to be applied to economically marginalized groups, such as those who were formerly caught within the social welfare system. These youths are now turned over to the criminal justice system. In the contrasting

discourses of the YOA, criminology and welfare, as the ends or principles of justice, are differently met. In the YOA, 'protection of society', 'least interference', and 'rehabilitation', as goals of crime control and justice are not priorized. State interests are presumably de-politicized. In effect, the stage is set for the acceleration of instrumental relations of legal rationality to both coerce and normalize the deviant population, to effect youth as a new consumer population, and to pacify the labouring population from the 'moral panic'.

The term 'rationality' is not a global concept, but pluralistic and differentiated. According to Foucault:

> "I don't believe one can talk in this way of 'rationalization' as something given, without on the one hand postulating an absolute value inherent in reason, and on the other taking the risk of applying the term empirically in a completely arbitrary way. I think one must confine one's use of this word to an instrumental and relative meaning." (Foucault, 1981:8)

This claim requires an understanding of the different forms of reasoning inherent in particular discourses, in order to read the YOA as a discourse.

According to the classical perspective (Pfohl, 1985), rational laws are the means to maintain the 'social contract' in its Hobbesian form. Liberal pluralists who framed the YOA, give a less individualistic account of the social order with a pluralist conception of social interests. Neo-classical theorists assume that social control ought to be centralized to achieve the social

utility of deterrence for the good of all, or to justify retribution. Liberal pluralists within the criminal justice system have adopted a sociological jurisprudence, combining social interests, individualism and the authoritative techniques of law, as guiding the consensual interest of society. The result is a combination of justice (individual accountability) and crime control (social interests, especially those of the family). Judical discretion should provide for certain 'mitigating circumstances', so that the moral character of the offender can be reformed for the good of the whole society. Sentences are aimed at reducing the irrationality (lack of moral character) of the offender. A form of rehabilitation is implied, without the positivist characterization of irrationality given to deviancy by social psychology as grounded within the implementation of the JDA. Deviancy control and normalization are imposed conditionally, rather than determinately, upon certain individuals. In these forms today, jurists maintain the dominant assumptions of the Enlightenment: the belief in control by a system of rationalized sovereignty, by science, and/or by law.

Judicial reasoning under the YOA requires both the scientific positivism of accelerating rehabilitation practices from surrounding power-knowledge relations, and the reformism of the older discourses of classicism. Out of historical knowledge relations of rationality, state=social control constructs a legal subject. The state, by these practices, maintains a disciplinary

social control network and, ideally hones one of its instrumentalities for the accumulation of capital.

In summary, the state continues to normalize and coerce the young person in trouble with the law. These reasons originated with legalizing practices, "which are political in that they are geared to producing specific power relations" (Sumner, 1979:293). The law has the same long-term hope of rationality as has been attributed to science.

Under the YOA, different practices are fashioned. In a 'justice' philosophy, the youth is now conceived as responsible as is the family for his problems, but the youth must take the blame. The responsibility and accountability of classical retribution have been served. Punishment inflicts pain and is justified because it acts as a deterrent and protects society from the offender. It is justified by its effects, even if the unintended consequences, and more likely the intended consequences of the law and order ideology, reinforce coercive rational relations. The dominant concern is that of curtaining financial services and the diminishment of social welfare service networks, by using the 'least interference' principles of neo-conservatism. The result is another unit available for capitalist production, that is, the creation of a youthful consumer. With crime control measures, just as under the JDA welfare philosophy, judges encourage discipline through factors that are linked to the mystification of patriarchy

and the family's role in preparing youth as a unit for production (Ursel, 1986) and consumption.

The law reform stance of the JDA and its enhancement in the YOA requires youth to become elements in a consensual social system, normalizing them or bringing them into line with state=social control interests. Judges see the individualizing programs of policy and control practices as inefficient, scanty, ambiguous, politicized reasoning. Their practical reasoning is the main defensible ethic for using deviancy control under the YOA, even more than under the JDA. It is a law and order ideology with underlying due process rights. The judges offer some objection to the reduction of administrative services, but not to the shrinking of collective (community) service networks. If the political intention of the state is linked to a fiscal crisis, it appears to be the role of the courts to legitimate this intention by social reasoning.

Social reasoning reinforces crime control as the central role of the courts because of an explicit net-widening power to use a retributive-utilitarian schedule of punishments. The legal net is widened to include the responsibility of family, the rights of citizenship to include accountability of individuals, and the disciplinary tactics of training and supervision to ensure advantages in the workplace. Underlying legal-social reasoning is a pessimistic 'social problem' approach to crime: individual and

social interests are problematized. The 'law' and the 'society' are dichotomized, with legal order transcendent, not immanent. Analytic-sociological reasoning adopts this stance. An alternative reasoning would be to discuss the creation of community structures to resolve community conflicts, where conflict is taken as a right.

The logic of legal reasoning (case reasoning, due process, individual accountability, and determinate sentences) departs from practical reasoning if we take Gadamer's social critique rather than Kant's 'immanent' critique. Legal reasoning adopts 'immanent critique' or "internal agreement between distinct (real and formal) things", like 'bad', 'sick', 'normal'. By creating a dualism between commonsense and rational method, the individual is emphasized over the collective. Gadamer's critique of rationality (1975) is based on a feeling about common, moral experience. Rational forms of domination, through informal as well as formal networks of control, effectively eliminate the commonsense participation of young offenders. A judges's practical attitude is directed to concrete situations (the child, the family, the community), in their individual, not collective variety. Rational method dominates, and is legally situated, unlike 'good' reason that comes from living in community and experiencing its aims, structures, and critiques. Legal reasoning is not itself reflective of collective experience.

By defining the state as social control, the thesis account is not required to discuss the reproduction of state relations, as Poulantzas conceives them, (Jessop, 1982). Legal struggle is political as well as merely legal. In going to the courts, a political 'faction' (Poulantzas) invokes a type of legal struggle with a particular dialectic. In this thesis, I describe the heuristic theme of law in order to question the relations of law that are merely contingent, rather than structurally dialectic. De Sousa Santos (1985) argues that the law is a material structure, but not an autonomous one. Law is a mediating collective process. Mandel (1989) describes many political debates frozen in the Courts through the sub judice principle. Hunt's analysis suggests the increasing incursion of law and politics into other structures (the family, the workplace and government), and the increasing centrality of law as an 'unqualified good' (E.P. Thompson, as quoted in Mandel, 1989). Habermas extends the concept of law as a pathology, to the point of discussing the decline of modernity (Habermas, 1973). Under modern conditions, legal administration, rather than communicative action and moral pragmatics, is the dominant form of rationality.

Foucault emphasizes the decline of law in capitalist society because of the rise of disciplinary power-relations. In stressing the diminishment of classical sovereignty relations, he overemphasizes the dichotomy of state power and civil power (de Sousa Santos, 1985). This thesis has explored the impact of formal

and informal systems of social control which surround the domain of criminal justice. The judges apply the YOA, keeping in mind both the constraints of the legislation, their legal culture, the heuristics of reasoning, and the surrounding networks of control services of the existing 'welfare state': education, social services, and corrections. The most general analysis of the foundations for a network of control is provided by Foucault. His work allows the researcher to draw a line of interconnection to include institutions for control of 'social deviants' (Scull, 1979); Cohen, 1985), and the family (Donzelot, 1979). When the analysis focuses on the changing strategies of control, the development of the law reform movement can be seen as one further line of discourse. Social reasoning is a strategy of the courts to merge the tactics of institutional reform with law reform.

In this study of the YOA, there are clear signs of articulations between juridical power and disciplinary power by the use of social reasoning which falls back onto classical notions of sovereignty combined with current crime control concepts of rehabilitation, training, segregation and supervision. This theme follows Weber's work insofar as legal strategies are based on a concept of structural affinities. Weber's theorizing urges a comparative or structurally differentiated approach to the problem of rationality, to illustrate the interconnections of juridical and disciplinary power. Weber is again linked to Foucault through the theme of rationality and forms of domination (Dreyfus and Rabinow,

1982:166), although Foucault insists on a pluralistic and net-widening approach. Weber's distinction between substantive and formal rationality aids in the study of the sociology of law reform, in analyzing the nature of institutional practices and explains the shift from treatment to crime control as a matter pertaining more to practices. The divergence between law as written and its practices, as Fine (1984) points out, suggests that law is built on practices, not on principles. This thesis documents the emphasis gived by judges to their practical reasoning within the YOA statute. By implication, legal/practical reasoning is built on practices with an ideological attachment to formal law. The process of legal reasoning is an agent for practices which operate on micro and macro levels. Specifically, the practices and social relations of crime control are enhanced in the YOA.

The YOA, as a form of production, does not displace earlier forms of meaning but circulates and mediates among three hegemonic configurations that are interchangeable: scientific normalizing, sociological jurisprudence and analytical (normative) jurisprudence. There are elements in judical dispositions of all these configurations that are present in complex conceptions and combinations. The outcome is not transformative of social power, but a joining of normative law and normalizing law.

Keeping to the notion of multiple forms of power, rather than power relations as autonomous, is consistent with the notion that

there are structural affinities and agents between them (de Sousa Santos, 1985). In the proliferation of expertise in the practices of law, social work, and criminology, it is possible to glide from normative to normalizing forms of control. Social reasoning in the YOA elicits the legal sense of people involved in matters of state. We can not thereby conclude that all forms of legal relations are linked to state-social control. Nor can we conclude that there is any other form of social power other than the law, in some form, to achieve the practical goals of resolving conflicting interests. What is problematic in the thesis is the specific form of law.

Involving the principle of welfare of the child opens the family up to the justice system, social work, and medico-hygienic surveillance (Donzelot, 1979). As a continuing concern of the juvenile justice system, care of the child is linked to judicial surveillance, because in the crime control ideology, the child is not represented entirely independently of the family. With the care issue, the justice system contains the possible return to a structural-collective focus, even without the medical model. In the Court of Appeal, criminal law prevails (Bala and Lilles, 1988) and affects the YOA in the long-term, which could abolish dispositions based on the 'special needs' of the child emphasis in the YOA. For now, Court of Appeal decisions encourage a 'rehabilitative' focus. The youth court judges, as I noted from the interviews, interpret 'care' as 'control': supervision, training, and pacification.

