

# SHOULD DETERRENCE BE A SENTENCING PRINCIPLE UNDER THE *YOUTH CRIMINAL JUSTICE ACT*?

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*Using data from a large Canadian study of incarcerated youths, the authors critically analyze deterrence as a sentencing principle for young offenders. Deterrence themes are examined from legal, legislative, policy and pragmatic perspectives. The authors also explore the deterrence controversy under the YCJA by reviewing the recent Supreme Court of Canada decision excluding deterrence as a sentencing principle.*

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*S'inspirant des données d'une importante étude canadienne sur les jeunes en milieu carcéral, les auteurs ont effectué une analyse critique de la dissuasion en tant que principe de détermination de la peine des jeunes délinquants. Les thèmes de la dissuasion sont examinés d'un point de vue juridique, législatif, pragmatique et par rapport à ses aspects politiques. Les auteurs se penchent également sur la controverse entourant la dissuasion dans le cadre de la Loi sur le système de justice pénale pour les adolescents en étudiant la récente décision de la Cour suprême du Canada sur l'exclusion de la dissuasion comme principe de détermination de la peine.*

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## *Introduction*

In Canada, the sentencing philosophy with respect to young offenders has been an area of political, judicial and scholarly debate. In particular, the evolution of the purpose, principles, and objectives of sentencing that apply when responding to youthful offending continues to be highly contentious. When the new *Youth Criminal Justice Act*<sup>1</sup> was proclaimed in force in April 2003, the aim of the Act was to provide clearer direction with a detailed preamble and extensive set of principles and objectives<sup>2</sup>

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<sup>1</sup> S.C. 2002, c. 1 [YCJA].

<sup>2</sup> The YCJA contains four exclusive sets of principles. It has an overarching

in an effort to counter the ambiguous and often conflicting principles of the *Young Offenders Act*.<sup>3</sup> One of the central changes of the *YCJA* in comparison to the *YOA* is the comprehensive principles that dictate the sentencing of young offenders.<sup>4</sup> From a pragmatic and legalistic point of view, the most controversial stage of proceedings for most young offenders charged with offences is sentencing. In effect, whether the youth pleads guilty or is found guilty, the most challenging decision made by the youth justice court judge is determining the sentence and what principles to utilize.

Historically, the *Juvenile Delinquents Act*<sup>5</sup> and the *YOA* had vague principles which left considerable judicial discretion in terms of guiding sentencing practices.<sup>6</sup> Very little guidance was provided and consequently substantial judicial variance occurred in provincial and

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Declaration of Principles that pertains to the entire Act as well as detailed principles for extrajudicial measures (s. 4), sentencing (s. 38) and custody (s. 83).

<sup>3</sup> R.S.C. 1985, c. Y-1 [*YOA*].

<sup>4</sup> Julian V. Roberts, "Harmonizing the Sentencing of Young and Adult Offenders: A Comparison of the Youth Criminal Justice Act and Part XXIII of the Criminal Code" (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 301. One of the main challenges when drafting the *YCJA* was determining whether the sentencing principles should continue to mirror those of the *YOA* or modify the 1996 codified principles of the adult *Criminal Code*, R.S.C. 1985, c. C-46 [Code] to assist in mitigating judicial discretion. As with the 1996 amendments to the Code, a primary aim of the *YCJA* is to reduce the use of custody, especially for non-violent offenders. Roberts suggested in *ibid.* at 309 that the fundamental principles of sentencing for adults and youth such as proportionality should be harmonized, but the "pattern of sentencing should remain clearly distinct." See also Andrew von Hirsch and Andrew Ashworth, "Proportionate Sentences for Juvenile Offenders" in *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 35. Von Hirsch and Ashworth argue for a reduced age-related proportionalist sentencing regime for young offenders in comparison to the proportionate sentencing system for adults who have committed similar crimes. Specifically, they believe young offender sentences should be significantly scaled down for three reasons: culpability; punitiveness; and special tolerance for juveniles. These scholars debate the merits of abolishing juvenile courts by having criminal courts of general jurisdiction process young offender cases with reduced penalty levels versus creating or preserving juvenile courts, but modifying the sentencing criteria.

<sup>5</sup> S.C. 1908, c. 40 [*JDA*].

<sup>6</sup> The *JDA*'s guiding philosophy of sentencing compelled the courts to treat children who had committed a delinquency, not as offenders, but rather as being in a condition of delinquency, requiring "help and guidance and proper supervision;" *ibid.* s. 3(2). According to s. 38 of that Act, adjudicated delinquents were to be treated as "misdirected and misguided" children who were in need of "aid, encouragement, help and assistance." The *YOA*'s Declaration of Principles reflected a Modified Justice Model or mixed model approach to understanding the evolving and often complex juvenile justice systems in Canada, the United Kingdom, and the United States; see Raymond R. Corrado "Introduction" in Raymond R. Corrado et. al., eds., *Juvenile Justice in Canada: A*

territorial sentencing of young offenders for essentially the same offence. Similarly, there were substantial differences between provinces regarding custodial sentences.<sup>7</sup> Under both of these previous statutes, a major criticism was that custodial sentences were inappropriately meted out either for non-serious offences, such as probation breaches/administrative offences, or in order to provide treatment and protective services for vulnerable youth, such as girls and Aboriginal youth. In contrast, there was considerable criticism within the media, the public, and among politicians that sentencing under the *JDA* and the *YOA* did not deter young violent offenders.<sup>8</sup> Sentences were seen as too lenient and too inconsistent, even among judges from the same jurisdictions.

The *YCJA* sentencing principles were constructed, in part, with the above concerns in mind. Since coming into force in 2003, the *YCJA* has engendered several controversies regarding its sentencing principles, perhaps none more important than whether the deterrence principle can be inferred from the Act's sentencing philosophy. Recently, the Supreme Court of Canada in *R. v. B.W.P.*; *R. v. B.V.N.*<sup>9</sup> definitively ruled that deterrence was not an intended sentencing principle. In this decision, the Supreme Court explicitly declined to review the deterrence literature in making its decision since it noted that it was up to Parliament alone to decide whether deterrence is an appropriate sentencing principle. It seems very likely, therefore, that the role of deterrence for youth justice in Canada will remain controversial given the highest court's decision to avoid commenting on its relevance. In most states in the United States, deterrence remains fundamental to how serious and violent youth are processed and sentenced in criminal justice systems. Given that the current Conservative government has focused on deterrence principles in

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*Theoretical and Analytic Assessment* (Toronto: Butterworths, 1992). The Modified Justice Model also captures the complexities of the extensive and overlapping principles contained in the *YCJA*. This model assumes a young person's offence and prior record are considered in conjunction with the youth's social, emotional, and family background; see Raymond R. Corrado, Karla Gronsdahl and David MacAlister, "The *Youth Criminal Justice Act*: Can the Supreme Court of Canada Balance the Competing and Conflicting Models of Youth Justice?" *Crim. L.Q.* (forthcoming).

<sup>7</sup> See Anthony N. Doob and Jane B. Sprott, "Punishing Youth Crime in Canada: The Blind Men and the Elephant" (2006) 8 *Punishment and Society* 223; Nicholas Bala, *Young Offenders Law* (Concord, ON: Irwin Law, 1997) at 258; and Raymond R. Corrado and Alan Markwart, "The Prices of Rights and Responsibilities: An Examination of the Impacts of the *Young Offenders Act* in British Columbia" (1988) 7 *Can. J. Fam. L.* 93.

<sup>8</sup> Raymond R. Corrado and Alan Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" ["New Era"] in Corrado et. al., *supra* note 6.

<sup>9</sup> 2006 SCC 27, [2006] 1 S.C.R. 941, 267 D.L.R. (4<sup>th</sup>) 385 [*B.W.P.*; *B.V.N.*], discussed in depth in the second half of this article.

revising the adult Code, it is only a matter of time before deterrence becomes a political issue at the youth justice level. Thus, it is important to review the deterrence literature, which mainly focuses on adults, in order to assess the utility of this sentencing principle for youth, especially serious and violent youth. Regarding the latter, data from a large Canadian study will be utilized to examine deterrence themes. One of the most important questions is whether the deterrence literature indicates, both conceptually and theoretically, the suitability of deterrence being incorporated into legal constructs at the youth justice level. However, before reviewing the deterrence literature and the most recent Canadian research study on deterrence for youth and its relevance to two appellate cases, it is important to examine the controversy involving deterrence under the *YOA*. In part, this discussion can help explain why the deterrence principle was not included in the *YCJA*.

