Proportionality as a Guiding Principle in Young Offender Dispositions

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In its approach to criminal activity by young persons, and in particular to sentencing, the purpose of the Young Offenders Act was to move away from a "treatment model" of juvenile criminal law toward a model which would hold young persons criminally accountable in much the same way as adults are accountable. The author examines sentencing practice under the Young Offenders Act and concludes that this goal has not been achieved. Courts continue to employ aspects of the "treatment model", leading to erratic sentencing and in many cases to the imposition of sentences that are more severe than if the young persons were treated as adults. The author examines possible reforms which would ensure that sentencing practice under the Young Offenders Act would accord more closely with its original purpose.

Sentencing is traditionally regarded as one of the most difficult and challenging functions of the criminal justice system. In arriving at the appropriate sanction to be imposed upon an offender, a court must reconcile the principles and objectives of the criminal law with the criminal act committed, the circumstances surrounding its commission, and the character of the offender who committed it. The court must, with the guidance of a few abstract, broadly philosophical, and often contradictory principles of sentencing, decide upon a sanction which is appropriate in the very concrete and factually specific case within which it is presented. This onerous task is even more difficult when the particular offender is a young person whose understanding of responsibility is less than complete, whose character has yet to be fully developed, and whose need for guidance is consequently greater than that of an adult offender. It is clear that there are special circumstances to be considered when sentencing young offenders. Unfortunately, an examination of current young offender legislation in Canada reveals that these special considerations are being used to justify a greater degree of state interference in dealing with young offenders than law and morality would permit in the adult context. In short the Young Offenders Act is being interpreted and applied so as to permit an interventionist approach to sentencing young people.

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This paper advances the argument that the state has no greater right to interfere with the liberty of young people who commit criminal acts than it does in respect of adult criminals. The only morally permissible basis for state intervention should be the culpability of the offender and the criminal act committed by that offender. A criminal sanction has just as significant an impact on the liberty of a young person as it would have on an adult.

This paper is divided into four parts. The first will show the historical development of sentencing philosophy in juvenile criminal law in Canada and other jurisdictions in North America. The second part will outline briefly the sentencing provisions of the current legislative régime in Canada, the YOA. The third part will consider how courts have used traditional objectives of adult sentencing in determining young offender dispositions. The fourth and final part of the paper will attempt to outline some possible reforms to the sentencing philosophy of the YOA in light of the approaches adopted in some American jurisdictions.

I. The Evolution of Sentencing Philosophy in Juvenile Criminal Law

Historically, the common law made little accommodation for the young offender. According to the maxim of doli incapax, a general incapacity for criminal conduct, children under the age of seven were not subject to criminal law. For children between the ages of seven and thirteen there was a presumption of criminal incapacity which could be rebutted depending on the level of development and culpability of the particular child. Children over the age of thirteen were subject to the full rigours of the criminal law.2 The 1892 version of the Criminal Code3 provided for a different mode of trial for young persons, one without publicity. There was, however, no differentiation between adult and young offenders in terms of sentencing.

The Criminal Code is generally considered to be based on a justice philosophy in which the justification for state restriction of the freedom and liberty of the offender is the offence which has been committed. Sentencing under the Criminal Code is thus governed by an overriding concern for proportionality: the penal sanction must be proportionate to the sum of the moral blameworthiness of the offender’s act and the consequences which result from that act. Any other objectives of sentenc-

3. S.C. 1892, c. 29.
ing, such as efforts to rehabilitate the individual or to deter the individual or others, must be accommodated within the range of punishments dictated by the principle of proportionality. Each offence has a specified maximum penalty and some offences have specified minima as well. Some writers would describe sentencing philosophy under the Criminal Code as offence oriented. 4

Since the introduction of the Juvenile Delinquents Act in 1908, 5 it has been recognized in Canada that principles of sentencing applied to adult offenders were not wholly appropriate for young offenders. The approach under the JDA was largely paternalistic. When a child showed signs of serious delinquency, which may or may not have meant that the child had actually broken the law, 6 the state saw fit to intervene and assume the role of raising the child. Provincial social welfare institutions consequently served as a form of substitute family for the delinquent. 7

The JDA has been characterized variously as a positivist model, a treatment model, and a welfare model. 8 The statute was predicated on the belief that the young offender had not chosen to do wrong, but had learned to do wrong as a result of the environment in which he or she had been reared. Thus, while the Criminal Code was based on a philosophy that saw crime as a chosen course of action which was to be punished, the JDA saw crime as a condition or sickness which was to be treated. 9 The JDA approached sentencing from a markedly different perspective than that taken under the general criminal law. Dispositions under the JDA were determined almost entirely on the basis of the needs of the individual offender, having regard to how that person could best be rehabilitated. It was believed that legislation could not adequately account for all the concerns of the individual delinquent. Consequently the legislation afforded virtually unlimited discretion to judges in determining dispositions. Removing the discretion from the trial judge would hamper the ability of that judge to arrive at the disposition which would most benefit the juvenile.

4. See e.g. J. Trépanier, "Principles and Goals Guiding the Choice of Dispositions under the YOA" in L. Beaulieu, ed., Young Offender Dispositions (Toronto: Wall & Emerson, 1989) 27.
5. S.C. 1908, c. 40.
6. See Juvenile Delinquents Act, R.S.C. 1970, c. J-3 [hereinafter JDA]. The offence of "delinquency" is defined in section 3(1) of the JDA as being the commission of any of the acts of a "juvenile delinquent". A "juvenile delinquent" is defined broadly in section 2 to include, among other things, a child who is guilty of any "form of vice", or a child who has been designated a delinquent by any other legislation, provincial or federal.
7. JDA, s. 20(1).
9. JDA, s. 3(2).
The *JDA* provided for "a significant variety of dispositions. These ranged from doing virtually nothing . . . to doing almost anything . . ."\(^\text{10}\) A central dispositional feature of the *JDA* was the indeterminate sentence. It was seen as an invaluable tool in dealing with juvenile delinquents because it permitted the state to maintain control over the child for as long as was deemed necessary to ensure reform and rehabilitation, but no longer. It became apparent, however, that institutionalization of young persons was not a wholly effective means of rehabilitation. Moreover, indeterminate sentences failed to recognize the rights of either the child or the child's parents. A child found to be delinquent in some minor way could be institutionalized and, upon responding poorly to "treatment" in a custodial facility, might be held for the duration of his or her years as a minor. The *JDA* has been seriously criticized for its failure to acknowledge and respect the rights of the young offender.