5.3.1. Power and Knowledge Relations

In this research, I am asserting that power implies knowledge. Power is not simply coercive nor merely reproduced through classes. In the 'Will to Power', (using a Nietzchean theoretical starting point), power is not confined to macro-economic relations only (the infrastructure). Public and private relations are not dichotomized. Systems of social control involving punishment, correction or treatment start with the body, in micro-social regions, or in populations. The economic diagram of power relations is implicated when its community control programs, (a knowledge form) obtain the services of 'youth' (a knowlege form). Menial service or labour is more cost efficient if done by volunteer or youth offenders. The political arena is implicated directly in the marginalization of youth as a measure of their 'docility'. Ideologically, the intended result of judicial sentence dispositions is the investment of a legal subject under the power-knowlege relations of a 'normalizing' process, suggesting that macro-economic relations do not work only from the top down.

There is no assumption in the above assertions that power-knowledge relations are either materialist and idealist components of social formations and a priori separated or hierarchically ordered from top echelons down. As a unit, they appear as a totality and functional. Foucault writes of a 'disciplinary society'. The point of departure for discourse analysis is the 'genealogy' or evolution of techniques, strategies, and social

practices. To include the YOA as a discourse, I presented the judicial intentions as political logic by tracing judge's statements of their connections with micro-physics (bio-physics) as social control of the bodies of the subjects. Tactics of carceration and decarceration and strategies of law reform connect with the investiture of institutions above the level of micro-physics.

The starting point of micro-physics is unlimited bodily capacities. These are acted upon by power relations, which are omnipresent. Once the body enters into social relations, it is incorporated in power relations because the 'will to power' is specified in all social relations. In an ascending path of power relations, in social action, these relations become tactics and strategies. Through these relations, the subject is formed. In current social relations, the individual subject is objectified. By files, documents, and processing by experts, the individual becomes known to others in a way only comparable to the sovereign of former times. In legal relations, delinquents are atomized and individualized to a degree that law-abiding youth are not. The individual is 'treated', 'rehabilitated', or 'incarcerated' on the basis of 'normalizing' practices and rules. It is generally the poor and the young from the social welfare system, who are subjected to a carceral network.

Social classes, become the concrete content of the abstractions of relations and forces of production. Insofar as social relations extend beyond such relations, they include matters of life, death, birth as well as wealth. All these relations are power relations. Inflating power does not reduce it, but specifies its domains as strata. Relations of production enter into the body through the creation of the subject and its technologies. When the body is constituted as a productive force, as in capitalism, it is invested with labour power relations, and constituted as an object.

Michel Foucault, in History of Sexuality, vol.I. and in Omnes et Singulatim (1981), attempts to escape the issue of social structures and their nuclear forms (institutions). The possibility of structures is provided by a grid of situations (he speaks of lines, grid and strata) involving individuals, discursive and nondiscursive practices, and unequal power relations. He restricts human nature to a relativizing, instrumental context. These practices maintain power relations. His start is not nuclear forms, but unequal confluences of power and knowledge (discourses) directly related to capital. It is these that generate the conditions for political economy.

Foucault's writing in Omnes et Singulatim is a discussion of the individualizing aspect of governmental rationality, as the 'total and individualized guidance of singular existences' (Gordon,1987:297). This reference to 'micro-practices' focuses on

the administration of the individual, a dominant theme in the YOA. It is complementary to Foucault's analysis of 'macro-physical' practices of the administration of populations. In the YOA, therefore, there is both an individualizing component to power relations, and a totalizing management of youth populations.

Foucault writes that it is certainly legitimate to focus on the background of moral ideas or legal structures for the construction of a history of punishment. The grounding for this history is criminalization (a discourse) of individuals. Both ideologies and legal structures are themselves therefore grounded in the social control of bodies through discourses. The use of the body in power relations within a political field is direct. Foucault elaborates this relationship:

> This political investment of the body is bound up, in accordance with complex reciprocal relations, with its economic use. It is largely as a force of producation that the body is invested with relations of power and domination; but, on the other hand, its constitution as labour power is possible only if it is caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body. This subjection is not only obtained by the instruments of violence: it may be subtle, make use neither of weapons, nor of terror and yet remain a physical order. (1976:26).

Foucault conceives of the body in his study of 'micro-physics', not by the metaphor of a property, but as a strategy. It is the effect of strategic positions - an effect "that is manifested and sometimes extended by the positions of those who are dominated." (1976:2 7). Because there are no power relations without the "correlative constitution of a field of knowledge", power-knowledge

determines the forms, the possible domains of knowledge, and their historical transformations. Social reasoning is a strategy of control affecting a new discourse for youth. The YOA creates a world where 'crime', 'offenders, and 'victims' circulate.

This study, therefore, does not reduce its claims to examine social policy to the domain of political economy as a form, but understands that political economy is a content which can be partly interpreted from a 'set of beliefs' (ideology) relating to legal administrative strategies dealing with the social control of youth. To make a form-content distinction, discourses are form. The YOA, as social policy, is the result of many lines of discourses: of jurisprudence, social work, criminology (knowledge), and of social organizations and institutions in which these operate (power-knowledge). Indeed, it is not merely in the physiology and psychology of the individual that these discourses are effected. They result in social practices that function to control spaces in the political economy of youth offenders for the service of state and class interests.

In most of the literature drawn on as background in this thesis, conceptions of power are problematized around the dichotomy of intersubjective relations and institutional (lawyer, judges, Courts) capacities. Bureaucratic and political bargaining theories retain an instrumental approach. Chambliss, for example, argues for a dialectical relationship where social change is undertaken

for purposes of legitimation. The sociology of law has been criticized for having single cause explanations of legal change (O'Malley). Studies of the litigation and mediation process are beginning to pay attention to the form of law in structuring the legal order (Tomasic, 1985). Existing theories of the state are shaped by theoretical assumptions which argue for a distinctive concept of power relations by inflating each of these social dichotomies: micro and macro relations. Foucault, however, argues that the range of institutions is limited by power relations through discourses, regardless of levels of operation (Layder) or interchanges of systems (Habermas). Unlike Habermas' work, there is no requirement to theorize 'intersubjectivity', nor 'system-life-world exchange'. In this thesis, the concept of power was taken as a central core for both 'individual' and 'society'. Knowledge-power relations converge in the YOA as social reasoning.

Social formations are shaped by power-knowledge relations. Within this analysis, the intent is not to reify the state, nor uphold its primacy, but to reveal tensions in the creation of discourses, limited by their construal of dependency for youth. The state is not sovereign in shaping discourses. These relations are built from a creative order, starting with 'bodily capacities', 'tactics' rooted in shared understandings, such as heuristic knowledge, which congeal in the formation of strategies. The Canadian Young Offenders Act (YOA) is one such strategy, discourse, or new power-knowledge relationship.

CHAPTER VI:

SUMMARY AND CONCLUSIONS

The YOA is a strategy to control deviancy, rooted in discourses and practices of crime control. A shift in the discourse of crime control, to reduce collectivism, has had a significant effect on privatization as a mode of production. The process of creating law is structurally related to labour and surplus production. By means of the YOA sentences, youth are introduced as a new group of consumers through decarcerative tactics such as alternate measures, family placements, fines and restitution, and by means of carcerative measures, their caregivers have become private producers in the service market. Because the new legal discourse of the YOA is actively supported by the state-social control, it has allowed acceptance of new definitions of crime, victim, and offender. These constructions are socially created and continue to expand through the reformist force of law.

To situate the control of youth crime within the total political economy of capitalist society, I have drawn on many theoretical-empirical and interpretive studies which argue that the law is a social process that attempts to isolate the juvenile from the material conditions of social life. (Clarke, 1985; Cohen, 1985). These studies show growing support for the substantive focus on the historical interaction of economy, ideology and

politics. It is in the historical growth of legal reform as a value within the law, that we have found an enhanced legal control of unemployed youth and those of their numbers who commit crime. Judges construct or deny (ideology), the stratified nature of the young offenders who appear before them in their relations to the political economy. Economics, gender and race relations are not focal to judicial decisions, in their individualistic emphasis, whether the reasoning is social or personal.

Both practices and principles of youth control are processes of creating individual subjects by rationality. The grounds for power-knowledge relations of youth control are established with the practice of surveillance. I have examined the practices of youth control to establish the manoeuvreability within the legal system for degrees and kinds of rational surveillance. Using the JDA and the YOA as different strategies with different tactics for surveillance, I have looked, in particular, at the use of reform reasoning in the process of creating legal practice. The law appears as contingent on its capitalist social relations rather than dialectical. Contingency in law, I have argued, operates within legal formations, dependent on reflecting legal culture by a heuristic process of reasoning. Even if the current form of law is individualistic, different substantive relations of law would follow from a collective form of reasoning. By examining the sociology of law within heuristic reasoning under the YOA, we can see that due process is de-contextualized from class or state

interests. When used to explain crime and social control, non-crime relations of class, age, race and gender are not included in liberal historical analysis. Sociological analysis of economic and political interrelations which includes power relations does examine this structuring within civil society. Within Marxism, these are endemic to the relations of ideology, politics and economy. The importance of forces and relations of production in explaining crime and crime control are of primary importance, but not focal here (Hall et al, 1978; Ratner, 1983; Chambliss, W., 1974). The debate around the relation between law and social control is addressed in this thesis by distinguishing the capitalist content from the form of law.

My analysis of the YOA sees the law first: as a linguistic practice, and discourse as well as ideology of legal reform from a class interest origin. The law protects private property, its ventures and assests (Pashukanis). Bourgeois legalism since the 18th century has sustained a view that the law protects property. Second, as linked to state control, the YOA supports capital's interest directly, by embedding power relations. In the case of the YOA, the legal system enhances the criminalization of unemployed youth, protects established property relations, and encourages privatization of the welfare system. Hence, I use the neologism, state-social control. The absence of race, age and gender in legal argument is a major oversight in the construction of law resulting in an androcentric, ethnocentric and

universalistic viewpoint. The notion of social reasoning embodies these viewpoints. Social reasoning is a form of law implicated in effective administrative control; it is ideological in not accounting for its substantive omissions of non-property relations. Since most youth offenders commit property crimes, their individual relations to the law are covered by legal reasoning since the time of 'social contract' assumptions, and have been reproduced as property relations since the historical creation of 'youth' in the 16th century (Aries, 1962). Relations to the law are now socially constructed in the YOA as a special relation, 'adolescence' (Archambault, 1983). Conflict relations of non-property life-worlds are irrelevant. The Law has an ideological theme. My aim has been to scrutinize the sociology of law to which the judges themselves adhere, by examining the influence of legal reasoning as a political relation.

