TRANSFER TO ADULT COURT:

**Punitive Approaches to Youth Justice
and their Implications for Violent Young Offenders**

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Abstract

This study will examine the relationship between punitive reforms to provisions of the youth justice system dealing with violent young offenders and patterns of violent youth crime over time in order to show that the current trend of government to increasingly transfer violent young offenders to adult court is inappropriate and unwarranted. This thesis will show that there has been relative stability in the patterns of violent youth crime both historically and in recent years but that changes to the way the youth justice system deals with violent young offenders to make its approach more punitive dictate that there is a crisis in the violent youth crime rate. The reality is that Canada's violent youth crime problem is neither out of control nor changing in such a way to warrant a more punitive approach towards dealing with violent young offenders. Approaches to youth justice that emphasize the welfare of young offenders are more appropriate to deal with violent young offenders.

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Introduction

The youth justice system is built around conflicting priorities. At any given moment, the youth justice system supports the following three different and competing philosophies in the administration of youth justice: welfare philosophy, justice philosophy and crime control philosophy. The way that these philosophies are prioritized by the youth justice system not only determines the overall approach of the youth justice system and the way in which youth justice is accomplished in Canada but the importance of these philosophies in the administration of youth justice as they are compared with one another. While these philosophies have been present to some degree throughout the youth justice system's history, the way that these philosophies are balanced in the administration of youth justice has changed. Each philosophy has been emphasized by the youth justice system at different time periods with the other competing philosophies taking less priority during the periods they are not emphasized. The following brief discussion on the different approaches prioritized by the youth justice system over time illustrates this point and provides some insight into these philosophies.

The Canadian juvenile justice system was created in 1908 with the passing of the Juvenile Delinquents Act. The central philosophy emphasized by the Juvenile Delinquents Act, the youth justice system created by the Act, and the decision making of the courts which implemented the Act was a welfare philosophy. This philosophy underlined the importance of the overall well-being and protection of youth and children and recognized that adolescents and children who commit crime are different from adult offenders in reference to their

maturity, their ability to discern right and wrong and their ability to be reintegrated into society. The welfare philosophy emphasized by the Juvenile Delinquents Act generally mandated that penalties imposed on juvenile delinquents be less severe and more informal than those applied to adult offenders in order to facilitate the successful rehabilitation and reintegration of juvenile delinquents into society and contribute to their overall well-being by addressing the social, environmental and psychological factors that led them to commit crime.¹ Although some juvenile delinquents were subject to punitive dispositions like indefinite detention that were indicative of the influence of crime control philosophy, the overall focus of the youth justice system following the Juvenile Delinquents Act was the well-being of youth and children. As Judge Penny J. Jones stated, "Canada ... established a separate court for juveniles to stem the tide of continuing recidivism into the adult years by the special application of rehabilitative procedures and services."²

The welfare philosophy of the Juvenile Delinquents Act underwent significant change with the introduction of the Young Offenders Act in 1984. The importance placed on welfare philosophy in the administration of youth justice was diminished. Unlike the Juvenile Delinquents Act, the Young Offenders Act primarily emphasized the use of a justice philosophy in the application of sanctions towards young offenders. The justice philosophy featured by the Young Offenders Act emphasized minimal interference with freedoms and due

¹Sandra J. Bell, Young Offenders and Juvenile Justice: A Century After the Fact, (Toronto: ITP Nelson Ltd., 1999) 184.

²Judge Penny J. Jones, Young Offenders and the Law, 2nd ed., preliminary version (Ottawa: Captus Press, 1996) 52.

process and focused on the individual rights of offenders through proportionate sanctions. This philosophy viewed crime, not as a result of outside factors, but as an act of free will for which individuals were responsible. While the importance of welfare philosophy was demonstrated by the inclusion of rehabilitative dispositions in the Young Offenders Act, the well-being of youth was no longer of most significance to the youth justice system. The primary focus of the youth justice system following the justice philosophy was the protection of young offenders' rights.³

In adopting the justice philosophy, the youth justice system demonstrated a substantial move away from the welfare philosophy of the Juvenile Delinquents Act. Subsequent reforms to the Young Offenders Act as well as the introduction of Bill C-3: the Youth Criminal Justice Act last fall, again changed the priorities of the juvenile justice system. These changes emphasized a new philosophy in the administration of youth justice, that of crime control.⁴ The introduction of crime control philosophy into the youth justice system meant another change in the priorities of the system. Crime control philosophy dictates that law and order in society are paramount, where the state is responsible for maintaining order. The primary focus of the juvenile justice system following this philosophy is the protection of society, protection of society being achieved through crime prevention, punishment that provides offenders with meaningful consequences or rehabilitation. Although the protection of society

³Sandra J. Bell, *supra* note 1 at 184.

⁴*Ibid.*

can be achieved by addressing welfare concerns, offenders are not looked at as misguided children needing aid, encouragement and assistance. The view of an offender following this philosophy is as an accountable and responsible actor whose sentence is meted out to fit the crime.⁵

While the emphasis on welfare philosophy, justice philosophy and crime control philosophy have generally determined the direction the youth justice system has taken over time, the emphasis on these philosophies in the approach the youth justice system takes towards specific groups of young offenders also affects the way the youth justice system deals with these groups separate and apart from its overall approach. For example, the use of these three philosophies in the youth justice system's approach towards dealing with violent and serious young offenders has made the youth justice system's approach to dealing with this group more punitive over time, this change not necessarily reflective of an overall change in the punitiveness of the youth justice system. Following the welfare philosophy of the Juvenile Delinquents Act, the youth justice system took an exceptional approach to dealing with violent young offenders that generally focused on their welfare and that dictated the use of harsh punishment as an exceptional measure. With the introduction of the Young Offenders Act and its focus on offenders' rights, and subsequent reforms to the provisions of the Young Offenders Act that dealt with violent and serious youth offending, crime control concerns became the priority and the scope of punitive responses to dealing with violent and serious

⁵Sandra J. Bell, *supra* note 1 at 184.

young offenders was expanded. The introduction of new provisions to deal with violent and serious young offenders in Bill C-3: the Youth Criminal Justice Act has continued these trends. The protection of society from violent youth crime would have been achieved under Bill C-3 primarily through harsh sanctions that focused on punishment rather than rehabilitation.

The introduction of an increasingly punitive approach to dealing with violent young offenders is symbolically significant to the youth justice system because it suggests that a portion of the youth population needs to be treated differently than the rest of its offending counterparts. It dictates punitive treatment for youth charged and convicted of violent and serious crimes so that these youth are judged as adult offenders. In doing so, this approach applies the values and principles associated with being processed in the adult justice system to a group of offenders who, by definition, are not adult offenders. The result is that this approach shifts the boundary of the youth justice system, so that violent young offenders are presumed subject to punitive treatment while non-violent young offenders retain the rights and privileges associated with being processed as a youth.

The introduction of an increasingly punitive approach to dealing with violent young offenders is also significant to the youth justice system because it suggests that the ability of the youth justice system to deal with violent and serious young offenders is in a state of crisis. The message that this approach sends out is that the youth justice system is not doing enough to protect society from violent and serious youth crime because its laws are not punitive enough to deal with a perceived growing violent and serious youth crime problem. The trend

of lawmakers to impose more and more punitive reforms to deal with violent and serious young offenders suggests that the youth justice system is not adult enough to deal with a serious violent youth crime rate that is considered to be spiraling out of control.

In reality, this crisis does not exist. This thesis will show that despite the overall shift in approach of the youth justice system towards violent and serious young offenders, the patterns of youth crime levels both historically and in recent years have been relatively stable. Youth have always committed some violent and serious crime and youth generally commit less serious violent crime than their adult counterparts. Moreover, violent offences make up the minority of crime adjudicated by the youth courts each year. The patterns of the most serious and violent crime such as murder, attempted murder and manslaughter have also remained stable overtime.

Furthermore, the Young Offenders Act is adequate to deal effectively with violent young offenders, even those whose crimes are considered to be the most violent in nature. The most serious incarcerative sanctions available under the Young Offenders Act for murder and second degree murder have never been imposed. Where custody is imposed, custodial placements are for less than six months in 92% of cases.⁶ If the seriousness of the youth's alleged crime and society's need for public protection dictate that a harsher response is required than is available in the youth justice system, the Young Offenders Act contains provisions that can transfer youth into the adult system.

⁶Canadian Criminal Justice Association, "Comments of the Canadian Criminal Justice Association on the 'Strategy for the Renewal of Youth Justice'", [<http://home.iSTAR.ca/~ccja/youth.html>] May 1999, 2.

The real crisis of the youth justice system today is the trend of lawmakers to increasingly dictate the use of punitive sanctions as a normal response to youth convicted of serious and violent youth crime instead of as an exceptional response. Based on misinformation and public fear, the federal government has brought more of the adult justice system into the youth justice system, blurring the lines between the two systems and pushing the youth justice system's approach to dealing with violent youth further away from its rehabilitative roots and the corresponding less punitive approach of the youth justice system towards other types of young offenders. The result is that the government has essentially excluded rehabilitative dispositions as an option when dealing with violent and serious young offenders, while at the same time encouraging the encroachment of the adult justice system into a youth justice system that was designed keep adult offenders separate from all young offenders, not just those that have been charged with non-violent crime.

The best indicator of the trend of lawmakers to increasingly dictate the use of punitive sanctions as a normal response to youth charged with violent and serious crime can be seen through an examination of the transfer to adult court provisions and the reforms undertaken to make these provisions increasingly more punitive. The transfer to adult court provisions both symbolically and factually represent the outer boundary of the youth justice system in that they move alleged young offenders out of the youth justice system and into the adult justice system for the adjudication of their alleged offence. The transfer provisions are

therefore the most serious decision a youth court judge can make.⁷ A judge who makes a transfer order in effect decides that the Young Offenders Act, its principles, legal framework, and the resources and dispositions established pursuant to it, represent an inadequate response to the young person and their alleged offense.⁸ As the transfer provisions are the most serious decision that a youth court judge can make, they are provisions that by nature are reserved for the most exceptional offenders, meaning those offenders whose alleged crimes are too serious or violent to be dealt with in the context of juvenile corrections. While the increased dictated use of these provisions would not necessarily make the overall approach of the youth justice system more punitive, a punitive approach taken towards transfer to adult court would restrict opportunities for violent and serious young offenders to be rehabilitated in the context of juvenile corrections and would place them outside the boundary of the youth justice system.

Until recently, the outer boundary of the youth justice system, as represented by the transfer to adult court provisions, has remained fairly constant. The transfer to adult court provisions were introduced in 1908 with the inception of the Juvenile Delinquents Act. Predicated on the existence of a justice system for youth that was separate and distinct from the adult system, the transfer to adult court provisions under the Juvenile Delinquents Act applied strictly to exceptional offenders and they were to be used only when a judge felt that

⁷Nicholas Bala and Heino Lilles, "Transfer to Adult Court: The Most Serious Disposition" in Dispositions Under the Young Offenders Act, Ed. Lucien A. Beaulieu, (Toronto: Canadian Association of Provincial Court Judges, 1989) 119.

⁸*Ibid.* at 119.

the procedures and penalties used in the Juvenile Court had proven to be, or would be, ineffective in dealing with the juvenile delinquent.⁹ Section 7 of the Juvenile Delinquents Act made transfer to adult court available for any youth over the age of fourteen who had allegedly committed an indictable offence; the transfer itself only taking place where the good of the child and the interests of the community necessitated that the youth be transferred.¹⁰

The transfer provisions took similar form under the Young Offenders Act. Introduced in 1984, section sixteen of the Young Offenders Act provided for transfers to adult court in regard to any serious indictable offence alleged to have been committed by a youth fourteen or older where the interests of society, having regard to the needs of the young person required transfer.

However, amendments have been brought about to the Young Offenders Act in the past few years that have made the transfer to adult court provisions more punitive. Bill C-12, given Royal Assent on April 9th, 1992, changed the test for transfer located in subsection 16(1) of the Act so that when making a transfer decision, where the rehabilitation of the offender and the protection of the public could not be reconciled, the Youth Court would have to find the latter principle to be paramount and order the youth transferred to ordinary court.¹¹ The amendment placed the protection of the public above the overall welfare of the offender, making the test for transfer more punitive.

⁹W. L. Scott, The Juvenile Court in Law, (Ottawa: The Canadian Welfare Council, 1941) 17.

¹⁰Priscilla Pratt, Young Offenders Law in Canada, 2nd ed., (Markham: Butterworths, 1995) 235.

¹¹Philip Rosen, The Young Offenders Act, (Ottawa: Research Branch, Library of Parliament, 1996) 17.

Bill C- 37, introduced in 1994, amended section sixteen to presumptively transfer specific offenders to adult court.¹² Offenders aged sixteen or seventeen alleged to have committed first or second degree murder, attempted murder, manslaughter or aggravated sexual assault were automatically transferred to adult court unless all the interests of society, including the protection of the public and the rehabilitation of the offender could be reconciled under the jurisdiction of the youth court. In doing so, Bill C-37 symbolically changed the outer boundary of the youth justice system by introducing an assumption that offenders committing certain violent offences were to be treated as adults. This amendment also made the transfer to adult court provisions more punitive by mandating that offenders committing certain violent offences would automatically be subject to the transfer process.

Amendments proposed by Bill C-3, which died in the House of Commons last fall due to a federal election call, would have also made the transfer provisions more punitive. Bill C-3, the Youth Criminal Justice Act, would have increased the number of violent offences for which a young person convicted of an offence would be presumed transferred to adult court and would have lowered the age of presumption for transfer from sixteen to fourteen. The test for transfer to adult court under the Youth Criminal Justice Act would have also changed, allowing for greater emphasis on public protection as opposed to the rehabilitation of offenders.

In sum, the way that violent young offenders subject to transfer have been treated by

¹²Generally, presumptive transfer means that certain youth are assumed transferred to adult court based on the offence that they have allegedly committed and based on their age at the time of the alleged offence. The onus of proving that the youth should remain in youth court rests with the youth.

the youth justice system has increasingly been modeled on the criminal justice system for adults. The approach taken towards the transfer to adult court provisions has become more punitive, with the law governing young offenders dictating the increased use of transfer to adult court as a crime-control measure. The result is that more violent young offenders are becoming subject to a disposition that mandates that youth be dealt with outside the boundaries of the youth justice system, depriving them of their entitlement to the rehabilitative philosophy and treatment resources normally associated with being processed in the youth justice system. The use of a punitive approach towards the transfer to adult court provisions has eroded the outer boundary of the youth justice system, minimalizing the use of transfer to adult court as an “exceptional” tool to be used by the youth justice system in the most extreme cases and introducing adult penalties as the norm when dealing with violent and serious young offenders.

The argument of this thesis is that the current trend of the government to support and emphasize a punitive approach towards the transfer to adult court provisions without cause is not the correct path for youth justice to follow. A punitive approach to dealing with youth subject to transfer takes the youth justice system to a place where the needs of these young offenders are not met and where society is not protected from crime because no effort is made to rehabilitate or reintegrate youth into society. While there are some young offenders who may require a more punitive response to their criminal behavior, these offenders are the exception and not the rule. The Juvenile Delinquents Act recognized that youth are different than adult offenders in reference to their maturity, their ability to discern right and wrong and

their ability to be successfully rehabilitated and reintegrated into society. Because Parliament has chosen to continue the difference in treatment for young offenders, the interest of society in reference to young offenders continues to be different than that in reference to an adult offender.¹³ This means that the rehabilitation of offenders should continue to be emphasized in court proceedings against youth charged with crimes. This also means that the Young Offenders Act, “clearly designed for the modification of procedures and treatment for a specified class of persons should not be lightly set aside in favour of a criminal process, which is still the extraordinary proceeding against youth.”¹⁴

Chapter one provides an examination of the amount and type of crime committed by youth historically in order to show that the patterns of youth crime were relatively stable both in the late 1800's/early 1900's and more recently during the time period the Juvenile Delinquents Act was in force. This information is important to current debates regarding the appropriate treatment of youth because one of the justifications for current reforms to the transfer to adult court provisions that have made them more punitive is that youth crime is becoming more violent and is “out of control.” This chapter will show that youth have always been responsible for a portion of overall criminal activity, where youth committed less crime than their adult counterparts during these periods. Although youth committed both violent and property crime, violent crime has always accounted for a significantly smaller proportion of overall youth criminal activity than property crime.

¹³Judge Penny J. Jones, *supra* note 2 at §2.

¹⁴*Ibid.*

Chapter one also provides an examination of how youth were treated by the criminal justice system historically in order to argue that while harsh sanctions were applied to youth throughout Canadian history, the use of harsh sanctions as a disciplinary measure was the exception during the time period that the Juvenile Delinquents Act was in force. Youth were subject to the same sanctions as adults before the Juvenile Delinquents Act was introduced in 1908. However, punitive treatment such as transfer to adult court, indefinite detention and detention in training schools were used sparingly under the authority of the Juvenile Delinquents Act.

Chapter two begins by exploring the history of the transfer to adult court provisions, from their inception in 1908 with the introduction of the Juvenile Delinquents Act to their current form under the Young Offenders Act in order to show that the transfer to adult court provisions have become increasingly punitive over time. Introduced during the period of the Juvenile Delinquents Act, these provisions began as a highly discretionary tool that was to be used with exceptional offenders. The Young Offenders Act proceduralized the section, lessening arbitrary decision making. With the change in the transfer test introduced by Bill C-12 to prioritize the protection of society when considering transfer, the provisions became increasingly punitive. Bill C-37 continued this punitive trend by introducing a presumption for certain violent young offenders to be transferred to adult court based on the seriousness of their offence. This amendment also represented the beginning of a change in the boundary of the youth justice system. Amendments to the transfer provisions introduced by Bill C-37 presumed that certain alleged violent and serious young offenders should no longer be dealt

with by the youth justice system.

Chapter two continues by providing a detailed examination of Bill C-3: the Youth Criminal Justice Act and the reforms it proposed to the transfer to adult court provisions in order to show that the current trend of government is to continue to support and emphasize a punitive approach towards youth subject to transfer to adult court. This chapter will show that the introduction of Bill C-3 into the youth justice system would have continued the punitive treatment of violent young offenders previously introduced by reforms to the Young Offenders Act, treating more youth as adult offenders and bringing more of the adult system into the youth realm. Bill C-3 undertook a punitive approach to dealing with violent young offenders that generally ignored concerns relating to their welfare, focusing instead on protecting society through proportionate sanctions. In reference to the transfer to adult court provisions, this Bill would have increased the number of offences for which a young person convicted of an offence would have been presumed transferred to adult court and would have lowered the age of presumption for transfer from sixteen to fourteen.

In examining the evolution of the transfer to adult court provisions and current attempts to reform the transfer to adult court provisions, chapter two will also provide a brief sketch of the shifts in philosophy of the youth justice system in order to link the shifts in the youth justice system's philosophy to changes in the transfer to adult court provisions over time.

Chapter three then explores the justifications given for the introduction of Bill C-3 in order to demonstrate that the reasons put forward for introducing an increasingly punitive

approach to transfer to adult court have little or no basis in fact. The Department of Justice argued that the introduction of a new act to replace the Young Offenders Act was necessary in order to adequately address a growing serious and violent youth crime problem and deal with public perception problems related to youth crime issues. This chapter will show that the patterns of youth crime levels generally and violent youth crime levels specifically have been relatively stable in recent years. This chapter also explores the nature and accuracy of the public's views on youth crime in order to show that introducing a new law to regain public confidence in the youth justice system is unwarranted because the public's perception of the youth justice system is not accurate. While members of the public believe that youth crime is increasing, that youth crime is becoming more violent and that the Young Offenders Act is inadequate to deal with current youth crime problems, these beliefs do not reflect the true situation of youth justice. In reality, the Young Offenders Act is adequate to deal with a relatively stable youth crime rate.