### *Deterrence and the Young Offenders Act*

Deterrence was an issue as early as 1976 when several failed predecessor bills to the *YOA* were the subject of debate. The Law Reform Commission of Canada identified one critical theme — the paradox inherent in the deterrence principle when combined with the rehabilitation principle:

Deterrence and rehabilitation are difficult to reconcile. Many writers present both in terms of “either” “or” and indicate that criminal policy makers should choose between either deterrence or rehabilitation. Logically it would appear that if imprisonment is to be an effective deterrent, life in prison should be made worse than life outside. On the other hand to achieve rehabilitation, conditions in prison have to be improved and life in prison should be as less different as possible from life outside.<sup>10</sup>

This paradox was significant in understanding why it took nearly two decades to replace the *JDA*. The initial attempt to reform this law focused on modifying its exclusive Welfare Model principles with the “fair procedure” or due process principle central to the Justice Model.<sup>11</sup> However, by the mid- to late 1970s, there was a decided political shift

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<sup>10</sup> Ezzat Abdel Fattah, “Deterrence: A Review of the Literature” in Law Reform Commission of Canada, *Fear of Punishment: Deterrence* (Ottawa: Minister of Supply and Services Canada, 1976) 1 at 21.

<sup>11</sup> The use of models can assist in explaining the complexities of the criminal justice and youth justice systems. In relation to youth justice, the models can be conceptualized on a continuum with the rehabilitative, offender-focused, treatment-oriented Welfare Model on one end, and the punitive, deterrent-oriented, protection-of-society-through-incapacitation Crime Control Model at the other end. Near the Crime Control Model end of the continuum, the Justice Model may be found, which emphasizes legal rights, due

towards the Crime Control Model principles of responsibility and deterrence. Supporters of the former principle, while simultaneously being critical of the latter principles, referred to the deterrence paradox to justify why deterrence should not be a sentencing criterion in youth justice. Many of these critics were from Quebec which had just enacted the provincial *Youth Protection Act*.<sup>12</sup> This law established a youth justice system emphasizing the Corporatist Model principle of diversion to non-judicial processing for all cases except the extreme or most serious offences. To a considerable extent, it appeared that, for the *YOA* to be politically acceptable in Quebec, this law had to be flexible or sufficiently ambiguous to allow Quebec to continue with a system based on the Corporatist Model while facilitating the inclusion of Crime Control principles, such as deterrence, in the youth justice systems in other provinces, including Ontario.<sup>13</sup>

Not surprisingly, the ambiguous sentencing philosophy of the *YOA* and the role of deterrence became an outstanding issue which the Supreme Court of Canada addressed in 1993 in *R. v. M.(J.J.)*.<sup>14</sup> Even though deterrence was not an explicit sentencing principle in the *YOA* Declaration of Principles, the Supreme Court ruled that deterrence was an appropriate consideration in deciding young offender dispositions, though of less importance or priority than for adult sentences. Nonetheless, this decision did not address the issue of the consistency of the application of *YOA* sentencing principles both within provinces and among them. As Doob and Beaulieu concluded, based on their study of judicial discretion in hypothetical cases decided by a small sample of youth court judges, the *YOA* had multiple sentencing principles:

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process representation and accountability of the offender through proportionate sanctions that reflect the seriousness of the offence. A rather unique approach to youth justice, developed in Britain by John Pratt, is referred to as the Corporatist Model. It presupposes an administrative system that emphasizes diversion from the formalized youth court process and custody. The Corporatist Model bifurcates serious and violent offenders who are likely to require custody from non-violent youth who would benefit from an alternative sanction in the community under multi-disciplinary agencies and programs. This Model positions itself closer to the Welfare Model end of the spectrum. A fifth model is the Modified Justice Model, developed by Raymond Corrado to describe Canada's youth justice system which represents a mixture of characteristics found in the other four models. The Modified Justice Model construct assesses the youth's familial, social and emotional needs and the offence together. This Model concentrates not only on the offender and rehabilitation but also reinforces due process and accountability as well as proportionate sentencing. Therefore, this Model is positioned in the middle of the continuum. For a detailed discussion of youth justice models, see Corrado, Grondahl and MacAlister, *supra* note 6.

<sup>12</sup> S.Q. 1977, c. 20; now see: R.S.Q. c. P-34.1.

<sup>13</sup> Corrado and Markwart, "New Era," *supra* note 8.

<sup>14</sup> *R. v. M.(J.J.)*, [1993] 2 S.C.R. 421, 152 N.R. 274 [*M.(J.J.)* cited to S.C.R.].

The difference occurs not because of the perversity of judges, but rather because judges weigh the different goals of sentencing differently and go about attempting to achieve these goals in different ways. ... The *YOA* ... does not give precedence to any single principle, nor does it indicate how much weight should be given to any one principle. Thus one should not be surprised to find that the relative importance of the different principles or purposes guiding dispositions differed across judges and across cases.<sup>15</sup>

Doob and Beaulieu stated further that inconsistent sentencing was mainly attributed to the deterrence principle by surmising, “The split [among judges] seems to be, for the most part, between those favouring individual deterrence and those giving precedence to rehabilitation.”<sup>16</sup>

It is beyond the scope of this article to theorize fully why Parliament did not explicitly include the deterrence principle in the *YCJA*, given how controversial it had been under the *YOA* and in the several reforms and attempted reforms of this law. However, one possible brief explanation might be that, for the most serious property and violent offences, Parliament assumed the young offenders convicted of *YCJA* presumptive offences would be sentenced according to adult sentencing criteria and lengths, which definitively include deterrence objectives.<sup>17</sup> Whatever the explanation, the Supreme Court of Canada clearly accepted that it was the sole responsibility of Parliament to amend the *YCJA* before deterrence could be considered an appropriate sentencing criterion for non-presumptive offences. The Minister of Justice at the time, the Honourable Vic Toews, stated in the summer of 2006 that he was considering Crime Control Model amendments to the *YCJA* and the adult Code, such as lowering the age of criminal responsibility to 10 years old and introducing longer minimum sentences for certain violent offences.<sup>18</sup> It is unlikely the proposed amendment lowering the age

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<sup>15</sup> Anthony N. Doob and Lucien A. Beaulieu, “Variation in the Exercise of Judicial Discretion with Young Offenders” (1992) 34 *Can. J. Crim.* 35 at 38, 42. There was substantial variation in the type and severity of dispositions given, which supported the view that judges have individual approaches in contemplating the purposes of sentencing. The judges vacillated between two theoretically different goals of sentencing when considering specific deterrence or rehabilitation as being paramount. One of the ongoing criticisms during the tenure of the *YOA* was the lack of prioritization and the open interpretation of the sentencing principles which encouraged judicial disparity.

<sup>16</sup> *Ibid.* at 43.

<sup>17</sup> Presumptive offences include the most serious offences committed by young people, as defined in s. 2 of the Act, and are subject to the imposition of an adult sentence in accordance with ss. 61-81 of the Act, unless the court orders that a youth sentence is appropriate in the circumstances, following application by the youth or Crown counsel for such an order.

<sup>18</sup> Janice Tibbetts, “Serious Crime Will Mean Serious Time” *The Kingston Whig-*

threshold of the *YCJA* would be successful given the Harper government's minority status and the anticipated united opposition of the Bloc Quebecois and New Democratic Party, along with a significant bloc of Liberal Party Members of Parliament. Nonetheless, it is very likely that deterrence will continue to be an important *YCJA* issue, especially since the use to date of presumptive offences involving adult length sentences is not common. In effect, the overwhelming number of young offender sentences will occur under the current *YCJA* legislation and, therefore, continue to be contentious in the absence of explicit deterrence objectives.

As stated above, the Supreme Court of Canada refused to consider the research on the relevance and efficacy of deterrence regarding young offenders under the *YCJA*. While deterrence has been an integral component of all common-law-based criminal justice systems, there is surprisingly little systematic research about its impact, such as whether recidivism rates are correlated with the punitiveness of the sentence and whether the threat of punishment for a crime inhibits non-offenders from committing such a crime. Even more unfortunate, there is even less research regarding deterrence and young offenders. It is necessary, therefore, to review the mainly adult deterrence literature along with the limited young offender literature.

### *Deterrence Literature*

Deterrence as a sentencing principle is conceptually uncomplicated:

[A] sentence from the court that is commensurate with the offender's criminal behaviour will have the effect of producing within the offender and others the belief that increasing punishment will follow should their behaviour not be curtailed, and hence further crimes are less likely to be committed.<sup>19</sup>

Traditionally, there are two types of deterrence. Specific deterrence refers to punishment that discourages a punished offender from re-offending. General deterrence refers to the threat of punishment for a crime which is designed to prevent potential offenders from committing crime. However, as Stafford and Warr assert, this simple distinction belies the complex interaction that occurs between direct and indirect or

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*Standard* (5 May 2006) 13; "Conservatives Promise Harsher Sentences for Violent Acts" *The [Halifax] Daily News* (5 May 2006) 10; Janice Tibbetts, "Ottawa Warned Against Automatic Sentencing" *The Vancouver Sun* (6 July 2006) A4; Janice Tibbetts, "Tories Want to Lower Age of Criminal Responsibility" *The Vancouver Sun* (15 August 2006) A1.