Under the JDA, the goal of juvenile justice, from 1900-1985, was individualizing treatment and personal reasoning relating to the idealistic conditions of social life. The personal subject was separated from the material conditions of social life and expected to change within an ideal personal identity framework. The form utilized was personal rationality. The focus of the YOA and the latter-day JDA was to return the offender to the community by means of tactics of institutionalization and deinstitutionalization. By universalizing treatment through social reasoning, the YOA remains an individualizing, rationalizing form of social control with a

surveillance goal. There is, again, a separation from the material conditions of social life by means of a selective process: specific offenses, prohibitions, tariffs and legal procedures, and by constructing the judicial subject as a young person in trouble with the law. The juvenile is separated from his or her social place through the construction of evidence or behavioural facts (ideational social history and reputation, rather than material class, age, race, and gender). These social characteristics are weighed within legal reasoning.

Legal reasoning, therefore, is a social process of reform, indifferent to the structural power relations in which the youth and the law are linked. Legal ideology mediates between political, economic and ideological structures. Young offenders, especially recidivists, are often products of the welfare/probation system. As well, they are vulnerable to non-welfare agencies (the lawyers, judges, and police). The reforming strategy of the YOA through its reasoned concern for due process makes it unaware of social and economic realities of the youth associated with their criminal behaviour. Anti-welfarism of the justice and crime control perspectives, and welfarism, both ignore the entrenched political and economic structures surrounding youth. As a system of social control the law criminalizes dependent youth and manages them through principles and practices of rehabilitation, welfare, justice, retribution, deterrence and crime control. "Short, sharp shock" is an addition to the juvenile justice system arsenal.

Under the YOA, coercive control is expanded, although this development is claimed to be rehabilitative. A spectrum of control options have been put in place as a de-escalating control mechanism. The three year sentence, now being raised to five years, is given to these worst offenders, unless they are raised to adult court. For less severe offenses, a set of tariffs is applied. Social reasoning, based upon 'protection of society' and 'legal rights', justifies a prohibative response and restricts young offenders to a punitive-style rehabilitative program.

Heuristics within legal rationality keeps the spirit of the legislative YOA alive by escalating retribution, deterrence, and 'special needs'. In effect, the courts, by interpreting 'special needs of children' as rehabilitation needs, recognize this principle in the YOA. None of the judges stated that as a concept of justice, rehabilitation should be introduced into the principles to clarify the intentions of the legislature to 'offer guidance' to young offenders. Instead, the judges argue that reformative intentions must be consonant with a justice and crime control philosophy at the expense of a rehabilitation philosophy. Under present fiscal and legal administrative conditions, requirements for rehabilitation geared to the offender rather than the offense are deemed irrelevant or of minimal importance.

In the interests of both control and emancipation, legal discourse claims to have recourse to an abstract moral principle:

justice, suggesting universal interests. Justice is applied through two basic forms of legal reasoning as identified in the literature and from our empirical presentations of the judges' legal reasoning. The judges adhered to these two schools of jurisprudence, each of which located justice in an abstraction. In the first, justice is 'discovered' through the jurists' production of sound judgment. Justice is, therefore, 'already there'. Abstract principles and case reasoning discover heuristically the 'judicial subject', defined in terms of rights, access to the law, impersonal but just treatment, and exemption from social background. In the second, sociological method is implemented to reveal a causal relationship. Analytic jurisprudence is what the judges accept as a standard or a priori for their judicial practice of discovery: understanding of principles; case reasoning; and experience of 'correct' application of the law. Sociological jurisprudence locates its reasoning in a posteriori accounts of events and their judicial/social implications. In keeping with the expectations of the sociological movement in law, I have elicited the judges' experience with the YOA and the JDA, as concerning these forms of legal reasoning, as well as their de facto accounts of constraints in the practices of officials and availability of resources.

Advocacy of correct reasoning was promoted to ensure justice and youth rights as a result of the specific practices of the trial, and of appropriate dispositions based on offence tariffs.

The two phases of judicial process, the trial and the sentencing, were separated. By advocating formal legal reasoning, on the one hand, the judges remained faithful to the heuristic practices of law. On the other hand, they criticized the trial process as open to subversion by requiring statistical practices, the operation of court delays and of legal aide system failures. Advocacy of better jurisprudence through modifications of the YOA, were suggested as solutions. However, these were ad hoc, regarding longer sentences as a response to adolescent murderers as a means to 'protect society', and to provide for better use of judges' time. The specific judicial decisions and general judicial practices in the youth courts were defended against abstract rule-guided Courts of Appeal decisions and 'moral panics' created by short-term community concern. The long-term hope of law reform through proper reasoning remained unchallenged.

The form of the law is not a determinate structure. Judical interpretation can become philosophical hermeneutics when it is linked to beliefs about the nature of interpretation, rather than with various techniques and the shortcomings of actual legal interpretation. That is, the legal interpretive form might be used to mediate (and aid in creating) structures for community conflict resolution. If the form of reasoning is an interpretive syllogism, its rationality can be used more broadly as a mediation tool for community change purposes, rather than merely for justice, welfare and crime control.

For those judges who subscribed to the law reform movement, pessimism stemmed from poor resources, the limits of welfare supervision, and wrongful interpretation or deliberate distortion of their judgments by correctional officials. Advocacy of delinquency legislation in the YOA was approved. However, if closely tied to the Charter of Rights, the YOA was thought to be overly legalistic. As a response to adolescent murderers, rapists, and apparently incorrigible offenders, the YOA judges call for tighter control, as a means to 'protect society'. The use of this principle has been given wider ecope in the expectation of a deterrent effect. For the remainder of young offenders before the court, there were no clear definitions of rehabilitation, except disciplinary supervision and moral reform. Law reform for disciplinary purposes was regarded as appropriate and termed 'rehabilitative'. The failures of law reform in not addressing inequalities of gender, class, and age were circumvented by jettisoning the parens patriae concept. The paternalistic practices of the Courts and of legislation attempting to address these structural inequalities were considered to be inappropriate concerns for delinquency control legislation.

The issue of collective against individualizing approaches to change, needs, firstly, a philosophical approach to the individual-social paradox. (In the last chapter, I gave a theoretical basis adopted from Foucault, as a research guiding directive.) Secondly,

it requires resolution of the distinction between practical and legal reasoning, but situated within a materialist structure, not in an individual ideational dimension. Underscoring 'rehabilitation' as an ideal concept in a modified YOA, would not be effective, since the grounds for this assumptive ideal are not based in power-knowledge relations. In contrast to opposing 'justice' and 'welfare', we need to locate, criticize and implement the processes of experiential, practical reasoning regarding our expectations for the use of material resources and quality of social life. Thirdly. We need to restructure social relations in order to derationalize and deconstruct a prevailing social control emphasis on 'pathological' interpretations of crime.

The relationship between the law and state social control is seen as a tool for the legitimation of the struggle for youth rights in the 60's period of reform. This can be assessed as either a gain or loss. The increasing use of incarceration and increasing control of youth suggest a loss. Advocacy of legislative change is insufficient. The sociology of reformism with its emphasis on practices and principles (power-knowledge relations) suggests that social control is expanding through ideological tactics of decarceration and carceration, which have a net-widening effect in replacing community-based options (Cohen, 1985). Under the JDA, recidivists were not so controlled by the mechanisms of legal reformism. Large numbers of youth offenders escaped the legal network. When the new forces of legal reformism

met in the political arena, the YOA developed a strategy to plug these holes in the carcernal network.

The strategic result of legal-administrative policies promoted by the youth court judges is grounded in a Canadian adversarial, managerial culture. Youth court judges use their term 'legal culture'. I have used this concept for its heuristic and historiographic implications. Inquiry through the social sciences has taken an 'interpretive turn' (Rabinow and Sullivan, 1979:1). There is no longer a positivist taboo against merging ethical concerns with description. The sociologist does not need to approach the real subject in a value-free way. By collecting both descriptive facts and evaluative historical-hermeneutic material, I presented the judges' method as heuristic reasoning. Heuristic action, or knowledge of good action and judgment in a context which is historical and cultural, is holistic. But action is nevertheless separated from discourse, because individuals do not have the same starting point. The problem of individualism, rather than of the concrete, practical subject, is not surpassed, or decentered. Within a theory of rationality it is thought possible to transcend social location. But there are problems within hermeneutics, relating to beliefs about interpretation as revealing the world. By grounding action in discourse and discursive practices, using Foucauldian lines of connection, I have located cultural 'traces' in the YOA and in its application, not simply for their variety and texture, as hermeneutics prescribes. My analysis

seeks to describe reasoning itself as a cultural/historical practice. The key to the differences between Habermas' and Gadamer's interpretive turn and Foucault's understanding of the present, "lies in a theory of rationality or a geneology of rational practices" (Rabinow and Sullivan, 1987:25).

Habermas supports a communicative action system, which does decenter the individual subject. He supports a theoretical practice for social movements and increased unity of subjects; he moves from individual ego-competencies to social agreements. His work could be used to asses the emancipatory effect of the law reform movement, as a communicative action movement, for example. I disagree with his method rather than his goals. By locating ideal speech a priori in rationality, the individual is emphasized over the collective. Using Foucault's work, I aimed to look at collective rational practices. Within the YOA and the criminal justice system I looked at the heuristic theme of law as a collective practice. Within this legal form, 'justice' fails because individual rationality surplants collective rationality. Although an interpretive syllogism uses a rational method, it is available to the law for non-individualistic case reasoning.

The criminal justice system with its ideology of youth crime control, can be seen as part of the state's attempt to supervise, atomize, and train the labouring or unemployed youth. Crime control can also be part of the structural affinities of rational

cultural relations. (Willis, 1977, discusses schooling as a structure-agent relation of learning to enter the labouring class). In the context of Canadian culture, crime control has been largely accepted. Using Foucault's conceptual domain, the discourse of the YOA is built upon a disciplinary social body, which uses justice and crime control strategies.

