How to Make a Criminal:
A Genealogy of the Youth Criminal Justice System in Canada

By

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Abstract
Youth criminal justice has been an ongoing narrative in Canada from the late 19th century which has interacted with the questions of the role of young people and appropriate punishments from the beginning. This project discusses those questions as a Foucauldian genealogy and considers how youth punishment is justified in Canada. Beginning with the work of John Joseph Kelso and the child saving movement from the late 19th century, the narrative of youth justice in Canada carries through the conversation surrounding the Juvenile Delinquents Act, the Young Offenders Act, and the Youth Criminal Justice Act. Through the public and federal debates, themes of hope and futurity, responsibilisation, and differing understandings of youth in society are constructed, which this project seeks to develop and explore.
Acknowledgements

Even though there is only one name on the front, a project like this doesn’t get completed by one person alone. I have so many people who helped and supported me throughout the process of writing this.

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Introduction

There has never been a moment since the inception of the youth criminal justice system in which we questioned whether we should have such a system, despite years of ongoing controversy over the appearance and implementation of the system. The *Juvenile Delinquents Act (JDA)* of 1908, the *Young Offenders Act (YOA)* of 1982, and the *Youth Criminal Justice Act (YCJA)* of 2003 together constitute the institution of youth criminal justice in Canada. It is an institution that has been considered a given since it began in 1908 under the hands of activist and Ontario Superintendent of Neglected and Dependent Children John Joseph Kelso and the activism of the Child-Savers. The core assumption of any such system is that youths and children are fundamentally different from adults, and as such, must be treated differently. While there have been many questions about what kind of penalties are apposite for youth and many debates about how best to respond to youth crime, the core assumption that states that youth and children are fundamentally different from adults has remained mostly unquestioned.

This assumption does not mean, however, that what constitutes an adult or a youth or a child is a static category. The line that separates the child from youth and youth from adult has shifted many times. For example, the spectacle method of punishment through the 16th and 17th century separated punishment into only two categories: those who were too young to be punished criminally and those who were old enough to be punished. The punishment was applied to everyone who committed the crime from roughly age seven through to adults. As the age shifted higher to 16 years and
then 18 years, so began the debates about how to regulate the grey zones. It is easy to make the argument that an 11-year-old youth does not understand the necessary consequences of their action, and it is still relatively simple to make that case for a 13-year-old youth. Approaching 16, however, the argument seems thinner – what, after all, is the real difference between a 16-year-old and an 18-year-old? What is the difference between an 18-year-old and a 19-year-old? How is it possible that there is such a fundamental difference between the two ages that currently one is charged under the YCJA and the other is charged under the Criminal Code? These questions lead to debates that seek to define crimes as ‘youth crimes’ and as ‘adult crimes,’ rather than defining the qualities of youth. Instead of clarifying the grey zones, the debate rages over how to address “adult crimes,” with many arguing that these crimes should have youth doing “adult time,” once again pointing at the blurred line between youth and adult.1

There is an essential aspect of the current line between youth and adult that a debate focused solely on age fails to address – legal citizenship. Is a youth a full citizen or a “citizen-in-training” in the style of Jean-Jacque Rousseau?2 This question is central to my work as I develop a genealogy of the youth criminal justice system in Canada to ask how Canadian law and society justifies punishing youth. At the core of the adult criminal justice system in most Western countries - Canada included - is an understanding of a social contract present in a logic of exchange.3 This logic

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1 Correspondence from public interest groups to Chuck Cadman, 1990-2005, R13269-2-8-E, Chuck Cadman Fond, Library and Archive Canada, Ottawa, Ontario, Canada.
fundamentally claims that one is subject to the ruling of the state in exchange for living in a given society, which then suggests that committing a crime deserves punishment for not abiding by the exchange. Regardless of one’s own moral or theoretical position, I argue that the criminal justice system tells itself a story of its existence in which it serves to uphold the exchange to which each citizen agrees. In this way, the justice system enacts a theatre of punishment and justice and develops an ‘unreal’ justifying story; a citizen who breaks the law, and thus the contract, is criminally punished.