The thesis concludes by summarizing the arguments presented in order to suggest that the way forward in this area is to return to dictating the use of transfer to adult court as an exceptional measure for exceptional cases only, meaning for those offenders who cannot be dealt with in the context of juvenile corrections. No research yet exists on what happens to young offenders after they have been transferred to adult court. To increasingly erode the outer boundary of the youth justice system by dictating the increased transfer of more violent youth to adult court based on misinformation and public fear does nothing to protect society from youth crime because the rehabilitative needs of youth and the educational needs of the

public are not addressed. What is required to address public misinformation is an education program to inform the public on the actual state of youth justice. In the same way, this thesis will argue that the best way to protect society from violent youth crime is to keep youth in the context of juvenile corrections where the importance of rehabilitation is recognized and supported. As the youth justice system was built on a philosophy which emphasizes the special needs and situations of youth, it should not be set aside or limited for a more punitive model to satisfy unwarranted concerns about a perceived crisis related to the youth justice system.

Chapter 1: Historical Youth Crime Patterns and Punishment Practices in Canada

“Perhaps the most basic assumption underlying many current views about youth crime, particularly the law-and-order perspective, is the notion that today’s youth are worse than they were in the good old days.”¹⁵ Indeed, the increasingly punitive manner in which the Canadian legal system responds to violent crimes committed by youth dictates that youth are committing more crime and are more violent than their historical counterparts.¹⁶ However, do these changes in the approach of the youth justice system correspond to an overall related increase in violent criminal activity by young offenders? While the type of violent crime committed by young offenders has changed in composition over time, it is the argument of this chapter that the overall patterns of violent youth crime both historically and in recent years have remained relatively stable.¹⁷ This chapter, then, will explore available statistical evidence on Canadian youth crime historically in order to show that the patterns of violent youth crime in Canada were relatively stable both in the late 1800’s/early 1900’s and during the time period the Juvenile Delinquents Act was in force.

This section will also discuss the type of punishments imposed on youth during these

¹⁵Sandra J. Bell, *supra* note 1 at 6.

¹⁶See chapter three below.

¹⁷Doob, Marinos and Varma in Youth Crime and the Youth Justice System in Canada: A Research Perspective note the introduction of the term “swarming” in reference to violent young offenders in the mid 1980’s as an example of the changing nature of violent youth crime. Swarming can be defined as large groups of youth surrounding one person for the purpose of committing some sort of violent crime.

time periods in order to argue that the use of harsh or punitive measures as a punishment for youth convicted of crimes was minimal during the time period the Juvenile Delinquents Act was in force. This section will show that while youth were subject to the same sanctions as adults before the introduction of the Juvenile Delinquents Act, the use of punitive measures such as transfer to adult court, indefinite detention and detention in training schools after the introduction of the Juvenile Delinquents Act was limited.

Before entering into a dialogue about the punishment of youth and violent youth offending historically, it is important to discuss the state of youth justice research in Canada, as this research will form the basis of many of the conclusions in this section. As Anthony Doob implies in his article "Youth justice research in Canada: An assessment," there are many problems with the data available to criminologists and legal scholars who research violent youth crime that make researching violent youth crime difficult.¹⁸ These problems, outlined below, include gaps in available data, lack of statistical analysis and the overall infrequency of violent youth crime. These problems are significant to debates surrounding violent youth crime because they represent roadblocks to complete and sustained research in this area, and thus responsible and accurate conclusions about violent youth offending.

The first and most significant challenge for researchers in this area is the infrequency of the phenomena of serious youth violence.¹⁹ Murder, manslaughter, attempted murder,

¹⁸Anthony N. Doob, "Youth Justice research in Canada: An assessment," (1999) 41 *Canadian Journal of Criminology* 222.

¹⁹Naomi Lee and Tim Leonard, Serious Violent Offences and Offenders in Youth Court, (Ottawa: Department of Justice Canada, 1995) 1.

aggravated sexual assault, sexual assault with a weapon and aggravated assault account for only 1% of all kinds of cases adjudicated by youth courts in Canada.²⁰ Of these, youth charged with homicide represent less than 0.1% of all youth charged in youth court, homicide defined as including first and second degree murder, manslaughter and infanticide.²¹

Because of the infrequency of violent youth crime, it is rarely analyzed statistically. As Lee and Leonard point out, there is currently no national source of data that would permit a detailed statistical analysis for most violent youth crimes.²² Further, statistics that are available may actually skew the true picture of violent youth crime simply because of its infrequency. Taking murder as an example, the total number of youths charged with homicide in 1997 was 54, representing 12% of 434 total persons charged.²³ Hypothetically speaking, if 5 more youths were charged with homicide in 1998, the overall number of persons charged with murder would increase by approximately 1% but the incidence of murder among young offenders would have increased by approximately 10%. Examining and analyzing trends in violent youth crime is difficult because violent youth crime represents such a small portion of overall offending. Examining trends in violent youth crime is also problematic because trends associated with these crimes relate to very small fluctuations in a very small portion of overall

²⁰Ibid. at 2.

²¹Canadian Centre for Justice Statistics, A Profile of Youth Justice in Canada, (Ottawa: Statistics Canada, 1998) 21-22.

²²Lee and Leonard, supra note 19 at 1.

²³Canadian Centre for Justice Statistics, supra note 21 at 19-20.

youth criminal activity.

Another problem associated with researching violent youth crime is that there is little information about violent youth offending over time. Information regarding the operation of the youth justice system comes largely from youth court data collected from the provinces by the Canadian Centre for Justice Statistics (CCJS). These data are the primary source of information for anyone interested in how Canada treats youth charged with offences. The data are more or less complete from 1991-1992 to the present but information before that time is not complete, creating data gaps. Also, data concerning specific areas of focus like violent youth crime are not gathered or recorded systematically or completely, if at all, by the Department of Justice or the CCJS.²⁴ Gaps in statistical information on youth offending both over time or in reference to violent youth crime affect the degree to which complete research on violent youth crime can be accomplished. These gaps represent barriers to identifying trends in violent youth offending over time.

If analyzing historical trends about the incidence and prevalence of violent youth crime is difficult using the CCJS, making assumptions about the use of transfers to adult court over time may be impossible. In the case of transfer to adult court, the CCJS can give a fair amount of information about cases that have actually been transferred to adult court for trial, but it cannot identify cases where the Crown attempted to have a case transferred but where the transfer application was not successful. This information is important to current debates

²⁴Doob, *supra* note 18 at 219-220.

surrounding the appropriate treatment of youth because one of the justifications for the expansion of the transfer provisions to encompass more types of violent crime is the perceived leniency or inefficiency of the youth justice system to deal with violent crimes committed by youth. Where information concerning unsuccessful transfer applications is missing from the CCJS, researchers are unable to find out whether the small number of cases transferred each year (92 of 110, 065 cases in 1996-7) is due to few transfer applications being brought or youth court judges being reluctant to deem young people to be adults.²⁵ Therefore, researchers are unable to fully explore and analyze the court's approach to transfer to adult court or compare the court's approach to transfer to adult court to the punitive position taken by the Department of Justice.

Another problem associated with researching violent youth crime is that we do not know what happens to youth after they have been transferred to adult court. The CCJS data gives no information about youth who are transferred to the adult system. Whether youths who are transferred to adult court receive sentences that are more punitive than those given in the youth system is essentially unknown.²⁶ Also, no information exists about offender recidivism among youth transferred so it is unclear whether the needs of society to be protected from violence are actually met by transferring youth to adult court to face adult sanctions. This information is important to current debates regarding the appropriate treatment of youth convicted of violent youth crime because reforms introduced to the youth

²⁵Doob, *supra* note 18 at 221.

²⁶*Ibid.*

justice system by the Department of Justice are dictating that a more punitive approach to transfer to adult court is necessary. If information existed regarding the situation of young offenders post transfer, then arguments for or against expanding the transfer provisions could be weighed on primary statistical fact, rather than on theory and secondary information.

Where information is available concerning transfer to adult court, this information contains gaps over certain time periods. Like the primary data available to researchers in regard to the incidence and prevalence of violent youth crime, the limited information available regarding the use of transfer to adult court is more or less complete from 1991-1992 to the present, but information before that time is less than reliable. Gaps in statistical information on transfer to adult court affect the degree to which thorough research on the use of transfers can be completed. These gaps represent barriers to identifying trends in the use of transfer to adult court historically.

Using the general punishment of youth crime as a substitute, one can see the same problems in the availability of data. Primary historical data on youth punishment are not always readily available since youth crime statistics were not always kept in the manner that they are today.²⁷ While prison records can provide a source of information on the punishment of youth crime, the ages of prisoners were not always recorded. There are also no consistent prison records until 1835, the year in which the Kingston Penitentiary opened.²⁸ These problems make independent inferences about the punishment of youth crime historically

²⁷Bell, *supra* note 1 at 8.

²⁸*Ibid.*

educated guesswork at best.

Even with the problems associated with available statistics on violent youth crime and the punishment of violent young offenders, some general trends can be reconciled from existing information. Crime statistics clearly indicate that Canadian youth have always been involved in some kind of offending historically and that this offending did include some serious violent crime. Dating back to the mid 1800's, the statistical Yearbook of Canada shows that young offenders were convicted of offences against the person as well as offences against property that included violence.²⁹

Young offenders were also convicted and punished for committing extremely violent crimes. To illustrate, "British Columbia's first mass execution after joining confederation took place on January 13, 1881, when three McLean brothers and a confederate, Alex Hare, went to their deaths for the murder of a British Columbia Provincial Policeman, Constable John Ussher, near Kamloops."³⁰ While the leader of the gang was 25, its other members were 15, 17 and 17 respectively. Further, in 1861 two 8 year old boys murdered a two year old in case very similar to the James Bulger murder.³¹ Recall that James Bulger was abducted in 1993 by two 10 year old boys from a shopping mall in Liverpool, England. He was then taken to a rail yard, sodomized, sexually assaulted and beaten to death, his death resulting from his

²⁹Bell, *supra* note 1 at 7.

³⁰Frank W. Anderson, A Concise History of Capital Punishment in Canada, (Calgary: Frontier Publishing, 1973) 35.

³¹Bell, *supra* note 1 at 8.

head having been repeatedly bludgeoned with a rock.³²

While evidence exists that young offenders were responsible for a portion of serious violent crime committed in Canada historically, it is important to note that “young people have always been responsible for a smaller amount of criminal activity than adults and most of their offences have involved petty property crime.”³³ As Sandra J. Bell suggests, this pattern of criminal activity was established in early pioneer days and has continued to the present. To illustrate, in 1909-10 youth under the age of 18 were responsible for 18 percent of all criminal charges brought before the Halifax criminal court. By comparison, the Nova Scotia department of Justice reported that in the 1993-94 year, youth accounted for the same proportion of criminal activity.³⁴

Current national information about youth court statistics reaffirm this information. Statistics Canada reported in its 1998 release of A Profile of Youth Justice in Canada that youths accounted for 23% of all persons charged with a Criminal Code offence in 1997. This means that adult offenders accounted for 77% of all persons charged.³⁵ The proportion of youth charged with violent offences was also lower than that for adults in 1997. Of the total amount of crime committed by youth in 1997, 18% was violent in nature and 49% was

³²P. A. News Centre, “James Bulger: Killing ‘An Act of Unparalleled Evil’,” 1999, [<http://www.pa.press.net/news/backgrounder/bulger/main/html>].

³³Bell, *supra* note 1 at 7.

³⁴*Ibid.*

³⁵Canadian Centre for Justice Statistics, *supra* note 21 at 19.

property related.³⁶ By comparison, 27% of adult accused were charged with violent offences and 35% were charged with property crime in 1997.³⁷

Information concerning the punishment of children and youth prior to the introduction of the Juvenile Delinquents Act also provides useful insight into the situations of child and adolescent offenders in pioneer Canada. Although the actual historical incidence of dispositions associated with young offenders is not known, secondary information regarding the application of adult sanctions to youth and children shows that the justice system reacted punitively towards youth and children prior to the introduction of the Juvenile Delinquents Act. Specifically, this information demonstrates that some youth and children were punished as adults during this time period and that this treatment extended over time.

Whereas transfers to adult court were not introduced in Canadian criminal law until 1908, the application of adult sanctions to young offenders can be traced back to before Confederation. Children convicted of crimes were sent to adult penitentiaries and early records of the Kingston penitentiary show that children as young as 8 were held prisoner with adult offenders. Names like Antoine Beache, aged 8; Alex Lafleur, 11; Sarah O'Connor, 14 and Elizabeth Breen, 11 represent examples of children convicted of crimes serving time in the Kingston Penitentiary with adults.³⁸

Although many young people convicted of more serious offences such as murder and

³⁶Canadian Centre for Justice Statistics, *supra* note 21 at 20.

³⁷*Ibid.*

³⁸Anderson, *supra* note 30 at 24.

manslaughter were sent to Kingston Prison, its youth population also included tender aged offenders guilty of theft and misdemeanors. Of thirty-six inmates aged ten to seventeen who were released from the penitentiary in 1849-50, one boy had been convicted of murder at age fifteen, another of manslaughter at age ten, with the remainder being convicted of offences including horse theft, stealing cows, larceny and various felonies and misdemeanors.³⁹ Thus, children sent to Kingston Penitentiary included both violent and non-violent criminals.

Children convicted of crimes were also subject to death by hanging. Many people would be surprised to know that the first person executed on the mainland of Canada was reputed to have been a young girl of sixteen who had committed theft.⁴⁰ This is not the only example of the hanging of a youthful offender. In the early 1900's, a 17 year old boy was hanged in Prince Rupert. Further, in September 1803, a boy of 13 named B. Clement was hanged in Montreal for stealing a cow.⁴¹

The patterns of youth criminality stayed substantially the same during the time period the Juvenile Delinquents Act was in force. The preponderant petty nature of juvenile crime changed little from the previous century, with crimes against property making up the vast proportion of total youth crime.⁴² Juveniles were also still committing extremely violent

³⁹D. Owen Carrigan, Crime and Punishment in Canada. A History. (Toronto: McClelland and Stewart, 1991) 209.

⁴⁰Ibid. at 9.

⁴¹Anderson, *supra* note 30 at 9.

⁴²Carrigan, *supra* note 39 at 210.

crimes, but these crimes represented a small portion of overall youth offending.⁴³

These trends in juvenile delinquency can be seen through an examination of statistical data from the Dominion Bureau of Statistics, presented in Tables 1-4 located on pages 37-40 of this thesis. These tables represent my own independent research of primary data provided by the Statistics Canada Library. All information is taken from the Juvenile Delinquents series and the years of the series explored are from 1950-1970.

This information was used in the absence of secondary sources which proved to be unavailable or unreliable. Problems with information availability and quality also influenced the choice of statistics explored, as information available from before 1950 took on several different formats that were difficult to compare and analyze. Statistics after 1970 were not examined simply due to the absence of information. The Juvenile Delinquents series is limited in its coverage, the series beginning in 1923 and ending in 1973.⁴⁴

Having said the above, there are some problems with the information used, the most important of those having to do with age. Whereas the maximum age under the Young Offenders Act is set at 18 years of age and is uniform to all the provinces and territories, the maximum age under the Juvenile Delinquents Act varied. The Act itself defined a child as "any boy or girl under the age of 16 years, or such other age as may be directed in any

⁴³Chart 2.

⁴⁴Beyond these concerns, time constraints did not permit an extensive examination of the wealth of information available from Statistics Canada. It is hoped that other researchers will take the initiative to explore this information, if for no other reason than it is important to current debates on youth crime.

province.”⁴⁵ Indeed, different provinces had different maximum ages. In Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Yukon and Northwest Territories, the official age was under 16 years. In Quebec, Manitoba and British Columbia, the official age was under 18 years and in Alberta the official age for boys was under 16, girls being defined as those under 18 years of age.⁴⁶

In order to provide uniform information on juvenile delinquency, the Dominion Bureau of Statistics limited its information in the Juvenile Delinquents series to the offending of children under the age of 16. However, “the restriction of juvenile statistics to the fifteen and under age group ... was perhaps too limited and did not portray an accurate profile of juvenile crime.”⁴⁷ In D. Owen Carrigan’s opinion, sixteen and seventeen year old offenders tended to break the law in larger numbers than offenders under the age of 16 at the time the Juvenile Delinquents Act was in force.⁴⁸ Note that sixteen and seventeen year old offenders are currently responsible for the majority of youth crime. In 1997, the highest proportion of accused youths was in the 16 and 17 year old age group, where 16 and 17 year olds were accused of 45% of youth crime. For the same year, 14 and 15 year olds were accused of 38% of youth crime and 12 to 13 year olds were accused of 17% of youth crime.⁴⁹ Thus, the

⁴⁵Dominion Bureau of Statistics, Juvenile Delinquents 1963, (Ottawa: Queen’s Printer, 1965) 1.

⁴⁶Ibid.

⁴⁷Carrigan, supra note 39 at 228.

⁴⁸Ibid.

⁴⁹Canadian Centre for Justice Statistics, supra note 21 at 25.

restriction of historical information to the fifteen and under age group may have skewed the true picture of historical youth offending to understate youth crime levels during the time period the Juvenile Delinquents Act was in force. The restriction of statistics by age also made specific comparisons with present day offending impossible.

Other problems with the selection of statistics used for this section include provincial variation in reporting from year to year, the exclusion of certain types of offending information for certain years and formatting changes in the way some of the information was presented and recorded.

Even with the problems associated with these primary data, general information about juvenile delinquency as well as trends relating to crimes of violence and the punishment of crime can be discerned from the information provided by the Juvenile Delinquents series. As Table 1 shows, juvenile delinquents did commit crimes of violence from 1950-1970 when the Juvenile Delinquents Act was in force. Juveniles were charged with and convicted of crimes such as murder, attempted murder, manslaughter, sexual assault and assault during the 1950-1970 time period.⁵⁰

While youth were convicted of different types of violent crime during the period the Juvenile Delinquents Act was in force, youth were more likely to be involved in less serious violent crime than more serious violent crime from 1950 to 1970. For example, in 1950 no convictions were recorded for the offences of murder, manslaughter, attempted murder or

⁵⁰Table 1.

criminal negligence causing death, while 59 convictions were noted for common assault. Similarly, 704 convictions were recorded for common assault in 1970 while only 11 convictions were recorded for murder, manslaughter, attempted murder and criminal negligence causing death combined. This pattern is consistent throughout the 20 year period studied.⁵¹ This suggests that juvenile delinquents committed few extremely serious violent offences as compared to all other violent offences committed during the time period the Juvenile Delinquents Act was in force.⁵²

The data in Table 2 show that violent offences made up the minority of all offences committed by juvenile delinquents from 1950-1970. In 1950, juvenile delinquents committed 151 offences against the person as compared to 6418 total offences committed. Similarly, in 1970, 1321 convictions for offences against the person were recorded in youth court as compared to 31,546 total convictions recorded. This trend is consistent throughout the time period studied. In fact, table 2 shows that violent crime accounted for less than 5% of all crime committed by juvenile delinquents from 1950-1970.⁵³ This suggests that throughout the time period the Juvenile Delinquents Act was in force, violent offences accounted for the minority of total offences committed by juvenile delinquents.

While juvenile delinquents committed few violent offences from 1950-1970 when

⁵¹Table 1.

⁵²Serious violent offences include first and second degree murder, attempted murder, manslaughter, aggravated sexual assault, among others.

⁵³Table 2.

compared to the total number of offences committed by juvenile delinquents, it is interesting to note that the amount of violent crime committed by juvenile delinquents increased over the twenty year period studied. Table 1 shows that the total number of offences against the person increased from 151 in 1950 to 1321 in 1970, this increase not being limited to specific offences. The number of juvenile delinquents convicted of the more serious offences of murder, attempted murder, manslaughter and criminal negligence causing death increased from zero convictions in 1950 to 11 convictions in 1970. At the same time, the number of juvenile offenders convicted of the less serious offence of common assault increased from 59 in 1950 to 704 in 1970. Yet, the overall youth population also increased in number over the same time period. Statistics Canada indicates that from 1950 to 1970, youth aged 7 to 15 years almost doubled in number from 2,092,000 in 1950 to 4,109,000 in 1970. By comparison, population aged 16 years or older increased in number from 9,410,000 persons in 1950 to 14, 412,000 persons twenty years later.⁵⁴ While the population increase during this time period cannot entirely explain increases in convictions for youth crime recorded during this time period, it is possible that the growth of the youth population combined with other factors may account for the increases in youth convictions.⁵⁵ If this is the case, it can be argued that the youth crime rate from 1950 to 1970 was relatively stable.