<sup>19</sup> A.W. Leschied et. al., "Treatment Issues and Young Offenders: An Empirically Derived Vision of Juvenile Justice Policy" in Corrado et. al., *supra* note 6 at 354.

vicarious experiences with punishment. In other words, in many situations, the decision not to re-offend is likely affected by both direct negative punishment and indirect experiences of punishment or knowledge about others experiencing punishment.<sup>20</sup> Similarly, Zimring and Hawkins viewed the two types of deterrence as often linked, so that specific deterrence influences general deterrence because the former punitive experience causes the avoidance of punishment for committing other types of crimes.<sup>21</sup>

The focus of research has been on other dimensions related to punishment — its certainty, severity, and celerity. There is the consistent finding that certainty of being caught and punished is most strongly associated with deterrence for adults; however, at issue is whether this long-accepted axiom of deterrence research applies to young offenders. There is some research indicating the harshness of punishment is a deterrent, and this relationship is also evident for youth. Levitt contends his analysis of U.S. national data over a fifteen-year period revealed this association between deterrence and young offenders' decisions to desist from further crime at the beginning of adulthood.<sup>22</sup> One of the pioneers of deterrence research, Daniel Nagin, stated, as early as 1978, that his empirical review of the U.S. criminal justice system statistics justified only a cautious conclusion about deterrence. However, twenty years later, utilizing a more sophisticated perception-based methodology involving self-reported offending or the stated intention to offend, Nagin asserted the impact of deterrence on recidivism was much stronger.<sup>23</sup> Equally important, another renowned deterrence researcher, Raymond

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<sup>20</sup> Mark Stafford and Mark Warr, "A Reconceptualization of General and Specific Deterrence" (1993) 30 *Journal of Research in Crime and Delinquency* 123. See also Alex Piquero and Raymond Paternoster, "An Application of Stafford and Warr's Reconceptualization of Deterrence to Drinking and Driving" (1998) 35 *Journal of Research in Crime and Delinquency* 3. Using ten-year-old data and a non-student sample, the authors found evidence supporting Stafford and Warr's model of deterrence (i.e. personal and vicarious experiences with punishment and punishment avoidance). They found the perceived certainty of sanctions — the notion that criminal law can have an impact on illegal behaviour — exercised a significant and negative effect on the projection to drink and drive. Regardless of gender, a person's moral beliefs prohibiting drunk driving are an effective source of inhibition.

<sup>21</sup> Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago: University of Chicago Press, 1973) at 73, 224-29.

<sup>22</sup> Stephen D. Levitt, "Juvenile Crime and Punishment" (1998) 106 *Journal of Political Economy* 1156. Levitt analyzed U.S. data published by the Office for Juvenile Justice and Delinquency Prevention and the Bureau of Justice Statistics between 1978 and 1993. He concluded that juvenile offending is just as responsive to harsher sanctions as adult crime.

<sup>23</sup> Daniel S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century" (1998) 23 *Crime and Justice: A Review of Research* 1.

Paternoster, has maintained, like Levitt, that his research provides strong support for the deterrent association with reduced recidivism for delinquents.<sup>24</sup>

In response to these apparent robust assertions about the efficacy of deterrence, there are several prominent researchers who have raised fundamental questions about the validity of the methodology employed in the above studies. The general theme of the criticisms, without reviewing the complex methodological issues in detail, is that researchers such as Nagin, Paternoster, and Levitt relied on either general delinquency or general youth samples as well as inadequate measures of key variables. Given such fundamental concerns, the ability of these researchers to generalize their positive view of the impact of deterrence is very limited, and, equally critical, their assertions are not necessarily relevant to deterrence regarding serious young offenders. It is the latter group who constitute the greatest challenge to youth justice, public perceptions of youth crime, and the political response to youth crime and youth justice.<sup>25</sup> For example, when recidivism in a serious and violent young offender sample was examined, a far more complex process was revealed about how youth react to their experience in the youth justice system. In effect, it is difficult to assess the relationship between deterrence and recidivism without considering several types of perceptions serious and violent offenders have about how they have been processed through the various stages of a youth justice system, relating

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<sup>24</sup> Raymond Paternoster, "Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective" (1989) 23 *Law & Soc'y Rev.* 7; and Raymond Paternoster and Alex Piquero, "Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences" (1995) 32 *Journal of Research in Crime and Delinquency* 251.

<sup>25</sup> Raymond R. Corrado, I.M. Cohen et. al., "Serious and Violent Young Offenders' Decisions to Recidivate: An Assessment of Five Sentencing Models" (2003) 49 *Crime & Delinquency* 179; Peggy Giordano, Stephen A. Cernkovich and Donna D. Holland, "Changes in Friendship Relations over the Life Course: Implications for Desistance from Crime" (2003) 41 *Criminol.* 293; Stephen W. Baron and Leslie W. Kennedy, "Deterrence and Homeless Male Street Youths" (1998) 40 *Can. J. Crim.* 27; Wanda D. Foglia, "Perceptual Deterrence and the Mediating Effect of Internalized Norms among Inner-city Teenagers" (1997) 34 *Journal of Research in Crime and Delinquency* 414; Anthony N. Doob, Voula Marinos and Kimberly N. Varma, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (Toronto: Centre of Criminology, University of Toronto, 1995); Anne Schneider, *Deterrence and Juvenile Crime: Results from a National Policy Experiment* (New York: Springer-Verlag, 1990); Deryck Beylvelde, "Deterrence Research and Deterrence Policies" in Andrew von Hirsch and Andrew Ashworth, eds., *Principled Sentencing: Readings on Theory and Policy*, 2<sup>nd</sup> ed. (Oxford: Hart Publishing, 1998); Anne Schneider and Laurie Ervin, "Specific Deterrence, Rational Choice, and Decision Heuristics: Applications in Juvenile Justice" (1990) 71 *Social Science Quarterly* 585.

to how they were treated at court, detention, and trial stages; how much help they received for their problems; and how fair they perceived their sentences to be.<sup>26</sup>

In one of the most recent reviews of the general deterrence literature with a focus on sentencing severity for adult criminals, Doob and Webster concluded: “There are in the deterrence literature — not surprisingly — several studies that conclude that harsher sentences reduce crime rates. However, the majority of the findings produced by this research are unreliable and, by extension, should cautiously be dismissed.”<sup>27</sup>

There is no consensus in the research literature on deterrence concerning its impact on youth, especially serious and violent young offenders.<sup>28</sup> Nonetheless, it is possible to briefly review the main propositions and underlying assumptions of deterrence theory as well as the research on how youth, particularly multi-problem or seriously troubled youth, typically make decisions. Since the beginning of the twentieth century, the general assumption about decision-making by children and early adolescents regarding the intent to offend has been that they lack the maturity to fully understand the consequences of their harmful acts. In other words, youth typically have been viewed as impulsive, inexperienced, emotionally volatile or vulnerable, and more easily influenced by negative family members, peers, negative culture values, and poverty than older adolescents and young adults. These assumptions provided the initial rationale for the development of late nineteenth and early twentieth century Welfare Model based youth justice laws, such as the *JDA*.

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<sup>26</sup> See Corrado, Cohen et. al., *ibid*.

<sup>27</sup> Anthony N. Doob and Claire M. Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” (2003) 30 *Crime and Justice: A Review of Research* 143 at 155.

<sup>28</sup> Paula Smith, Claire Goggin and Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Ottawa: Public Works and Government Services Canada, 2002). A large scale meta-analysis of 117 studies dating back to 1958 was completed to determine whether prison and intensive community sanctions (i.e. electronic monitoring, intensive surveillance, probation, drug testing) reduced recidivism. While few studies specifically tested a deterrence hypothesis, the data produced results unassociated with reductions in recidivism. In particular, there were no differential effects of sanctions reported for juveniles, females or minority groups. As Gendreau surmised at 20, “[T]here is absolutely no cogent empirical or theoretical rationale for criminal justice sanctions to suppress criminal behaviour in the first place. ... To those who believe that criminal justice sanctions in general or threats in particular are effective punishers or negative reinforcers, we advise they consult the relevant behaviour modification literature or any

The *JDA*, for example, implicitly assumed youth were incapable of forming criminal intent. Since the early 1980s, the adult Code has precluded the imposition of criminal responsibility on children under twelve years of age. While it has been assumed since that time that children under twelve are incapable of forming the intention necessary for a crime, the *YOA* nonetheless asserted that adolescents between the ages of 12 and 18 years old could form such an intent, but not to the same degree as adults. Under the *YOA*, it was further assumed that adolescents varied in their ability to formulate criminal intent and, therefore, this variability needed to be considered as a mitigating factor when determining the punitiveness of the sentence. Most importantly, for adolescents over fourteen years old who were charged with a serious property or violent offence, maturity was a critical factor in the court's decision to transfer the case to the adult criminal court where these youth were subject to far harsher punishment and supposedly deterrent impacts.<sup>29</sup> Finally, under the *YCJA*, adolescents over fourteen years of age who have allegedly committed presumptive offences are assumed to be fully mature or capable of the same criminal intent as adults, unless otherwise demonstrated in "fitness to stand trial" reviews. Given this, the clear trend in Canada, since the inception of laws based on the Modified Justice Model, such as the *YOA* and *YCJA*, is towards the assumption that deterrence is an appropriate sentencing principle for the most serious offences.