Like any other model of justification, this sort of model needs to make several assumptions about its actors. First, such a system assumes that all the actors are fully rational beings, and as such, are fully capable of understanding the outcomes of their decisions. Second, the model assumes that the actor is an independent member of the imagined social contract, privy to all the benefits and subject to all the obligations. Finally, criminal justice in a social contract model needs to view every member as fundamentally equally capable; each member of the society is equally capable of being a threat to each other member of the society, regardless of station or ability. Basing any system on assumptions of rationality and the nature of members is necessarily flawed, but

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5 This is not to claim that there are not provisions placed within criminal law to account for individual differences, but rather to suggest that in the fashion of “justice is blind,” anything operating on a model of a social contract presumes that every citizen starts from the same position of equal capability and it has to be adjusted to accommodate.
there is a benefit to this story playing out in the context of the adult criminal justice system; the theatre of punishment appears justified in saying “Do the crime, do the time.”

This same justification does not translate nearly as neatly to the youth criminal justice system, as the youth system needs to contend with diminished moral culpability as was shown in *R. v D.B* in 2008, in which the Supreme Court of Canada ruled adult sentencing for youth was unconstitutional. The majority held the opinion that

> [T]he principle of fundamental justice at issue here is that young people are entitled to a presumption of diminished moral blamelessness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. That is why there is a separate legal and sentencing regime for them.

The Supreme Court of Canada found that the presumption of diminished moral culpability met the three requirements of a fundamental principle of justice: 1) the presumption is a long-standing legal principle, 2) such a principle is necessary for maintaining a just legal system, and 3) the principle is a manageable test to establish the proper punishment of a youth. Adult criminal justice is expected to serve a different role compared to the youth criminal justice system. The court’s understanding of youth justice suggests that that youth justice system would need to find a way to reconcile youth’s lack of culpability with the story of a social contract if it wanted to enact the same kind of punishment theatre seen in the adult criminal justice system. The different roles of the youth and adult criminal justice system further indicate that there is a fundamentally different model of justification employed for that youth criminal justice system, though that the public discourse does not reflect that difference at a federal level.

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7 *Ibid* at para 3.
The importance of the distinction between youth and adult in criminal justice relates back to the role of youth in society. Public correspondence indicates that image of the youth criminal justice system in the discourse of collective Canadian society is a mirror of the adult justice system – according to interest groups and public correspondence, the two criminal justice systems are fundamentally the same, differing only in sentences to reflect the ages of their subjects. The public’s expectation of exchange is clear in sentiments like “do adult crime, get adult time,” found in letters from members of the Canadian public addressed to Chuck Cadman and other members of Parliament. It is this rationale of exchange that allows an imagined social contract to justify a criminal justice system. However, the ruling of the Supreme Court of Canada in R v. D.B. indicates that posing the logic of punishment as a direct reflection of the youth and adult criminal justice systems is problematic and contradictory. The social contract logic of exchange does not describe the justification of punishment with youth. In a model of citizens-in-training, youth cannot be responsible for their actions in the way a justification through a social contract requires. Not only does diminished moral culpability conflict with ideas of criminal responsibility, but there are also several problems with envisioning youth as members of a social contract – the question of right and the role of consent – that indicate that the story of the social contract is not the primary justification for the punishment of youth.

Social contract theorists employ the notion of rights throughout their work to ask what the rights of individuals are and the rights of the state are. While the answers vary

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9 Cadman, supra note 1.
by the theorist, the overall assumption of inalienable rights remains and is often taken up in logics of punishment – for example, the state has the right to enact violence, the citizen does not. When considered regarding youth, the question of right asks if a criminal justice system which understands itself based on a social contract has any right to enact punishment on youth? This is to say, does a state’s monopoly on the legitimate use of violence extend onto youth?¹⁰ This question harkens directly back to Rousseau’s citizens-in-training: do youth constitute full citizens? If it is the case that a youth is a full citizen, it is evident how that same justifying story would be employed in the case of youth as was employed in the case of adult criminal law. The member of the contract broke the rules of the social contract and thus, the state must now enact punishment for that transgression. However, if we assume that youth do not have the sufficient level of moral culpability to understand consequences entirely, then youth cannot constitute full, self-responsible and capable members of a social contract. In this case, the story for the justification of adult punishment cannot play out because the youth cannot be a full citizen if they cannot fulfil all the obligations of a citizen and are not offered the same rights as a citizen.