It is widely accepted that the introduction of the *YOA*\(^\text{11}\) in 1983 represented a shift in the philosophy of juvenile penal law.\(^\text{12}\) As seen above, the *JDA* had been criticized for its failure to respect the rights of the young person, both during the process of determining guilt and in the consequences of a finding of guilt. The *YOA* was an attempt to move closer to a justice-oriented model: there was a greater emphasis on the rights and concomitant responsibilities of the young offender. Within the *YOA* itself, the Declaration of Principle is indicative of the transition: s. 3 makes reference to such concepts as accountability, responsibility, the rights of the young person, and protection of society.

It must be acknowledged, however, that the *YOA* is not a "mini-Criminal Code".\(^\text{13}\) The *YOA* makes it clear that young offenders are not to be held accountable to the same extent as adults. The implication is that while young persons are responsible for their acts, their understanding of responsibility is circumscribed in light of their limited experience and maturity. The reference to "limited accountability" in s. 3 of the *YOA* is probably an acknowledgement that there should be some leniency and understanding with respect to the wrongdoing of a young person. Whether this concept is actually employed in handing down dispositions is another matter.\(^\text{14}\) There is also reference to the dependency, level of development,

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and special needs of young persons. Young persons are impressionable, lack experience and education, and thus are in need of guidance. The YOA implicitly acknowledges that the state has a higher level of responsibility in dealing with young offenders than it does in the adult context.

The YOA, as a result, is a mixed model of juvenile penal law incorporating elements of each of the two extremes embodied by the Criminal Code and the JDA. The Supreme Court of Canada described the YOA in the following manner:

[T]he Act should be seen as part of a spectrum of legislation from those statutes that provide welfare care for children at one end to the strict sentencing provisions of the Criminal Code at the other.\(^{15}\)

It is noteworthy that, while the Criminal Code specifies a maximum for each offence named, custodial dispositions under the YOA are not tied to substantive crimes with the exception of those punishable by life imprisonment under the Criminal Code. This distinction has been used by some writers to support the proposition that the YOA is offender-oriented.\(^{16}\)

Manfredi points to the similarities between the development of juvenile penal philosophy in Canada and the experience of state legislators in the United States.\(^{17}\) The initial impetus for the move from a treatment to a justice perspective is reflected in a line of United States Supreme Court decisions respecting the rights of young persons within criminal procedure. Landmark decisions in Re Gault,\(^{18}\) Kent v. United States,\(^{19}\) and Re Winship\(^{20}\) affirmed the procedural rights of young offenders, but in the view of commentators such as Sarri had little impact on the dispositional practices of state juvenile penal systems. In Sarri’s view, dispositions in most American jurisdictions are not governed by any clear criteria.\(^{21}\)

Both Manfredi and Schneider\(^{22}\) assert that the philosophy of state juvenile justice systems is moving closer to the philosophy used in adult criminal law. Manfredi points to legislation in Michigan, New York, and Washington that has been “criminalized” in a number of ways, two of which impact directly on dispositional practices. First, substantive changes

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17. Supra note 13.
to dispositional provisions have been implemented in a move from an offender-oriented to an offence-oriented system of sentencing. Manfredi describes the process as an attempt to create a more direct link between the substance of dispositions and specific acts. The impetus for this development has been two-fold: (1) the desire to control discretionary decision making and dispositional discrepancy; and (2) the realization that the failure to establish a relationship between acts and their consequences undermines the deterrent value of juvenile court intervention.23

Secondly, declarations of principle have been included in a number of new state enactments. Such declarations generally acknowledge the rights of the young offender in a comprehensive way and, in Manfredi’s opinion, go further in guaranteeing fairness or “justice” in dispositional practice than do sporadic decisions of the United States Supreme Court.24 Manfredi views the merging of juvenile and adult penal philosophy as a progressive trend, since it is based on the proposition that the only justification for state intervention is the commission of an offence. There is a great deal of support for the view that a gradual shift in the philosophy of young offender sentencing is occurring across North America. Simply put, the overall sentencing philosophy in young offender legislation is moving ever closer to the traditional adult philosophy. Viewed in this context, it is submitted that Parliament’s transition from the JDA to the YOA is a first step toward the adoption of a justice model in juvenile criminal law.

This development is not without controversy. Some commentators feel that adult philosophies of justice are simply an inappropriate basis on which to ground a juvenile justice system. They feel that, given the special needs of young offenders and their special place in society, a different model of sentencing is warranted. It is argued that principles used in determining a just sentence in adult criminal law should not be wholly applicable in determining the appropriate disposition in the juvenile criminal context:

Criminal justice cannot be equated with retributive justice. Evolving toward criminal justice does not mean that we are moving toward punishment as such. In some of its variants, criminal justice can also aim at rehabilitation and reinsertion in society and the person of the offender can be accorded more importance than his crime.25

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23. Supra note 13 at 53.
24. Ibid.
25. Brodeur, supra note 16 at 113.
II. The Dispositional Provisions of the YOA

In contradistinction to the Criminal Code, which provides little guidance for sentencing of adult offenders, the YOA explicitly provides for a broad range of dispositions\(^{26}\) and articulates a set of principles to be used in imposing those dispositions.\(^{27}\) In this portion of the paper each of these parts of the YOA will be discussed.