This trend in Canada, regarding the assumption of deterrence efficacy, is even more evident in the United States where automatic transfer to adult criminal courts and minimum life-terms without parole are not uncommon. The renowned U.S. youth justice theorist, Barry Feld, has argued eloquently that a separate youth justice system is no longer tenable given the changes in juvenile delinquency laws in all the U.S. states required by a series of U.S. Supreme Court decisions since the 1960s as well as the changing public and political perceptions about serious and violent young offenders. The central tenet behind Feld's position of abolishing juvenile courts altogether is that adult criminal courts are fully capable of providing all the necessary procedural or due process rights, while at the same time making age-appropriate decisions regarding mitigating and aggravating circumstances at the sentencing stage. In effect, Feld argues that adult criminal court judges have the same capacity as juvenile court judges to review professional or expert reports and testimony regarding age related factors, such as impulsivity, personality disorders, and family problems.<sup>30</sup> And, given the emphasis in

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experimental learning text for supportive evidence. There is none."

<sup>29</sup> Corrado, *supra* note 6; Bala, *supra* note 7.

<sup>30</sup> Barry Feld, "Juvenile Justice and the Criminal Court Alternative" (1993) 34

most states on Crime Control Model principles, such as protection of the public, adult criminal court judges are in a better position, based on their daily experiences with adult serious offenders, to make deterrence-considered sentences.

At its core, rational choice theory is the basis for deterrence. Individuals are considered to behave in a manner that maximizes their self-interest while minimizing harm to themselves. In other words, rational decision-making involves gauging likely gains versus losses. This theory assumes that most routine decisions are based on a simple calculation of benefits versus harms which reflects our past experiences or the known information about likely outcomes of our decisions. When decisions are made about committing a crime, for example, the individual rarely fails to assess the likelihood of being caught and the extent of the punishment versus the benefits of taking such risks. Similarly, once caught and punished, individuals can decide whether the benefits of the crime outweigh the punishment experienced if one commits this crime again. This calculus is also evident for those individuals who are considering whether to commit a crime since, for the most part, the costs of committing any crime are well known.<sup>31</sup>

There is no consensus in the literature on whether serious and violent young offenders utilize rational choice theory decision-making principles regarding deterrence. While the *YCJA* assumes that such principles are in effect when these types of offenders commit presumptive offences, it remains unclear whether deterrence is appropriate for young offenders who commit less serious offences. Regarding serious and violent young offenders, there is little research in Canada about the relevance of deterrence theory and its assertions about how these young offenders make choices to recidivate or not. In the next section, it will be argued that certain individual characteristics of a large group of incarcerated serious and violent young offenders, as well as their family characteristics, raise fundamental doubts about the applicability of rational choice regarding recidivism.

*Multi-Problem Profiles of a Sample of Serious  
and Violent Young Offenders*

Between 1997 and 2003, 507 incarcerated young offenders in British

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Crime & Delinquency 403; Barry Feld, "Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy" (1997) 88 J. Crim. L. & Criminology 68.

<sup>31</sup> Doob, Marinos and Varma, *supra* note 25; Schneider, *supra* note 25; Schneider and Ervin, *supra* note 25.

Columbia were interviewed in either a secure or open custody centre.<sup>32</sup> This figure represented a 94 per cent participation rate. The main objectives of this study were to assess the impact of custody on incarcerated youth regarding: their sense of safety; their ability to adjust to institutional life; their utilization of school, recreational, arts, and other programs; their perceptions of the criminal justice system; their self-perceptions or identities; and their views about deterrence in light of their custodial experiences. Demographic variables, offense profiles, victimization profiles, family multi-problem profiles, youth mental health problems, educational experiences, drug or alcohol use, and peer relationships were among the numerous independent variables obtained in order to understand the above custodial impact variables. Institutional files were reviewed for each participating youth in order to code variables such as prior offense records and custodial infractions. Personal interviews averaging approximately two hours were conducted to obtain youth perceptions and views about most of the above variables.

Of the 507 youth in this sample, three-quarters (75.3 per cent) were male. The one-quarter female part of the sample is very important since girl violence has increased sharply in the last decade<sup>33</sup> and the use of custody for girls has been highly controversial.<sup>34</sup> Similarly, ethnicity has been a major consideration because, in adult corrections, Aboriginal incarceration rates are disproportionately high especially in the prairie provinces. While 62 per cent of the youth sample were Caucasian, approximately one-fifth (21.4 per cent) self-identified as Aboriginal. This is grossly disproportionate to the prevalence of Aboriginals in the general population given the Aboriginal population in British Columbia under the age of eighteen years old is estimated at three per cent.<sup>35</sup> The average age of the sample was 16.1 years and ranged between 12 and 19 years old (see Table 1).

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<sup>32</sup> The research presented derives from three Social Sciences and Humanities Research Council of Canada grants awarded to Raymond R. Corrado. (R-410-98-1246).

<sup>33</sup> Candice L. Odgers and Marlene M. Moretti, "Aggressive and Antisocial Girls: Research Update and Challenges" (2002) 1 *International Journal of Forensic Mental Health* 103.

<sup>34</sup> Raymond R. Corrado, Candice Odgers and Irwin M. Cohen, "Girls in Jail: Punishment or Protection?" in Ronald Roesch, Raymond R. Corrado and Rebecca J. Dempster, eds., *Psychology in the Courts: International Advances in Knowledge* (London: Routledge, 2001) 41; Raymond R. Corrado, Candice Odgers, and Irwin M. Cohen, "The Incarceration of Female Young Offenders: Protection for Whom?" (2000) 42 *Can. J. Crim.* 189.

<sup>35</sup> For an extensive evaluation of the complex profiles of Aboriginal youth in custody, see, Raymond R. Corrado and Irwin M. Cohen, "A Comparison of Aboriginal

Mean Age	16.1 Years Old
Gender	
Male	75.3%
Female	24.7%
Ethnicity	
Caucasian	62.0%
Aboriginal	21.4%
Other	16.6%

All the dominant theories about the causes of serious and violent young offending focus mainly on the instability of families, the presence of conflict, inconsistent and disproportionate disciplining, early negative socialization, poor school success, the presence of trauma and abuse, negative sibling and peer relationships, the presence of parental and sibling criminality, a history of familial mental disorders, and the presence of familial alcohol and drug abuse.<sup>36</sup> The two competing theoretical perspectives on youth crime — the low self-control focus of Gottfredson and Hirschi,<sup>37</sup> and the more numerous and complex developmental stage theories — share a common critical variable, impulsivity. As discussed above, deterrence requires the ability to calculate benefits and costs of future criminal behaviours. If family is systematically disruptive throughout childhood and early adolescence, the likelihood of a youth developing low self-control and thus developing into a “life-course persistent offender” is very high.<sup>38</sup> As well, disruptive family situations and poor school performance during

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and Non-Aboriginal Youth in Custody from the *YOA* to the *YCJA*” *Report to the Department of Justice Canada*, June 2004; and see also Raymond R. Corrado and Irwin M. Cohen, “A Needs Profile of Serious and/or Violent Aboriginal Youth in Prison” (2002) 14 *Forum on Corrections Research* 22.

<sup>36</sup> Rolf Loeber and David P. Farrington, *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions* (London: Sage Publications, 1998).

<sup>37</sup> Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990).

<sup>38</sup> Terrie E. Moffitt, “Adolescence-Limited and Life-Course Persistent Offending: A Complementary Pair of Developmental Theories” in Terence P. Thornberry, ed., *Advances in Criminological Theory, Vol 7: Developmental Theories of Crime and Delinquency* (New Jersey: Transaction Publishers, 1997). See also Richard E. Tremblay and David LeMarquand, “Individual Risk and Protective Factors” in Rolf Loeber and David P. Farrington, eds., *Child Delinquents: Development, Intervention and Service Needs* (London: Sage Publications, 2001); Gerald R. Patterson, Deborah Capaldi and L. Bank, “An Early Starter Model for Predicting Delinquency” in Debra J. Pepler and Kenneth H. Rubin, eds., *The Development and Treatment of Childhood Aggression*

adolescence is further associated with adolescent onset of criminality.<sup>39</sup>

It is evident in Table 2 that most of the incarcerated youth sample has been overwhelmed by familial discord. In terms of family conflict between youth and parents, nearly the entire sample (89.5 per cent) mentioned they had been involved in serious trouble at home, that is, disputes involving extreme anger and physical exchanges. Not surprisingly, more than three-quarters of the sample left home on their own volition. Most disturbing were the average age (12.5 years) for leaving and the average number of times that the youth in this sample left their primary homes (11.3 times) (see Table 2).