By assessing the formations of resistance, might we see the possibilities of counterpower? The analysis of communication as a form of resistance is focal in assessing the impact of the YOA. From an emancipatory theory, I disagree with Foucault that there is no construal of counterpower in the notion of 'resistances'. Power might be defined as the power of language projected into domains of action. These domains are mediated by social structures. If the motive source for power is bodily capacities, power is mediated by communication in the form of discourses (knowledge-power relations); the result is again mediation of social structures and leads to social action. Understanding the construction of groups encompasses the self-reflexivity of social action, but creates a problem in its own right. Philosophical hermeneutics relates to beliefs, which though related to practices, is not reflexive of its grounding in power-knowledge relations.

As I understand Foucault, state interests are contingent on political-ideological formations of power-knowledge relationships. I criticized the discourses directing the claim that the legal

system is separable from state strategies. Jurisprudence claims formal practices. Since legal focus is moral and procedural, discourses of a legal formation claim to be protective of youths' interests and rights throughout their sojourn in the legal system. The guiding thread informing the thesis narrative of the replacement of the JDA with the YOA is the intentional formation of discourses. To ground intention, I have examined social and personal reasoning. These forms of reasoning are based in power and knowledge relations, intersecting as rational 'discourses'. In the YOA, four legal discourses are manipulated: welfare, justice, crime control, and community change. State strategies are the resulting terminal pattern of these discourses. Jurists are implicated through discourses by their practices of reason and judgement (legal-practical rationality), by their use of other lines of discourses that tend to normalize youths, or by the constraints on the legal/administrative hierarchy. In contrast, as an alternative power relations, discourse ethics as communication uses critique, rhetorics and aesthetics, not only rationality, in a communicative action system with a goal of overcoming coercion and repression.

The foregoing argument suggests that discourses are written into the normative structures of the 'social'. Youth between the years 12 and 18, and judges, who interpret the act, make a point of intersection of many lines of discourse. These lines constitute a social location into which the offender and the judge are 'thrown'.

The notion of the openness of the location stems from Heidegger. Yet, there is no open location that is free from its grounding in power. From these ontological locations, understandings are produced that fuse with contingent understandings of others within institutions: education, family, law and economy. Using Foucault's analytics and Gadamer's hermeneutics, as a way of fusing interpretive horizons, I constructed a grid of interpretations of judgments and acts of law regarding youth, turning back to the YOA, and to the legal-/administrative practices of state-social control. The limitations of state strategies come in the form of resistances that can take the shape of a counter-grid. Counter-power is not based on communicatively shared rational convictions, as Habermas argues. If power/knowledge relations have antagonisms in current legal discourses, the shape of the grid would be transformed by use of the collective power of community change structures. The concept of 'emancipatory power' suggested here is conceptualized as collective discourses. It begins from points that fuse into tactics. There are no priorities within judicial reasoning for discursive, nondiscursive practices of communication regarding collective structures. In fact, there may well be such discourses already in place. Foucault interprets disciplinary power as a power that produces civil society, rather than a civil society mediated by political, ideological, and economic processes. Is disciplinary power the prime mover?

Insofar as there is no total, rational moral consensus, (MacIntyre, 1984), rhetorics of persuasion are used to solve issues of justice, but do not allow the "truth" of contesting pluralities. What touches the heart (what comes from experience) is what comes to be true. In law, judges interpret the world regarding their sense of the love of justice (as well as of pride, honour, courage, and pity). Adding to 'emotivism' is their sense of constraints from judgments, statutes and other social contingencies as the realization of their sense of a just decision. Emotivism is the doctrine that:

> all evaluative judgments and more specifically all moral judgements are nothing but expressions of preference, expressions of attitude or feelings, insofar as they are moral or evaluative in character. (A. MacIntyre, 1985:12)

Language signifies a 'form of life' that shows us how to go about the world (Wittgenstein, 1958). Without addressing the question of how expression, emotion, holism, action and community are interrelated, Charles Taylor, in an address given at UBC last year, argued that language use is constitutive of these characteristics in producing the specificity of signs.

Unlike Habermas' communicative action system, the communicative life-world is not something imposed reflexively by consciousness, but is given in the cultural experience itself as the 'understanding' of the other person (the youth offender) from a certain social location. In this thesis, I examined the specificity of location as grounded in power-knowledge relations. If rational moral grounds offer possibilities for reconstruction,

as MacIntyre argues, where does morality come from? If morality, is not grounded in rationality, then we are left with emotivism (MacIntrye,1984). In the juvenile justice system, there is no form of participatory communication that allows for rational consideration of the ethics of all contending viewpoints. An alternative starting point would be found within theoretical-empirical studies of rational collective structures. Sociologists could be engaged to study alternative dispute resolution processes in groups related to youth, especially those with a socialization-education component, such as Parent-Teachers Associations. Empirical/theoretical studies of legality in the creation of law and dispute resolution (endemic to social formations) is an important research direction.

As an outcome of the justice system in place, morality is seen as embedded in the constructions of action by rational individuals. But we could empower decentralized, community bodies to work with youth and rework the notion of rationality to include experiences of lay people, 'therapists', as well as of youth assigned to particular groups. Voluntarism remains an issue, but one that can be addressed in dialogue; coercion disappears. The assumptive ideal of jurisprudence is that by referring to its own first principles of justice, and by its method, it can rationally reconstruct the intentions of individuals. Habermas states that jurisprudence has assumed the universal rational foundations of legal domination (Habermas, 1973:98). As he argues, legal

legitimation is established through procedure without going back to the formal conditions for the moral - practical justification of legal norms. The condition of legality assumes that the normative order must be established positively by belief in legality, rather than on grounds of principle. However, normative validity remains latent and does not explicitly enter into power relations. These can be deconstructed in the process of socially constructing 'right' action, rather than 'truth'.

To understand the young offender as a male or female in a particular cultural context is to recognize that a relationship ('therapist'-young offender) is not to be defined in terms of technical means and ends stategy. When the relationship of those surrounding the young offender are dialogical, we apply power-knowledge relations originating in contexts that empower the young offender and challenge existing knowledge. 'Correcting' the young offender is the task of everyone around the young person -- professionals, volunteers, concerned friends and peers who help each other in difficulties around issues related to our own lives. These issues affect not only the immediately concerned individuals but also the communities in which we all live. We engage in a co-investigation of reality, seeking historical practices and personal interpretations, including the effects of one's actions upon this reality.

Even if coercion is a short-term strategy, there are long-term effects from the new YOA discourse. In the new practical reasoning, normative law is joined to normalizing discipline, which has the effect of net-widening control in the public-private domain to enhance the power of law. As a form, law mediates between social structures and formations (work, citizenship and family). It is not an autonomous apparatus, nor an instrument of capital in the abstract. But there are other available forms of mediation, within the law, in concrete Canadian political, economic and ideological relations.

Analysis of social or personal forms of law and transformation in reasoning is limited to the structural contradictions within capital relating to juvenile care and control. Personal or social forms of care and control are the inevitable result of neo-classical social discourse, an unstable dominant ideology. The interpretive syllogism within the law as 'legal reasoning' is an open formation. Pared of neo-classical content, the legal syllogism is available to collective minor and major premises of non-normalizing discipline, if based on a common experience within local communities. The modus operandi of communal law is contingency and a heuristic discourse practice.

BIBLIOGRAPHY

Abercrombie, N and B.S. Turner
"The dominant ideology thesis" in British Journal of Sociology, vol.29,no.2. pp149-170. 1978.

Aleguire, David
"Runaway Youth in a Suburban Community: A Study of Social Policies Affecting Youthful Home-Leaving". Vancouver. Unpublished PhD dissertation. UBC. 1985.

Althusser, Louis
"Ideology and Ideological State Apparatuses" in Lenin and Philosophy and other Essays. London. New Left Books. 1971.

Alvi, Shahid
"Realistic Crime Prevention Strategies through Alternative Measures for Youth" in The Administration of Justice, (ed) Dawn H. Currie and Brian D. Maclean. Social Research Unit, Dept. of Sociology, U. of Saskatchewan, Saskatoon. 1986.

Andenaes, Johannes
Punishment and Deterrence. Ann Arbor. The University of Michigan Press. 1974.

Archambault, O.
"The Young Offenders Act: Philosophy and Principles" in Provincial Judges Journal, 7(2)1-20. 1980.

Archer, Margaret S.
"Morphogenesis versus structuration: on combining structure and action" in British Journal of Sociology, vol.33,no.4 (Dec.). 1982.

Arendt, Hannah
The Human Condition. Chicago. The University of Chicago Press. 1958.

Alford, Robert R. and Roger Friedland
Powers of Theory: Capitalism, the State, and Democracy. Cambridge. Cambridge U. Press. 1985.

Bala, N and H. Lilles
Young Offenders Service. London, Ont. Butterworths. 1986.

Bala, N. and H. Lilles
The Young Offenders Act Annotated. Don Mills, Ont. Richard de Boo. 1984.

Bar-Hillel, Y.
"Habermas' hermeneutic philosophy of language" in Synthese. vol.26. Dordrecht, Holland, D. Reidel Publ. Co. pp1-12. 1974.

Barrett, Michele and Mary McIntosh
The Anti-Social Family. London. Verson Editions/NLB. 1982.

Barnes, Barry and David Bloor
"Relativism, Rationalism and the Sociology of Knowledge" in Rationality and Relativism. (eds) Martin Hollis and Steven Lukes. Basil Blackwell. Oxford. 1982.

Baxter, Hugh
"System and life-world in Habermas's Theory of Communicative Action". Theory & Society. 16:39-86. 1987.

Bean, Philip
Punishment: A Philosophical and Criminological Inquiry. Oxford. Martin Robertson. 1981.

Bell, Daniel
" The Turn to Interpretation: An Introduction." Partisan Review. 51,2,Spr., pp215-219. 1984.

Berger, Peter and Thomas Luckmann
The Social Construction of Reality: A Treatise in the Sociology of Knowledge. England. Harmondsworth. 1967.

Bernstein, Richard
The Restructuring of Social and Political Theory. University of Pennsylvania Press. 1976.

Bourdieu, Pierre and Jean-Claude Passeron
Reproduction in Education, Society and Culture. transl. Richard Nice. London. Sage Publications. 1977.

Bowles, Samuel and H. Gintes
Schooling in Capitalist America. New York. Basic Books. 1976.

Binder, Arnold and Gilbert Geis
"Ad Populum Argumentation in Criminology: Juvenile Diversion as Rhetoric." Crime and Delinquency. vol.30,no.2,April. pp.309-333. 1984.