1. Dispositional Options under the YOA

While the Criminal Code focuses primarily on custodial sentences and fines, the YOA provides a considerable variety of dispositions. Under s. 20 of the YOA, a youth court can impose:

- an absolute discharge [paragraph (a)]
- fine not exceeding one thousand dollars [paragraph (b)]
- an order of compensation [paragraphs (c),(f)]
- an order of restitution [paragraphs (d),(e)]
- an order of community service [paragraph (g)]
- an order of prohibition [paragraph (h)]
- a treatment order (subject to consent) [paragraph (i)]
- an order of probation not exceeding two years [paragraph (j)]
- a custodial term [paragraphs (k), (k.1)]
- other conditions [paragraph (l)]

S. 20(6) requires that the court provide written reasons for its disposi-
tions. S. 20(7) of the YOA states that no disposition under the YOA is to be more severe than the maximum penalty which would be imposed under the Criminal Code. At first glance one might take this to mean that dispositions under the YOA are not as harsh as dispositions under the Criminal Code. As far as the aftermath of a finding of guilt is concerned, the general thrust of the YOA is to provide less severe consequences than those for adult offenders under the Criminal Code.\(^{28}\) However, s. 20(7) only states that a disposition under the YOA cannot be as harsh as the maximum sentence available under the Criminal Code. In reality the maximum sentence is almost never applied in adult sentencing. Furthermore,

while adults are entitled to a number of mandatory and discretionary remissions from sentence, a young offender is not. A two year sentence for a young person means two years. In many respects, it is equivalent to a 6 year sentence for an adult, who can expect day parole in two years time.\(^{29}\)

\(^{26}\) YOA, s. 20.
\(^{27}\) YOA, s. 3.
Thus it cannot truly be stated as a general proposition that young offender dispositions are less severe than those available for adult offenders.

Bala points out that the most frequently used disposition under s. 20 is the probation order with conditions. This disposition is extraordinarily flexible and permits the court to tailor the nature of the order to the “needs of the individual”.

The breadth of options available to the youth court under s. 20 reflects an attempt to avoid imposition of custodial terms if at all possible. Given the uncertain effect of rehabilitative efforts, it is probably fair to assume that, in enumerating such a broad array of dispositional tools under s. 20, Parliament was acknowledging the criticism that sentencing in criminal matters places too great an emphasis on incarceration to the exclusion of other potential sanctions. This intention is confirmed by s. 24(1), which permits custodial dispositions only when “necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed having regard to the needs and circumstances of the young person”. It has been suggested that institutionalization is to be avoided wherever possible because of the negative impact incarceration has on the individual. Custodial institutions can be a source of negative influences for young persons who are in many cases still very impressionable. Nevertheless this position is not without controversy. There are those who feel that incarceration of young persons is indeed necessary in order to ensure rehabilitation.

Another condition precedent to the imposition of a custodial disposition is found in s. 24(2). By virtue of that section a youth court cannot impose a custodial disposition without first considering a pre-disposition report. The purpose of a pre-disposition report is to ensure that the court is informed of the current home environment of the young person and the history of the young person in an effort to determine his or her amenability to rehabilitation. While at first glance it appears to be a laudable objective to ensure that the court is well appraised as to the young person’s history and circumstances, it must be noted that the actual effect of requiring pre-disposition reports is to encourage and support the imposition of custodial dispositions. Often youth courts will impose a custodial disposition in order to remove the young person from a negative home environment which has been brought to the court’s attention through the pre-disposition report.

30. Supra note 2 at 28.
31. YOA, s. 24(1).
Even if one goes so far as to say that “custody is to be imposed only when all else fails,” it is clear that at some point concerns other than the absolute welfare of the child must be taken into consideration. When a serious and violent crime has been committed, the public will demand a serious sanction be imposed, and moreover the offender and those like him or her must be shown that young people who commit acts of serious violence will be held accountable. The YOA therefore provides for custodial dispositions of up to two years, and for dispositions of up to three years in custody for those offences which are punishable by life imprisonment under the *Criminal Code*.

There have been a number of significant criticisms of the YOA’s dispositional provisions. First, academics have criticized the somewhat unclear distinction between secure and open custody in s. 24.1(1). Since custodial institutions are administered provincially there is a marked disparity in quality and availability of facilities from province to province and municipality to municipality. The result has been regional disparity in the length and severity of dispositions under the YOA. Moreover, some academics have argued that the differentiation between secure and open custody has been used by youth courts as a “middle option”; a justification for imposing custodial terms where they would not previously have been imposed. It is argued that s. 24.1 has therefore had a punitive impact on dispositional practices. S. 24(1) requires that custodial dispositions only be imposed “when necessary for the protection of society . . . having regard to the needs and circumstances of the young person.” This was to be an additional requirement to be met before a custodial disposition was imposed. It has become clear, however, that s. 24(1) has not made it more difficult to impose a custodial disposition. Courts have used the words “having regard to the needs and circumstances of the young person” to argue that where the child is in need of guidance which is not available in his or her family environment a custodial term is required.

S. 20 also fails to deal with a very real problem that youth courts face in wading through the available dispositions: the lack of institutional

35. *YOA*, s. 3 (1) (a).
37. *YOA*, s. 20(1)(k)(ii).
resources which exists in most if not all jurisdictions. While a youth court judge might think it preferable to place an offender on probation on the condition that he or she live in a group home, there may simply be no space available in the home. The judge may be led to the conclusion that there is no choice but to order a custodial disposition.

2. Declaration of Principle

In imposing a disposition under s. 20 of the YOA, courts are to have regard to s. 3, which enumerates a set of principles which are to be used in interpreting and applying that statute. This section has been interpreted to have the force of a substantive provision and not merely a descriptive preamble. Briefly stated, s. 3(1) provides that the following principles are to be considered in arriving at dispositions for young offenders:

- (limited) accountability and responsibility [paragraph (a)]
- protection of society [paragraph (b)]
- needs of the young offender [paragraph (c)]
- rights of the young person [paragraph (e)]
- least possible interference [paragraph (f)]
- parental responsibility [paragraph (h)]

There is no question that all of these principles are valid and essential factors necessary for arriving at sound dispositions for young offenders. The fundamental problem, however, is that these principles are not prioritized in any way, and as a result the courts have been given no direction or starting point upon which to structure their decision-making process. The problem is described aptly by Doob and Beaulieu:

The YOA lists a number of different principles that are to guide dispositions under the Act but does not give precedence to any single principle, nor does it indicate how much weight should be given to any one principle.42

The problem is compounded by the fact that the principles in s. 3 often involve contradictory considerations. Unlike the JDA, which considered the protection of society and the interests of the juvenile to be substantially similar, the YOA is based upon a philosophy which views these two principles as fundamentally at odds with each other. The protection of society, which has been interpreted to include general deterrence, specific deterrence and incapacitation, often conflicts with the “needs

44. R. v. C.W.W., ibid.
of the young offender”, which has been interpreted on various occasions to include rehabilitation.45

A particularly striking example of the clash between these two principles is the British Columbia Court of Appeal decision in R. v. H.(A.).46 In that case, a young offender involved in a gang altercation stabbed another young person. The victim was seriously and permanently incapacitated and left virtually unemployable. At trial, the offender was given a two-year term of secure custody, but on appeal evidence was adduced showing that he was reacting negatively to custody. His behaviour had become more and more antisocial since he had been incarcerated, and he was increasingly bitter. The disposition was varied to time served (eight months). In dissenting, Locke J.A. pointed out that the Court was required here to “squarely face the dilemma between protecting society and rehabilitation.”47 In this case the crime was serious and violent and called for a harsh disposition, but placing the offender in a custodial institution clearly had a negative effect on him personally.