⁵⁴Statistics Canada, "Historical Statistics" (<http://WWW.StatsCan.CA /english/Pgdb/People/Popula.htm>)

⁵⁵Examples of these factors could include changes in data recording practices, changes in charging practices, etc. While I was unable to find information dealing with these other factors other than the information I found on population increases, I was also unable to find information countering the hypothesis that other factors were not at least partly responsible for increasing crime rates during this period. It is therefore my argument that outside factors may have influenced increases in the youth crime rate from 1950 to 1970.

Equally as important, the majority of the increases in convictions for violent crime during the twenty year period were for less serious violent crime. Note that the greatest increases in convictions were for the offences of common assault and other offences against the person, which increased in number from 59 to 704 and 14 to 232 respectively.⁵⁶ By contrast, the number of convictions for the two most serious groups of offences showed much smaller increases over the twenty year period. Manslaughter, murder, attempted murder, and criminal negligence causing death increased from zero convictions in 1950 to 11 convictions in 1970. Rape, attempted rape, carnal knowledge and attempt, sexual intercourse and incest increased from 4 convictions in 1950 to 28 convictions in 1970.⁵⁷

For offenders committing offences from 1950 to 1970, a range of penalties were imposed on them. As Table 3 shows, juveniles faced a variety of consequences for their criminal acts. These penalties ranged from the more severe, such as indefinite detention and training school, to the more lenient, such as probation or the imposition of a fine.

While a variety of dispositions were imposed on juvenile delinquents from 1950 to 1970, the least used dispositions were generally those that were more punitive in nature. Table 3 demonstrates that only three juvenile delinquents were sentenced to indefinite detention and only 21 were sentenced to a term in a training school in 1951 out of a total of 184 juvenile delinquents sentenced to dispositions for offences against the person. Similarly,

⁵⁶Table 1.

⁵⁷Table 1.

only 28 juvenile delinquents were sentenced to indefinite detention and only 55 were sentenced to terms in training schools in 1970 out of a total of 852 juvenile delinquents sentenced to dispositions for offences against the person.⁵⁸ This trend in offending is consistent throughout the 20 year period studied. This trend suggests that few punitive dispositions were handed down from 1950 to 1970.

The minimal use of transfer to adult court from 1950 to 1970 also suggests that youth courts preferred to dispose of juvenile delinquents using less severe dispositions during this time period. Transfer to adult court was the most serious disposition available to youth courts during the time the Juvenile Delinquents Act was in force. Although accessible to the court for approximately 50 years, Table 3 shows that this disposition was ordered only 15 times from 1950-1970. These 15 transfers all occurred in 1970. This might seem to suggest that the approach to disposing of juvenile delinquents was more punitive for that year. However, Table 1 shows that increases in the most serious types of dispositions also occurred in 1970. Convictions for murder, manslaughter, attempted murder and criminal negligence causing death increased from 5 convictions in 1969 to 11 convictions in 1970. Convictions for rape, attempted rape, carnal knowledge, sexual intercourse and incest also increased from 8 convictions in 1969 to 28 convictions in 1970.⁵⁹ As transfer to adult court is primarily supposed to be used for offences that are too serious to be dealt with in the context of juvenile corrections, it is possible that the increases in the most serious offences in 1970 may

⁵⁸Table 3.

⁵⁹Table 1.

partially account for the sudden, increased use of transfer to adult court that same year.

The fact that the overall distribution of dispositions for 1970 does not generally seem more punitive than other years in the sequence, despite the higher number of juvenile delinquents subject to transfer, also attests to the overall trend of youth court judges to avoid using punitive dispositions during this time period. For example, release on probation was the most used disposition for offenders convicted of offences against the person in 1970. It was also the most used disposition from 1951 to 1969. Indefinite detention was used minimally in comparison to the total number of dispositions given out in reference to offences against the person from 1951 to 1969. It was also used minimally in comparison to the 852 total dispositions handed down for offences against the person in 1970. This suggests that throughout the time period the Juvenile Delinquents Act was in force, the trend of youth courts to favour less serious dispositions was relatively consistent.

The extensive use of less punitive dispositions by the juvenile courts from 1950-1970 also supports this trend. As Table 3 shows, the most heavily used dispositions from 1950 to 1970 were probation, suspension of final disposition and fine or restitution. The data also indicate that the types of dispositions imposed during this time period were generally rehabilitative in nature.⁶⁰

The data in Table 3 also suggest that the use of most dispositions for juvenile delinquents brought to court for committing offences against the person increased over the

⁶⁰Table 3.

Indefinite detention, release on probation, fine or restitution, training school, and suspension of final disposition all demonstrated substantial gains from 1951 to 1970. Table 1 also showed increases in offences against the person committed by juvenile delinquents during the same time period. While it is not known whether the increases in these dispositions corresponds exactly to the increases in crime committed, it can be said that the two are related.

While not entirely representative of all juvenile delinquency occurring under the ambit of the Juvenile Delinquents Act throughout the Act's history, this selection of information does provide good insight into certain aspects of youth crime occurring during the 1950-1970 time period. It is important to note that many of findings of this chapter are supported by other examinations of youth crime that cover the entire period that the Juvenile Delinquents Act was in force. For example, in its 1970 publication of the Juvenile Delinquents series, Statistics Canada provided a detailed description of convictions of juveniles for offences against the person throughout the history of the Juvenile Delinquents Act. This information, produced in chart form and covering 5 year periods from 1925 to 1970 is reproduced in Table 4. As Table 4 shows, juveniles were convicted of violent crime throughout the history of the Act, this finding not being restricted to the 1950-1970 time period. In this sense, an argument can be made that the findings of this chapter in regards to juvenile delinquency and the punishment of youth crime from 1950-1970 do apply throughout the time period the Juvenile Delinquents Act was in force.

Overall, the information provided in this section concerning youth offending from early pioneer times to the early 1970's does show some interesting trends. Juveniles in pioneer

Canada did commit criminal offences. These criminal offences included property related crime, violent crime and serious violent crime including murder. However, the majority of crime committed by youth and children was property related and the total amount of crime committed by youth was less than that of adult offenders.

For youth convicted of crime during the time period the Juvenile Delinquents Act was in force, the patterns of criminality are much the same. Juvenile delinquents did commit property related and violent crime during the time period the Juvenile Delinquents Act was in force and some of the crime committed was extremely violent in nature. However, the largest proportion of crime committed by juvenile delinquents was property related. Where violent offences were committed, the majority of these offences were less serious in nature. In sum, the patterns of youth crime, and more specifically violent youth crime, were relatively stable historically.

This section has also shown that juvenile delinquents committing crime in the late 1800's/early 1900's and during the time period the Juvenile Delinquents Act was in force were subject to punishment. Youth committing crime in pioneer Canada were subject to the same penalties as adult offenders and some youth were hanged or imprisoned for their crimes. Juvenile delinquents were also subject to punitive measures during the time period that the Juvenile Delinquents Act was in force. However, the application of punitive measures was the exception with juveniles under the Juvenile Delinquents Act and not the norm. In sum, juveniles were punished for their crimes but the majority of dispositions handed down were rehabilitative or less punitive in nature.

Table 1 - Serious/Violent Offences Committed by Juvenile Delinquents - 1950-1970

Offences	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960
Manslaughter, murder, attempt murder, causing death by criminal negligence	0	0	0	1	0	2	1	2	2	2	0
Rape & attempt, carnal knowledge & attempt, sexual intercourse, incest	4	3	3	5	0	3	4	5	6	4	5
Indecent assault	38	31	19	28	32	39	26	66	75	66	96
Aggravated assault and wounding	26	31	27	16	24	12	49	38	17	25	42
Common assault	59	89	65	89	76	71	115	115	214	127	198
Endangering life on railway/Interfering with transportation facilities	12	9	25	11	10	3	12	1	3	3	0
Other offences against the person	14	25	33	19	42	51	43	43	27	29	38
Total Offences Against the Person	151	188	172	169	184	181	250	270	344	256	379
Offences	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	
Manslaughter, murder, attempt murder, causing death by criminal negligence	5	9	7	3	5	4	3	5	5	11	
Rape & attempt, carnal knowledge & attempt, sexual intercourse, incest	5	12	6	4	12	5	3	14	8	28	
Indecent assault	70	127	101	134	114	101	84	133	108	134	
Aggravated assault and wounding	43	43	62	60	58	61	94	88	184	212	
Common assault	223	209	280	278	307	337	323	389	484	704	
Endangering life on railway/Interfering with transportation facilities	3	0	0	5	2	0	0	0	0	0	
Other offences against the person	33	60	34	41	41	51	67	123	2	232	
Total Offences Against the Person	382	460	490	525	539	559	574	752	791	1321	

Table 2 - Offences Against the Person vs. Total Offences Committed - 1950-1970

Year	Offences Against the Person Committed by Juv. Delinquents	Total Offences Committed by Juvenile Delinquents	Offences Against the Person as % of Total Offences
1950	151	6418	2.35
1951	188	6644	2.82
1952	172	6068	2.83
1953	169	6377	2.65
1954	184	6332	2.90
1955	181	7025	2.57
1956	250	8985	2.78
1957	270	9679	2.78
1958	344	11391	3.01
1959	256	11686	2.19
1960	379	13965	2.71
1961	382	15215	2.51
1962	460	16608	2.76
1963	490	17556	2.79
1964	525	19365	2.71
1965	539	18352	2.93
1966	559	20310	2.75
1967	574	20743	2.76
1968	752	27164	2.76
1969	791	27197	2.90
1970	1321	31546	4.18

Table 3 - Disposition of Cases for Delinquents Brought to Court for Committing Offences Against the Person - 1950-1970

Disposition of Cases	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960
Repatriated	0	0	0	0	0	0	0	0	0	0
Reprimand	16	11	14	7	10	18	14	20	3	11
Indefinite Detention	3	0	2	1	4	2	4	2	0	1
Release on Probation	81	65	90	74	91	101	122	203	148	221
Fine or Restitution	26	22	16	25	12	17	33	27	36	44
Training School	21	27	25	26	33	34	31	40	37	53
Mental Hospital	0	0	0	0	4	1	0	3	1	3
Corporal Punishment	2	0	0	0	0	0	0	0	0	0
Final Disposition Suspended	39	47	22	51	29	57	35	51	40	36
Transfer to Ordinary Court	0	0	0	0	0	0	0	0	0	0
Disposition of Cases	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
Repatriated	0	0	0	0	0	0	0	0	0	3
Reprimand	15	25	29	27	23	24	33	31	22	13
Indefinite Detention	3	3	4	3	2	3	8	11	22	26
Release on Probation	221	286	258	268	311	327	344	445	489	464
Fine or Restitution	30	21	39	40	45	53	57	120	118	111
Training School	34	37	50	48	58	55	57	65	62	55
Mental Hospital	2	2	8	3	4	1	3	3	1	2
Corporal Punishment	0	0	0	0	0	0	0	0	0	0
Final Disposition Suspended	77	86	102	138	96	96	72	174	169	161
Transfer to Ordinary Court	0	0	0	0	0	0	0	0	0	1

n.b. no information available for 1950

n.b. release on probation includes both release to supervision of court and release to supervision of parents

**Table 4 - Convictions of Juveniles for Offences Against the Person by Five Year
Periods - 1925-1970**

Offences	1925	1930	1935	1940	1945	1950	1955	1960	1965	1970
Manslaughter, murder, attempt murder, causing death by criminal negligence	0	0	0	2	0	0	2	0	5	11
Rape and attempt, carnal knowledge and attempt, sexual intercourse and incest	0	5	8	12	14	4	3	5	12	28
Indecent assault	37	49	29	32	30	36	39	96	114	134
Aggravated assault and wounding	12	11	60	24	27	26	12	42	58	212
Common assault	118	101	100	99	115	59	71	198	307	704
Endangering life on railway/interfering with transportation facilities	40	31	48	28	30	12	3	0	2	0
Other offences against the person	5	2	3	11	4	14	51	28	41	232
Total Offences Against the Person	212	199	248	208	220	151	181	369	539	1321

Chapter 2: The Transfer to Adult Court Provisions and Legislative Reform

Chapter one has shown the relative stability of the violent youth crime rate historically and the minimal use of punitive measures with juvenile delinquents during the time the Juvenile Delinquents Act was in force. It is the argument of this thesis that the current trend of lawmakers runs contrary to these historical trends in that the Department of Justice is dictating an increased use of punitive sanctions for youth charged with serious and violent crimes in reforms to the juvenile justice system. This thesis is also arguing that the transfer to adult court provisions are the best indicator of this punitive response because these provisions symbolically represent the outer boundary of the youth justice system. They are the most punitive measure that a youth court judge can apply to a youth charged with a crime and they are generally restricted in their application to the most exceptional offenders found in the youth justice system, meaning those offenders whose alleged crime is too serious or violent to be dealt with in the context of juvenile corrections. In order to demonstrate that the current approach of the youth justice system towards violent and serious young offenders is a more punitive response than its historical counterparts, it is necessary to explore the development of the transfer to adult court provisions. This chapter, then, will explore the evolution of the transfer to adult court provisions, from their inception in 1908 with the introduction of the Juvenile Delinquents Act to their most recent form in proposed reforms to the youth justice system located in the Bill C-3: the Youth Criminal Justice Act in order to argue that the transfer to adult court provisions have become increasingly punitive.

This chapter will show that the transfer to adult court provisions have become

increasingly punitive over time by identifying two trends in reforms to the transfer to adult court provisions. It will be shown that judicial discretion in the decision to transfer youth to adult court has been reduced and the scope of the transfer provisions has been expanded by reforms to the youth justice system. These two trends have weakened the boundary of the youth justice system and have reduced the ability of the youth justice system to utilize rehabilitative dispositions with violent and serious young offenders, making the youth justice more punitive.

This chapter will also discuss the competing philosophies supported by the youth justice system over time and the changes in priority placed on welfare philosophy, justice philosophy and crime control philosophy in order to link the changes in the youth justice system's emphasis on these philosophies to changes in the transfer to adult court provisions. It will be shown that the emphasis placed on the underlying philosophies of the youth justice system corresponds to changes made to the transfer to adult court provisions.

Prior to the introduction of the Juvenile Delinquents Act in 1908, the criminal courts took a punitive approach to dealing with youth and children convicted of crimes. Children and adolescents who violated criminal law were treated the same as adults until the end of the nineteenth century and were subject to the same penalties as adults including death by hanging and confinement in adult penitentiaries.⁶¹ "Young persons were processed in the same criminal court system as adults, albeit with certain special common law principles such as *doli*

⁶¹Nicholas Bala, Joseph P. Hornick, Marnie McCall and Margaret E. Clarke, State Responses to Youth Crime: A Consideration of Principles, (Ottawa: Department of Justice Canada, 1994) 49.

capax⁶², or the inability to form criminal intent, which was available as a substantive defense for children due to immaturity by age.”⁶³ Thus, common law adult courts presumed that up to age seven children were incapable of criminal intent and could not be held personally responsible for violations of the law. Children between the ages of seven and fourteen were also presumed innocent unless the prosecution proved their ability to discern between good and evil and thereafter they were fully responsible.⁶⁴

With the creation of the juvenile justice system in 1908 by the Juvenile Delinquents Act, the emphasis placed on punishing youth and children for their crimes diminished. The philosophy underlying the Juvenile Delinquents Act was one that generally focused on the welfare of juveniles. As such, the Juvenile Delinquents Act mandated that the primary purpose of the Juvenile Court was to serve the best interests of the children and youth coming before it by treating youth in conflict with the law as misdirected children in need of aid, encouragement, help and assistance rather than as mini-criminals needing punishment, as was previously the case prior to the creation of the juvenile justice system. Informality and

⁶²The principle of *doli capax* is most clearly enunciated by Blackstone when he stated in 1796 that “the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent’s understanding and judgment. See W. Blackstone, Commentaries on the Laws of England, 1857 ed. (London: John Murray, 1857) IV, 19.

⁶³Raymond Corrado and Alan Markwart, “Canada”, International Handbook on Juvenile Justice, Ed. Donald J. Shoemaker, (Westport: Greenwood Press, 1996) 35.

⁶⁴Margaret May, “Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century,” Crime and Justice in American Society, ed. Eric H. Monkkonen, (Westport: London, 1991) 47-48.

flexibility were the hallmarks of the Juvenile Delinquents Act.⁶⁵ Its “aim was to mitigate the strict application of the criminal justice system in such a way as to permit social intervention to ‘save’ the child.”⁶⁶

While the Juvenile Delinquents Act generally mandated that juvenile delinquents be treated less punitively than adult offenders, a measure was included in the Juvenile Delinquents Act that allowed the application of adult penalties to juvenile delinquents charged with offences in specific cases. This measure was called transfer to adult court and it made its first appearance in Canadian criminal law in 1908 with the advent of the Juvenile Delinquents Act.

Predicated on the existence of a justice system for youth that was separate and distinct from the adult system, the transfer to adult court provisions provided an outer boundary for the youth justice system under which the court could determine which offenders would be treated as juveniles and which offenders would be treated as adults. Yet, these provisions were intended to apply strictly to exceptional young offenders and were to be used only when a judge felt that the procedures and penalties used in juvenile court had proven to be, or would be ineffective in dealing with juvenile delinquents.⁶⁷ Thus, where section 7 made transfer to adult court available for any youth over the age of 14 who had allegedly committed an indictable offence, the transfer itself could only take place where the good of the child and

⁶⁵Juvenile Delinquents Act, 1908, s. 31

⁶⁶Philip Rosen, *supra* note 11 at 1.

⁶⁷W. L. Scott, *supra* note 9 at 17.

the interests of the community necessitated that the youth be transferred.⁶⁸

Judicial discretion played a key role in the decision to transfer a youth to adult court. Like many provisions under the Juvenile Delinquents Act, subsection 7(1) of the Act permitted the court, through its own discretion, to order the child to be proceeded against by indictment in adult court in accordance with the provisions of the Criminal Code. Likewise, the court could rescind an order to transfer a child to adult court under subsection 7(2) of the Act at any time before a proceeding had been initiated against the child in ordinary criminal court.⁶⁹

Once transferred to adult court under section 7 of the Juvenile Delinquents Act, the youth would be tried and sentenced as an adult under the Criminal Code, gaining all the rights and procedures applicable to an adult accused such as the right to counsel at all stages of proceedings, the right to notice and the right to give full answer and defense.⁷⁰ Yet, juvenile delinquents could not be returned to juvenile court either for the adjudication or disposition of their case once proceedings had been initiated in adult court. These offenders were also incarcerated with adults pending trial and they were subject to the same penalties as adult offenders if convicted of their alleged crime.⁷¹

⁶⁸Priscilla Pratt, *supra* note 10 at 235.

⁶⁹The Juvenile Delinquents Act, 1908, s. 7(1), (2)

⁷⁰Philip Rosen, Young Offenders Legislation, (Ottawa: Law and Government Division of the Research Branch of the Library of Parliament, 1980) 3-4.

⁷¹Priscilla Pratt, *supra* note 10 at 236.

The transfer provisions of the Juvenile Delinquents Act remained substantively unchanged throughout the 76 year history of the Act.⁷² The Juvenile Delinquents Act generally dictated the use of transfer to adult court as an exceptional measure because the Juvenile Delinquents Act which created the provisions was based on the existence of a justice system for youth that was separate from the adult system. The welfare of offenders was the most important concern of the Juvenile Delinquents Act. The transfer to adult court provisions demonstrated this concern by mandating that juvenile delinquents' welfare be a primary consideration in the decision to transfer youth to the adult system.