Broadie, Alexander
"The Practical Syllogism" in Analysis, 20, pp26-28. 1968-69.

Brannigen, Auguste
"Moral Panic and Rationality in Criminal Law Reform " in Law and Society: A Critical Perspective. Caputo, T et al. Toronto. Harcourt, Brace and Jovanovich. 1989.

Bulmer, Martin
The Uses of Social Research in Public Policy-Making. London. George Allen and Unwin. 1982.

Callahan, D and Bruce Jennings E.
Ethics, the Sociological Sciences, and Policy Analysis. New York. Plenum Press. 1983.

Caputo, T.C. and S. Goldenberg
"Addressing the Problem of Disenfranchised Youth in Canada: Past Responses and Future Strategies" in Journal of Human Justice, January, ch. 8. 1990

Caputo, T. and Sheldon Goldenberg
"Young People and the Law: A Consideration of Luddite and Utopian Responses" in The Administration of Justice (ed) Dawn Currie and Brian D. MacLean. Saskatchewan. Social Research Unit. 1986.

Carnoy, Martin
State and Political Theory. Princeton, N.J. Princeton U. Press. 1984.

Catton, K.
"Models of Procedure and the Juvenile Courts". Criminal Law Quarterly. 18:181-201. 1975/76.

Catton, Katherine and Jeffery S. Leon
"Legal Representation and the Proposed Young Persons in Conflict with the Law Act" in Osgoode Hall Law Review Journal. vol.15 (1). pp107-135. 1977.

Chambliss, William J.
Law, Order, and Power. Reading, Mass. Addison-Westley Publ. 1982.

Chambliss, William J.
"The Criminalization of Conduct", in J. Lawrence Ross (ed), Law and Deviance. Beverley Hill. Sage. pp45-64. 1981

Christie, Nils
"Conflicts as Property". The British Journal of Criminology. vol.17,Jan. pp1-15. 1977.

Clarke, John
"Whose Justice? The Politics of Juvenile Control" in International Journal of the Sociology of Law, 13, pp407=421. 1985

Cohen, Stanley
Visions of Social Control: Crime, Punishment, and Classification. Polity Press. Cambridge. 1985.

Corrada, R. R. & A. Markwart
"The Prices of Rights and Responsibilities: An Examination of the Impacts of The Young Offenders Act in British Columbia" in Canadian Journal of Family Law. vol.7, pp.93-115. 1988

Currie, Dawn H and Brian D. MacLean
(ed.) The Administration of Justice. Saskatoon. Social Research Unit. 1986.

Decker, Scott H.
Juvenile Justic Policy: Analyzing Trends and Outcome. Beverley Hills, California. Sage Publications. 1984.

Descartes, Rene
Discourse on Method. Great Books Foundations. 1952

Dews, Peter (ed)
Juergen Habermas: Autonomy and Solidarity. Interviews. New Left Books. (Verso). London. 1986.

Diamond, Irene
(ed) Families, Politics and Public Policy. New York and London. Longman. 1983.

Dineen, F. P.
An Introduction to General Linguistics. New York: Holt, Rinehart and Winston, Inc. 1967.

Dixon, M.
"World Capitalist Crisis and the Rise of the Right" in Contemporary Marxism. (4)Winter). 1981

Donzelot, Jacques
The Policing of Families. New York. Pantheon Books. 1979.

Dreyfus, Hubert and Paul Rabinow
Michel Foucault: Beyond Structuralism and Hermeneutics. The University of Chicago Press. Chicago. 1982.

Dupre,Louis
"Marx's Critique of Culture and its Interpretations" in The Review of Metaphysics. vol 34(Sept.). pp91-121. 1986.

Dupre, Louis
Marx's Social Critique of Culture. New Haven. Yale University Press. 1983.

Edelman, Murray
"The political Language of the Helping Professions". The Sociology of Mental Illness. O. Grusky and Melvin Pollner. New York. Holt, Rinehart and Winston. 1981.

Empey, P.
Juvenile Justice: The Progressive Legacy and Current Reforms. Charlottesville, Va. Press of Virginia. 1979.

Empey, P.
"Revolution and Counterrevelution: Current Trends in Juvenile Justice," in D. Schior and D.H. Kelly (ed) Critical Issues in Juvenile Delinquency. Lexington, Mass.: D.C. Heath, pp157-181.

Ewing, A. C.
The Morality of Punishment: WIth Some Suggestions for a General Theory of Ethics. Montclair, N.J. Patterson Smith. 1970.

Evans, Peter B., Dietrick Rueschmeyer and Theda Skocpol
Bringing the State Back In. Cambridge. Cambridge U. Press. 1985.

Ezorsky, Gertrude (ed.)
Philosophical Perspectives on Punishment. Albany. State University of New York Press. 1972.

Faust, F.L. and B.J. Brantingham
Juvenile Justice Philosophy. St. Paul, Minn.:West Ltd. 1974.

Faust, F.L. and B.J. Brantingham
"A Perspective on the Dilemma of Free Will and Determinism in Juvenile Justice." Juvenile Justice, 25:54-60. 1974.

Fine, Bob
Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques. London. Pluto Press. 1984.

Finkel, Alvin
"Origins of the Welfare State in Canada" Leo Panitch (ed) The Canadian State: Political Economy and Political Power. Toronto. University of Toronto Press. pp344-370. 1977.

Fitz, John
"The Child as a Legal Subject" in R. Dale et al. Education and the State. vol II: Politics, Patriarchy, and Practice. Hampshire, Sussex, England. The Falmer Press. 1981.

Foucault, Michel
"Omnes et Singulatim" in S. McMurrin (ed). Tanner lectures on Human Values. Cambridge U. Press. vol.2. 1981.

Foucault, Michel
Power and Knowledge: Selected Interviews and Other Writings, 1972-1977. trans., C. Gordon et al. New York. 1980.

Foucault, Michel
Discipline and Punish: The Birth of the Prison. (transl.) A. Sheridan. New York. Vintage Books. 1979.

Foucault, Michel
"What is Enlightenment" in Rabinow, P. and W. M. Sullivan. Interpretive Social Science: A Second Look. Berkeley. University of California Press. 1979.

Foucault, Michel
The History of Sexuality: Volume One, An Introduction. Pantheon Books. New York. 1972.

Foucault, Michel
The Archaelogy of Knowledge and the Discourse on Language. (trans.) A. M. Sheridan Smith. Pantheon Books. New York. 1972.

Foucault, Michel
The Order of Things: An Archaeology of The Human Sciences (ed) R.D. Laing. New York. Vintage Books. 1970.

Fraser, Nancy
"Towards a Discourse Ethic of Solidarity" in Praxis International vol.5,no.4. pp425-429. 1986.

Friedman, Lawrence M.
"History, Social Policy, and Criminal Justice" in Social History and Social Policy. Rothman D.J. and S. Wheeler (eds). New York. Academic Press. 1981.

Gadamer, Hans-Georg
"Hermeneutics and Social Science" in Cultural Hermeneutics. no.2. pp307-390. 1974.

Gadamer, Hans-Georg
Truth and Method. New York. The Seabury Press. 1975

Gadamer, Hans-Georg
"The Problem of Historical Consciousness" in Rabinow, P. and W.M. Sullivan. Interpretive Social Science: A Second Look. Berkeley. U. of California Press. 1979.

Gabor, Peter, I. Greene, P. McCormick
"The Young Offenders Act: The Alberta Court Experience in the First Year." Canadian Journal of Family Law vol.5,#2, (Fall). 1986.

Gerber, Rudolph J. & Patrick D. McAnany. (eds.)
Contemporary Punishment: Views, Explanations, and Justifications. Notre Dame. University of Notre Dame Press. 1972.

Giddens, Anthony
"Ideology and Consciousness" in Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis. Berkeley. U. of California Press. pp165-197. 1979.

Giddens, Anthony
"Structuralism and the Theory of the Subject" in Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis. Berkeley, U. of California Press. 1979.

Giddens, Anthony
"Reason without Revolution? Habermas's Theorie Des Kommunikativen Handelns" in Praxis International. vol.2. 1982/3.

Gilman, David
"How to Retain Jurisdiction over Status Offenses" in Crime and Delinquency. vol.22. pp48-51. 1976.

Godelier, Maurice
"Infrastructures, Societies and History." New Left Review, no.112: 84-96. 1978.

Goldmann, Lucien
The Philosophy of the Enlightenment: The Christian Burgess and the Enlightenment. (trans.) H. Maas. London. Routledge and Kegan Paul. 1968.

Gordon, C.
"The Soul of the Citizen: Max Weber and Michel Foucault on Rationality and Government," in Lash, S. and Whimster, S. (eds), Max Weber, Rationality and Modernity. London. Allen & Unwin. pp293-316. 1987.

Gough, Ian
The Political Economy of the Welfare State. London. The MacMillan Press. 1979

Gramsci, Antonio
Selections from the Prison Notebooks. London. London and Wishart. 1971

Gross, Hyman & Andrew von Hirsch. (eds.)
Sentencing. New York/Oxford. Oxford University Press. 1981

Grupp, Stanley E. (ed.)
Theories of Punishment. Bloomington. Indiana University Press. 1971.

Habermas, Juergen
Knowledge and Human Interests. transl. Jeremy J. Shapiro. Boston. Beacon Press. 1971.

Habermas, Juergen
Legitimation Crisis. Boston. Beacon Press. 1973

Habermas, Juergen
Communication and the Evolution of Society. trans. T. McCarthy, Boston Beacon Press. 1976.

Habermas, Juergen
The Theory of Communicative Action. Vol. 1 Reason and the Rationalization of Society. transl. Thomas McCarthy. Boston. Beacon Press. 1981.

Habermas, Juergen
Rationalization, Reification and the Colonization of the Life-World. trans. Ray Morrow. Vancouver. Unpublished paper. 1983.

Habermas, Juergen
"The Geneological Writing of History: On Some Aporias in Foucault's Theory of Power. C.J. of Political and Social Theory. vol x,no.1-2. 1986.

Hackler, J. and A. Garrapon
"Stealing Conflicts in Juvenile Justice: Contrasting France and Canada" in Canadian Journal of Law and Society. vol.2, pp141-151. 1987.