The result is probably best described by Markwart and Corrado:

This Declaration is, in fact, a set of eight propositions that are not prioritized, are often qualified and consequently unclear, and often seem incompatible with one another.48

There are a number of unfortunate side effects of this failure to rank the principles in s. 3. First, permitting courts to pick and choose among mutually incompatible principles of sentencing will result in considerable variance in the severity of dispositions in like cases. Doob, in a survey of statistical studies of the impact of the YOA on dispositional practices, concludes that the lack of clarity in the declaration of principles is one of four factors contributing to variance in the severity of dispositions under the Act.49

More compelling data indicating that the lack of prioritization of the principles in s. 3 causes variation are found in an independent survey conducted by Doob and Beaulieu.50 In that survey 43 judges experienced in dealing with youth court dispositions were given four fact patterns and asked to determine dispositions and provide reasons for their determinations. The results were indicative of a lack of consensus among judges

47. Ibid, at 121.
48. Supra note 12 at 15.
49. Supra note 38. Doob acknowledges that it is impossible to isolate the statistical significance of each of the factors contributing to variance in light of the marked variation in resources, prosecuting policies, and enforcement practices between and within provinces.
50. Supra note 42.
with respect to the goals to be emphasized in determining the disposition for any of the cases. There was a significant variation in the severity of dispositions handed down. Doob and Beaulieu concluded:

The variation in dispositions that we have shown . . . can be understood as being a direct result of the Young Offenders Act itself.\(^5\)

A second consequence of the ambiguity in s. 3 is that it has resulted in a greater degree of overall interference with the liberty of young offenders than was the case under the JDA. This is because courts with an inclination toward custodial dispositions can draw on and give paramountcy to the principle under s. 3 which best suits their cause. In order to support a severe custodial term with reference to a serious offence, the court will give primacy to the protection of society. In order to support a custodial disposition for a relatively minor offence, the courts will emphasize the needs of the young offender and argue that the offender needs to be placed in custody in order to be treated.

A third effect of the lack of clarity in s. 3 is the irrationality that such an ambiguous declaration perpetuates. The result is an erosion of the deterrent effect of dispositions. When penalties are not imposed rationally and consistently, the connection between the commission of the offence and the penalty is lost. The result is a failure to bring home to young people the fact that their contraventions will lead to punishment. In Trépanier's words, courts should "aim at general deterrence . . . by regular and constant imposition of fair punishments".\(^5\) Thus while custodial dispositions may be handed down more frequently than was the case under the JDA, there is no guarantee that this increase will result in increased general deterrence.

Having assessed the effects of the ambiguity in the declaration of principle, it is next necessary to ask why Parliament did not prioritize or rank the principles in s. 3. There are two possible explanations for the lack of clarity and prioritization in the declaration of principle: (1) the need for individualization and judicial discretion in dispositions, and (2) the fact that legislative ambivalence is simply a reflection of societal ambivalence.

First, the lack of prioritization in s. 3 is often explained as an attempt by Parliament to leave dispositional discretion in the hands of courts. It is contended that courts should not be bound or limited by any particular abstract principle in arriving at the appropriate disposition in particular situations. Legislation, it is argued, cannot account for the particular circumstances in which the offence was committed, nor can it accommodate the particular needs of the individual:

\(^{51}\) Ibid. at 49.
\(^{52}\) Supra note 4 at 49.
Most judges appear to take the view that there is no need to change section 3 of the YOA. They see it as an improvement over the JDA, indicating that it gives the judges the scope to deal with almost any case.53

This is the view of the Alberta Court of Appeal. In R. v. C. W. W. that court stated that it is "improper to attempt to express a starting point for offences involving young offenders because the Act contemplates a very significant degree of individualization."54 This opinion assumes that limiting youth court discretion will render youth court judges unable to tailor their sentences to the needs of individual young offenders. It must be recognized that pointing youth court discretion in a certain direction is not the same thing as removing the discretion altogether. Prioritizing the principles in s. 3 would simply give the courts an indication of the "dimensions to be used in individualizing the sentence."55

It would be useful, at this point, to state the obvious: the YOA cannot rehabilitate all young offenders, nor can it eliminate all crime among youth. It is one of many tools to be used in grappling with the problem of youth crime, and it is necessary that youth courts recognize this. Doob and Beaulieu submit that judges, within the context of a single disposition, are attempting to accomplish an enormous amount....[Our survey] suggests that judges have set themselves an almost impossible task: combining almost contradictory goals to arrive at a disposition.56

Thus, while many youth court judges would assert that the declaration of principle in s. 3 is an exemplary means of achieving the degree of discretion necessary in sentencing young offenders, a survey of youth court practice leads to the conclusion that the ultimate goal will vary from disposition to disposition. What is the overall purpose of handing down a disposition under the YOA? What is the role of the YOA in dealing with youth crime? It is submitted that a rational approach to interpretation of s. 3 must be identified, in turn leading to a rational and consistent application of the YOA's substantive dispositional provisions.