With the introduction of the Young Offenders Act in 1984, the way that juvenile justice in Canada was regulated was substantially reformed. Whereas the Juvenile Delinquents Act emphasized a welfare philosophy as the primary philosophy of the youth justice system and limited the importance of justice and crime control philosophy, the Young Offenders Act shifted the balance of these philosophies so that justice philosophy gained primary importance. The primary purpose of the youth justice system following a justice philosophy is the protection of individual rights through proportionate sanctions, minimal interference with freedoms and due process.⁷³ Thus, the focus of the youth justice system following the Young Offenders Act was the protection of individual rights and the criminal offence.⁷⁴

⁷² Amendments to the Juvenile Delinquents Act in 1912, 1914, 1921 and 1924 produced no changes to the section. The complete revision of the Act in 1929 made no substantive changes to the transfer provision. However, it was renumbered and appears from that revision on as section 9 of the JDA.

⁷³ Sandra J. Bell, *supra* note 1 at 184.

⁷⁴ *Ibid*.

The introduction of the Young Offenders Act and its underlying philosophy were brought about to respond to concerns that juvenile delinquents were denied basic elements of due process under the Juvenile Delinquents Act.⁷⁵ The Young Offenders Act was introduced because of concerns regarding the infringement of children's rights under the Juvenile Delinquents Act and the overall efficiency of the treatment oriented dispositions that the Juvenile Delinquents Act imposed. The inconsistency of the application of the treatment provisions of the Juvenile Delinquents Act, the lack of accountability in decision making and the discretion given to the courts in sentencing all contributed to calls for reform.⁷⁶ The treatment approach of the Juvenile Delinquents Act was also criticized as undermining the seriousness of some criminal behavior, thereby inhibiting any deterrent effect of punishment on more serious juvenile delinquents.⁷⁷ While the primary reason for the introduction of the Young Offenders Act was the infringement of children and youths' rights, the leniency of the Juvenile Delinquents Act on serious and violent offenders was also a concern.

The new transfer provisions created by the Young Offenders Act reflected concerns related to the infringement of juveniles' rights. As compared to the transfer provisions of the Juvenile Delinquents Act, the transfer provisions of the Young Offenders Act were more restrictive of judicial discretion and emphasized procedure more in the decision to transfer. By way of example, the transfer provisions in section 16 of the Young Offenders Act

⁷⁵Rosen, *supra* note 70 at 1.

⁷⁶Sandra J. Bell, *supra* note 1 at 184.

⁷⁷Sandra J. Bell, *supra* note 1 at 178.

continued to provide for transfers to adult court in regard to any serious indictable offence alleged to have been committed by a youth fourteen or older where the interests of society, having regard to the needs of the young person required transfer.⁷⁸ Yet, section 16(2) of the Young Offenders Act introduced specific factors that also had to be considered in the decision to transfer youth to the adult system. This section instructed the courts to consider the seriousness of the alleged offence, the age, character and prior record of the youth, the adequacy of the Act as opposed to the Criminal Code to deal with the case and the availability of treatment and correctional resources in deciding whether to transfer a case to ordinary court.⁷⁹ By specifying that the court had to consider specific factors in the decision to transfer youth to the adult system, the transfer provisions of the Young Offenders Act reduced judicial discretion in transfer to adult court proceedings.

This was not the only requirement of the Young Offenders Act which limited the court's discretion in the decision to transfer. For example, the Young Offenders Act prohibited a judge from making a decision to transfer without first ordering and considering pre-disposition reports.⁸⁰ The court's discretionary powers in deciding to transfer a youth to adult court were also limited by requirements in section 16 (1) which restricted a judge from initiating a transfer hearing. Under this section, applications for transfer could only be made

⁷⁸Priscilla Pratt, *supra* note 10 at 248.

⁷⁹Nicholas Bala, "The Young Offenders Act: A Legal Framework", Justice and the Young Offender in Canada, ed. Joe Hudson, Joseph P. Hornick and Barbara A. Burrows, (Toronto: Wall and Thompson, 1988) 31.

⁸⁰Philip Rosen, *supra* note 70 at 14.

by the young person or his or her counsel, or the Attorney General or his or her agent.⁸¹ These requirements were added to the transfer process to limit the court's discretion in transferring youth to adult court. In doing so, the transfer to adult court provisions became more procedure oriented.

While transfer hearings under the Young Offenders Act were more procedural and rights oriented in nature than those under the Juvenile Delinquents Act, they still were not considered formal trials. The rules of evidence remained greatly relaxed, and the court permitted the presentation of hearsay evidence regarding the youth's background and circumstances of the alleged offence.⁸² Yet the consequences of transfer remained substantially the same as those under the Juvenile Delinquents Act. Youth who were transferred to adult court were treated as adult offenders and were subject to the same penalties applicable to adult offenders.⁸³

Amendments introduced to the Young Offenders Act after its inception in 1984 also served to limit judicial discretion in the decision to transfer youth to adult court. The first amendment to the Young Offenders Act, introduced by Bill C-106 in 1986, amended section 16 of the Young Offenders Act to require a youth court to inquire whether either the defense or the prosecution wished to make a transfer application before adjudication.⁸⁴ This change

⁸¹Priscilla Pratt, *supra* note 10 at 286.

⁸²Nicholas Bala, *supra* note 80 at 31.

⁸³*Ibid.*

⁸⁴Young Offenders Act, Bill C-106, 1986.

was seen by the government as a response to problems caused by precipitate guilty pleas that were being made to avoid transfers in youth court as well as a way to deal with cases in which the parties had not given consideration to a transfer.⁸⁵ However, this amendment reduced judicial discretion in the transfer process, thereby serving to increasingly proceduralize the transfer to adult court provisions.

Bill C-12, given Royal Assent on April 9, 1992, further amended section 16 of the Young Offenders Act. It changed the test for transfer located in subsection 16(1) of the Act, so that, when making a transfer decision, where the rehabilitation of the offender and the protection of the public could not be reconciled, the Youth Court would have to find the latter principle to be paramount and order the youth transferred to ordinary court.⁸⁶ Recall that the Juvenile Delinquents Act mandated that transfer could only take place if both the needs of society and the interests of the offender required the youth be transferred to ordinary court. This amendment to the Young Offenders Act represented a philosophical departure from the welfare orientation of the Juvenile Delinquents Act in that the amendment placed the protection of the public above the overall welfare of the offender, making the test for transfer more punitive.

By prioritizing the protection of the public in the test for transfer, the amendments to the transfer provisions introduced by Bill C-12 also served to lessen judicial discretion in the decision to transfer youth to the adult system. Prior to the amendments, there had been

⁸⁵Rosen, *supra* note 70 at 3.

⁸⁶Philip Rosen, *supra* note 11 at 17.

substantial disagreement between court of appeal judges as to how to interpret the Young Offenders Act's standard for transfer. Some judges believed that the standard under the Young Offenders Act was similar to the standard articulated under section 9 of the Juvenile Delinquents Act (previously section 7), where a transfer could only take place if both the needs of society and the interests of the offender required the youth be transferred to ordinary court.⁸⁷ Other judges felt that the transfer test under the Young Offenders Act placed a new emphasis on the interest of society as it related to the needs of the young person. For example, the Manitoba Appeal Court stated in *R. v. C.J.M.* that the primary concern had shifted under the Young Offenders Act so that the interests of society appeared to be of primary importance in deciding whether to transfer a youth to ordinary court.⁸⁸ By mandating that the protection of the public was paramount, the amendments to the transfer provisions introduced by Bill C-12 restricted youth court judges from prioritizing the welfare of offenders in the decision to transfer, thereby reducing confusion in interpreting the transfer test and lessening judicial discretion.

Bill C-12 also extended the potential sentence length that could be imposed on young persons not transferred to ordinary court for murder from three years to five years less one day. At the same time, it reduced the period of parole ineligibility that would apply to young offenders charged with murder who were transferred to adult court from 10 or 25 years to

⁸⁷Nicholas Bala, *supra* note 79 at 32.

⁸⁸Pratt, *supra* note 10 at 229 (no case citation available).

5 to 10 years.⁸⁹ Drafted because of “criticisms of the sentencing, and hence the transfer provisions of the Act regarding very serious crimes”⁹⁰, the Bill attempted to provide more ‘appropriate’ choices in sentences by reducing the gap between sentencing choices available in the adult and youth justice systems. These amendments are important because previously, many justifications for transferring a youth to adult court revolved around the large gap between sentencing choices available under the Young Offenders Act and the Criminal Code.⁹¹ Yet, as Priscilla Pratt suggests in her book Young Offenders Law in Canada, these amendments only appeared to make the gap less wide between sentencing in youth court and sentencing in adult court for violent and serious crimes.⁹² In actual fact, judges presiding over transfer cases still faced the choice between a maximum sentence in youth court versus a mandatory life term. The only difference was that for the specific crime of murder the choices available under the Young Offenders Act now allowed the court to be more punitive within the youth realm while the changes to parole eligibility in the adult system made a decision to transfer a youth to adult court more “just” in the eyes of the law.

While the main focus of reforms to the transfer to adult court provisions of the Young Offenders Act was the emphasis of justice philosophy, remnants of the welfare philosophy

⁸⁹Pratt, *supra* note 10 at 241.

⁹⁰Pratt, *supra* note 10 at 237.

⁹¹Maureen McGuire, “C-19, An Act to Amend the Young Offenders Act and the Criminal Code - ‘Getting Tougher’”, 39 Canadian Journal of Criminology 197.

⁹²Pratt, *supra* note 10 at 241.

which gained prominence with the Juvenile Delinquents Act could be seen to a lesser degree in some reforms. Bill C-12 gave judges greater flexibility in sentencing post-transfer offenders by introducing a provision that allowed a young person to serve their sentence from any conviction in adult court in a youth facility.⁹³ Moreover, this flexibility regarding placement applied to youth awaiting trial in an adult court so that a youth ordered to be transferred could remain in a youth facility until the date of their trial.⁹⁴

The British Columbia Court of Appeal emphasized the reasons why this amendment supports, and is important for the welfare of young offenders subject to transfer in 1994. In *A. (F.B.)*, Lambert J. stated:

It is important to understand that even if the sentence is more than two years, a part of the sentence may be served in a place of custody for young persons separate and apart (from adult offenders). Of course, the maturing young person will in the course of time reach an age where he cannot be incarcerated with 14 and 15 year olds but this provision allows, to the greatest extent possible, the use of all of the provincial facilities that are available, all of the youth facilities that are available, and all of the adult facilities that are available in the federal system, to try and reach a reasonable approach to rehabilitation through the incarceration process to the extent that may seem to be possible.⁹⁵

In general, however, the focus of the transfer to adult court provisions in the Young Offenders Act, and early reforms to these provisions by Bill C-108 and Bill C-12 was the protection of young offenders' procedural rights. As compared to the transfer provisions of the Juvenile Delinquents Act, the transfer provisions of the Young Offenders Act during this

⁹³Pratt, *supra* note 10 at 241.

⁹⁴*Ibid.*

⁹⁵*A. (F.B.)*, (1994), 22 W.C.B. (2d) 199 (B.C.C.A.)

time period became increasingly proceduralized resulting in the restriction of judicial discretion in the decision to transfer. The focus on procedure demonstrated in reforms to the transfer provisions related to an overall shift in the philosophy of the youth justice system to emphasize justice philosophy.

With the introduction of Bill C-37 in 1994, the emphasis placed on justice philosophy in reference to the transfer to adult court provisions diminished. Bill C-37 introduced reforms to the transfer provisions that emphasized crime control philosophy. As the introductory chapter explained, the primary focus of the juvenile justice system following this philosophy is the protection of society.⁹⁶ The crime control philosophy underlying Bill C-37 shifted the focus of reforms to the transfer provisions away from the justice philosophy generally emphasized by the Young Offenders Act because the focus of the reforms introduced by Bill C-37 was not the individual rights of young offenders. The primary focus of reforms to the transfer provisions introduced by Bill C-37 was the maintenance of order, order being maintained by protecting society through harsh sanctions that held young offenders accountable for their crimes.

The introduction of Bill C-37 and its underlying philosophy were brought about to respond to concerns that the Young Offenders Act was not tough enough on violent and serious youth crime. Bill C-37 was introduced by the government to respond to increasingly vehement demands for government action to reduce the incidence of violent youth crime and

⁹⁶Sandra J. Bell, supra note 1 at 184.

to satiate public dissatisfaction with the existing youth justice system. The 'tough on crime' amendments introduced by Bill C-37 were to improve public protection by improving the Act's ability to deal effectively with serious and violent youth crime through more punitive sanctions. These reforms were seen as a response to critics calling for greater accountability in the system and more punitive sanctioning as well as the general need to reform the Act's treatment of violent young offenders.⁹⁷

Amendments made to the transfer to adult court provisions of the Young Offenders Act by Bill C-37 demonstrate the Bill's emphasis on crime control concerns. The Bill amended section sixteen to introduce presumptive transfer to adult court for certain violent young offenders.⁹⁸ Offenders aged sixteen or seventeen alleged to have committed first or second degree murder, attempted murder, manslaughter or aggravated sexual assault were automatically transferred to adult court unless all the interests of society, including the protection of the public and the rehabilitation of the offender could be reconciled under the jurisdiction of the youth court. If reconciliation of the latter objective was impossible, the protection of society was deemed paramount and the Bill ordered that the youth be transferred.⁹⁹ Thus, in introducing presumptive transfer, Bill C-37 demonstrated the use of

⁹⁷Marilyn Pilon, Bill C-37: An Act to Amend the Young Offenders Act and the Criminal Code (Ottawa: Law and Government Division of the Research Branch of the Library of Parliament, 1994) 1.

⁹⁸Generally, presumptive transfer means that certain youth are assumed transferred to adult court based on the offence that they have allegedly committed and based on their age at the time of the alleged offence. The onus of proving that the youth should remain in youth court rests with the youth.

⁹⁹Penny J. Jones, supra note 2 at 51.

crime control philosophy in its reforms to the youth justice system by introducing a provision that assumed a presumption that young offenders charged with certain violent offences should automatically be subject to adult punishment.

However, the introduction of presumptive transfer also expanded the scope of the transfer to adult court provisions by dictating that young offenders committing certain violent offences should no longer be treated as youths in the eyes of the law. The consequences of expanding the scope of the transfer provisions was that other available options that could have been used to deal with violent and serious young offenders subject to transfer within the confines of the youth justice system were automatically limited. Transfer to adult court presupposes the need for differential treatment of young offenders based on the needs of society to be protected from violent and serious crime and the efficiency of the youth justice system to protect society and rehabilitate youth in conflict with the law. Where it is presumed that differential treatment for youth charged with violent and serious crime is necessary, it is also presumed that the youth justice system is not able to protect society from these offenders, nor rehabilitate them such that they don't recidivate upon release. In this way, reforms to the Young Offenders Act that subjected certain violent young offenders to presumptive transfer made other dispositions in the youth justice system unavailable to them. The introduction of presumptive transfer presupposed that those youth and their crimes were too "adult" to be dealt with by the youth justice system.

The introduction of presumptive transfer to adult court also changed the boundary between the adult justice system and the youth justice system. Transfer to adult court both

factually and symbolically represents the outer boundary of the youth justice system. Prior to the introduction of Bill C-37, this boundary was fairly strong because the dictated use of transfer was as an exceptional measure. With the introduction of an assumption that young offenders committing certain violent and serious offences were to be treated as adults, Bill C-37 made the mandated use of transfer to adult court for these violent offences normal. In doing so, the Bill brought aspects of the adult justice system into the youth justice system that were not there before, eroding the line between the treatment of youth charged with violent crime and adult offenders and weakening the boundary of the youth justice system.

Other reforms introduced by Bill C-37 included a provision for longer sentences for violent offences under the Young Offenders Act. The Bill increased the five years less a day maximum penalty for murder under the Young Offenders Act to seven and ten years for second and first degree murder respectively.¹⁰⁰ In the same vein, Criminal Code amendments increased the minimum parole ineligibility periods for sixteen and seventeen year-old offenders convicted of murder in adult court after transfer. Offenders now had to serve at least seven to ten years of their life sentence instead of the five to ten years previously required.¹⁰¹

Bill C-19, enacted in 1997, was also seen as an amendment to the Young Offenders Act that was “tough on crime”. Bill C-19 was introduced by then Minister of Justice Allen Rock in response to critics of the system calling for greater accountability and more punitive sanctioning as well as the general need to reform the Act’s treatment of violent young

¹⁰⁰ *Act to amend the Young Offenders Act and the Criminal Code, Bill C-37, s. 20*

¹⁰¹ Marilyn Pilon, *supra* note 97 at 1.

offenders. This Bill, in the opinion of the Department of Justice, changed the Young Offenders Act in order to specifically satisfy public demands for greater accountability in dealing with youth violence.¹⁰² Yet the transfer to adult court provisions, as amended by the Bill, did not become more punitive. Rather, the major amendment of the section proposed by the Bill seemed to be administrative in nature. As was previously the case under section 16 of the Young Offenders Act, the court had to consider the objectives of affording protection to the public and the rehabilitation of the offender, where the youth had to be transferred to adult court if the two objectives could not be reconciled within the youth justice system. The difference between the section before and after the amendment is that the amended section provided that where the two objectives could be reconciled, the young person was to be proceeded against in youth court.¹⁰³ Hence, while the intent of these amendments to the Young Offenders Act was to make the transfer to adult court provisions more punitive, the most punitive sentencing option available under the Young Offenders Act remained substantively unchanged.

This point is also illustrated by the formal establishment of a subsection in the Act to deal with the question of burden of proof in a transfer application. The burden of proving that a transfer was necessary under earlier versions of the Young Offenders Act was assigned to the party bringing the application, as dictated by common law. Bill C-19 formalized this procedure by stating that the onus in proving that a transfer application is justified rests with

¹⁰²Maureen McGuire, *supra* note 91 at 194-195.

¹⁰³Young Offender Act, ss. 16(1.1))

the applicant in all cases.¹⁰⁴ The reason for this amendment was simply that the Act itself was silent on the issue of onus in transfer hearings.

Bill C-19 represents the last and most current successful reform to the transfer to adult court provisions of the Young Offenders Act and the Act itself. While reforms introduced by Bill C-19 were primarily procedural in nature, reforms generally introduced to the transfer provisions during this time period supported crime control philosophy. The protection of society through punitive sanctions was the priority of reforms to the transfer to adult court provisions in the mid 1990's. The transfer provisions became increasingly punitive with the prioritization of the protection of society in the transfer test and the scope of the provisions was expanded with the introduction of presumptive transfer for certain violent offences. Amendments to the transfer provisions during this time period reflect the overall shift in philosophy of the youth justice system to de-emphasize justice philosophy in the administration of youth justice and prioritize crime control philosophy.

On March 11, 1999, Anne McLellan, Minister of Justice and Attorney General of Canada introduced the Youth Criminal Justice Act in the House of Commons. Contained in Bill C-3, this Act was to replace the Young Offenders Act as the primary legislation dealing with crime committed by youth age twelve to seventeen. Bill C-3 was introduced by the Department of Justice to address concerns by the public and critics of the Young Offenders Act that the current system was not doing enough to prevent youth crime or ensure that there

¹⁰⁴Maureen McGuire, *supra* note 91 at 195.

were meaningful consequences for violent and serious young offenders.¹⁰⁵ In sum, proposed amendments to the youth justice system located in Bill C-3: the Youth Criminal Justice Act were introduced because the Department of Justice felt that the youth justice system was not as effective as it should be in protecting society.