<b>Table 2: Family Life</b>	
Primary Residence	
Immediate Family Member	46.1%
Extended Family Member	6.8%
Independent without Adult Supervision	21.2%
Ward of the State	25.8%
Leaving Home	79.5%
Average Number of Times	11.3 Times
Earliest Age	12.5 Years Old
Kicked Out of Home	48.3%
Average Number of Times	5.2 Times
Earliest Age	13.3 Years Old

In terms of the child-rearing practice of resolving conflict, approximately half of the sample (48.3 per cent) were kicked out of the home at least once, while the average number of times was 5.2. The mean age at which this activity began was 13 years old.

The absence of immediate family and its relationship to criminal behaviour is clearly evident since the majority (53.9 per cent) of the current offences which resulted in incarceration occurred when the youth were not living at home. Slightly more than one-fifth (21.2 per cent) were living independently without adult supervision when they were arrested for the current offence. This living arrangement mostly involved so called “street youth” and youth who “couch surfed” in friends’ homes or apartments. One-quarter of the youth were wards of the state at the time of their current offence which again reveals the absence of daily supervision or monitoring of highly-troubled adolescents. Of particular

(Hillsdale: Lawrence Erlbaum Associates, 1991) 139.

<sup>39</sup> Loeber and Farrington, *supra* note 36.

importance, the majority of those youth who reported living with their immediate family were in a single parent family, usually with the mother.

Regarding family income, approximately one-third (34.1 per cent) of fathers and 41.1 per cent of mothers were not gainfully employed. Given these low levels of employment during the period of this study, these parents were likely part of the structurally unemployed.<sup>40</sup> While the reasons for structural unemployment are complex and varied, they are typically associated with emotional instability and low education. The former is clearly evident given that nearly three-quarters (73.7 per cent) of the youth reported at least one family member suffered from alcoholism and more than half (59.5 per cent) had a significant drug problem (see Table 3). These abnormally high rates of addictions are also likely linked to several other family problems. Approximately half (49.1 per cent) of the youths stated that at least one family member had been physically abused and more than one-fifth (23 per cent) experienced either sexual abuse or a major mental illness.

<b>Table 3: Family Dysfunction</b>	
Alcoholism	73.7%
Drug Problem	59.5%
Victim of Physical Abuse	49.1%
Victim of Sexual Abuse	23.2%
Mental Illness	23.7%
Criminal Record	67.7%

As stated above concerning the most important predictors for serious and violent young offenders, the enormously high proportion (67.7 per cent) of respondents with at least one family member having a criminal record is critical in understanding the criminogenic family context which likely lessens the impact of deterrence on adolescents.

In addition to family, school is another fundamentally critical context for understanding recidivism and deterrence. Only around one-half (51 per cent) of the sample were attending school at the time of being convicted for their current offence. The average grade completed was grade ten, which was approximately two years behind the age norm. It is not surprising that over 90 per cent of the sample had experienced serious discipline problems, poor school attendance, and consistently poor academic performance. With these problems, it was not unexpected

<sup>40</sup> Even during periods of sustained job growth, these adults have difficulty finding or maintaining employment. During the study period, general employment rates typically exceeded 90%: see “Labour Force Data for British Columbia and Canada” online: <<http://www.bcstats.gov.bc.ca/data/lss/lfs/ bccanlfs.pdf>>.

that those who changed schools, other than for grade advancement, did so, on average, six times. Theoretically, early and persistent school failure are associated with poor social skills, low verbal ability, high impulsivity, negative peer associations, and drastically diminished employment opportunities.

In considering what factors affect how serious and violent young offenders contemplate deterrence, it appears that the ability to earn even a minimal income is central to a cost-benefit analysis of recidivating. Serious property and drug trafficking offences are committed, rather obviously, for the purposes of survival, maintaining a higher standard of living, drug addiction, or any combination of the above. In other words, even if one assumes that a serious or violent young offender has the capacity to weigh the consequences of committing a crime,<sup>41</sup> the dearth of legitimate means to earn an adequate income is likely to substantially diminish the deterrent effect of most future punitive sentences, including longer incarceration episodes. However, as is evident in Tables 4 and 5, the prevalence of addictive and other mental disorders is so widespread within this sample of young offenders that the likelihood of the above calculative process occurring appears minimal.

ADHD	52.0%
Conduct Disorder	49.0%
Depression	10.0%
PTSD	12.0%

Either through personal interviews or institutional file reviews, it was estimated that mental disorders were pervasive (see Table 4). Certain mental disorders, such as Attention Deficit Hyperactivity Disorder (ADHD), can be considered more directly relevant to deterrence decision-making. With 52 per cent of this sample of serious and violent young offenders either self-reporting or having been diagnosed as ADHD, the implication for a positive deterrence impact is considerable.<sup>42</sup> This disorder is associated with frequent impulsive behaviours. Given the mental health profiles of the sample, it was not surprising that nearly three-quarters (71.5 per cent) of the youth reported that they had not planned to commit the offence for which they were presently incarcerated. Equally important, planning did not occur for most (59.6 per cent) of these youth for their crimes in general whether

<sup>41</sup> For example, in cases where there is no major mental health disorder.

<sup>42</sup> Given the method used to collect this data, and the difficulty in diagnosing ADHD and other mental disorders in a custodial setting, it is likely that this finding underrepresents the actual proportion of youth with ADHD and other mental disorders.

minor offences, serious property offences, or violent offences.

Given that the average age of first contact with the youth justice system for this sample was 14.5 years old, it was not surprising that nearly half (49 per cent) had conduct disorders (see Table 4). This disorder indicates a persistent pattern of childhood and early adolescent anti-social attitudes and behaviours. In other words, it is questionable whether conduct-disordered youth who are, to a considerable degree, entrenched non-conformists, would be deterred by the typically and relatively short incarceration sentences.<sup>43</sup> One-tenth of the incarcerated youth suffered major depression and slightly more (12 per cent) had post-traumatic stress disorder. Again, this is not surprising given that nearly half (44.2 per cent) had been seriously physically abused and approximately one-fifth (22.2 per cent) had reported sexual abuse.

While there are obviously several reasons why youth use either soft or hard drugs, it is not uncommon for their excessive use to be associated with self-medication in response to trauma and related mental disorders. Virtually the entire sample (90.3 per cent) used marijuana, with most of them (80.5 per cent) reporting use either daily or, at minimum, several times a week (see Table 5). The most disturbing concern though is the pervasiveness of hard drugs. Nearly half of the sample (48.9 per cent) reported using cocaine frequently and 37.9 per cent used crack at a rate of several times a month to daily. Slightly more than one-quarter (26.4 per cent) similarly used heroin. Drug use began, on average, at approximately, twelve years of age. Alcohol use also began at the same age, and it was subsequently consumed frequently by nearly all (92.7 per cent) of the youth in the sample.

<b>Table 5: Drug Use Profile</b>	
Marijuana	90.3%
Crack	37.9%
Heroin	26.4%
Cocaine	48.5%
Alcohol	92.7%

This large sample of serious and violent incarcerated youth is overwhelmingly characterized by major and multiple childhood and early adolescent problems beginning with virtually identical multi-problem families, poor educational experiences, removals from both families and school, negative peer and street life-styles, early and frequent use of alcohol and hard drugs, pervasive mental health

<sup>43</sup> For this sample, the mean sentences were approximately either four months in open custody or five and one-half months in closed custody.

disorders, along with abuse histories, youth justice records of either multiple violent or property crimes, and repeated incarcerations. This extreme picture of multi-problem profiles is very important in understanding the youth's responses to the hypothetical deterrent impact of various sentencing options regarding their decisions to commit future crimes upon their release from custody.

### *Hypothetical Deterrence Decision-Making*

In order to understand the factors that are involved in the decision to recidivate, the methodology developed by Anne Schneider in a classic study of mainly young adults concerning deterrence was utilized in this study of serious and violent incarcerated youth.<sup>44</sup> Schneider resorted to a 100-point scale anchoring “*definitely will not*” recidivate at the lowest quartile and “*definitely will*” recidivate at the upper quartile. Regarding the deterrent impact of their current custodial sentence, the youth were asked to respond to the following statement using the 100-point scale: “My present sentence will stop me from committing another crime.” The median response was 57. While this score suggests that youth indicated that their custodial experience would very slightly deter them, a substantial number indicated it would not. Interestingly, only one-quarter of the youth stated they would likely commit the same offence within a year of being released. Since a majority of the current custodial sentences were for violent offences, it appears that most youth do not view themselves as routinely violent. In contrast, the 57 median score for the deterrent cost of likely being caught by the police for committing the same offence indicated that this concern was not persuasive. However, nearly three-quarters (73.4 per cent) believed that, if caught, they would be incarcerated again. There is little doubt, therefore, that these youth were well aware of the impact of recidivating. Similarly, the median score of 37.6 regarding their “dislike” of a secure custody sentence indicated a clear understanding of the cost of a custodial sentence.