Secondly, there are those who contend that the ambiguity in the declaration of principle is a result of a general legislative ambivalence regarding the purposes of juvenile penal sentencing. It is difficult to determine whether the structure of the YOA is an attempt to permit broad judicial discretion or simply an act of avoidance or an overt intention "to

55. "Dispositions", supra note 53, at 204.
56. Supra note 42.
dump the problem on the courts.”57 The YOA has been praised by some as a “courageous attempt to balance concepts and interests that are frequently conflicting.”58 The position expounded by those who praise the lack of specificity in s. 3 is that there is simply no single philosophy which will accommodate all the types of offenders. The ambivalence in the YOA is a reflection of the societal ambivalence regarding the objectives of juvenile penal law. Beaton argues that the public wants emphasis placed on protection of society for what it perceives as criminal conduct and emphasis on the needs of the individual in disposing of cases which it perceives to be mere adolescent rebelliousness.59 It is submitted, however, that the Act is anything but courageous in its attempt to deal with the various competing views of juvenile justice. Parliament simply threw all of its concerns together in s. 3 without making any tough decisions about which concerns should be given preeminence. The way s. 3 is structured, in combination with the way that it is interpreted, has led to disparity and irrationality in dispositional practices.

III. Traditional Goals of Adult Sentencing Employed in the Young Offender Context

The only proposition which can be stated with any degree of certainty is that considerations applicable in adult sentencing are not to be applied without modification to young offenders.60 The extent to which the five traditional objectives used in adult sentencing—general deterrence, specific deterrence, incapacitation, rehabilitation, and retribution—are applicable to young offenders is unclear. In 1986 the New Brunswick Court of Appeal was of the opinion that objectives used in adult sentencing are wholly inapplicable in determining young offender dispositions.61 Nevertheless the better view, which appears to have been recently affirmed by the Supreme Court of Canada, is that adult sentencing objectives may be drawn upon in youth courts, but are of limited usefulness.62 What this means in practice is unclear, but the point is well taken that traditional sentencing objectives were developed in reference

60. J.J.M., supra note 15.
61. R. v. R.C.S., supra note 34.
to a different penal philosophy and therefore should be applied with caution.  

Before looking at the judicial treatment of each of the traditional objectives individually, an attempt must be made to place judicial interpretations of the YOA in their proper context. First, appellate court opinions on the usefulness of adult sentencing objectives in young offender dispositions are far from uniform; the state of the law differs significantly from province to province. The Supreme Court of Canada has done little to alleviate the disparity in philosophical approaches to young offender dispositions. The Court’s recent ruling in *J.J.M.* condones the ambivalent and unrestricted approach taken by Parliament in the *YOA’s* Declaration of Principle.

Secondly, insofar as there has been any consistent and meaningful consensus on the overall philosophy of the *YOA*, there appear to have been two distinct periods in the interpretation of the *Act*. As Young points out in his survey of appellate court pronouncements on young offender sentencing, early decisions emphasized differences between the *YOA* and the *JDA*. By focusing on the “rights and responsibilities” which the *YOA* created, youth courts saw the *YOA* as a rejection of the treatment/welfare approach which existed under the *JDA*. Corrado and Markwart concluded that, initially at least, the *Young Offenders Act* was more punitive than the *JDA*. During this period some appellate courts handed down decisions which, at least in certain circumstances, condoned the practice of giving paramountcy to the seriousness of the crime over the needs of the young offender.

Since the late 1980’s, however, appellate courts have tended to view the *YOA* as occupying the middle ground between the treatment/welfare orientation of the *JDA* and the justice orientation of the *Criminal Code*. The result has been a general reluctance to place concerns for the protection of society and the seriousness of the offence above concerns for the rehabilitative needs of the young offender, and an apparent return

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64. *Supra* note 15.
to the interventionist and paternalistic sentencing practices commonly found under JDA jurisprudence.

1. Retribution and Proportionality

Retribution is a central objective in adult sentencing. Retribution has been condemned by some as a barbaric need for society to exact vengeance on the criminal. But such a condemnation ignores the fact that retribution is an attempt to vindicate the indignation that society has suffered at the hands of the criminal. More importantly, retribution ensures that the state does not disregard the dignity of the offender. If there were no moral constraints on the severity of interference with the offender, utilitarian punishment objectives such as deterrence or rehabilitation would permit the state to ignore the dignity of the offender in order to achieve broader societal objectives. In short, retribution leads to proportionality, which is the essential basis for the intervention of the state in a “justice model” of criminal law. This paper therefore proceeds on the assumption that deviations from the principle of proportionality on the basis of some utilitarian objective of sentencing are very difficult to justify morally.

Given the young person’s limited understanding of responsibility, lack of development, and need for guidance, our society acknowledges that the just sentence for the adult offender is not necessarily the same as the just disposition for the young offender.

Criminal justice cannot be equated with retributive justice. Evolving toward criminal justice does not mean that we are moving toward punishment as such. In some of its variants, criminal justice can also aim at rehabilitation and reinsertion in society and the person of the offender can be accorded more importance than his crime.\(^7\)

This is affirmed by the YOA’s Declaration of Principle, which specifies that young persons are to be held accountable only in a limited sense (paragraph (a)) and that young persons have special needs (paragraphs (c) and (f)). Thus, dispositions under the YOA may deviate from the principle of proportionality where consistent with the needs of the young offender. It is thus generally accepted that proportionality is a less central concept in young offender sentencing than it is with respect to adult offenders.\(^7\)

In \(R. v. R.I.\), the Ontario Court of Appeal stated:

The close correlation which is generally looked to as appropriate in the case of an adult offender, between the seriousness of the offence and the

\(^{71}\) Brodeur, \textit{supra} note 16 at 113.
\(^{72}\) \textit{J.J.M.}, \textit{supra} note 15.
length of the sentence imposed for it, may or may not be equally as appropriate in the case of a young offender.\footnote{73}{(1985), 17 C.C.C. (3d) 523.}

The problem, as is demonstrated below, is that the "needs of the young offender" have been interpreted to include the "need" to be incarcerated in order to facilitate rehabilitation. This interpretation is by no means demanded by the YOA itself. The Declaration should have been interpreted to implicitly limit departures from proportionality. Given the emphasis placed on the rights of the young person in paragraph (e), the inclusion of the principle of least interference in paragraph (f), and the recognition of parental responsibility in paragraph (h), the YOA should be interpreted so as not to permit deviations from proportionality which would permit a more onerous disposition than would otherwise be the case. The mixed model of justice which the YOA represents should allow the court to reduce the severity of a disposition. It should not allow the court to increase the severity of dispositions, either in the interests of the protection of society or in the interests of the needs of the young offender. The principle of least interference should preclude more onerous dispositions. Moreover, the role of the parents should not be usurped by the state through the criminal law. The best way to deal with concern over the adequacy of parental supervision is through family law and provincial child protection legislation.