The proposed Youth Criminal Justice Act did not become law. On October 22nd, 2000, a federal election was called by the Prime Minister of Canada, Jean Chretien. As a result of this election call, Bill C-3: the Youth Criminal Justice Act, died in the middle of third reading in the House of Commons. Although Bill C-3 did not become law, it is significant to the youth justice system in that it represents part of a trend in reforms to the transfer to adult court provisions and other provisions dealing with violent and serious young offenders. This chapter has already shown that reforms to the transfer provisions contained in Bill C-37 emphasized crime control philosophy when dealing with youth subject to transfer. Had the Youth Criminal Justice Act been passed, it would not only have continued that trend, but it would have dictated the primacy of crime control philosophy when dealing with all young offenders convicted of violent and serious crime subject to transfer to adult court. Indeed, at the time this thesis is being written, the Youth Criminal Justice Act has been reintroduced in revised form in Parliament as Bill C-7 on February 5, 2001.¹⁰⁶ Therefore, the shift in

¹⁰⁵Canadian Criminal Justice Association, *supra* note 6 at 1.

¹⁰⁶The overall approach of the Youth Criminal Justice Act in Bill C-7 is almost identical to the Youth Criminal Justice Act, as represented in Bill C-3. The transfer provisions are also similar. As Bill C-7 was introduced in Parliament after the first complete draft of this thesis was written and as little commentary yet exists on the new version of the Act, this Bill will not be explored in this Chapter. Rather, Bill C-3 will be explored but will be referenced in the conclusion.

philosophy proposed by Bill C-3 will be discussed in order to argue that the current trend of lawmakers is to continue to prioritize crime control philosophy when dealing with serious and violent young offenders.

The shift in philosophy associated with the introduction of Bill C-3 can be seen in section 3 of the Youth Criminal Justice Act. Section 3 of the Youth Criminal Justice Act identifies the primary goal of the youth justice system. Unlike the Juvenile Delinquents Act which prioritized the welfare of offenders and the Young Offenders Act which focused on procedural rights, section 3 of the Youth Criminal Justice Act stated that the principal goal of the youth justice system was the protection of society.¹⁰⁷ By placing the protection of society as the primary goal of the youth justice system, the balance achieved by the Young Offenders Act in reference to the three competing philosophies of the youth justice system shifted. In placing the protection of society as the primary goal of the youth justice system, Bill C-3 prioritized crime control philosophy in the administration of youth justice, diminishing the importance of welfare philosophy and justice philosophy.

The protection of society could have been achieved under the Youth Criminal Justice Act in three ways: by subjecting young people to meaningful consequences that held them accountable for their crimes, by addressing the circumstances underlying a young person's offending behavior in order to prevent crime, or by rehabilitating young people who commit

¹⁰⁷Bill C-3: Youth Criminal Justice Act, section 3.

offences and reintegrating them into society.¹⁰⁸ This suggests that the Youth Criminal Justice Act recognized multiple concerns in the administration of youth justice. However, the importance placed on the competing priorities of rehabilitation, crime prevention and punishment is open to debate. As Carol Letman of the Criminal Lawyer's Association argued in her presentation to the Standing Committee on Justice and Human Rights, by specifying as clause 3 does, that the primary objective of Bill C-3 was to protect society and that rehabilitation and reintegration were only considerations that needed to be emphasized, the Bill would have destroyed the balance that has been achieved between these concerns by the Young Offenders Act.¹⁰⁹

Similarly, Miss Rita Scott, a Board Member for the Church Council on Justice and Corrections, argued that rehabilitation would be de-emphasized if Bill C-3 came into law. She suggested that the adoption of what she termed a retributive and punitive response of the Youth Criminal Justice Act by the youth justice system would mean that the system would overlook a lot of the social reasons for why violent young offenders commit crime.¹¹⁰ She went on to argue that:

¹⁰⁸ Bill C-3: Youth Criminal Justice Act, section 3.

¹⁰⁹ Ms. Carol Letman - Criminal Lawyers' Association - Presentation to the Standing Committee on Justice and Human Rights on Bill C-3 Youth Criminal Justice Act, Feb. 17, 2000, Ottawa, House of Commons.

¹¹⁰ Ms. Rita Scott,, Church Council on Justice and Corrections, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, Feb. 15, 2000, Ottawa, House of Commons.

...(the) philosophy of punishing the deviant actions of our young people, centred primarily on the consequences of the offence and treating the young person's needs as secondary, completely obscures the subjective assessment of criminality that is peculiar to the adolescent phase of one's life...¹¹¹

The Supreme Court decision in *R. v. J.J.M.* in 1993 clearly recognized that young offenders law should allow for a proper balance between the protection of society and the specific situation and needs of the young people involved.¹¹² The crime control philosophy followed by the Youth Criminal Justice Act would have constituted a new balance of these competing priorities in the youth justice system as well as a significant shift away from the welfare philosophy upon which the youth justice system was based.

Although the change in the statement of legislative intent contained in section 3 of the Youth Criminal Justice Act demonstrates the shift in the overall philosophy of the youth justice system, changes made to the transfer to adult court provisions that would have expanded their scope specifically demonstrate the Bill's focus on crime control in reference to violent and serious young offenders. Like the Young Offenders Act, the Youth Criminal Justice Act would have allowed an adult sentence for any youth 14 years or older who was convicted of an offence punishable by more than two years in jail. However, the Act would have also expanded the offences for which a young person convicted of an offence would be presumed transferred to adult court. Where the Young Offenders Act provides that youth charged with murder, attempted murder, manslaughter and aggravated sexual assault can be

¹¹¹ *Ibid.*

¹¹² *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421

presumptively transferred to adult court, the Youth Criminal Justice Act would have also allowed youth to be presumptively transferred if they had committed a pattern of serious violent offences.¹¹³ A youth would be deemed to have committed a pattern of serious violent offences following the Youth Criminal Justice Act where, at the time the young person had committed the present serious violent offence, at least two judicial determinations were previously made that the young person had committed a serious violent offence. Serious violent offences were defined in section 2 (1) of the Youth Criminal Justice Act as an offence that caused or created a substantial risk of causing serious bodily harm and generally included any offence against the person for which an adult could be sentenced to imprisonment for more than two years.¹¹⁴ By expanding the presumption for transfer to adult court to include offenders committing multiple serious violent offences, the scope of the transfer provisions would have been expanded because the Bill presumed that more violent young offenders required adult punishment.

The scope of the transfer to adult court provisions would have also been increased by the expansion of presumptive transfer by the Youth Criminal Justice Act because young offenders committing offences not traditionally defined as serious or violent would have been subject to presumed transfer to adult court. As representatives from the John Howard Society pointed out in their presentation to the Standing Committee on Justice and Human

¹¹³Department of Justice Canada, News Release: Minister of Justice Introduces New Youth Justice Law (Department of Justice Canada: Ottawa, 1999) 1.

¹¹⁴Bill C-3, Youth Criminal Justice Act, section 2(1).

Rights, the definition of a serious violent offence following Bill C-3 was extremely broad and could have included a number of offences.¹¹⁵ The wording of ‘substantial risk of causing bodily harm’ in the definition of a serious violent offence was very open-ended. Taken literally, this definition could have included offences such as impaired driving offences. Youth who get behind the wheel in an intoxicated condition can create a substantial risk of physical harm to others.¹¹⁶ The expansion of presumption to include youth committing a pattern of serious violent offences, then, could have also included youth committing a pattern of non-violent offences in the presumption for transfer.

Transferring youths to adult court under the Youth Criminal Justice Act based strictly on the number of violent and serious offences youth had committed could have also brought violent or serious offenders under the scope of presumptive transfer who should not have been included. The underlying assumption behind transfer to adult court is that youth are transferred to adult court in exceptional cases, in instances where the needs of young offenders and the needs of society to be protected from crime cannot be met in the youth justice system. Representatives from the Canadian Bar Association pointed out that with the Youth Criminal Justice Act, there could be situations where someone may have been found guilty of three offences that could be found by the judge to be the type of offence that falls into the serious violent category and could then have been transferred to adult court even

¹¹⁵Standing Committee on Justice and Human Rights, Meeting Transcript, February 9, 2000.
[<http://www.parl.gc.ca/InfoComDoc/36/2/JUST/Meetings/Evidence/justev11-e.htm>]

¹¹⁶Ms. Carol Letman, *supra* note 109.

though the transfer may not be warranted or necessary.¹¹⁷ Take the following example: a youth is convicted of two counts of assault causing bodily harm resulting from schoolyard fights where the other parties ended up with a broken nose or broken wrist. The youth gets into a third fight at school, causing similar injury to the other person involved and receives a third conviction for assault. That youth is now eligible to be presumed transferred to adult court even though their offences could have been dealt with in the context of juvenile corrections.

The introduction of a “three strikes and you’re out rule” for transfer to adult court would have also been problematic in that it could have encouraged courts not to consider all of the circumstances surrounding both the offence and the offender because they would be focusing primarily on the offence committed and not on the needs of the youth.¹¹⁸ The crime control philosophy that the Youth Criminal Justice Act followed focused on the accountability of offenders through proportionate sanctions. Where the Youth Criminal Justice Act dictated the court presumptively transfer youth to adult court after committing a specific number of violent offences, it would have implied that the offences committed were the primary consideration in the decision to transfer, such that the needs of the offender could have been ignored.

Another change to the transfer provisions that would have occurred had the Youth

¹¹⁷Ms. Isabel Schurman -Chair, National Criminal Justice Section, Canadian Bar Association, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act , February 29, 2000, Ottawa, House of Commons.

¹¹⁸*Ibid.*

Criminal Justice Act been passed is the introduction of a new minimum age for presumptive transfer. Where Bill C-37 mandated that youth aged 16 and 17 charged with murder, attempted murder, manslaughter and aggravated sexual assault could be presumptively transferred to adult court, the Youth Criminal Justice Act provided that offenders aged 14 years or older who committed those offences or a pattern of serious violent offences were subject to presumptive transfer.¹¹⁹

The decision to lower the minimum age for presumption in favour of adult penalties in Bill C-3 would have changed the symbolic boundary of the youth justice system. As Representatives from the Chaudiere-Appalaches Association des Centre Jeunesse du Quebec argued in their presentation to the Standing Committee on Justice and Human Rights on Bill C-3, the introduction of presumptive sentences for 14 and 15 year olds would have made the adult system increasingly part of the system for minors in that it attempted to make the system for minors correspond to the system for adults by copying it.¹²⁰ Bill C-3 would have increased the dictated use of transfer to adult court to include more violent and serious young offenders. In doing so, it would have accentuated the movement of more violent youth into the adult system.¹²¹ More of these youths would no longer be able to avail themselves of their

¹¹⁹Department of Justice Canada, supra note 113 at 1.

¹²⁰Jacques Dumais, Director of Youth Protection, Chaudiere - Appalaches Association des Centres Jeunesse de Quebec-Presentation to the Standing Committee on Justice and Human Rights, on Bill C-3-Youth Criminal Justice Act, February 15, 2000, Ottawa, House of Commons.

¹²¹Justice Heino Lilles, Chief Judge of the Territorial Court of Yukon, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, February 22, Ottawa, House of Commons.

entitlement to the rehabilitative philosophy and treatment resources normally associated with being processed in the youth justice system.¹²² The proposal in Bill C-3 to dictate adult punishment as a normal response to more violent youth and their crimes would have continued to blur the line between youth and adult corrections thereby weakening the boundary of the youth justice system.

The test for transfer would have also changed with the introduction of the Bill C-3: the Youth Criminal Justice Act. The court would no longer have been restricted to a specific test that looked at the objectives of affording protection to the public and rehabilitating offenders as primary considerations in determining whether transfer is appropriate.¹²³ Instead, the court would have considered the seriousness and circumstances of the offence, the degree of responsibility, age, maturity, character, background and previous record of the young person as well as the general purposes and principles of sentencing in the transfer test in order to determine whether transfer to adult court was warranted.¹²⁴

The transfer to adult court test in sub-section 72(1) of the Youth Criminal Justice Act provided that youth courts consider the seriousness and circumstances of the offence and the degree of responsibility, age, maturity, character, background and previous record of the

¹²²Ms. Isabel Schurman, *supra* note 117.

¹²³Section 16(2) of the Young Offenders Act instructed the courts to consider the seriousness of the alleged offence, the age, character and prior record of the youth, the adequacy of the Act as opposed to the Criminal Code to deal with the case and the availability of treatment and correctional resources in deciding whether to transfer a case to ordinary court. However, these factors were of secondary importance to the transfer test located in section 16(1).

¹²⁴Bill C-3, Youth Criminal Justice Act, section 72(1).

young person and any other relevant factors, and if the court was of the opinion that a youth court sentence imposed in accordance with the purpose and principles set out in section 37 would not be adequate to hold the young person accountable for their offending behavior, the young offender must be transferred to adult court.¹²⁵ Also, where a youth court sentence imposed after considering the factors listed above, and in accordance with the purpose and principles set out in section 37 would be adequate to hold the young person accountable for their offending behavior, the court would have had to order that the young person was not liable for an adult sentence and a youth sentence must be imposed.¹²⁶

The purpose of sentencing under section 37(1) of the Youth Criminal Justice Act was to contribute to the protection of society by holding young people accountable for their offences through the imposition of just sanctions that had meaningful consequences for the young person and that promoted his or her rehabilitation and reintegration into society.¹²⁷ The purpose of sentencing would have been achieved by applying the principles of sentencing espoused by section 37(2) of the Youth Criminal Justice Act. For example, this section provided that punishment imposed on a young person must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence. The sentence must have also been one that was likely to rehabilitate the young person, reintegrate them into society, and promote in the young person a sense of

¹²⁵Bill C-3, Youth Criminal Justice Act, section 72(1).

¹²⁶Bill C-3, Youth Criminal Justice Act, subsections 72(1)(a) and (b).

¹²⁷Bill C-3, Youth Criminal Justice Act, section 37 (1).

responsibility and an acknowledgment of the harm done to victims.¹²⁸

The inclusion of many factors in the transfer test of the Youth Criminal Justice Act was supposed to allow judges more flexibility in transfer decisions.¹²⁹ While the test was broad in nature and was designed to allow flexibility in interpretation, the test focused on the accountability of young offenders. Because the primary purpose of sentencing and the overall goal of the Youth Criminal Justice Act was the protection of society and because crime control concerns were emphasized in the transfer test, it is the argument of this thesis that youth court judges could not have applied the test to emphasize the needs of the young people. As Michel Bellehumeur, member of the Standing Committee on Justice and Human Rights argues, if you emphasize the needs of the public to be protected from crime and state that judges must hand down sentences proportional to the seriousness of the offence, they will not be focusing on the needs of the young offender, but on the offence itself which happens to have been committed by a young person.¹³⁰ In sum, the needs of young people subject to transfer would have been de-emphasized once youth court judges applied the transfer test because the transfer test and the overall mandate of the Youth Criminal Justice Act focused on crime control concerns. The application of the transfer test would have been made more punitive if the Youth Criminal Justice Act had been passed by Parliament.

¹²⁸Bill C-3, Youth Criminal Justice Act, sections 37(2) (a) though (c).

¹²⁹Standing Committee on Justice and Human Rights, Meeting Transcript, March 29, 2000.
[<http://www.parl.gc.ca/lfoComoc/36/2/JUST/Meetings/Evidencejustev40-e.htm>]

¹³⁰*Ibid.*

The process of transferring a youth to adult court would have also changed with the introduction of the Youth Criminal Justice Act. Currently, an application for a transfer hearing is made by the young person, their counsel, or the Attorney General or his agent some time after an information is laid against a young person but prior to adjudication. Youth are then subject to a transfer hearing and if transferred to adult court, trial, conviction and sentencing take place in the adult system.¹³¹ What is essentially a dispositional hearing takes place before a finding of guilt and on the assumption that the prosecution will be able to prove the alleged offence. This leaves offenders in a situation where they are formally presumed innocent but actually assumed guilty. This also puts the transfer process in conflict with traditional principles of due process and judicial responsibility.¹³²

The procedural amendments to the transfer provisions introduced by Bill C-3 would have changed the time at which transfer is imposed. Unlike the current system which requires that a transfer hearing take place before trial, the decision to apply adult sentences to a young offender would have been moved to take place after the trial had occurred and the young offender had been found guilty. Under this process, the Crown would indicate intention to the youth court judge to seek an adult sentence before the trial began. The young offender would then elect to be tried in either a provincial youth court, by a superior youth court judge or by a superior youth court sitting with a jury. The youth court chosen would be responsible for

¹³¹Priscilla Pratt, *supra* note 10 at 286.

¹³²Lucien A. Beaulieu, Youth Offences - Adult Consequences, (1994) Canadian Journal of Criminology 329 at 338.

determining the innocence or guilt of the specific offender, and where the transfer criteria were met, would be responsible for sentencing the youth to adult punishment. Thus, there would have been no physical transfer to adult court imposed by the youth court. The trial, transfer eligibility hearing and sentencing would have all taken place in the youth justice system.¹³³

In the opinion of Anne McLellan, Minister of Justice, this change would have been more respectful of the presumption of innocence, would have allowed youth to retain age-appropriate due process protections during the transfer process and would have made the decision to transfer a youth to adult court a much more informed one.¹³⁴ However, this process would have also meant that youth court judges would have had two sets of sentencing tools at their disposal. When the criteria for transfer were not met, judges would have used sentencing guidelines and dispositions from the youth justice system to sentence young offenders convicted of crimes. When the criteria for transfer were met, judges would have used sentencing guidelines and dispositions from the adult system. As youth court judges would have had two sets of sentencing tools at their disposal during transfer proceedings, the process of imposing adult sanctions on young offenders would not have become more fair. It would have simply replaced a rights violation earlier on in the transfer process with the inappropriate introduction of adult sentencing tools later on.

¹³³Department of Justice Canada, *Canada's Youth Justice Renewal Strategy* (Ottawa: Department of Justice Canada, 1998) 7.

¹³⁴Standing Committee on Justice and Human Rights, *supra* note 129.

The introduction of adult sentencing tools in the youth justice system would have been inappropriate because the youth justice system was built on a welfare philosophy which dictates that youth are to be treated differently than adults. Where transfer to adult court is necessary, youth should be transferred to an adult court for their sentencing hearing. If youth court judges would have utilized adult sentencing guidelines and dispositions from the adult system, youth court judges would have brought another aspect of the adult justice system into youth justice corrections that should not have been there in the first place. In doing so, youth court judges would again have been weakening the boundary of the youth justice system by bringing aspects of the adult justice system's decision making process into transfer to adult court hearings.

The changes made to the transfer process under Bill C-3 were also supposed to reduce delays endured by youth going through the transfer process. Youth subject to transfer under the Young Offenders Act must participate in a transfer hearing, a trial in adult court if transferred, and a sentencing hearing if convicted. This process can last as long as two years.¹³⁵ By contrast, youth subject to transfer under the proposed Bill would have received notice of the intention to apply for transfer, go to trial in youth court and if convicted would have been subject to a transfer eligibility hearing before being sentenced by a youth court judge to an adult disposition for their crime.

Whether this change would have actually reduced the length of the transfer process

¹³⁵Standing Committee on Justice and Human Rights, *supra* note 129.

is questionable. As Justice Heino Lilles points out, the introduction of 13 new hearings under the Youth Criminal Justice Act that could have taken place for youth charged with transferrable offences might have actually made the process longer.¹³⁶ For example, the Youth Criminal Justice Act would have allowed for a new hearing to listen to representations made by parties to the proceedings and the parents of the offender before sentence is imposed. Justice Michel Jasmin, Associate Chief Justice of the Youth Division of the Court of Quebec, made a similar comment regarding the introduction of post-adjudication transfer in his presentation to the Standing Committee on Justice and Human Rights. He suggested that the transfer process would not be any shorter under the Youth Criminal Justice Act because the court would first have to determine whether the offence committed qualified as a serious violent offence. "The question you first have to debate (before transfer) is whether it's a violent crime or not, and we haven't defined what is a violent crime."¹³⁷ In sum, the time saved by eliminating the transfer hearing would have been spent dealing with issues surrounding sentencing.

Another amendment to the transfer to adult court provisions that would have been introduced by the Youth Criminal Justice Act is a presumption that youth under 18 would serve an adult sentence in a youth facility. Under the existing Young Offenders Act, those who are transferred to adult court can be required to serve their sentences in adult provincial

¹³⁶Standing Committee on Justice and Human Rights, *supra* note 129.