Fundamental to the rational choice theory of recidivism is the proposition that the escalating severity or cost of sentencing should result in a larger deterrent impact. However, the 42.3 median score for this kind of questioning suggests that there was not substantial support for this key proposition. Given the pervasive dislike of custody expressed above, it appears lengthier sentences are not a widespread deterrent for this sample of serious and violent youth. In the following series of hypothetical questions, there was support for the impulsivity theme discussed above. The median score of 38.7 in response to “Before I commit a crime, I think about what my chances are of getting caught,”

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<sup>44</sup> Schneider, *supra* note 25.

and 40.3 median score in response to the question “Before I commit a crime, I think about what will happen to me if I’m caught” suggests there was not a persistent concern with the costs of being caught and sentenced to custody. The deterrent impact of family was substantially less evident since there was a 25.5 median score regarding concern for parental reaction when asked, “Before I commit a crime, I think about what my parents will think or do.”

Another measure of escalating punitive costs was “What sentence do you feel would keep you from ever committing another offence?” Nine options (see Table 6) were provided, ranging from “no sentence” to provincial or federal adult prison sentences. One-quarter of the youth responded that “no sentence” would stop them from recidivating. Another extremely small percentage (5.5 per cent) stated a lengthy youth custody sentence would be a sufficient cost to deter them while only 12.9 per cent claimed they would not recidivate because of an adult sentence of two years or more. Neither youth custody nor the lengthier and more punitive adult prison disposition appeared to be significant in the deterrence thinking process of the overwhelming number of serious and violent youth in this study, even though the majority disliked their custodial experiences.

**Table 6: Sentences that might Deter Offender**

Nothing	27.4%
2 Years or More in Adult Prison	12.9%
Less than 2 Years in Adult Prison	6.2%
3 Years or More in Youth Detention	5.5%
1 – 3 Years in Youth Detention	14.3%
Less than 1 Year in Youth Detention	13.4%
Time Served in Open Custody	6.4%
Intensive Daily Supervision	5.3%
Probation	8.6%

While the self-anchoring measure of the deterrence impact of the current custodial sentence indicated more frequent positive responses, the direct question measure revealed far less. To a considerable extent, this discrepancy was an artifact of the median scoring methodology of the self-anchoring measure. In other words, when asked a specific

question using either an open-ended response option or a fixed Likert scale, the responses indicated less support for the deterrence hypothesis than when youth were asked to rate their attitudes or level of agreement with a statement on a scale from 1 — 100. Nonetheless, there was no evidence that the cost of custody was routine in the deterrence thinking process of the majority of serious and violent youth in this large-scale study. As discussed in the previous sections, the research, mainly American, on deterrence in youth justice is contradictory, and the *YOA* and *YCJA* both appeared to have deterrence principles embedded in their sentencing philosophies regarding the most serious property and violent young offenders.<sup>45</sup> Yet, the tentative inferences from the descriptive data presented suggests that, in a Canadian sample of serious and violent youth, there is little evidence of a pervasive deterrent impact of custodial sentences.

The implications of the data gathered from serious and violent youthful offenders in British Columbia lends credence to the notion that deterrence is not a fruitful sentencing principle to guide the determination of the most appropriate disposition for this group of offenders. Following the adoption of the *YCJA* in 2003, the courts were asked to assess whether deterrence should, nonetheless, have a role to play in the crafting of youth sentences. In *R. v. B.W.P.*<sup>46</sup> and *R. v. B.N.*<sup>47</sup> courts were put to the task of assessing whether deterrence ought to play a role. Many of the deterrence themes discussed above are reflected in these two cases, ultimately receiving the attention of the Supreme Court of Canada in 2006.<sup>48</sup>

### *The Deterrence Principle and the Supreme Court of Canada*

For over a decade Canada's courts accepted the belief that general deterrence had some importance when sentencing young offenders under the *YOA*, due to the Supreme Court of Canada's ruling in *M.(J.J.)*.<sup>49</sup> While this temporarily solved judicial disagreements about general deterrence as a factor in youth court sentencing, the same controversy was raised again under the *YCJA*. Within the first year of the *YCJA*, provincial and territorial courts were divided in their decisions about deterrence having an appreciable effect on a young person or other

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<sup>45</sup> While the *YCJA* does not mention deterrence as a sentencing principle for any youthful offenders, the availability of adult sentencing for presumptive offences leads to the logical inference that adult sentencing principles, including deterrence (as found in s. 718 (b) of the Code) applies to the sentencing of young people as adults.

<sup>46</sup> (2003), 176 Man. R. (2d) 218, 59 W.C.B. (2d) 146 (Prov. Ct.) [*B.W.P.*].

<sup>47</sup> 2004 BCPC 22, [2004] B.C.J. No. 153 (B.C. Prov. Ct.) (QL) [*B.N.*].

<sup>48</sup> *B.W.P.*; *B.V.N.*, *supra* note 9.

<sup>49</sup> *Supra* note 14.

youths.<sup>50</sup> Two provinces, namely Manitoba and British Columbia, witnessed the deterrence issue coming before their respective appellate courts, where fundamentally different views won out. A brief look at the backgrounds of the youthful offenders involved in the cases that made their way to the Supreme Court of Canada reveals circumstances not unlike those found amongst youth residing in youth detention centres across the country. An early Manitoba decision, delivered by Meyers J. in *R. v. B.W.P.*,<sup>51</sup> held that deterrence was not a legitimate sentencing principle under the *YCJA*. This decision was confirmed by a unanimous panel of the Manitoba Court of Appeal.<sup>52</sup> This case involved a fifteen-year-old Aboriginal male who was convicted of manslaughter arising from circumstances in which the court found he had been intoxicated while engaging in a fight. The offender struck the victim with a stocking-covered pool ball resulting in sufficient trauma to cause death. His conduct was given a serious violent offence designation, and he was sentenced to one day open custody and fifteen months conditional supervision followed by twelve months probation.<sup>53</sup> B.W.P.'s prior youth court record consisted of a property offence and breach of an undertaking when he was 13 and 14 years old respectively. He completed fifty community service hours for these offences without question.

He apparently came from a relatively stable background, having been raised by his great-grandmother (his legal guardian) and his uncle who assumed most of the parental responsibility for B.W.P. and his two siblings.<sup>54</sup> Although B.W.P.'s mother rescinded her custodial rights to her children, she continued to remain involved and supportive in their life.

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<sup>50</sup> A number of lower court decisions rejected deterrence as a factor in sentencing: see e.g. *R. v. C.(M.D.)*, 2004 MBQB 47, 181 Man. R. (2d) 267; *R. v. M.(H.A.)*, [2003] 9 W.W.R. 533, 174 Man. R. (2d) 119 (Prov. Ct.); *R. v. B.(A.E.)*, 2003 BCPC 446, [2003] B.C.J. No. 2967 (B.C. Prov. Ct.) (QL); *R. v. D.(K.)*, 2003 NSSF 13, 214 N.S.R. (2d) 100, 57 W.C.B. (2d) 612; *B.W.P.*, *supra* note 46; *R. v. S.(B.R.)*, 2003 SKPC 84, 235 Sask. R. 113, 57 W.C.B. (2d) 575. Meanwhile, other provincial decisions clearly took the opposite approach, holding that deterrence can be an appropriate principle to be considered in sentencing young offenders: see e.g. *R. v. P.(T.D.)*, 2004 SKPC 57, 250 Sask. R. 3, 61 W.C.B. (2d) 520; *R. v. P.(C.M.)* (2003), 59 W.C.B. (2d) 292 (Nfld. Prov. Ct.); *R. v. K.(T.)* (2003), 58 W.C.B. (2d) 111 (Ont. Ct. J.); *R. v. N.B.*, *supra* note 47. For a detailed discussion of the provincial discrepancy regarding the applicability of deterrence, see Corrado, Grondahl and MacAlister, *supra* note 6.

<sup>51</sup> *Supra* note 46.

<sup>52</sup> *R. v. P.(B.W.)*, 2004 MBCA 110, [2006] 5 W.W.R. 676, 187 C.C.C. (3d) 20 (Man. C.A.) [*P.(B.W.)* cited to W.W.R.].

<sup>53</sup> B.W.P. spent 108 days in pre-trial detention, but the sentencing judge was cognizant that remand time could not form part of the actual calculated custodial period of his sentence. Meyers J. took this into consideration when crafting the sentence.

<sup>54</sup> *P.(B.W.)*, *supra* note 52 at para. 38.