There is a further point which must be made about the application of the proportionality principle in young offender dispositions. An argument that proportionality should be the guiding principle in young offender dispositions should not be taken as an argument that all dispositions in the young offender context should be proportionate in some concrete sense to sentences for similar offences in the adult context. Strict numerical comparisons of sentences in adult and young offender matters are wholly inappropriate given the limited severity of dispositions under the YOA. "While proportionality is clearly a consideration, the temptation to give it a numerical expression [in relation to a similar offence in the adult context] must be avoided."\footnote{74}{R. v. C.D.N. (1990), 100 N.S.R. (2d) 4 (C.A.).}

2. General and Specific Deterrence

It could be argued that references to the protection of society in s. 3(1)(b) and in s. 24(1) include the objective of general deterrence. With the exception of the Alberta Court of Appeal,\footnote{75}{R. v. C.W.W., supra note 43.} there is judicial support for
Proportionality as a Guiding Principle in Young Offender Dispositions

this interpretation. That the protection of society includes the objective of general deterrence has been affirmed by the Supreme Court in *J.J.M.* In that case Cory J. opined that, in theory, the deterrent effect of dispositions in young offender cases should be effective because a large proportion of juvenile delinquency is the result of “group activity”.

Initially there was concern among academics that, in observing the significant change in philosophy from the *JDA* to the *YOA*, courts were giving paramount weight to the protection of society and consequently had been focusing on the objective of deterrence in sentencing to the exclusion of other principles. But it has become clear, in light of numerous appellate court pronouncements, that this is no longer the case. In determining dispositions for young offenders the courts have consistently subordinated the objective of general deterrence to other goals. For example, in *R. v. S.R.H.*, two young offenders were convicted of manslaughter for killing an old man. The young offenders were intoxicated at the time. The trial judge imposed a term of open custody on both. At the Ontario Court of Appeal it was accepted that in light of the seriousness of the crime the proper disposition would have been a term of secure custody, but the disposition was not disturbed because there was evidence that the two offenders were “doing well” in open custody.

There is an abundance of literature which questions the efficacy of imposing harsh custodial terms in order to deter the general population from committing crime. It is well beyond the scope of this paper to evaluate the merit of any such criticisms. It is nevertheless necessary to state that the deterrent effect of dispositions is far from certain, and this is a relevant factor in determining dispositions under the *YOA*. Consequently, deterrence alone cannot be a valid moral basis upon which to remove the freedom of the individual. It is submitted that the use of disproportionately harsh sentences in order to deter others is a strategy which should be impermissible in young offender dispositions, given the explicit recognition in the legislation of principles such as accountability and least interference. In the words of Trépanier:

77. *Supra* note 15 at 496.
80. *Supra* note 45.
A judge is not a legislator. Contrary to the latter who, when he makes legislative choices, makes decisions that apply to all citizens, a judge's role is to make decisions that concern individual cases.

The deterrent effect of sentences should be derived from the system as a whole, not from exemplary dispositions in particular circumstances. The preferred way to deter society in general from committing crimes is to demonstrate that criminal conduct, when detected, will be sanctioned on a rational and consistent basis, in proportion to the wrong which has been committed.

In sentencing young offenders the courts appear to be more comfortable with the use of specific deterrence than with general deterrence. This is probably because specific deterrence is more amenable to a paternalistic outlook than is general deterrence. It can be argued—and often is—that the "needs of the young person" require that he or she be deterred, in his or her individual capacity, from criminal conduct.

Again, it is submitted that the use of disproportionately severe sanctions in an effort to show the young offender that his or her contraventions will result in a significant curtailment of personal liberty should be discouraged. Any individual deterrence which can be derived from the penal sanction should be the result of a just form of punishment, and not the reason for imposing the punishment.

3. Incapacitation

Incapacitation has received judicial approval as a proper consideration in young offender dispositions. Since any custodial disposition removes the offender from society, the disposition is a form of incapacitation. But as a primary objective of dispositions, incapacitation does not provide an adequate moral basis upon which to support a penal sanction in the context of juvenile justice. In the case of adult offenders who pose a serious threat to society, the state might well be justified in imposing a custodial sentence of significant duration based on incapacitation. But in the case of young offenders who have markedly better opportunities to be re-integrated into society, who have their whole lives ahead of them, and the most threatening and violent of whom will be transferred to adult courts, it is inappropriate to use incapacitation as a primary objective of sentencing. Given the fact that s. 3 of the YOA espouses the principles of

82. *Supra* note 4 at 48.
86. See Young, *supra* note 65 at 71.
limited accountability and least interference, the YOA should be interpreted in such a manner that the interests of juvenile offenders are not subordinated to the interests of society. It is submitted that incapacitation should be relegated to the role of an incidental result of the rational imposition of proportional dispositions.

4. **Rehabilitation**

The objective of rehabilitation can easily be derived from the reference to the "needs of the young offender" in paragraph (c) of the YOA's Declaration of Principle. Courts have given rehabilitative objectives significant weight in the context of young offender dispositions. In *R. v. E.M.*, Abella J.A. was of the opinion that rehabilitative concerns should take precedence over all others in sentencing young offenders.

While these guiding principles in section 3 appear to reflect a philosophical and cautious balancing between offender and offence and between deterrence and rehabilitation, read as a whole they none the less call for the determinative emphasis to be on the remedial, rehabilitative and prospective needs of the young offender.87

There are generally two manifestations of rehabilitative objectives in young offender dispositions. First, youth courts have on numerous occasions given priority to rehabilitative concerns in order to arrive at a disposition that is less onerous than would otherwise have been the case. This is done by giving determinative weight to the "needs of the young person" in spite of a contradictory concern for the "protection of society".88

Such a deviation from the principle of proportionality may be permissible in light of the special position of young people, especially when the choice is between a non-custodial and a custodial term. Custodial institutions are a concentrated source of bad influences and negative socialization for young people, and can have significant impact on the character development of adolescents.89 This position is not without controversy. There are those who argue that efforts at rehabilitation have significant impact on recidivism.90 Nevertheless, given the uncertain effects of rehabilitative measures, it is submitted that where two or more courses of action are available to the court in handing down a disposition to a young offender, the option which represents the least intrusion on the liberty of the young person should be adopted (in the absence of evidence

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87. *Supra* note 70 at 169.
89. Dawson, *supra* note 32.
that rehabilitation might be effective in the particular young offender's case).