Hagan, John
Modern Criminology: Crime, Criminal Behavior, and its Control. Toronto. McGraw-Hill. 1985

Hall, Stuart, et al.
Policing the Crisis. London. MacMillan. 1978.

Hall, Stuart et al.
On Ideology. Centre for Contemporary Cultural Studies. London. Hutchinson. U. of Birmingham. 1977.

Hall, Stuart
"Re-thinking the Base and Superstructure Metaphor" in J. Bloomfield (ed.) Class, Hegemony, and Party. London. Lawrence and Wishart. 1977.

Hall, Stuart
"Signification, Representation, Ideology: Althusser and the Post-Structuralists Debates" in Critical Studies in Mass Communication. vol. 2, pp.91-114. 1985.

Ham, Christopher and Michael Hill
The Policy Process in the Modern Capitalist State. Sussex. Harvester Press. 1984.

Handelman, Don and Elliott Leyton
Bureaucracy and Worldview: Studies in the Logic of Official Interpretation. Memorial U. of Newfoundland. 1978.

Hanson, Jim
"Youth Confessions: Sec. 56 of the YOA". Canadian Journal of Family Law. vol.6,Fall #2. 1987.

Harris, Peter
Young Offenders Manual. Aurora, Ont.. Canada Law Book. Release No.13, Mar. 1988.

Harris, R. and D. Webb
Welfare, Power, and Juvenile Justice. Havistock Press. London. 1986.

Havemann, Paul
"From Child Saving to Child Blaming: The Political Economy of the 1984 Young Offender's Act." Regina, Sask. U. of Regina School of Human Justice. mimeo. 1985.

Havemann, Paul
"Crisis Justice for Youth: Making The Young Offenders Act and the Discourse of Penality." in Journal of Human Justice. January. 1990

Hearn, Frank
Reason and Freedom in Sociological Thought. Boston. Allen & Unwin. 1985.

Hekman, S.
Hermeneutics and the Sociology of Knowledge. Indiana. University of Notre Dame Press. 1986.

Held, David et al.
States and Societies. Oxford. Martin Robertson, in assoc. with The Open University. 1983.

Heller, Agnes
"Sociology as the Defitishisation of Modernity" in International Sociology. vo.2,no.4. 1987.

Hewitt, Martin
"Bio-Politics and Social Policy: Foucault's Account of Welfare." Theory, Culture, and Society: Explorations in Critical Social Science. vol.2,no.1. pp67-85. 1983.

Hilgendorf, Linden
"Advocacy and Expertise in the Juvenile Court" in Geach, H. & Szwed E. (eds). Providing Civil Justice for Children. London. Edward Arnold. 1983

Hogarth, John
Sentencing as a Human Process. Toronto. Toronto U. Press. 1971

Hollis, Martin and Steven Lukes
Rationality and Relativism. Oxford. Basil Blaskwell. 1982.

Horton, John
"Order and Conflict Theories of Social Problems as Competing Ideologies." in The Sociology of Knowledge: A Reader. Ed. J.E.Curtis and J.W. Petras. New York. Praeger. pp605-623. 1970.

Hospers, John
Human Conduct: Problems of Ethics. New York. Harcourt Brace Jovanovich, Inc. 1972.

Hougate, L.D.
The Child and the State. Baltimore. John Hopkins University Press. 1980

Howard, Roy J.
Three Faces of Hermeneutics: An Introduction to Current Theories of Understanding. Berkeley. U. of California Press. 1982.

Hoy, David C.
The Critical Circle: Literature, History and Philosophical Hermeneutics. Berkeley: University of California Press. 1982.

Hudson, Barbara
Justice through Punishment: A Critique of the 'Justice' Model of Corrections. Hampshire. MacMillan Education. 1987.

Hunt, Alan
The Sociological Movement in Law. London. The MacMillan Press. 1978

Ingram, David
"Foucault and the Frankfurt School: A Discourse on Nietzsche, Power and Knowledge" in Praxis International. vol.,6,no.3. 1986.

Jessop, Bob
The Capitalist State: Marxist Theories and Methods. Oxford. Martin Robertson. 1982.

Jones, R.A.
"The New History of Sociology" in American Review of Sociology, vol.9. pp447-469. 1983.

Johnson, Richard
"Histories of Cultre/Theories of Ideology: Notes on an Impasse." in Michele Barrett, Philip Corrigan, Annette Kuhn and Janet Wolff (eds). Ideology and Cultural Production. London. Croon Holm, pp49-77. 1979.

Kant, Emanuel
Grounding for the Metaphysics of Morals. (trans.)James W. Ellington. Indianapolis. Haskett Publ. Co. 1981.

Kuhn, T.
The Structure of Scientific Revolutions. U. of Chicago Press. 1970.

Laing, R.D.
The Divided Self. New York. Pantheon Books. 1960.

Layder, Derek
"Problems in Accounting for the Individual in Marxist-rationalist Theoretical Discourse." in British Journal of Sociology, vol.30,2,June. pp149-163. 1979.

Lemert, Edwin M.
"Diversion in Juvenile Justice: What Hath Been Wrought." Journal of Research in Crime and Delinquency. Jan. 1981

Leschied, A. W. & Peter G. Jaffe
"Implications of the YOA in Modifying the Juvenile Justice System: Some Early Trends" in Bala, N. & H. Lilles (ed). Young Offenders Service. London, Ont. Butterworths. 1986.

Louch, Alfred
"The Very Idea of a Social Science" in Inquiry, 6. pp273-286 1963.

Luke, Timothy W.
"The State and Family under Advanced Capitalism." New Political Science. (issue #7)

Lundman, Richard
"Will Diversion Reduce Recidivism" in Crime and Delinquency. October. 1976.

McCarthy, Thomas
The Critical Theory of Juergen Habermas. Cambridge, Mass. The MIT Press. 1982.

McConville, Brian and Bala, N.
"Childrens' Rights: For or Against Treatment." Canada's Mental Health. vol.33,no.4, Dec. pp2-5. 1985.

McIntosh, Mary
"The family, regulation and the public sphere" in McLennan et al. State and Society in Contemporary Britain: A Critical Introduction. Cambridge. Polity Press. pp204-240. 1984.

McLennan, G., David Held, and Stuart Hall
State and Society in Contemporary Britain: A Critical Introduction. Cambridge. Polity Press. 1984.

McLennan, G.,V. Molina and R. Peters
"Althusser's Theory of Ideology" in On Ideology. Centre for Contemporary Cultural Studies. Hutchinson. U. of Birmingham. 1977.

MacIntyre, Alisdair
After Virtue: A Study in Moral Theory. London. Duckworth. 1984

MacLean, B.D.
The Political Economy of Crime: Readings for a Critical Criminology. Prentice-Hall Canada Ltd. 1986 Marshall, T.H. Social Policy in the Twentieth Century. London. Hutchinson University Library. 1965.

Marcuse, H.
One Dimensional Man. Boston. Beacon Press. 1964.

Merleau-Ponty, M.
The Primacy of Perception and Other Essays in Phenomenological Psychology, the Philosophy of Art, History, and Politics. (ed., with an introduction by James M. Edie). Northwestern University Press. 1964.

Melton, G.B.
"Children's Rights: The Foundation of Child Advocacy" in Melton, G.B. Child Advocacy. New York. Plenum Press. 1983

Mills, C. Wright
"Situated Action and Vocabularies of Motive" in Power, Politics and People: The Collected Essays of C. Wright Mills. ed. I. L. Horowitz. New York. Oxford U. Press. 1963.

Misgeld, Dieter
"Communication and Societal Rationalization: a Review Essay of Juergen Habermas's Theorie des Kommunikativen Handelns" in Canadian Journal of Sociology. vol.8,no.4. 1983.

Misgeld, Dieter
"Critical Theory and Hermeneutics: The Debate between Habermas and Gadamer" in Critical Theory. (ed)John O'Neil. New York. Seabury Press. 1976.

Mishler, Elliot G.
Research Interviewing: Context and Narrative. Harvard U. Press. Cambridge, Massachusetts. 1986.

Moyer, Sharon
Diversion from the Juvenile Justice System and its Impact on Children: A Review of the Literature. Ottawa. Minister of Supply and Services. 1980

Navarro, Vincente
Class Struggle, the State and Medicine: An Historical and Contemporary Analysis of the Medical Sector in Great Britain. New York. Prodist. 1978.

Nejelski, Paul
"Diversion: The Promise and Danger." in Crime and Delinquency. vol.22. October. 1976.

Olson, Paul
"Laboring to Learn: How Working Theory Gets Down to Classrooms and Kids" in Interchange. vol.12,no.2-3. pp252-268. 1981.

O'Malley, P
"Theories of Structure Versus Causal Determination: Accounting for Legislative Change in Capitalist Societies" in Legislation and Society in Australia. Sydney. George Allen and Unwin. 1980.

O'Neill, John
On Critical Theory. New York. The Seabury Press. 1976.

Palmer, Richard E.
Hermeneutics: Interpretation Theory in Dilthey, Schleirmacher, Heidegger and Gadamer. Northwestern U. Press. Evanston. 1969.

Pitkin, Hannah
American Political Review. 60. 1966.

Platt, Anthony
The Child Savers: The Invention of Delinquency. 2nd edition, enlarged. Chicago. U. of Chicago Press. 1977.

Polk, Kenneth
"Juvenile Diversion: A Look at the Record in Crime and Delinquency. vol. 30,no.4. pp648-659. 1984.

Poster, Mark
Foucault, Marxism, and History: Mode of Production vs. Mode of Information. Polity Press. Cambridge. 1984.

Pound, Roscoe
"The Need of a Sociological Jurisprudence" in 19 Green Bag,607. 1910.

Pound, Roscoe
Outline of Lectures on Jurisprudence. Cambridge. Harvard U. Press. 1943.

Pound, Roscoe
"The Limits of Effective Action" in Crime and Delinquency. no. 10. pp490-504. 1964.

Putnam, Hilary
"After Empiricism" in Post-Analytic Philosophy. ed. John Rajchman and Cornel West. New York. Columbia U. Press. 1985.

Rabinow, Paul & William M. Sullivan. (eds.)
Interpretive Social Science: A Second Look. Berkeley. University of California Press. 1987.

Radnitzky, Gerard
Contemporary Schools of Metascience. Chicago. Henry Regnery Co. 1973.