¹³⁷Justice Michel Jasmine, Associate Chief Justice of the Youth Division of the Court of Quebec, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, February 22, 2000, Ottawa, House of Commons.

or federal correctional facilities at the discretion of the judge.¹³⁸ While the proposed change to the transfer provisions would not have taken away that discretion, it presupposed that youth transferred would serve their sentence in a youth facility until they reached the age of 18. Similarly, youth over 18 would have been mandated to serve the remainder of their sentence in an adult facility. This means that young offenders subject to transfer would have been sent to adult correctional facilities where little or no rehabilitative services exist after commencing substantive rehabilitation in a youth facility. If the purpose of this proposed reform was to ensure that youth under the age of 18 were to have access to treatment resources within the youth justice system, it seems contradictory that this treatment would have been interrupted at the age of 18. As Justice Jasmine suggested, it would be better to send a young person straight into the adult system, the implication being that efforts to rehabilitate youth in the context of youth corrections would be a waste of time if youth are going to finish their sentence in the adult system.¹³⁹

You work with young people for three years in the youth system and then send them to an adult penitentiary where they will learn to steal, blow up safes, deactivate alarm systems, hot-wire cars, and hang around with nice friends and a nice gang when they get out of prison. I believe that it makes no sense to think this way ... We should not invest in them if we intend to have them finishing serving their sentence in an adult penitentiary.¹⁴⁰

The final amendment proposed in relation to transfer to adult court by the Youth

¹³⁸Standing Committee on Justice and Human Rights, *supra* note 129.

¹³⁹Justice Michel Jasmine, *supra* note 137.

¹⁴⁰*Ibid.*

Criminal Justice Act was a provision that would have permitted the publication of names of all youth convicted of a crime who were transferred to the adult system.¹⁴¹ The publication of names of youth convicted of offences and transferred to the adult system would have represented another definitive move towards the adoption of an adult correctional system for offenders subject to transfer. The youth justice system presently does not allow for the publication of names of any young offenders. In adopting a provision which allows for the publication of names of youth, the Youth Criminal Justice Act would have brought another aspect of adult corrections into the youth justice system.

One of the reasons why young offenders identities are not presently publicized is because the stigma associated with being identified as a criminal problematizes the successful rehabilitation and reintegration of young offenders into the community upon release, rehabilitation being one of the primary goals of youth justice system. As the Youth Canada Association pointed out, by allowing for the publication of names, the principles of rehabilitation and a separate youth justice system would have been severely weakened by the Youth Criminal Justice Act.¹⁴² Diminishing rehabilitation as a goal of the youth justice system through the introduction of the publication of names for youth transferred to adult court would have made the system more punitive.

¹⁴¹Department of Justice Canada, Canada's Youth Criminal Justice Act: A New Law - A New Approach, [http://canada.justice.gc.ca/Orientations/jeunes/penale/youth_en.html] (Ottawa: Department of Justice Canada, 2000) 4.

¹⁴²Youth Canada Association, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, February 15, 2000. Ottawa: House of Commons.

The publication of names of all youth transferred to the adult system under the Youth Criminal Justice Act might have also been unfair to the youth involved. The decision to publish a youth's name would have come about at sentencing. While the sentence would have been appealable, there would have been no stay of publication ability provided for by the Act for the appeal period. Therefore, the newspapers could have published right away. As Anthony Doob states, this situation "seems ... to be adding real insult to very real injury." He goes on to argue that "if a young person does have the unfortunate consequence of having his name published as part of the sentence, then certainly that should not be allowed until the young person has had an opportunity to appeal."¹⁴³

Generally, this chapter has shown that the overall trend of the youth justice system has been to move away from prioritizing welfare philosophy in dealing with young offenders towards a philosophy which primarily emphasizes crime control and procedure. The youth justice system began in 1908 with the introduction of the Juvenile Delinquents Act. The Juvenile Delinquents Act followed a welfare philosophy in dealing with juvenile delinquents. With the introduction of the Young Offenders Act in 1984, the justice philosophy was highlighted by the youth justice system, placing more emphasis on the rights of young people and less emphasis on welfare concerns. Successive amendments to the Young Offenders Act that followed continued to emphasize procedure in decision making. However, recent amendments to the Young Offenders Act and proposed reforms to the youth justice system

¹⁴³ Anthony Doob, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, February 8, 2000. Ottawa, House of Commons.

located in Bill C-3 have emphasized crime control philosophy in the administration of youth justice.

Changes to the transfer provisions from their inception in 1908 to their most recent form in proposed reforms to the youth justice system reflect the shifts in the overall philosophy of the administration of youth justice. Created in 1908 by the Juvenile Delinquents Act, the transfer provisions began as an exceptional measure, predicated on the existence of a justice system for youth that prioritized the welfare of offenders and that was separate and distinct from the adult system. With the advent of the Young Offenders Act, the successive reforms to the Young Offenders Act and the introduction of the Youth Criminal Justice Act the transfer provisions became more proceduralized, reflecting the new focus of the youth justice system on the rights of youth committing crime through reduced judicial discretion and the diminished importance of welfare concerns. The scope of the transfer provisions were also expanded through reforms to the youth justice system. The combined effect of these two trends in reforms to the transfer provisions has been to make the transfer provisions increasingly punitive such that violent and serious young offenders are now symbolically viewed in the same light as their adult counterparts and are dealt with differently than youth committing non-violent forms of crime.

Chapter 3: Dispelling the Myths of Youth Crime and Violence

The previous chapter has shown that the trend of the youth justice system has been to move away from emphasizing a welfare philosophy in the administration of youth justice towards prioritizing a crime control philosophy when dealing with young offenders. It has also been shown that reforms to the transfer to adult court provisions over time and changes made to the youth justice system's approach to dealing with violent and serious young offenders subject to transfer correspond to these trends. While not necessarily representative of an overall punitive shift in the approach to the way that youth justice is administered, the trend of the youth justice system to emphasize crime control philosophy when dealing with violent and serious young offenders subject to transfer has made the approach of the youth justice system towards transfer to adult court more punitive than it was previously. This approach has expanded the scope of the transfer to adult court provisions, dictating that more violent youth should be subject to adult punishment and making the youth justice system's approach to dealing with violent young offenders increasingly similar to its adult counterpart. The consequences of this shift in approach are enormous for youth charged with violent offences coming into the youth justice system. More of these youth than ever before will be treated like adult offenders in the future, losing their rights to the rehabilitative resources and limited dispositions normally associated with being processed as a young offender. As the Department of Justice is planning to continue this punitive trend by re-introducing reforms to the transfer provisions proposed by Bill C-3: the Youth Criminal Justice Act in revised form, it is imperative that the justifications given for emphasizing crime control philosophy

in the youth justice system's approach to dealing with violent young offenders are explored and their validity judged. Bill C-3: the Youth Criminal Justice Act represents the most current example of proposed reforms to the transfer to adult court provisions emphasizing crime control philosophy. Therefore, the justifications for Bill C-3's approach will be examined in this chapter.

The justifications given by the Department of Justice for the approach the Youth Criminal Justice Act took can be separated into two broad categories: those dealing with public perception and those dealing with the incidence and prevalence of youth crime. The Department of Justice argued that the introduction of the Youth Criminal Justice Act was necessary in order to adequately address a growing and serious violent youth crime problem and deal with public concern related to violent youth crime issues.¹⁴⁴ It is the argument of this chapter that these justifications for reform have little or no validity. Chapter one of this thesis has shown that the youth crime rate historically was relatively stable. This chapter will continue the exploration of youth crime statistics to show that the crisis dictated by the Department of Justice in current violent youth crime rates is a myth. In reality, the youth crime rate has been relatively stable both recently and over time.

This chapter will also explore the nature and accuracy of the public's views on youth crime in order to show that introducing reforms to regain public confidence in the youth justice system is unwarranted because the public's perception of youth crime issues is

¹⁴⁴Canadian Criminal Justice Association, *supra* note 6 at 1.

inaccurate. While members of the public believe that youth crime is increasing, that youth crime is becoming more violent and that the Young Offenders Act is inadequate to deal with current youth crime problems, these beliefs do not reflect the true situation of youth justice. In reality, the Young Offenders Act is adequate to deal with a relatively stable youth crime rate.

Public knowledge and opinion on youth crime issues can be divided into five categories: general knowledge of youth crime issues, opinions on youth crime levels, opinions on violent youth crime levels, opinions on the effectiveness of the Young Offenders Act to deal with youth crime and opinions on the best practice to use when dealing with young offenders. These categories will be explored briefly in this section in order to show the lack of congruence between public opinion on youth crime issues and the reality of the youth justice system.

In general, the public's knowledge of the youth justice system and youth crime issues is inaccurate. Very few Canadians have a clear understanding of the youth justice system, the Young Offenders Act or its application.¹⁴⁵ This suggestion is supported by a 1993 nationwide survey done by Decima Research that found that almost half their sample admitted they were not at all or not very familiar with the Young Offenders Act.¹⁴⁶ Because most members of the public lack understanding of the Young Offenders Act, their opinions about issues

¹⁴⁵Canadian Centre for Justice Statistics, *supra* note 21 at 11.

¹⁴⁶Julian V. Roberts, Public Knowledge of Crime and Justice: An Inventory of Canadian Findings. (Ottawa: Department of Justice Canada, 1994) 44.

surrounding youth crime are often inaccurate.

The inaccuracy of the public's view on youth crime issues is apparent when discussing public opinion surrounding youth crime levels. The public generally believe that youth are committing more crime under the auspices of the Young Offenders Act than under its predecessor, the Juvenile Delinquents Act. For example, a recent public opinion survey done by Environics in 1998 showed that 89% of respondents believed that youth crime was increasing.¹⁴⁷

These public misconceptions exist despite recent trends showing decreasing youth crime rates. The Canadian Centre for Justice Statistics reveals in A Profile of Youth Justice in Canada that apart from a pause in 1995, there has been a downward trend in the youth charge rate since reaching a high in 1991 of 643 youth charged per 10,000 population.¹⁴⁸ In 1997, the rate of youth charged was 495 per 10,000 population, a rate similar to that of 10 years ago.¹⁴⁹

The number of cases heard in youth courts has also generally followed a downward trend. From 1992/93 to 1998/99, the number of cases processed by youth courts dropped seven percent. In 1992/1993, 115,000 cases were processed in youth courts in Canada.¹⁵⁰

¹⁴⁷Canadian Centre for Justice Statistics, supra note 21 at 10-11.

¹⁴⁸Canadian Centre for Justice Statistics, supra note 21 at 20.

¹⁴⁹Canadian Centre for Justice Statistics, supra note 21 at 19.

¹⁵⁰Canadian Centre for Justice Statistics, Youth Court Statistics, 1992-93 (Ottawa: Statistics Canada, 1994) i

106, 665 cases were processed in 1998/99.¹⁵¹ Thus, there has been no significant increase in youth crime in recent years.

The reality is that a very small proportion of youth are charged with a crime by police and then convicted. Information from Statistics Canada indicates that in 1998, the most recent year for which youth crime statistics are available, 106, 665 youth were charged with a federal offence, representing 22% of the 542, 279 total persons charged for that year.¹⁵² Of the 106, 665 youth charged with a federal offence in 1998/1999, 44, 090 young offenders were subsequently convicted.¹⁵³ Put differently, youth convicted of federal offences represented only two percent of the total youth population in 1998/99.¹⁵⁴

This trend is not new. As chapter one has shown, youth charged with crime both in early pioneer days and during the time period the Juvenile Delinquents Act was in force were responsible for a small portion of overall criminal activity. Youth committing crime historically always committed less crime than their adult counterparts.¹⁵⁵ Current statistics show similar trends. For example, 318,578 more adults were charged with a criminal offence

¹⁵¹Canadian Centre for Justice Statistics, *supra* note 21 at 2

¹⁵²Statistics Canada, Youth Court Statistics, 1998/1999 Highlights (Ottawa: Statistics Canada, 2000) 1.

¹⁵³*Ibid.* at 2.

¹⁵⁴Statistics Canada notes that the youth population as a whole accounted for eight percent of the total population in 1998, where the Canadian population totaled 30.3 million persons and where the youth population totaled 2.45 million persons. Thus, youth convicted of federal offences in 1998/99 represented 0.15% percent of the total Canadian population in 1998/99. Youth charged with federal offences in 1998/99 represented 0.36% of the total Canadian population in the same year.

¹⁵⁵See chapter 1 - page 21.

in 1998/99 than their juvenile counterparts.¹⁵⁶ In sum, youth charged with offences represent a small and relatively stable portion of overall persons charged both historically and in recent years.

While the public generally believes that youth crime is on the rise, the public also believes that the seriousness of crime that youth commit is becoming worse.¹⁵⁷ Public perceptions or misconceptions of the seriousness of youth crime are generally related to growing concerns about violence. "Opinion polls consistently show public overestimation of the incidence of violent crime in Canada."¹⁵⁸ The majority of Canadians believe that most crimes involve interpersonal violence and that such offenses are increasing. They also believe that most youth crime involves acts of aggression.¹⁵⁹

In reality, youth crime in Canada principally involves property related crimes; violent youth crime accounting for a small proportion of criminal incidents involving youth. Crime committed by young offenders can be categorized into Criminal Code offenses, drug offenses and other federal statute offenses where Criminal Code offenses include both violent and property crimes. In 1998/99, 43% of youths were charged with property crimes, 22% of youth were charged with violent offenses and 35% of youth were charged with drug related

¹⁵⁶Statistics Canada, *supra* note 152 at 3.

¹⁵⁷Nicholas Bala, "What's wrong with YOA bashing? What's wrong with the YOA? - Recognizing the limits of the law," (1994) Canadian Journal of Criminology 247 at 247.

¹⁵⁸Standing Committee on Justice and Human Rights, Renewing Youth Justice: Thirteenth Report of the Standing Committee on Justice and Legal Affairs, (Ottawa: House of Commons Canada, 1997) 12.

¹⁵⁹Ibid. at 14.

and other crimes.¹⁶⁰ Generally, most young offenders commit property crimes such as theft and break and enter. Violent offenses such as assault account for a much smaller proportion of overall youth crime.

This situation is not new. Crime committed by young people historically involved more property related crime than crime that was violent or serious in nature. As Sandra J. Bell suggests, this pattern of criminal activity was established in early pioneer times and has continued to the present.¹⁶¹ The type of crime and proportion of crime committed by youth has remained relatively constant over time.

More importantly, the public also believes that the present rate of violent youth crime is spiraling out of control.¹⁶² The reality is that the rate of youths charged with violent crime has varied little from 1992/93 to 1998/99. Information from Statistics Canada indicates that the rate of youth charged with violent crime has increased slightly (2%) from 1992/1993 to 1998/1999. While the rate of youth charged with violent crime has increased in the last 7 years, it decreased by 1% from 1997/98 to 1998/99.¹⁶³

Despite the stabilization of the violent youth crime rate over the past seven years, the rate of youth charged with violent offenses is more than double what it was a decade ago. This finding would seem to support claims that violent youth crime is on the rise. Yet,

¹⁶⁰ Canadian Centre for Justice Statistics, *supra* note 21 at 4

¹⁶¹ Sandra J. Bell, *supra* note 1 at 7.

¹⁶² Standing Committee on Justice and Human Rights, *supra* note 158 at 12.

¹⁶³ Canadian Centre for Justice Statistics, *supra* note 21 at 2.

increases in less serious violent crime are mainly responsible for this trend. To illustrate, the rate of youth charged with common assault in 1997 was 119% higher than it was 10 years earlier. The youth robbery rate demonstrated even larger increases. In 1997, the robbery rate for young offenders charged was three times what it was in 1987.¹⁶⁴

One could argue that these increases in the charging rate are due to an actual increase in this type of less serious violent crime. However, Statistics Canada is quick to state that “the increase in the rate may reflect more aggressive ‘zero tolerance’ strategies on the part of police, schools and others.”¹⁶⁵ To the degree that these practices are affecting the charge rate for less serious violent crime, it is questionable to what degree the rate of these offenses is truly increasing.

While the charge rate for less serious violent crime is increasing, the charge rate for the most serious types of crime committed by youth has remained stable. Note that the rate of more serious violent youth crimes including murder, manslaughter and attempted murder has remained constant at 18 per 10,000 since 1995.¹⁶⁶

Of youth charged with violent youth crime, cases dealing with minor or less serious violence generally make up a large portion of violent crime committed by youth. As Table 5 shows, minor assaults accounted for 45% of all violent crimes committed by youths in

¹⁶⁴Canadian Centre for Justice Statistics, *supra* note 21 at 22-23.

¹⁶⁵Canadian Centre for Justice Statistics, *supra* note 21 at 22.

¹⁶⁶Mark Totten, “Dispelling Myths about Youth Violence.” *Ottawa Citizen*. (Ottawa) 10 Feb. 1999, C4.

1998/99.¹⁶⁷ By contrast murder, manslaughter and attempted murder cases together accounted for less than 1% of violent crime cases heard in youth courts.¹⁶⁸ There were 37 cases of murder and manslaughter, and 71 cases of attempted murder in 1998/99.¹⁶⁹

This finding is not limited to present day offending. As chapter one has shown, juveniles committing violent crime during the time period the Juvenile Delinquents Act was in force generally committed more offences that were less serious and violent in nature than offences which were more serious and violent.¹⁷⁰ Juveniles committing crime in early pioneer Canada were also charged and convicted of a variety of serious or violent crimes. However, the overall trends in youth offending, from pioneer times to present day show that youth generally commit less serious violent crime. Thus, youth committing the most serious and violent crimes such as murder, attempted murder and manslaughter are the exception and not the rule.

Although the Young Offenders Act has been in force for nearly two decades, the Act continues to be the subject of intense public scrutiny. "There is now a widespread perception that the YOA is worse than the law it replaced, the Juvenile Delinquents Act, and that the new law has contributed to a worsening juvenile crime problem in Canada."¹⁷¹ Indeed,

¹⁶⁷This refers to the least serious form of assault and includes pushing, slapping, punching and face-to-face verbal threats.

¹⁶⁸Table 5.

¹⁶⁹Canadian Centre for Justice Statistics, supra note 21 at 5

¹⁷⁰See chapter 1 - page 26.

¹⁷¹Nicholas Bala, supra note 158 at 247.

concern about violent youth crime and justice is related to the perceived effectiveness of the youth justice system to deal with youth offending. Public opinion surveys have found little confidence in the way the Young Offenders Act deals with young offenders. A recent public opinion poll by Angus Reid in 1997 showed that only 26% of respondents interviewed were somewhat or very confident in the Young Offenders Act.¹⁷²

Recall, however, that very few Canadians have a clear understanding of the youth justice system, the Young Offenders Act or its application.¹⁷³ If members of the public are not familiar with the Young Offenders Act, then their views on the adequacy of the Young Offenders Act to deal with crime may not have any merit.

By way of example, many public arguments against the Young Offenders Act suggest that the Young Offenders Act is too lenient and that the provisions of the Young Offenders Act are not tough enough to deal with Canada's youth crime problem. A recent study by Environics in 1998 reported that 77% of respondents felt that the sentencing of young offenders under the Young Offenders Act is too lenient.¹⁷⁴ Similarly, several studies conducted prior to the 1995 amendments to the Young Offenders Act that increased the maximum sentences for certain violent crimes found that most people wanted increased sentences for violent young offenders.¹⁷⁵

¹⁷²Canadian Centre for Justice Statistics, *supra* note 21 at 11.

¹⁷³*Ibid.*

¹⁷⁴*Ibid.*

¹⁷⁵*Ibid.*

These facts would seem to suggest that the Young Offenders Act is in need of renewal. The reality, however, is that the Young Offenders Act is adequate to deal with Canada's youth crime problem. The most serious sanctions available under the Young Offenders Act have never been used. Note that the maximum five-year disposition for murder, available since 1992 was never imposed; nor the seven and ten year disposition introduced in 1995.¹⁷⁶ Further, in 92% of cases where custody is imposed, custodial placements are for less than six months.¹⁷⁷ In actual fact, the Young Offender's Act is not too lenient to deal with Canada's youth crime problem. The more serious incarcerative dispositions available within the confines of the youth justice system have simply not been used.