It is valid to assume (though it is by no means explicitly stated) that in passing the YOA Parliament made a conscious decision to deviate from the principle of proportionality where it conflicts directly with the interests of the young person. The drafters, in creating a "mixed model" of juvenile criminal justice, have made a statement that our society will forego some of the punitive and retributive impact of dispositions in order to assure that young people, who represent the future of our society, are given adequate opportunity to be reintegrated.

The second way in which courts have used rehabilitative objectives in young offender dispositions is to justify imposing more severe dispositions or more lengthy custodial terms on offenders who they perceive to be in need of treatment, guidance, and/or a more stable environment. In R. v. K.L.B., the Appeal Division of the Nova Scotia Supreme Court affirmed a lengthy custodial disposition for a first time offender who was perceived to be "out of control" and in need of guidance which could not be adequately provided at home.

A recent decision of the Supreme Court of Canada appears to have given its approval to this approach. In J.J.M., a lengthy custodial disposition based primarily on the fact that the offender's family environment involved alcoholism, domestic violence, and the negative influences of other siblings was upheld on appeal. The appellant argued that the YOA required the sentence to be proportional to the offence committed. In response, Cory J. ruled that

"for the young person, a proper disposition must take into account not only the seriousness of the crime, but also all other relevant factors."

The factors taken into consideration in J.J.M.'s case were his home situation and his lack of guidance which were "indicative of the need for care [custody]."

It is clear that the courts, in viewing the YOA as a mixed model which includes elements of both the treatment model and the justice model, have decided that the YOA permits paternalistic intervention. Our society, they argue, will permit more intrusive state action in respect of its young people than it will permit in respect of its adult citizens. Children are not considered to have absolute liberty; their liberty is curtailed by parental guidance until such time as they have acquired a certain level of maturity and responsibility. Thus in handing down dispositions under the YOA, the

92. Supra note 40.
93. Supra note 15 at 494.
state should be permitted to intervene on the basis of paternalism where it is clear that a young person’s home life is not providing adequate guidance and control. The author submits, however, that the proper means of dealing with children who are in need of more stable family environments and are subject to abuse in the home is through provincial family law and welfare legislation. Provincial statutes such as Nova Scotia’s *Children and Family Services Act* have specific provisions for removing children from abusive home situations.\(^9\)4

The criminal sanction should not be used as a tool in the welfare system. This was one of the fundamental reasons for the transition from the *JDA* to the *YOA*. Young points out that [t]his practice appears to contradict the strong and resolute appellate pronouncements that custodial sanctions are not to be used as a substitute for either welfare problems or mental health problems.\(^9\)5 For example, in *R. v. R.I.*, the Ontario Court of Appeal stated:

> The fact that this young offender may require some long term form of social or institutional care or guidance if there is any real prospect of rehabilitation does not mean that the vehicle of the *YOA* can be employed for that purpose. Here, as under the *Criminal Code*, it is a cardinal principle that, within the limits prescribed by Parliament, the punishment should fit the crime but should not be stretched so that it exceeds it.\(^9\)6

Similarly, in *R. v. M.B.*, a severe custodial disposition handed down to a young offender was reduced by the Ontario Court of Appeal because it was “chosen to get him out of the community in which he was brought up.”\(^9\)7 In *R. v. E.B.* it was made clear that a custodial disposition under the *YOA* was not to be treated as a substitute for wardship.\(^9\)8

Trépanier is of the opinion that “whereas the *JDA* permitted increasing the degree of intervention according to the needs of the child, the *YOA* does not.”\(^9\)9 This would appear to be a reasonable interpretation given that the former model made little distinction between provincial child welfare systems and the juvenile criminal system, while the latter clearly reflects an attempt to sever the two systems. Nevertheless, it is evident from *J.J.M.*\(^10\)0 that this interpretation has not found favour with the Supreme Court of Canada. In that case it was determined that the rehabilitative needs of the young offender required a significant custodial term, in part due to the negative influences of a poor home environment.

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94. S.N.S. 1990, c.5, s.100.
95. *Supra* note 65 at 93.
99. *Supra* note 4 at 34.
100. *Supra* note 15.
5. Conclusion

It is thus concluded that the dispositional regime under the YOA has been interpreted as part of a mixed model of juvenile criminal law in which both "justice" and "treatment" objectives are permitted. The law permits disproportionate dispositions in two circumstances: (1) where the deviation is based on the principle of least interference, and (2) where the deviation is based on a paternalistic assessment of the "needs" of the young offender. This paper has concluded that the state does not have the moral authority to intervene into the liberty of a young person through the criminal law when that intervention is based on paternalism. The next section will attempt to identify some potential reforms which could help to advance the evolution of sentencing practice for young persons in Canada.

IV. Potential Reform

There are academics who feel that, given the convergence of philosophical approaches to adult law and young offender legislation, the only means of maintaining any valid distinction at all is through different dispositional practices. In making the move from the JDA to the YOA, however, Parliament has taken a step toward the adoption of an unadulterated justice philosophy in young offender dispositions. Viewed as part of a larger movement across North America, the YOA can be considered as only one step in a number of steps toward justice-based dispositional philosophy in young offender legislation. But given the variance in dispositions under the YOA, the lack of a rational system for determining dispositions, and the sporadic use of disproportionate dispositions, it is apparent that there must be some more specific form of guidance than currently exists with respect to young offender dispositions in Canada.

A frequently cited example of the justice model of young offender sentencing is the Washington State Juvenile Justice Act. In the words of one commentator:

The changes in Washington's code reflect the principles held by modern day advocates of a "just deserts" or "justice" model for the legal system... [which emphasizes] uniformity, equity, fairness, and accountability rather than rehabilitation or deterrence.