Ratner, R. S. and John L. McMullan
"Social Control and the Rise of the 'Exceptional State' in Britain, the U.S., and Canada", in Crime and Social Justice. Summer. 1983.

Reagan, Charles E. and David Stewart (eds)
The Philosophy of Paul Ricoeur: An Anthology of His Work. Beacon Press. Boston. 1978.

Reid, Susan A. and Marge Reitsma-Street
"Assumptions and Implications of New Canadian Legislation for Young Offenders" in Canadian Criminology Forum. vol.7 Fall. pp1-19. 1984.

Reid, Susan A.
"Ideology and the Young Offenders Act." unpublished M.A. Thesis. Department of Criminology. University of Toronto. 1984.

Ricoeur, Paul
Hermeneutics and the Human Sciences. (ed.)John B. Thompson. Cambridge U. Press. Cambridge. 1981.

Robbe-Grillet, Alain
"Order and Disorder" in Critical Inquiry. August, pp1-20. 1977.

Ross, Stephen David
"Foucault's Radical Politics." in Praxis International. vol.5, (no.2),July. pp131-144. 1985.

Rothman, D.
Conscience and Convenience. Boston: Little Brown and Co. 1980.

Runciman, W. G.
Max Weber: Selections in Translation. Cambridge. 1978.

Rusche, George and Otto Kirchheimer
Punishment and Social Structure. New York. Russel and Russel. 1939, 1968.

de Sousa Santos, Boaventura
"On Modes of Production of Law and Social Power" in International Journal of the Sociology of Law. 13, pp299-336. 1985.

Schurmann, Reiner
"On Constituting Oneself an Anarchistic Subject" in Praxis International vol.6, no.3 (Oct.). 1986.

Scull, Andrew
Decarceration: Community Treatment and the Deviant: A Radical View. Englewood Cliffs. NJ.: Prentice-Hall. 1977

Shoemaker, Donald J.
Theories of Delinquency: An Examination of Explanations of Delinquent Behaviour. New York. Oxford U. Press. 1984.

Simpson, Lorenzo C.
"On Habermas and Particularity: Is there Room for Race and Gender on the Glassy Plains of Ideal Discourse?" in Praxis International, vol.6,no.3. 1986.

Smart, Barry
Sociology,Phenomenology, and Marxian Analysis: A Critical Discussion of the Theory and Practice of a Science of Society. London. Routledge and Kegan Paul. 1976.

Smart, Barry
"Foucault, Sociology, and the Problem of Human Agency" in Theory and Society: Renewal and Critique in Social Theory. vol.12, no.2, March. 1982

Smart, Barry
Michel Foucault. Chichester. Ellis Horwood. 1985.

Smith, Trudie F.
"Law Talk: Juveniles' Understanding of Legal Language." Journal of Criminal Justice. vol.13. pp. 339-353. 1985

Speiglman, Richard
"Andrew Scull: Decarceration" in Crime and Social Justice. no.11. Spring-Summer. pp68-70. 1979.

Stapleton, W. Vaughan
In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts. New York. Russell Sage Foundation. 1972

Sutherland, David Earl
"The Factor of Hermeneutics in Habermas's Critical Theory" in Research in Sociology of Knowledge, Sciences and Art. vol.2. pp229-247. 1979.

Taylor, Charles
"The Explanation of Purposive Behavior" in Explanation in the Behavioral Sciences (ed) Robert Borger and Frank Cioffi. Cambridge. Cambridge U. Press. pp49-79. 1970.

Taylor, Charles
Hegel and Modern Society. Cambridge. Cambridge U. Press. 1979.

Taylor, Charles
"Understanding in Human Sciences" in Review of Metaphysics. 34(Sept.), p26. 1980.

Taylor, Ian
Crime, Capitalism and Community: Three Essays in Socialist Criminology. Toronto. Butterworths. 1983

Taylor, Ian, P. Walton and J. Young
The New Criminology: For a Social Theory of Deviance. London. Routledge and Kegan Paul. 1973.

Thompson, E.
Whigs and Hunters: The Origins of the Black Act. London. Penguin Books. 1975

Thompson, E. P.
"The Poverty of Theory or An Orrery of Errors" in The Poverty of Theory and Other Essays. London. Merlin Press. 1978.

Thompson, John B. and David Held (ed)
Habermas: Critical Debates. The MacMillan Press Ltd. London. 1982.

Thompson, John B.
Critical Hermeneutics. Cambridge U. Press. Cambridge. 1981

Thomson, G.M.
"Commentary on the Young Offenders Act" in Provincial Judges Journal. vol.7,no.2. pp27-34. 1983.

Titmuss, Richard M.
Essays on 'The Welfare State'. London. Unwin U. Books. 1958.

Titmuss, Richard M
Social Policy: An Introduction. (ed) Brian Abel-Smith and Kay Titmuss. London. George Allen and Unwin Ltd. 1974.

Tomasic, Roman
"The Sociology of Law" in Current Sociology. London. Sage Publications. vol.33. 1985

Turk, Austin T.
Legal Sanctioning and Social Control. Rockville, Md. The National Institute of Mental Health. 1972.

Urry, John
"The Anatomy of Capitalist Societies: The Economy, Civil Society and the State." in Contemporary Social Theory. (ed) Anthony Giddens.

Ursel, Jane
"The State and the Maintenance of Patriarchy: A Case Study of Family, Labour, and Welfare Legislation in Canada" in Family, Economy and the State. (ed)James Dickinson and Bob Russell. Garamond Press. Toronto. 1986.

van den Haag, Ernest.
Punishing Criminals: Concerning A Very Old and Painful Question. New York. Basic Books. 1975.

Walzer, Michael
Interpretation and Social Criticism. Harvard University Press. Cambridge, Mass. 1987.

Wardell, Bill
"The Young Offenders' Act: A report Card ,1984-1986" in The Administration of Justice. ed. Dawn Currie and Brian D.MacLean. Saskatoon, Saskatchewan. Social Research Unit. 1986.

Watters, John G.
Reviews of the Young Offenders Act: A Bibliography. User Report to Solicitor General, Canada. 1987.

Weiler, R. and Ward, B.
"A National Overview of the Implementation of YOA: one year later" in Perception. vol.8(5). 1985

Wellmer, Albrecht
"Communications and Emancipation: Reflections on the Linguistic Turn in Critical Theory" in John O' Neill Critical Theory. New York. Seabury Press. 1976.

West, W. Gordon
"Education, Moral Reproduction, and the State: Some Implications of Recent European State Theories for Canadian Educational Policy Analysis" in Interchange vol.12,no.2-3. 1981.

West, W. Gordon
Young Offenders and the State: A Canadian Perspective on Delinquency. Toronto. Butterworths. 1984.

Wheeler, Stanton
Controlling Delinquents. New York. John Wiley & Sons. 1968.

Willis, Paul E.
Learning to Labour: How Working Class Kids Get Working Class Jobs. Farnborough, Eng. Saxon Rouse. 1977.

Winch, Peter
The Idea of a Social Science and its Relation to Philosophy. London. Routledge and Kegan Paul. 1958.

Wittgenstein, L.
Philosophical Investigations New York. The MacMillan Co. 1958.

Zaretsky, Eli
Capitalism, The Family, and Personal Life. New York. Harper Colophon Books. 1976

Zimmerman, Don H. & Melvin Poliner
"The Everyday World as a Phenomenon." in Understanding Everyday Life. (ed.) J. D. Douglas. London. Routledge and Kegan Paul. pp80-103. 1971

Zimmerman, Don H. and D. Lawrence Wieder
"Ethnomethodology and the Problem of Order: Comment on Denzin." in Understanding Everyday Life. (ed.) J.D. Douglas. pp285-298. London. Routledge and K. Paul. 1971.

APPENDIX A

INTERVIEW SCHEDULE

I. INTRODUCTION:

Hello - thank you for agreeing to meet with me. I'm grateful for the time that you are giving me.

I have had some experience working in the social welfare and justice systems using the Family and Child Service Act and the former Protection of Children Act. My interest currently is in the practical and philosophical problems you work with under the YOA. The aim of the interview will be to elicit some of the common understandings of judges who use the Act. My objective in focusing on the interpretations of judges is to learn more about the goals of practical reasoning.

If you agree, I would like to proceed with tape-recording the interview. The machine can be shut off whenever you like, and I will continue to take notes as we talk. Tape-recording will make it easier for me to attend to your remarks, but if you prefer that I not record the interview, I won't. Do you mind if I tape-record the interview?

This form requests your written permission to proceed with the interview, and to tape it.

II. INTERVIEW:

My thesis work seeks to elicit the legal reasoning under the YOA that judges, as the primary interpreters, utilize in their deliberations.

1. How long have you been a youth court judge dealing with delinquents or young offenders? Where? From where? How has your experience as a youth court judge since the advent of the YOA altered or confirmed your assumptions about the dispositions of sentence toward young offenders?

2. a). If you worked with the JDA as well, which of the two acts do you prefer? Explain.

b). Does the Young Offender's Act prevent you from doing what is appropriate in a particular case?

3. a). In your opinion what causes young people to commit crimes?

b). Do you see the Young Offenders Act as identifying or reflecting what you have stated as the reasons /causes for why young people commit crimes? Explain.

4. To which of the policy principles listed in section 3 of the Young Offenders Act, the Declaration of Principles, do you give priority in sentencing?

------make an issue of internal consistency?
------remedy for limitations in consistency?
------how?

5. a). How do you decide which is the dominant sentencing philosophy?

b). When do you feel that the end you have achieved in sentencing is an ideal one?

- interpretation of community values
- balance between "individual rights" and "responsibilities"; indvidualizing criteria; individual balance with society.
- protection of society is dominant under which criteria, when what crimes are involved.

CASE REVIEW

Here is an abstract from a case in the Ontario Family Court in August, 1987. The case is also summarized in the Young Offenders Service (Bala and Lilles, 1987), as applicable to cases for youth under 14. It illustrates some of the constraints on legal decision-making under the YOA.