Not only is the perception that the Young Offenders Act is too lenient incorrect, but statistics reveal that the youth justice system may actually be too punitive in its approach to dealing with young offenders. To illustrate, the rate at which the youth justice system in Canada sentences youth to custody is four times higher than that for adults.¹⁷⁸ The rate of youth incarceration in Canada is also twice that of the United States, and ten to fifteen times the rate per 1,000 youth population in many European countries.¹⁷⁹ That custodial sentences under the Young Offenders Act are not used to their full potential does not negate the fact that members of the public often underestimate the extent to which youth courts sentence

¹⁷⁶Canadian Criminal Justice Association, *supra* note 6 at 2.

¹⁷⁷*Ibid.*

¹⁷⁸Standing Committee on Justice and Human Rights, *supra* note 158 at 12.

¹⁷⁹*Ibid.*

young offenders to custody. The reality is that the Young Offenders Act does act punitively towards many young offenders. The Canadian youth justice system's approach to disposing of young offenders is actually more punitive than many similarly situated countries.

Similar patterns in the punishment of youth were prevalent historically, the punitive treatment of youth convicted of crimes not being limited to the time period the Young Offenders Act has been in force. Youth and children committing crimes in early pioneer days were sentenced to imprisonment and hanging for their crimes; and juveniles convicted of crimes during the time period the Juvenile Delinquents Act was in force were sentenced to dispositions that involved custody.¹⁸⁰ In sum, the youth justice system is not overly lenient with young offenders. Both historically and in recent times, youth convicted and charged with crimes have been subject to punitive treatment.

While the public generally feels that the Young Offenders Act is not punitive enough to effectively deal with youth crime, a view also widely held by Canadians is that the introduction of harsher penalties to deal with Canada's youth crime problem will deter young people from future offending.¹⁸¹ This view is based on a larger misconception on the part of the public that harsh sentences generally reduce crime rates. Indeed, many members of the public think that youth crime rates can be significantly reduced by making dispositions for young offenders much harsher.¹⁸² They argue that boot camps and other sentences that expose

¹⁸⁰See chapter 1 - pages 25-26 and 32-33.

¹⁸¹Standing Committee on Justice and Human Rights, supra note 158 at 12.

¹⁸²Julian V. Roberts, supra note 146 at 45.

offenders to arduous, physically demanding environments are successful avenues through which to deal with youth offending.¹⁸³

This belief is not supported by available evidence. The fact is that the youth justice system has been using incarcerative sentences to deal with young offenders. However, many of the young offenders convicted in youth court that are sentenced to incarcerative dispositions are released only to reoffend. Further, these repeat offenders represent a substantial proportion of the youth court caseload. In 1996-1997, 41% of the cases brought to youth court involved youths with prior convictions.¹⁸⁴ Of those youth who do reoffend, many graduate to serve time in provincial jails and federal penitentiaries as adult offenders. These findings support empirical research which has “shown consistently that harsh penalties do not change the incidence of crime post-release.”¹⁸⁵

In general, this section has shown that the public’s views on youth crime issues are misinformed. While the Minister of Justice, Anne McLellan, argued that it was imperative to not only replace the Young Offenders Act with another law but encourage a more “meaningful” approach to dealing with violent young offenders in order to foster a higher level of confidence and acknowledgment of the youth justice system by the public, the argument of this thesis is that what is required to correct public misinformation is

¹⁸³Standing Committee on Justice and Human Rights, *supra* note 158 at 12.

¹⁸⁴Canadian Centre for Justice Statistics, *supra* note 21 at 51.

¹⁸⁵Standing Committee on Justice and Human Rights, *supra* note 158 at 12.

education.¹⁸⁶ Similar arguments have been made by the Canadian Criminal Justice Association. They recommended in 1998 that the federal government develop a comprehensive strategy aimed at informing and educating Canadians about all aspects of youth crime and the youth justice system.¹⁸⁷

Instead, the government introduced a new law to replace the Young Offenders Act that was more punitive in nature in its approach to dealing with violent offenders. However, responding to public concerns about youth justice issues by introducing an act to replace the Young Offenders Act that takes a harsher approach to dealing with violent youth does nothing to address public perception problems. As the John Howards Societies of Canada point out, this proposed reform is part of a larger trend that represents “the tendency of legislators to misinterpret public attitudes” in the “belief that punitive legislation will satiate those who promote deterrence (and crime control) as the cornerstone of youth corrections.”¹⁸⁸

Even if the Minister is arguing that the public wants and needs the government to reform the youth justice system to make sure there were meaningful consequences when violent youth crime occurred, substantive reform should not take place until the public has

¹⁸⁶Canadian Criminal Justice Association, supra note 6 at 1.

¹⁸⁷Canadian Criminal Justice Association, supra note 6 at 2.

¹⁸⁸Standing Committee on Justice and Human Rights, supra note 158 at 14.

an accurate idea of what the youth justice system is actually about.¹⁸⁹ To do so places violent young offenders subject to transfer in a position where they are subjected to increasingly punitive treatment by the youth justice system based on the misinformed fears of the public.

Similar arguments have been made by the Child Welfare League of Canada. As they suggested in their submission to the Standing Committee on Justice and Human Rights, there is concern that further reform of the Young Offenders Act “in response to misinformation about the Act and anxiety over extreme, unrepresentative cases (may) create a legal framework that fail(s) to address the majority of youth crime.”¹⁹⁰ Likewise, a representative of Nova Scotia Legal Aid argued that misunderstanding in reference to the Young Offenders Act is reason to educate the public, not to change or replace the Young Offenders Act in such a way as to unnecessarily detriment the population it polices.¹⁹¹ As an unidentified author in the *Globe and Mail* suggests, too often, we craft public policy to satisfy mistaken impressions and prejudices, rather than correct them at the source”.¹⁹²

Introducing public policy to deal with a perceived crisis in the youth justice system can also have major consequences for violent young offenders. In much the same way that public influence on attempts to reform the Young Offenders Act can be dangerous where that

¹⁸⁹Department of Justice Canada, News Release: Minister of Justice Introduces New Youth Justice Law. (Ottawa: Government of Canada, 1999) 1.

¹⁹⁰Standing Committee on Justice and Human Rights, supra note 158 at 15.

¹⁹¹Standing Committee on Justice and Human Rights, supra note 158 at 15.

¹⁹²Nicholas Bala, supra note 157 at 1.

influence is based on misinformed views, introducing public policy based on a perceived violent youth crime problem can place violent young offenders in a situation where they are exposed to unnecessarily punitive treatment by the youth justice system. For this reason, this section will explore the perceived youth crime crisis cited by the Department of Justice in order to argue that this crisis doesn't exist.

The state of crisis dictated by the Department of Justice deals primarily with the adequacy of the youth justice system to deal with a perceived growing violent youth crime rate. The message that the Department of Justice has been sending out is that the youth justice system is not doing enough to protect society from violent youth crime because its laws are not punitive enough to deal with a perceived growing violent and serious youth crime problem. In sum, the youth justice system is not adult enough to deal with a serious violent youth crime rate that is considered to be spiraling out of control.

However, this chapter has already shown that violent youth crime is not out of control. The violent youth crime charge rate has been relatively stable since 1993. In reality, violent youth crime represents the minority of youth crime committed. Violent youth crime accounted for twenty-two percent of youth crime in 1998/99. This trend is consistent historically. Violent youth crime has always represented the minority of total youth crime committed.

Serious violent youth crime is also not out of control. The crime rate for the most serious forms of youth violence such as murder, manslaughter, attempted murder and aggravated sexual assault has remained stable both recently and over time. While less serious

violent crime has shown increases in certain areas such as common assault and robbery, those increases do not necessarily mean that youth crime is becoming more violent in nature. In actual fact, police charging practices and zero-tolerance policies may have much more to do with increases in less serious violent youth charge rates. When occurrences such as pushing or verbal threats are being brought into the youth justice system, one has to wonder whether increases in less serious violent youth charge rates have more to do with net-widening than actual increases in violent criminal behavior.

General youth crime rates have also remained constant. The charge rate for youth has been on a decline since 1991 and current charge rates for youth in conflict with the law are similar to those of 10 years ago. Furthermore, only three percent of the Canadian youth population were convicted of a federal offence in 1998/99, representing a small proportion of the overall youth population. This trend is consistent over time. Youth convicted of crime historically represented a small portion of the overall youth population.

The alleged inadequacy of the youth justice system to deal with violent youth crime also has little or no basis in fact. The major criticism of the youth justice system is that violent and serious young offenders are not treated punitively enough, thereby making the Young Offenders Act and the youth justice system inadequate to deal with Canada's violent youth crime problem because society is not protected from this type of youth crime. Indeed, Bill C-3 was drafted because the Department of Justice felt that "Canada's youth justice system is in

need of renewal.”¹⁹³ The Department felt that the current youth justice system did not do enough to ensure that there were meaningful consequences for violent young offenders.¹⁹⁴

However, the following statistical analysis shows that youth charged with violent offences are sentenced to dispositions that are punitive in nature. This information is based on information provided in Tables 5-8 on pages 102-105. Table 8 provides an outline of the dispositions imposed on youth convicted of the crimes of murder, manslaughter and attempted murder from 1992-1999. These three offences were chosen for examination because they are considered to be the most violent offences that youth can commit and are therefore the type of offence that would receive a more punitive response by the youth justice system. Table 8 shows that youth convicted of murder, manslaughter and attempted murder were sentenced to custody from 1992-1999. In fact, custody was regularly used as a disposition for youth convicted of these offences. For example, of the 6 youth convicted of murder within the youth justice system in 1998-99, all were sentenced to secure custody.¹⁹⁵ Similar results can be seen for youth charged with manslaughter and attempted murder. In 1998-99, 8 youth were convicted of manslaughter and 12 youth were convicted of attempted murder. Of the 8 youth convicted of manslaughter, 5 were sentenced to terms in secure custody and 3 were sentenced to terms in open custody. Of the 12 youth who were convicted of attempted murder, 11 received terms in secure custody with one youth receiving an

¹⁹³Department of Justice Canada, *supra* note 133 at 2.

¹⁹⁴*Ibid.*

¹⁹⁵Table 8.

undisclosed disposition.¹⁹⁶ Youth convicted of violent offences, then, are treated punitively by the youth justice system when sentences are handed down.

This information also shows that youth convicted of these crimes rarely receive dispositions that are rehabilitative in nature. Few youth convicted of murder, manslaughter, or attempted murder from 1992-1993 received dispositions that were not terms of custody. Note that only 1 offender out of 59 convicted of murder, 5 offenders out of 61 convicted of manslaughter and 8 offenders out of 80 convicted of attempted murder from 1992-1999 received identifiable sentences that did not prescribe a term of custody.

Transfer to adult court, the most serious disposition, was also used to deal with young offenders during this time period. Transfer to adult court is the most serious disposition available to youth court judges because it is the only disposition that transfers youth into the adult system for the adjudication of their offence. The fact that it was used by youth court judges attests to the punitiveness of the youth justice system during this time period. As Table 7 shows, transfer to adult court was used from 1992-1999 to deal with a variety of youth charged with offences. Transfers were used throughout the time period studied to dispose of youth charged with both property and violent crime.

Where transfer to adult court was used, the majority of youth transferred were charged with violent offences. For example, Table 7 shows that in 1992-1993, 33 of the 52 total youths transferred to adult court were charged with offences against the person.¹⁹⁷ This

¹⁹⁶ Ibid.

¹⁹⁷ Table 7.

trend was consistent for the majority of the time period studied.¹⁹⁸ This trend is important because move to reform the transfer to adult court provisions to make them more punitive is based on the perceived leniency of the youth justice system in dealing with violent youth. While the Department of Justice believes that violent youth require a more 'meaningful' response to their alleged crimes, the fact remains that violent young offenders are already more likely than young offenders committing other types of crimes to be transferred to adult court.

However, this trend also means that offenders charged with non-violent or property related offences are being transferred to the adult system. While Table 7 shows that youth charged with property related offences generally represented a smaller proportion of youth transferred to adult court from 1992-1999, the fact remains that youth were transferred to the adult system that were not supposed to be included. Transfer to adult court is meant to be used with offences that cannot be dealt with in the context of juvenile corrections because of their serious and violent nature. To the degree that offences that are not serious and violent are included in transfer to adult court, the juvenile justice system can not only be criticized for reacting punitively to offenders, but can be criticized for taking an overly punitive approach to transfer to adult court.

Of youth charged with violent offences that were transferred to adult court, youth charged with the most violent offences were most likely to be transferred. This means that

¹⁹⁸ Youth charged with violent and serious crime were the minority of all youth transferred in 1993-94 and 1998-1999. In these years, youth charged with property offences, criminal code offences and YOA offences represented the majority of youth transferred - See Table 3.

youth charged with the most serious crimes were more likely to receive the most serious disposition available. Note that in 1998/99, 7 of 26 youths charged with murder were transferred to adult court, representing approximately 25% of youth charged with murder in that year.¹⁹⁹ By contrast, only 19 of 16,127 youths charged with assault in 1998/99 faced transfer to adult court for their alleged offence. The total number of youths transferred to adult court charged with assault represented 0.001 percent of total youths charged with assault.²⁰⁰

Interestingly, however, transfer to adult court was used minimally during this time period. Much like the use of transfer to adult court during the time period the Juvenile Delinquents Act was in force, Table 7 demonstrates that the use of transfer from 1992-1999 was limited compared to the overall number of youth charged with offences. From 1992 to 1999, less than 125 youths were transferred to adult court each year. This does not mean that the youth justice system was not punitive in dealing with youth subject to transfer. The fact that transfer was used at all and that it was used with offenders charged with non-violent offences during this time period speaks to the juvenile justice system's punitiveness. The minimal and relatively consistent use of transfer during the period studied could simply be reflective of the relatively stable youth crime rate. If the violent youth crime rate is stable,

¹⁹⁹ Similar results can be seen for the other years examined. Note that of the total number of youth charged with murder, 25% were transferred to adult court in 1997-98, 25% were transferred to adult court in 1996-97 and 29% were transferred to adult court in 1995-96.

²⁰⁰ Similar results can be seen for other years examined. Note that of the total number of auth. charged with assaults in 1997-08, 1996-97 and 1995-96 were similar to those of the 1998-99 year.

there is no need for the youth justice system to increasingly use transfer to adult court.

This section has shown that justifications given by the Department of Justice for the emphasis of a punitive approach in dealing with violent and serious young offenders subject to transfer based on the alleged inadequacy of the Young Offenders Act to deal with a perceived growing and violent youth crime rate have no merit. The violent youth crime rate of the youth justice system is not in a state of crisis. Furthermore, the Young Offenders Act is adequate to deal with Canada's violent youth crime problem. The youth justice system has the capability to react punitively to violent young offenders where necessary and is presently reacting punitively to young offenders in various cases. In fact, the youth justice system may be too punitive in its approach to dealing with youth convicted of crime, given the high use of incarceration in the youth justice system and the use of transfer to adult court with non-violent offenders. If the relatively punitive approach the youth justice system takes towards young offenders does nothing to increase a relatively stable youth crime rate, then the Young Offenders Act should be considered adequate to deal with Canada's present violent youth crime problem.

Justifications for the punitive approach taken by the Youth Criminal Justice Act based on negative public perception of the youth justice system also have little basis in fact. This chapter has shown that public opinion on youth crime issues is inaccurate and misinformed. If the public's views on youth crime issues do not reflect the true situation of youth justice, then introducing reforms to regain public confidence in the youth justice system is unwarranted because the public's perception of youth crime issues is inaccurate.

This is not to say that concerns about youth justice issues in today's society do not have some validity. However, conclusions about youth crime must be arrived at responsibly, where these concerns are situated within the larger Canadian context of low crime rates for youth, a stable violent youth crime rate and a generally law-abiding and respectful youth population. "Failure to do so results in yet another instance of fueling the widening gap between a declining rate of criminal behavior and a rising fear of youth crime."²⁰¹ It is only when the myths of youth violence are dispelled and the public and politicians stop focusing on high profile, serious and infrequent cases of extreme youth violence that violent young offenders can be properly dealt by the criminal justice system.

Further, crafting the law that governs youth justice to satisfy the mistaken impressions and prejudices concerning young offenders and youth crime issues will have disastrous effects on violent young offenders. Under the proposed Bill C-3, more youth committing violent offences than ever before would have been subject to transfer to the adult system. This means that more of the violent young offender population would have lost access to the rights and privileges associated with being processed as a young offender. If the decision is to make the youth justice system more punitive, it is irresponsible and unjust to base that decision on ignorance of Canada's youth crime situation. To reform the youth justice system based on misconceptions of youth crime simply punishes violent young offenders for public and government ignorance.

²⁰¹Mark Totten, *supra* note 166 at C4.

Table 5 - Violent Youth Crime Cases - 1998/99

	Number of Cases	% of violent cases
Minor Assault	10,545	45
Aggravated Assault/weapon	4,978	21
Robbery	3,263	14
Weapons/Firearms/Explosives	2,091	9
Sexual Assault/other sexual offences	1,743	7
Murder/Manslaughter/attempted murder	108	<1
Other	836	3

Source: Youth Court Statistics, 1998/99 Highlights

**Table 6 - Number of Cases Heard in Youth Court by Principle Charge -
Offences Against the Person - 1992/93 - 1998/99**

Violent Offences	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99
Murder	45	32	30	28	32	48	26
Manslaughter	10	7	24	16	23	13	11
Attempted Murder	75	52	55	64	63	74	71
Sexual Assault (includes sexual assault, sexual assault with a weapon, aggravated sexual assault and rape/indecent assault)	1793	2076	1846	1617	1507	1554	1498
Assault (includes assault, aggravated assault, assault with a weapon, cause bodily harm/Intent, minor assault, unlawfully cause bodily harm, assaulting police officer, other assaults)	14208	15519	15480	15793	15948	15994	16127
Robbery	2388	2318	2338	2630	2849	3398	3263
Weapons Offences (includes dangerous use of a weapon, possession of a weapon, other weapons offences)	2579	2713	2684	2406	2192	2113	2091
Other Violent Offences (includes infanticide, Kidnapping/Hostage Taking, Extortion, Other Sexual Offences, Criminal Negligence etc.)	555	657	553	530	430	517	477
TOTAL	216	23374	23010	23084	23044	23711	23584

Table 7 - Transfers to Adult Court by Offence Charged - 1992/93 - 1998/99

Violent Offences	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99
Murder	9	6	11	8	8	12	7
Manslaughter	0	0	2	0	0	0	0
Attempted Murder	2	8	1	1	4	1	5
Sexual Assault (includes sexual assault, sexual assault with a weapon, aggravated sexual assault and rape/indecent assault)	6	6	15	10	10	8	6
Assault (includes assault, aggravated assault, assault with a weapon, cause bodily harm/Intent, minor assault, unlawfully cause bodily harm, assaulting police officer, other assaults)	8	9	21	10	12	13	19
Robbery	4	11	22	8	11	3	15
Weapons Offences (includes dangerous use of a weapon, possession of a weapon, other weapons offences)	3	1	4	3	7	2	1
Other Violent Offences (includes infanticide, Kidnapping/Hostage Taking, Extortion, Other Sexual Offences, Criminal Negligence etc.)	2	3	6	0	0	2	0
Property/Other Criminal Code/YOA Offences	19	50	41	34	40	38	47
TOTAL	52	94	123	74	92	79	91

*Taken from "Number of Cases Heard in Youth Courts by Most Significant Disposition for the Most Significant Charge, by Sex of the Accused, Provinces/Territories

Table 8 - Punitive Treatment by the Youth Justice System - Murder, Manslaughter and Attempted Murder 1992/93 - 1998/99

OFFENCE	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99
Murder	16	13	8	2	9	5	6
Secure Custody	13	10	8	2	6	5	6
Open Custody	1	3			2		
Probation	1						
Fine							
Compensation							
Community Services							
Absolute Discharge							
Other	1				1		
Manslaughter	4	4	16	5	15	9	8
Secure Custody	2	2	8	2	7	7	5
Open Custody	1	2	6	3	6	1	3
Probation	1		2		2		
Fine							
Compensation							
Community Services						1	
Absolute Discharge							
Other							
Attempted Murder	20	8	11	9	5	15	12
Secure Custody	14	4	8	6	4	10	11
Open Custody	3	1	1	3		4	
Probation	2	3	2		1		
Fine							
Compensation							
Community Services							
Absolute Discharge							
Other	1					1	1

*taken from "Number of Cases Heard by Most Significant Disposition"

Conclusion: The False Promise of Protection of Society

The previous chapter attempted to dispel the myths about a perceived crisis in the youth crime rate and the need for a tougher, more punitive approach towards dealing with violent young offenders. The chapter showed that the justifications for this shift in approach have no merit. These justifications are based on a myth about a crisis related to the youth justice system that doesn't exist. The reality is that Canada's youth crime problem is neither out of control nor changing in such a way to warrant a more punitive approach towards dealing with violent young offenders based on either public perception problems or a perceived youth crime rate in crisis. The government's response to the false crisis of the youth justice system to shift the youth justice system's approach to dealing with violent young offenders increasingly towards an approach emphasizing punishment is therefore misguided.