The Washington State scheme is similar to the YOA in that it has as its main objectives the protection of the public, the accountability of young persons, and concern for the needs of the young person. The Washington

101. Young, supra note 65.
102. Schneider and Schram, supra note 22 at 213.
State model differs from the YOA, however, in that it makes a clear choice to emphasize the justice-oriented components of the model at the expense of the treatment-oriented components. To borrow the phraseology of the Alberta Court of Appeal in *R. v. C.W.W.*, the legislation "expresses a starting point". According to Manfredi the third of the above objectives, the accommodation of the needs of the young person, is the least important, since treatment needs are not used by the commission as a variable in determining the length of sentences. Juveniles who might benefit from additional rehabilitative services after completing their dispositions are encouraged to continue... voluntarily. The reform suggestions presented in this paper will be based partly on the Washington State model. The Washington model was selected for comparative analysis because it is generally considered to be the most distinctly justice-oriented piece of legislation in juvenile criminal law in North America at this time. It must be noted that the judicial preference for interventionist sentencing tactics and unlimited judicial discretion in Canada would probably require that any reforms to the YOA be instituted through significant modification to the statute itself.

It is submitted that young offender dispositions be based primarily upon the principle of proportionality between the seriousness of the offence committed and the seriousness of the concomitant state sanction. If this means that young offender dispositions are determined in a manner which is substantially similar to the way in which adult sentences are determined, so be it. There are certainly factors which will distinguish young offender dispositions from adult sentences: young offender dispositions will be less onerous, and deviations from proportionality in order to accommodate the needs of the young offender will be easier to justify.

Doob points out that dispositional guidance may take the form of either abstract or concrete guidelines. The Declaration of Principle has served as a form of abstract guidance for youth courts, but it is apparent that in its current form s. 3 is insufficient. Nevertheless, simply ranking the principles in s. 3 would probably not be sufficient to provide the direction needed. Brodeur is of the opinion that while a Declaration of Principle is necessary, it is of limited usefulness because the legislation itself simply cannot accommodate all of the contingencies of offence and offender. Concrete guidance is simply an attempt to specify a particular range of
dispositions which would be appropriate under a particular set of circumstances. Concrete guidance in adult sentencing often takes the form of tariff sentencing. Washington’s Juvenile Justice Act includes abstract guidance in the form of a legislative statement of intention which is supplemented by concrete guidance in the form of sentencing guidelines which are approved by the legislature.

Concrete guidance would require a method of determining the appropriate range of dispositions for each type of offence and set of circumstances. The Washington example based its concrete range of disposition on a “points system” which assigned numerical values to the severity of the offence, the recency and severity of prior offences committed by the offender, and the age of the offender. Each offender was given a “score” which was then used to determine the range of sentence which to be imposed. This is perhaps a somewhat contrived and rigid mode of classification of sentences. A more liberal range of presumptive sentences in combination with a more general mode of classifying the severity of dispositions would be preferable. This would permit youth courts to exercise some degree of factual and contextual discretion in applying the guidelines.

It must also be pointed out that there is no need to require that all dispositions for a given offence fall within the determined range. The established range should only be viewed as a starting point, which would presumptively apply. In the Washington State model, the guidelines apply presumptively and can be varied up or down if the judge provides written reasons demonstrating the “manifest injustice” which would result from adhering to the presumptive sentence. The Washington State model is arguably too rigid in this respect given that the “manifest injustice” standard has been used very sparingly. While this standard would undoubtedly encourage certainty and uniformity it is submitted that it might be unduly difficult to vary the disposition downward when consistent with the needs of the young person. As was stated in part three of this paper, the principle of least interference in combination with the desire to maintain some accommodation for the needs of the young offender could be used to permit a deviation from the presumptive guideline where that deviation would represent a lesser interference with the liberty of the young person.

It is also necessary to consider the appropriate forum for establishing dispositional guidelines. As Brodeur points out, appellate courts are probably not well suited to this task given the fact that they deal only with exceptional circumstances, and that they deal primarily with errors in

108. Schneider and Schram, supra note 22.
principle (abstract guidance) and only incidentally deal with actual dispositions (concrete guidance). This approach is affirmed by Locke J.A. in R. v. H.A.110 Brodeur concludes that the most effective way to develop a set of presumptive guidelines which would be adequately consulted on a regular basis is through the establishment of an independent sentencing commission. This is the approach taken in Washington, where a nine member Commission establishes guidelines which are then approved by the legislature.111

The overall effects of the Washington State model were assessed by Schneider and Schram in 1986, eight years after the introduction of the Juvenile Justice Act.112 They concluded that there was a significantly greater degree of proportionality between the severity of the offence committed and the severity of the sanction imposed in the post-reform period (as one should expect from a mode predicated on proportionality). Moreover, sentences under the reformed legislation were generally less severe, while at the same time offenders were more certain to receive some form of sanction for committing a crime than in the pre-reform era. The result, in logic, would be an increase in the general deterrent value of the law. Dispositions were also more uniform: like cases were more likely to receive like sentences in the post-reform era.

The overall effect of the reforms was thus determined to be positive, though this conclusion was by no means unanimous. There was no possible way to determine the law’s effect on rates of recidivism because the procedural impact of the reform package introduced too many new variables. This will undoubtedly prove to be a major area of contention in future debate over the usefulness of the Juvenile Justice Act, since those in favour of a rehabilitation-based model would argue that this should be the focus of juvenile criminal law. Moreover, judges were extremely unhappy with the new legislation because it removes almost all discretion they have in handing down sentences. This is probably a result of the fact that young offenders are classified on the basis of a points system which does not leave any factual or contextual discretion.

What does this mean for potential YOA reforms? This paper concludes that the juvenile criminal law in Canada could benefit significantly from increased certainty and uniformity in dispositions. A more rigid set of principles in s. 3 of the YOA specifically removing from the court the opportunity to exercise any degree of paternalism, in combination with a

110. Supra note 46.
111. Manfredi, supra footnote 13.
112. Supra note 102.
set of concrete guidelines (possibly in the form of regulations), are recommended. It is acknowledged that the likelihood of seeing such drastic change to the YOA in the recent future is unlikely given that the transition from the JDA to the YOA occurred less than ten years ago. Nevertheless, viewed in the context of a larger movement toward justice-orientation in juvenile criminal law across North America, it is submitted that such changes are inevitable.