Hand the following case to the judges on a separate page:

A black youth, aged 13, recently arrived from Jamaica with his father, who has lost interest in him. There are no other immediate relatives in Canada. He was apprehended by the Ministry of Social Services and placed in a group home exclusively for children from the islands. In the pre-sentence report, the youth depicts the youth as functionally illiterate but able to grasp concepts. He appears to be undersocialized in terms of his values, and according to the presiding judge, he presented himself as a youth who is saying "I don't care". He has come from a background where there was no one to care extensively or adequately for him. The youth claims that there are people for him to go to in Jamaica, but the court did not ask for confirmation of this information. While in the group home he "escaped custody" and three times broke into the house next door. On one of these occasions he pulled out a knife and cut a seat. The recommendation of the staff director of this home was that the youth required a period of time in closed custody.

He was convicted of escaping lawful custody and two other offences of break and enter. The youth court judge committed him

to 12 months of secure custody on the charge of escaping custody, and to 12 months of open custody plus six months of probation on the other charges. The secure custodial disposition was imposed for the protection of society and the security of other peoples's property in that the youth was likely to escape from any other place. In a secure setting, the youth could receive help. In an unusual exercise of "judicial notice", the provincial judge recounted his favourable impressions from a visit to places of secure custody, finding them a "superb place" for the youth because at times there is a high staff-to-inmate ratio for educational opportunities, a director who is a trained psychologist, and a positive peer culture system. The duration of secure custody was dictated by: the uncertainty as to the amount of time the youth needed to straighten out; the duration of an academic year; and the relative ease with which the youth could apply to have the duration modified on review.

6. What are the essential facts to consider in this case that ought to guide sentencing?

- doctrine of parens patriae in the YOA - is the welfare model alive and well?
- doctrines of justice and crime control - are they paradigmatic?

7. From this summary, what would you say was the legal reasoning guiding the judge's decision in this case?

- follows carefully the first principles of the Declaration of Principles?
- Is the YOA used instrumentally?

8. Should a different legal principle or principles have been applied? If so, why?

- How do you see the quality of life as a goal within YOA case decisions?
- how does the principle of mens rea apply to youth?
- how relevant in this case?
- Is your main concern in sentencing with the causes of the offense or in correction of the offender
- Is the reasoning based on significance of first principles or on consequentialism?

9. In this case, how does the committal to custody reconcile with the probable need for treatment?

-Do you regard custody as a rehabilitation option, or as a punishment in this case? Why?
-How do you feel about the treatment - containment contradiction?

-Does favouring the "protection of society" principle as against the freedom of the young offender result in your using the custody option rather than other options?
-what do you do with recidivists?
-Is the act to focus on specific or general deterrence?
-What is to be achieved by custody, specifically open and secure custody? What are the dynamics of the care function in custody centres?

10. In general, apart from the legal principles, are there other provisions and relevant considerations that influence your sentencing dispositions? Explain.

- are these provisions sec. 23-27?
- In practice, from looking at sentencing dispositions, it appears that first time offenders are decarcerated into communmity correction programs, including probation rather than referred to treatment or community care supervision.
- Is the YOA used as route for treatment?
- Do you focus on the problem of larger numbers of offenders now requiring processing? Is there a formula?
- Is custody the first step in a progressive reintegration process?
- How effective are the courts as a gateway to life off the streets?
- What do you see as the effect of punishment or of community corrections on youth offenders? Protection of others? Interests of other people in the community?
- Does lack of mechanisms for referral to social services compromise the treatment potentional of the YOA.
- The YOA emphasizes victim input in the proceedings, more so than the JDA. What is a victim as you interpret the YOA?

11. a). We have been discussing the way in which legal decisions in the Youth Court are reached. Have we missed anything? For example, do different judges use different guidelines in reaching their decisions? If so, explain.

-Are legal ratios reached through interpretation of law and of legal cases, knowledge of attitude of the offender, or by discovery of the most appropriate set of principles to apply to the case? Does lateral thinking occur through case application or institutional rationality?

b). Has the emphasis on due process rights and legalism impeded your ability to communicate with the accused, as you did under the JDA?

c). Are you concerned about the disparities in sentencing?

d). Are there any mechanisms for minimizing the disparities between judges in their sentencing philosophy and decision-making with respect to the YOA?

- conferencing; informal meetings with peer judges; reading of case law and literature, especially periodicals.

12. What are the most significant constraints that you face in your deliberations re implementation of the YOA? (institutions, community, economy, appellate courts) How do you respond to those constraints with respect to sentencing youths?.

- Diversion is now formalized
- The majority of young offenders receive dispositions that keep them in their communities, sec20 (1)(a).
- Is it always a good decision to keep youth in their communities?
- Do you feel there are adequate levels of control in the community?
- What do you see as the appropriate level of cooperation between the courts and the community corrections programs?
- Is the social goal for community corrections directed at a respect for property or focus on service?
- Do you give priority to either contingency?

13. Are there any other comments that you have about the YOA which would clarify your estimation of it as a philosophical and practical document?

14. Do you think that the YOA, in terms of sentencing, needs to be changed/modified/amended in any way or ways? If so, how and why?

III. CLOSE OF INTERVIEW:

Thank the judges, ask them to refrain from discussing the interview with any colleagues (at least until the interviewing is completed-- which would be in -----). Let them know that I may wish to call them at some time in the near future in order to clarify a point made during the interview, but that this is not too likely. Emphasize that I will send them an abstract of the completed thesis, and that if they wish to read the entire document, I will be happy to lend them a copy upon request.

APPENDIX B

(*b*) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,

and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act;

"youth court" means a court established or designated by or under an Act of the legislature of a province, or designated by the Governor in Council or the Lieutenant Governor in Council of a province, as a youth court for the purposes of this Act;

"youth court judge" means a person appointed to be a judge of a youth court;

"youth worker" means a person appointed or designated, whether by title of youth worker or probation officer or by any other title, by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate, to perform, either generally or in a specific case, in that province any of the duties or functions of a youth worker under this Act.

Proclamation changing definition of "young person".

(2) The Governor in Council may, at any time prior to April 1, 1985, by proclamation

(*a*) direct that in any province "young person", for the purposes of this Act, means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under sixteen or under seventeen years of age, as the case may be; and

(*b*) revoke any direction made under paragraph (*a*).

Limitation.

(3) Any direction made under paragraph (2)(*a*) shall cease to have effect on April 1, 1985.

Words and expressions.

(4) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

DECLARATION OF PRINCIPLE

Policy for Canada with respect to young offenders.

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

(*a*) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

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

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

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

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

APPENDIX C

LETTER OF INTRODUCTION

August 7, 1988

The Honourable Judge -----

Vancouver, B.C.

Dear Judge

Hermeneutics of the Young Offenders Act (S.C. 1984)

I am writing to you to seek your cooperation in the major portion of my research on interpretations of the Young Offenders Act. I am studying the underlying assumptions of the Act as a thesis project for my master's degree in Sociology. The task of this research is to obtain the understanding of youth court judges as you interpret the Act. As you know, the Young Offenders Act refers to "social accountability" and "individual rights". These general concepts are translated into legal arguments for the practical application of youth justice.

In the literature in Sociology that I have reviewed, I have discerned four philosophical intentions within the Act. From your discourse, I would like to determine if, where, and how these assumptions obtain. These intentions are briefly set out as follows:

1. REHABILITATION: The basic feature is parens patriae, the state as the good parent. Emphasis of the approach involves an understanding of human nature, leading to treatment rather than punishment. Cases using this approach are individualized with the hope of returning youth to the community in better shape through the help of experts.

2. CRIME CONTROL: Rather than focus on the individual, emphasis is placed on "social accountability". The assumption is that a youth, as a miniature adult, jeopardizes the existing social/economic environment by his decision to enter into criminal activity, and can be "corrected" by services using a set of prescriptions enforced by community authorities. Sentencing options extend to incarceration.

3. JUSTICE: In this context, the "natural rights of the child" are primary. Focus is on the offense more than on the offender.

Good administration of justice, with the application of "due process" concerns are primary. Punishment is proportional to the crime. The justice model considers the rationality of means used to deal with the young offender.

4. COMMUNITY CHANGE: The theme underscores the societal responsibility to provide welfare and prevent youthful crime. Radical changes in practice, involving the juvenile justice system, would establish control in the community by full participation of all the contenders in the conflicting situation.

I ask your permission to interview you about the above considerations in conjunction with the Young Offenders Act.

I will ask some set questions, but the interview will be mainly open-ended and approximately one and one-half hours in length, though this period may be shortened or extended if necessary.

We will proceed on the basis of notes and discussion. If you consent to a tape-recorded interview, it would be on the understanding that at any point in the interview that you wish, the recording may be temporarily suspended or ceased entirely, and the discussion would only allow note-taking.

If you are dissatisfied with the interview, you may terminate it at any point. You can choose not to answer any specific questions should you not wish to do so.

Portions of the interview may be quoted or referred to should this research result in publication. Without your written permission, no information will be attributed to you by name. A form acknowledging this will be presented to you at the time of the interview.

I will be contacting you by telephone within ten days to ask if you will participate in my thesis study.

If you have any questions regarding this research, please feel free to telephone my department office, at during normal business hours, and leave your name and phone number so that I can return your call.

Yours truly,

Helen J. Sturdy,
Sociology,
University of British Columbia,
Vancouver, B.C.

APPENDIX D

CONSENT FORM

I, _____, freely consent to be interviewed by Helen Sturdy.

I understand that I will be given the option of having the interview tape-recorded and later transcribed by the researcher, or of limiting the researcher to taking notes of the interview.

I understand that I may terminate this interview at any point, without prejudice.

I understand that I have the right to request and review a copy of the transcript of my interview (based on either the recording or the notes), and if I desire, that I can modify or delete any of my comments.

I understand that portions of this interview may be quoted or referred to, should this research result in publication, but that no quotes or information will be attributed to me by name, unless permission to do so is requested and I so authorize.

Date:_____Signature:_____

A copy of this document will be sent to you by return mail.

Table 1 (continued)

The Thirteen Phrases of the YOA's Declaration of Principle
Categorized by the Four Models of Juvenile Justice
According to the Authors

Number	Phrase	Authors' Categorization
8	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 . (s.3(1)(e))	Justice (Welfare)*
9	In the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom. (s.3(1)(f))	Justice
10	...that is consistant with the protection of society. (s.3(1)(f))	Crime Control
11	....having regard to the needs of young persons and the best interests of their families. (s.3(1)(f))	Welfare
12	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. (s.3(1)(g))	Justice
13	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 supervision are inappropriate. (s.3(1)(g))	Welfare

*Phrases within the asterisks were also considered appropriate to a second model of juvenile justice.