Despite this fact, the recent introduction of legislation to the youth justice system seems to indicate that the trend to support philosophically punitive approaches towards dealing with violent young offenders will persist. Misconceptions about youth justice issues have continued to underpin recurrent demands for harsher criminal justice sanctions to deal with violent young offenders.²⁰² The Young Offenders Act has been amended four times since its inception in 1984, and many of the amendments to the Young Offenders Act were undertaken to address public concerns related to social protection and political arguments for tougher measures citing increased violence and crime in Canada's youth population. Public

²⁰²Standing Committee on Justice and Human Rights, *supra* note 158 at 14.

and political calls to enact tougher legislative measures against violent young offenders have persisted with the introduction of Youth Criminal Justice Act this past year.²⁰³ These calls for reform continue to be based on misplaced fear of youth crime and violence and an overall obliviousness to the true situation of youth justice.

The government's response to calls for reform of the youth justice system based on misinformation and public fear also continues to be a response that emphasizes introducing punitive reforms to the youth justice system to solve misconception problems. The introduction of the Young Offenders Act, the reforms to the Young Offenders Act and the proposed introduction of Bill C-3: the Youth Criminal Justice Act have all shifted the way the youth justice system deals with violent young offenders away from an approach emphasizing welfare concerns towards an approach emphasizing crime control and punishment.

This change in approach has been shown specifically in this thesis through an examination of reforms to the transfer to adult court provisions. The transfer to adult court provisions were chosen to examine the shifting approach of the youth justice system towards violent young offenders because the provisions represent the outer boundary of the youth justice system and are therefore the most serious disposition that a youth court judge can impose on a youth charged with a crime. These provisions also disproportionately target youth convicted of violent crimes, both because of the way the provisions are drafted, and their actual use by the youth justice system.

²⁰³Standing Committee on Justice and Human Rights, *supra* note 158 at 14.

This thesis has shown that the transfer to adult court provisions were introduced as a highly discretionary and exceptional measure with the Juvenile Delinquents Act that focused on juvenile delinquent's welfare as its primary concern. With the introduction of the Young Offenders Act and subsequent reforms to the Young Offenders Act, the transfer to adult court provisions became more proceduralized and the scope of the provisions was expanded.

This thesis has also shown that the expansion of the transfer to adult court provisions has created a differentiation between the treatment of violent young offenders and non-violent young offenders by the youth justice system. The changes made to the transfer provisions have mandated that youth charged with violent and serious crime be presumed subject to punishment in the adult justice system while non-violent young offenders retain their rights to be processed as young offenders. In differentiating between violent and non-violent young offenders, the transfer to adult court provisions have shifted the boundary of the youth justice system to symbolically exclude violent young offenders from being processed as youth, thereby making the approach that the youth justice system takes towards dealing with violent young offenders more punitive.

The introduction of Bill C-3: the Youth Criminal Justice Act and the current attempt by the Department of Justice to pass the revised Youth Criminal Justice Act in Bill C-7 reiterate that the trend to support punitive approaches towards dealing with violent young offenders will likely continue. The revised Youth Criminal Justice Act contained in Bill C-7

is almost identical to the Youth Criminal Justice Act introduced last fall by Bill C-3.²⁰⁴ Thus, Bill C-7 will continue the trend of the Department of Justice to increasingly emphasize a punitive approach towards dealing with violent young offenders by specifically expanding the scope of the transfer provisions to subject more young offenders to transfer, and more generally, by continuing to support the prioritization of crime control philosophy when dealing with violent young offenders.

One of the major reasons the Department of Justice will continue to emphasize a punitive approach towards dealing with violent young offenders despite evidence showing that justifications for this approach are false deals primarily with the belief system underlying punitive approaches to youth justice and its relation to both public safety concerns and the perceived effectiveness of punitive sanctioning. Generally, proponents of these types of approaches believe that longer incarcerative sentences that hold youths accountable for their crime will protect society better than dispositions emphasizing rehabilitation.

Arguments for transfer to adult court provide an excellent example of this belief system. Many arguments for transfer to adult court emphasize the need for retribution or accountability. Anecdotal accounts are common of juveniles laughing at the juvenile system,

²⁰⁴Note that the revised Youth Criminal Justice Act contained in Bill C-7 is almost identical to the Youth Criminal Justice Act introduced last fall by Bill C-3. The protection of society continues to be emphasized in the Act as the primary aim of the youth justice system and as the primary goal of sentencing. Changes proposed to the transfer provisions by Bill C-7 are also similar to reforms proposed by Bill C-3. If passed, Bill C-7 will change the test for transfer to make it identical to the test proposed by Bill C-3, it will expand presumptive offences to include youth convicted or charged with a pattern of serious violent offences and it will lower the minimum age for transfer to between 14-16, depending on provincial preference. See - Bill C-7: the Youth Criminal Justice Act, sections 3(1)(a), 38, 62 and 72.

accumulating 'free' crimes until they reach the age of majority."²⁰⁵ Transfer to adult court is seen as a disposition that exposes offenders to longer, incarcerative dispositions that could not otherwise be found in the youth justice system. Proponents of transfer argue that by transferring youths to the adult system, they experience real consequences. They experience sanctions that are harsher than the sanctions typically provided by the juvenile court.²⁰⁶

Proponents of transfer also point out that if offenders transferred to adult court are sentenced to terms of incarceration that are longer than the sentences they would have received had they been processed in juvenile court, their opportunities to commit subsequent offenses will be reduced.²⁰⁷

This argument is based on the idea that the removal of offenders from the community will protect society by removing the safety threat created by giving youth an opportunity to reoffend in an unrestricted setting. Indeed, one way the criminal justice system protects society is to remove serious and violent offenders from the community and place them where they will not pose a safety threat. Since the majority of youth transferred to adult court already have a relatively high incidence of reoffending, proponents of transfer argue that placing a young offender in adult custody will achieve a significant degree of community protection through extended incapacitation.²⁰⁸

²⁰⁵ Donna Bishop, Charles E. Frazie, Lonn Lanza-Kaduce and Laurence Winner, "The Transfer of Juveniles to Criminal Court: Does it Make a Difference?" (1996) 42 Crime and Delinquency 171 at 173.

²⁰⁶ Nicholas Bala and Heino Lilles, supra note 7 at 136.

²⁰⁷ Donna Bishop et al, supra note 205 at 173.

²⁰⁸ Naomi Lee and Tim Leonard, "Serious Violent Offences and Offenders in Youth Court" (1995) Department of Justice Canada, Ottawa.... point out that many young offenders transferred to adult court have multiple convictions in their youth court history. Of the 85 transfer candidates they studied, their YCS histories indicated approximately 14 charges overall per person and 5 convictions per person. (P. 16)

Proponents of transfer to adult court also argue that adult penalties deter youths from committing crime more than the dispositions available in youth court. According to this argument, youth crime is prevented simply by the intimidation of the law.²⁰⁹ The most important effects of intimidation are its deterrent effects, and these effects are achieved by persuading youth not to commit crime and the offender not to reoffend through threats made by the state or through the actual experience of punishment.²¹⁰ Where transfer to adult court is imposed, the threat to youth is greater than the threat imposed by the youth justice system. Transfer to adult court is seen as useful because it deters youth being transferred and prevents others from offending by making examples of those charged with offences.

Most importantly, though, advocates of transfer to adult court argue for transfer to adult court because they feel that it is the only disposition that can protect society from crime in the same way that the adult justice system does. Proponents of transfer often couch their positions in rationales of social defense.²¹¹ As Van den Hang stated:

The victim of a fifteen-year old mugger is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen year-old murderer or rapist is as dead or as raped as the victim of an older one. The need for social defense or protection is the same.²¹²

²⁰⁹Franklin E. Zimring and Gordon J. Hawkins, Deterrence: The Legal Threat in Crime Control, (Chicago: The University of Chicago Press, 1973) 7.

²¹⁰Igor Primoratz, Justifying Legal Punishment, (New Jersey: Humanities Press International, 1989) 13.

²¹¹Donna Bishop et al, supra note 205 at 174.

²¹²Van den Haag 1975, in Donna Bishop et al, supra note 205 at 174.

In sum, proponents of harsh sanctions like transfer to adult court support punitive approaches to youth justice because they view these types of approaches as a more promising means of reducing juvenile crime and increasing public safety than approaches emphasizing the welfare of young offenders. Punitive approaches to addressing youth crime are generally believed to provide more effective deterrence and greater community protection through harsher sanctions.²¹³ In reference to the transfer to adult court of violent young offenders, this sanction is seen as more effective in dealing with violent youth crime than dispositions available within the confines of the youth justice system because it exposes violent young offenders to harsh adult penalties.

The reality is that this belief is unfounded. This thesis has shown that no statistical evidence yet exists regarding the situations of Canadian youth post-transfer. It is unknown whether youth who are transferred to adult court in Canada receive more punitive dispositions than youth who remain in the youth justice system. It is also statistically unclear whether youth transferred recidivate at similar or different rates than similarly situated youth in the youth justice system. While proponents of punitive approaches to youth justice may believe that youth transferred receive dispositions that better protect society from crime, no information yet exists to support this claim.

Adopting punitive approaches towards dealing with violent young offenders that treat them as adults may actually do less to protect society from crime than using dispositions that

²¹³ Donna Bishop et al, *supra* note 205 at 173.

emphasize the welfare of these young offenders. The youth justice system was built on a welfare philosophy that recognized that adolescents and children who commit crime are different from adult offenders in reference to their maturity, their ability to discern right and wrong and their ability to be reintegrated into society. The system in turn provides services which are appropriate to youth's needs and which aid in the rehabilitation and reintegration of youth into society. The adult system does not provide age appropriate services to youth transferred such as education or counseling.²¹⁴ The adult system therefore cannot address youth's behavior in a manner which not only recognizes their age and maturity but also enhances their capacity to become respectful and productive citizens. Where rehabilitative services are not made available to youth charged or convicted of violent crimes in the adult justice system, society cannot be fully protected from violent youth crime because the specific situations of youth are not addressed.

In actual fact, prosecuting and punishing youths as adults harms them.²¹⁵ Comments were made by the Canadian Criminal Justice Association in their presentation to the Standing Committee on Justice and Human Rights on Bill C-3 regarding the damage that transfer to adult court can cause. Referencing the experience with transfer in the United States, they pointed out that:

²¹⁴Canadian Criminal Justice Association, Presentation to the Standing Committee on Justice and Human Rights on Bill C-3-Youth Criminal Justice Act, February 15, 2000, Ottawa, House of Commons.

²¹⁵Ibid.

(C)ompared to those held in juvenile detention centres, youth held in adult jails are seven times more likely to commit suicide, five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked with a weapon.²¹⁶

If youth in adult facilities are more likely to be harmed emotionally and physically while incarcerated in the adult system than youth serving time in a youth facility, using adult sanctions to punish violent young offenders will not be able to protect society better than dispositions available in the youth justice system. Dispositions imposed on youth that have the effect of harming them cannot address their behavior in a manner which will rehabilitate youth or reintegrate youth into society.

As dispositions imposed on youth in the adult system do not address young offenders' needs, treating violent young offenders as adults may also make youth transferred to adult court more likely to reoffend than their counterparts in the youth justice system.²¹⁷ As the Canadian Criminal Justice Association pointed out when researching transfer issues in the United States, juveniles coming out of the adult system in the United States are more likely to reoffend and reoffend earlier, to commit more subsequent offences and to commit more serious subsequent offences than juveniles retained in the juvenile system.²¹⁸

In general, dispositions imposed on violent young offenders in the adult justice system do not necessarily protect society from violent youth crime better than dispositions imposed

²¹⁶Canadian Criminal Justice Association, *supra* note 214.

²¹⁷*Ibid.*

²¹⁸*Ibid.*

on youth in the context of youth corrections. While incarcerative sentences in the adult system may expose young offenders to punitive dispositions, these dispositions do not address the needs specific to young offenders and thus cannot deter young offenders from re-offending. If anything, these types of dispositions make youth charged with violent crime more likely to reoffend. As the Canadian Criminal Justice Association suggested in comments made on Bill C-3, it is a mistake to believe that sanctions and approaches applicable to adults are more effective in deterring and reforming violent young offenders.²¹⁹

This is not to say that punitive sanctions like transfer to adult court are not necessary in some circumstances. Transfer to adult court was created to deal with exceptional situations where society's need to be protected from crime and offenders' needs to be rehabilitated and reformed cannot be met in the context of youth corrections. These situations do exist. However, the dictated use of punitive sanctioning by the youth justice system should reflect the fact that serious violent offences are a rare phenomenon among Canadian youth. Moreover, transfer to adult court should only be used in situations where serious or violent offences are committed that require a response that the youth justice system cannot give.

The fact that transfer to adult court has been used sparingly in Canada supports this argument. Throughout its history, transfer to adult court has been the extraordinary proceeding against youth. This fact is reflected in the dictated use of the transfer provisions as they were created in the Juvenile Delinquents Act and in their transformation with the

²¹⁹Canadian Criminal Justice Association, *supra* note 214.

introduction of the Young Offenders Act in 1984. The limited use of the transfer to adult court provisions historically and in recent years also supports the use of the punitive sanctioning as a last resort.

Moreover, the justifications given for the punitive approach taken by the Department of Justice towards transfer to adult court, and more generally towards violent youth offending, are either inaccurate or misinformed. The Department of Justice argued that reforms to the youth justice system were necessary in order to adequately address Canada's perceived growing and increasingly violent youth crime problem as well as the public's negative perception of issues related to youth justice. However, Canada's youth crime problem is neither out of control nor changing in such a way to suggest that a change in approach to the way that violent young offenders are dealt with by the youth justice system is required. Canadian youth crime rates both historically and in recent years have been relatively stable. Where a punitive response is necessary, provisions such as transfer to adult court are in place to address the situation.

The reality is that dispositions that emphasize rehabilitation do more to protect society from violent youth crime than punitive approaches to youth offending because these dispositions can address violent young offenders' needs in a way that punitive sanctioning cannot. Where rehabilitative measures are included in dispositions given to violent young offenders, society will be better protected from violent youth crime because an attempt has been made to deal with some of the social, economic and psychological factors that lead youth to commit crime. The truth is that taking kids' needs into account is the real way to

protect the public.²²⁰ Using punitive sanctioning as a blanket measure to deal with violent youth offending will do nothing to protect society from crime.

The best approach for the youth justice system for the future, then, is an approach which resists the pressure to expand the scope of the transfer to adult court provisions and dictates the use of transfer to adult court and other punitive sanctions as exceptional measures. As shown in this thesis, a top down approach to the youth justice system that emphasizes punitive treatment for violent and serious young offenders automatically limits the use of rehabilitative dispositions as an option when dealing with violent youth. However, the continued emphasis on punitive approaches to dealing with violent youth offending by the youth justice system may also place other youth at risk for overly punitive treatment. The punitive approach taken by the youth justice system towards dealing with violent young offenders has been consistently expanded to include increasingly larger numbers of the violent young offender population. The concern of this thesis is that not only will the punitive treatment of violent young offenders continue, but this treatment will be expanded to include youth convicted of non-violent crimes.

For this reason, the youth justice system must preserve the welfare philosophy on which it was based in order to continue to not only recognize the difference between violent young offenders and adult offenders in terms of their maturity, their ability to discern right and wrong and their ability to be reintegrated into society, but make available dispositions that

²²⁰ Canadian Criminal Justice Association, *supra* note 214.

focus on the rehabilitation of all youth convicted of crimes. Where transfer to adult court is expanded, options that emphasize welfare philosophy and that attempt to rehabilitate youth charged or convicted of crimes will no longer be accessible. In order to preserve the underlying welfare philosophy of the youth justice system, the dictated use of punitive sanctions must be the exception, and not the norm.

One way to ensure that the dictated use of punitive sanctions remains exceptional is to avoid false promises brought forward by the Department of Justice. One of the false promises brought forward by the Department of Justice is that punitive reforms to the youth justice system will address a youth crime rate perceived to be in crisis. This thesis has shown that this promise has no merit because youth crime rates both historically and in recent years have been relatively stable. Since adopting a punitive approach towards dealing with young offenders deprives youth of the opportunity to be rehabilitated and reformed, new reforms to the youth justice system that emphasize punitive philosophy based on misleading promises should not be passed. No further reforms to the youth justice system should be attempted until the consequences of current practices are known.

The consequences of current practice can only be seen through the completion of research. Taking transfer to adult court as an example, the present research on transfer to adult court and serious violent youth crime in Canada is dismal. The incidence of serious youth violence and transfer to adult court are both infrequent, making it hard for researchers to determine trends in serious violent youth crime rates. Information concerning violent youth offending and transfer to adult court also has many gaps. The gaps include the absence of

information regarding offending and punishment over time and the absence of information regarding both transfer applications and the situations of youth post transfer. What is required in reference to serious and violent youth offending and transfer to adult court is serious and sustained research. Until research in this area is completed, the consequences of punitive approaches to the administration of youth justice on Canadian young offenders will not be fully known.

Another one of the false promises brought forward by the Department of Justice is that punitive reforms to the youth justice system will be able to address public perception problems related to youth justice issues. This thesis has shown that this is simply not the case. Successive reforms have been introduced to the youth justice system and public perception problems continue. In fact, the Department of Justice's repeated reforms to the youth justice system may have worsened the public's already prevalent misconceptions and fear about youth crime.

What is required to address public perception problems is an education program to bring the true picture of youth crime issues in Canada to the Canadian public. This initiative needs to not only educate the public about the nature and situation of youth crime in Canada but about the primary purpose of the youth justice system being the rehabilitation of youth. It is only when the myths of youth crime are dispelled and the public is aware of the benefits of rehabilitation that the public can have informed opinions on the youth justice system, transfer to adult court and related issues.

More generally, the value of a rehabilitative approach in dealing with young offenders

needs to be re-emphasized in the administration of youth justice. The restriction of punitive approaches towards dealing with violent young offenders will allow rehabilitative dispositions to be used with these youth within the youth justice system. However, the recent focus on punishing violent young offenders has caused the benefits of rehabilitation to be forgotten in many ways. The social value associated with rehabilitation is immeasurable. Rehabilitation gives the youth justice system an opportunity to deal with the social, economic and psychological reasons for why juveniles commit crime and the opportunity to reintegrate youths into society as fully participating and law abiding citizens. It is only in recognizing the value of rehabilitation that the underlying welfare philosophy of the youth justice system can be truly preserved.

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