B.W.P.'s academic performance and attendance had not been a concern for school officials and while on remand his behaviour in class was characterized as "beyond reproach."<sup>55</sup> Even though this youth resided in an area of Winnipeg where gang activity prevailed, he rebuffed any demands or pressures to join a group. In relation to pro-social activities, B.W.P. remained active in hockey, having played for six years with the same coach "who observed him to have a great attitude ... never a problem — always on time, never misses practice — a good learner ... a real student of the game and that he always handles the aggressive part of the game without losing his composure when seriously fouled."<sup>56</sup> Psychological assessments cited substance use as being the only significant area of concern, but concluded this youth to be a low risk for future offending due to his family stability, minimal legal record and positive school and extracurricular activities and thus recommended a community sentence.

Hamilton J.A. of the Manitoba Court of Appeal dismissed the Crown's argument that the Supreme Court of Canada's *YOA* ruling in *M.(J.J.)* should continue to be applicable under the *YCJA*. Rather, Hamilton J.A. concluded that deterrence was not a sentencing principle for youths as it is for adults:

Under the *YOA*, the protection of society and the public was an important principle. While the long-term protection of the public and respect for societal values remains important under the *YCJA*, Parliament has directed that this is achieved through rehabilitation, reintegration and accountability wherever possible. ... A judge cannot sentence one young person with the aim of sending a message to other youth. This would be at variance with the required focus on the young person being sentenced. I am also of the view that specific deterrence is not a principle of sentencing in light of the exclusion of this principle under s.50(1) of the *YCJA*. Having said that, the sentence, and the judicial process itself, may very well have a deterrent effect on the young person and others.<sup>57</sup>

Manitoba's appellate court endorsed an individualistic approach to sentencing young offenders which emphasizes rehabilitation and accountability. This court took the absence of the deterrence principle in the *YCJA* as a clear indication that Parliament did not intend to reduce crime levels through a strict crime control strategy of punitive sanctions. The trial and appellate decisions in *P.(B.W.)* clearly reflect an individualistic view of sentencing by considering not only the offence and minimal prior record but the familial, social, emotional and

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<sup>55</sup> *B.W.P.*, *supra* note 46 at para. 26.

<sup>56</sup> *Ibid.* at para. 28.

<sup>57</sup> *P.(B.W.)*, *supra* note 52 at para. 64.

psychological background of the young person. A sentence of one day in custody followed by a lengthy term of supervision in the community visibly echoes rehabilitative and reintegrative principles rather than punishment or deterrence.

Meanwhile, British Columbia's provincial and appellate courts took the opposite approach. Auxier J. in *R. v. B.N.*<sup>58</sup> acknowledged the inconsistency in the provincial case law that had developed regarding general deterrence as a sentencing principle in the early months of jurisprudential development under the *YCJA*. However, she concurred with Gorman J's opinion in *R. v. P.(C.M.)*<sup>59</sup> that general deterrence could play a limited role in fashioning an appropriate sentence under the *YCJA*. Auxier J's only endorsement of general deterrence was the single remark: "I agree with [Gorman J's] conclusion. I will consider general deterrence as one factor, albeit a minor one, in determining the appropriate sentence."<sup>60</sup> *B.N.* involved a 16-year-old youth (two months shy of his seventeenth birthday at the time of the offence) who was sentenced to nine months custody and supervision followed by fifteen months intensive support and supervision for assault causing bodily harm.<sup>61</sup> The youth and his co-accused accosted a 42-year-old heroin addict over a drug debt, resulting in the victim being stabbed by the co-accused.

B.N.'s family background is quite tragic and unfortunate. B.N. was born in Malaysia and his family moved to Canada when he was an infant. When B.N. was three years old his father murdered his mother and was imprisoned. B.N. and his younger brother were placed with their paternal aunt until their father was released on parole in December 2001. After one month their father was arrested on new charges and deported to Viet Nam. Thereafter, B.N. had been in care with the Ministry of Children and Family Development and was placed in various group homes. His behaviour in these group homes was quite volatile as he verbally and physically threatened the staff, stole money and had weapons such as knives, machetes and a pellet gun in his bedroom. Although his youth

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<sup>58</sup> *Supra* note 47.

<sup>59</sup> *Supra* note 50.

<sup>60</sup> *B.N.*, *supra* note 47 at paras. 26-27.

<sup>61</sup> In this case Auxier J. did take into consideration the 81 days B.N. spent in pre-trial detention when calculating the custody and supervision order. Specifically, Auxier J. adhered to the formula advanced by her colleague Lytwyn J. in *R. v. D.(C.L.)*, 2003 BCPC 186 that called for calculating remand time as the creditable equivalent to the custody portion of a sentence of custody and supervision. Therefore, Auxier J. translated the 81 days to a custody and supervision order of approximately 120 days (4 months) in addition to a further nine-month period of custody and supervision.

court history was minimal and non-violent,<sup>62</sup> it did not clearly reflect his past behaviour in the community. B.N. had a poor academic history, coupled with school suspensions for assaulting another student and selling drugs at school.

Youth Forensic Psychiatric Services described a bleak prognosis for this youth, concluding he was a high risk for future serious violence due to his history of antisocial conduct, violence and aggression, admitted drug trafficking, involvement in gang-related activities, substance abuse, lack of commitment to pro-social activities, absence of remorse or insight about his offending, as well as the presence of historical risk factors such as parental criminality and early loss of mother.<sup>63</sup> The psychiatrist who conducted the evaluation commented:

An additional clinical concern, particularly in relation to a potential for recidivism, are a constellation of personality traits, including his impression management, grandiosity and entitlement, low remorse, pathological lying and failure to accept responsibility for his behaviours. Together, these suggest a youth who has few internal inhibitors and who has potential to engage in serious criminal activity, including violence, with little emotional impact.<sup>64</sup>

The psychiatrist strongly recommended this youth's behaviour and activities be closely supervised.

The Court of Appeal for British Columbia recognized the provincial and territorial discrepancies regarding deterrence as a sentencing principle under the *YCJA*. The Court noted the sentencing judge amalgamated the objectives of "rehabilitation and meaningful consequences"<sup>65</sup> to justify a custodial sentence that would allow for effective programming, as the lower court was not confident the young person would comply with treatment if given a community sentence. Therefore, Mackenzie J.A. concurred with Auxier J. that, under certain circumstances, deterrence continues to be relevant under the *YCJA*:

The theory underlying the observations of Mr. Justice Cory on deterrence in *J.J.M.*, *supra*, has been criticized on the ground that empirical evidence suggests that longer sentences for young offenders have no deterrent effect on other youths (see *A.N. Doob and C. Cesaroni, Responding to Youth Crime in Canada (2004)*, pp 249-51).

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<sup>62</sup> His prior record included convictions for theft under \$5,000, breach of probation and theft of a motor vehicle.

<sup>63</sup> *B.N.*, *supra* note 47 at paras. 13-14.

<sup>64</sup> *Ibid.* at para. 13.

<sup>65</sup> *R. v. N.(B.V.)*, 2004 BCCA 266, 186 C.C.C. (3d) 21 at para.13, 322 W.A.C. 100 [*N.(B.V.)* cited to C.C.C.].

... I accept that the absence of any reference to general deterrence in the sentencing guidelines under the YCJA implies a reduced emphasis on general deterrence under that statute compared to adult sentencing under the Criminal Code, but on principle I do not think that the silence of the YCJA requires sentencing judges to completely disregard general deterrence in particular cases where it may realistically have some result. In my view, the Supreme Court of Canada's direction in *J.J.M.*, *supra*, to reduce the emphasis on general deterrence but not exclude it entirely, remains applicable.<sup>66</sup>

Oppal J.A. (as he then was) agreed with Mackenzie J.A. that deterrence still applies to young offenders:

The criminal law has always made a distinction between adult offenders and young offenders. The fundamental basis for the distinction is that young offenders generally do not have the same degree of moral culpability as adult offenders. It can also be said that young offenders generally do not always have the necessary foresight to appreciate the consequences of their acts. ... the principle of general deterrence is still applicable, albeit on a somewhat more limited basis. ... in my view, in spite of the recognition and the acceptance of the general principle that young offenders are not generally possessed with the same degree of moral blameworthiness as adult offenders, the fact remains that not all young offenders are unaware of the sanctions imposed by the criminal justice system. I think it would be unrealistic and unwise to conclude that the principle of general deterrence has no application in dealing with young offenders.<sup>67</sup>

The Court of Appeal decision seems inconsistent with the research that increasing the severity of the sanction fails to deter youthful offending. Young persons do not have the level of foresight of adults, nor do they typically consider the possibility or outcome of being apprehended. The data discussed above from youth custody centres in British Columbia supports the view that deterrence has no fundamental impact on delinquent offending.

Approximately two years after the Manitoba and British Columbia Courts of Appeal rendered their respective decisions regarding general deterrence, the Supreme Court of Canada, in a unanimous judgment, concurred with the approach taken by the Manitoba courts.<sup>68</sup> The highest court acknowledged the diverse opinions between the two provinces in determining whether general deterrence is a permissible sentencing principle under the *YCJA*.<sup>69</sup> Charron J., writing for the Court, explicitly

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<sup>66</sup> *Ibid.* at paras. 14-15.

<sup>67</sup> *Ibid.* at paras. 22-23.

<sup>68</sup> *B.W.P.; B.V.N.*, *supra* note 9.

<sup>69</sup> Prior to the Supreme Court of Canada decision, the Alberta Court of Appeal in *R.*

outlined the parameters of their judgment, and noted that the Court would not delve into the research on whether general deterrence works in preventing crime. Rather, the Court held that the issue of deterrence was clearly debated during Parliamentary hearings, and therefore it was accepted that a policy decision had been made by Parliament to omit deterrence as a sentencing principle under the *YCJA*, which was not a matter to be reopened by the courts. The Court accepted that their clear mandate was thus to interpret the *YCJA* sentencing regime to clarify the original decision that Parliament made regarding the exclusion of deterrence as a sentencing principle.<sup>70</sup>

Charron J. remarked that the *YCJA* significantly changed how the youth justice system is approached at all stages of the process, noting the most substantial change occurred at the sentencing phase of youth cases. In particular, the new legislation provides specific direction to judges, expressly stipulates the sentencing principles and relevant factors, standardizes the sentencing options, and explicitly outlines the restrictions on the use of custody.<sup>71</sup> Of further importance, Charron J. rejected the Crown's attempts to draw on the 1993 Supreme Court of Canada decision in *M.(J.J.)*, or to make reference to the *YOA*:

In my view, little can be gained by attempting a detailed comparison of the two statutes. The *YCJA* created such a different sentencing regime that the former provisions of the *YOA* and the precedents decided under it, including *M.(J.J.)* are of limited value. In order to determine the question before the Court, the focus must be rather on the relevant provisions of the new statute.<sup>72</sup>

Accordingly, the Supreme Court of Canada found their previous *YOA* deterrence decision to be irrelevant, and reference to it inappropriate under the new legislation.

The *YCJA*'s Preamble, Declaration of Principle,<sup>73</sup> and statement concerning the purpose of sentencing<sup>74</sup> reference certain concepts or goals that seem to be emphasized throughout the new youth justice system, particularly noteworthy is an emphasis on "meaningful consequences." Roberts and Bala surmise this term might be viewed by some judges as incorporating the fundamentals of deterrence:

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v. *K.(P.K.)*, 2006 ABCA 1, 206 C.C.C. (3d) 222, 69 W.C.B. (2d) 287 also debated the merit of deterrence as a sentencing principle. This Court agreed with the position held by British Columbia that deterrence was still important, particularly individual deterrence.

<sup>70</sup> *B.W.P.; B.V.N.*, *supra* note 9 at para. 3.

<sup>71</sup> *Ibid.* at para. 19.

<sup>72</sup> *Ibid.* at para. 21.

<sup>73</sup> *YCJA*, *supra* note 1, s. 3.

<sup>74</sup> *Ibid.* s. 38.

A society that permits criminal behaviour without imposing consequences on offenders invites lawlessness. The presence of meaningful consequences could therefore be interpreted as the existence of responses sufficiently rigorous to deter the offender and, possibly, other potential offenders. If not to serve as a deterrent, why should wrongful conduct be accompanied by “meaningful consequences”? In everyday discourse, when someone is informed that certain actions on their part will have “meaningful consequences,” this information is imparted in an attempt to inhibit the conduct in question — deterrence, in other words. Although the term “deterrence” has disappeared from the statute, the concept of deterring young offenders may well continue to underlie the sentences that some judges impose.<sup>75</sup>

Charron J., however, rejected British Columbia’s argument that the rather expansive idioms “meaningful consequences” and “accountability” encompass general deterrence.<sup>76</sup> When reading the statute, the Court found that these terms specifically focus on young offenders and their needs, and are not directed towards the general public. Therefore, any attempts to use the expression “meaningful consequences” or “accountability” to support the position that a harsher sentence ought to be imposed on a young person to deter others were admonished. Moreover, Charron J. declined a similar argument by British Columbia’s Crown counsel that the two phrases, “long term protection of the public” and “respect for societal values” endorse a justification for a more punitive sentence. Charron J. noted:

[P]rotection of the public is expressed, not as an immediate objective of sentencing, but rather as the long-term effect of a successful youth sentence. . . . the means of promoting the long-term protection of the public describe an individualized process by focusing on underlying causes, rehabilitation, reintegration and meaningful consequences for the offender.<sup>77</sup>

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<sup>75</sup> Julian V. Roberts and Nicholas Bala, “Understanding Sentencing Under the *Youth Criminal Justice Act*” (2003), 41 *Alta. L. Rev.* 395 at 399-400.

<sup>76</sup> The terms “meaningful consequences” and “accountability” are found in the following sections of the *YCJA*: s. 3(1)(a)(iii): “The youth criminal justice system is intended to . . . ensure that a young person is subject to *meaningful consequences* for his or her offence in order to promote the long-term protection of the public”; s. 3(1)(b)(ii): “The criminal justice system for young persons must be separate from that of adults and emphasize the following . . . fair and proportionate *accountability* that is consistent with the greater dependency of young persons and their reduced level of maturity”; and s. 38(1): “The purpose of sentencing under section 42 (youth sentences) is to hold a young person *accountable* for an offence through the imposition of just sanctions that have *meaningful consequences* for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public” [emphasis added].

<sup>77</sup> *B.W.P.; B.V.N.*, *supra* note 9, at para. 31 [emphasis in original].

Similarly, “respect for societal values” was interpreted by the Court using the French version of the legislation which dismissed any ambiguity that this phrase encompassed deterrence, as the *YCJA*, “is speaking about reinforcing the young person’s respect for societal values, not society’s at large.”<sup>78</sup>

The Supreme Court of Canada’s exclusion of both general and specific deterrence<sup>79</sup> as sentencing principles is consistent with Parliament’s intent to reduce the use of custody as outlined in the Preamble to the legislation.<sup>80</sup> Perhaps the essence of their decision comes from the following analysis:

Unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher; its effect is never mitigating. The application of general deterrence as a sentencing principle, of course, does not always result in a custodial sentence; however, it can only contribute to the increased use of incarceration, not its reduction. Hence, the exclusion of general deterrence from the new regime is consistent with Parliament’s express intention to reduce the over-reliance of incarceration for non-violent young persons. . . . In its narrower sense, specific deterrence calls for the incapacitation of the offender in order to prevent the further commission of crime, usually by separating the offender from society through incarceration. It is plain from the preceding analysis on general deterrence that, in this sense, specific deterrence, as a distinct factor in youth sentencing, is also excluded under s.50(1) and cannot be implied from any of the provisions of the *YCJA*.<sup>81</sup>

While the Preamble specifically refers to reserving custody for the most serious crimes as well as reducing custody for non-violent young persons, our research confirms that increasing the use of custody is not likely to have a mollifying effect on serious property and/or serious violent juvenile offenders. Rather, the multiple custody sentences

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<sup>78</sup> *Ibid.* at para. 32.

<sup>79</sup> Charron J. devoted little analysis to the issue of specific deterrence, simply noting near the end of the judgment that the absence of a reference to specific deterrence in the *YCJA* leads to the conclusion that it is not to be taken as a relevant consideration in devising an appropriate sentence; *ibid.* at paras. 39-40.

<sup>80</sup> The *YCJA* Preamble expressly ascribes the goal of reducing the use of custody: “[And Whereas] Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and *reduces the over-reliance on incarceration for non-violent young persons*” [emphasis added].

<sup>81</sup> *B.W.P.; B.V.N.*, *supra* note 9 at paras. 36, 40.

received by these kinds of offenders creates a profile of punishment and incapacitation which coincides with the idea that increases in custody will somehow deter these or other youth. Our research underscores that seeking deterrence for young offenders is a misguided venture and of little value. This does not interfere with sentencing to achieve the underlying goal of assisting in rehabilitating young persons while at the same time holding them accountable for their criminal behaviour. As Nicholas Bala notes in regard to the most serious youthful offenders:

The unfortunate reality is that those youths who commit the most serious and senseless crimes are precisely those who lack foresight and judgment, and who will not be deterred by adult sentences. Adult sentencing for the most violent of young offenders may be justified on accountability principles, but it will not produce a safer society. A reduction in serious violent offending cannot be achieved by a “legislative quick fix,” but rather requires a resource intensive combination of preventative, enforcement and rehabilitative services.<sup>82</sup>

The British Columbia youth custody research seems to resonate with the Supreme Court of Canada decision that the *YCJA* does not, and should not permit the justification of a harsher sanction in the hopes of deterring the offender or others from committing further offences.

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<sup>82</sup> Nicholas Bala, “*Charter* Challenges to Presumptive Adult Sentences for Serious Youth Offenders” (2006) 37 C.R. (6<sup>th</sup>) 287 at 300.