Envisioning youth as legal citizens is further complicated by the second part of the social contract story – consent to be governed. The adult criminal justice uses consent to create legitimacy. A social contract system can assume consent in two ways: explicit and tacit. Thomas Hobbes calls for a very explicit consent in which the member citizen

actively gives up the power of their claim to the legitimate use of violence to state in exchange for protection. This explicit exchange is mobilised by the *Criminal Code* as a principle of justice to consider in laying criminal charges and enacting punishment. Through giving up their power, the member citizens select a state granted the power to define social transgression. The second mode, tacit consent, proposes that by remaining a part of a given state, the member tacitly consents to the rule of the sovereign. Under this model, just by remaining a citizen of the territory, one consents to live under the laws of the state and consents to be punished for breaking the laws of the state. Modern dialogue mobilises the tacit model more often than the explicit model, as a part of rights and responsibilities of citizenship. Baldly, having received benefits of citizenship, it is expected that citizens will live up to the obligations. By mobilising the logic of tacit consent, the Western state makes itself challenging to reject – one would need to shed formal citizenship to shed the obligations fully.

As the state does not offer youth the full obligations or rights of a legal citizen in Canada, youth are not capable of consenting explicitly or tacitly, making the transfer of power a much messier story to mobilise for justification. Youth are not permitted to vote, and thus, they are not invited to offer up their claim to legitimate violence. It is incredibly difficult, even impossible, for youth to leave Canada on their own, indeed more difficult than it would be for a full adult citizen. The majority of long-term visas require either

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family sponsorship or accompaniment when younger than the age of majority. Thus, the youth is required to remain regardless if they consent to the social contract or not. As the youth cannot leave, they cannot be assumed to agree tacitly. The inability to consent to be a part of the imagined social contract severely complicates the use of social contract theory as a means of justifying criminal punishment of youth. The two complications are pointed out by Institut Philippe-Pinel De Montreal in saying, “Those young persons do not have the right to vote, get married, or own a car – but they do have the right to receive a life sentence.”\textsuperscript{15} Despite the apparent public understanding of youth criminal justice as an off-shoot of social contract logic, the story does not translate from its use in justifying adult punishment to justifying youth punishment.

Instead, the justification for youth punishment is better described as the process of normalising the youth into a liberal subject. In this view, a young person is a work-in-progress and punishments serve the purpose of disciplining and normalising the young person into the proper kind of citizen, a subject which is knowable and thus, is subject to power.\textsuperscript{16} The construction of a person as a liberal subject is something an individual does to themselves, creating a liberal self-mediated through an authority figure.\textsuperscript{17} The individual creates themselves as a liberal subject by making choices mediated by knowledge facilitated by the authority figure. This practice plays out in ways reminiscent

\textsuperscript{15} Interest group report submitted by Institut Philippe-Pinel De Montreal to Standing Committee on Justice and Human Rights, 1999-2000, RG14-D-4, Box 41, Wallet 4, File Institut Philippe-Pinel De Montreal, Government funds, Library and Archives Canada, Ottawa, Ontario, Canada.


of to putting a child to bed – the child can choose between several bedtime stories, but they will be going to bed regardless.

To ensure correct behaviour, the authority figure enacts disciplinary technologies on the subject to constrain and construct them into a proper liberal individual. By engaging in normalised, correct behaviour, the individual subject is contained economically and socially in the totalised collective.\(^\text{18}\) In the case of youth criminal punishment, that state is engaging in the same process of normalising the child into a liberal subject in which a parent and a school are also participating.\(^\text{19}\) The parent, the school, and the state are all acting as mediating authority figures to teach the young person regulation and shape the young person into a proper, self-regulating liberal subject. A young person is accepted as a member of society once they have been fully normalised. The state engages with youth in the form of youth justice as a means of teaching regulation through disciplinary punishment, which requires external justification in order to claim legitimacy. The claim of legitimacy is where the youth criminal justice system draws on the public acceptance of the story of a social contract and the contract’s logic of exchange.

There is a clear divide, even in the description I just gave, of the different kinds of responsibilisation. This work will be interested in exploring two variations: 1) responsibilisation as process of normalising or socialising, and 2) responsibilisation which requires subjects to account for there own risk. The first variation I will refer to as responsibilisation throughout this project. The second variation I will refer to as...


securitization for the sake of clarity. Securitization is often characterised as a mobilisation of a specific discourse “with various strategies of argumentation according to different contexts and public policies.” For this project, the strategies of argumentation I am interested in is the call to arms regarding the risk of youth, which asks for youth to assume ownership of their own inherent risk and creates policy from that call.

The purpose of this project is to track the development of the contradiction above, in which the public perception of youth criminal justice subscribes to the logic of a social contract even if that model is not compatible with the mode and purpose of punishment in youth justice. This narrative will illustrate the changing perception of the purpose of youth criminal justice as it transitioned over time from the late 19th century to 2006. To do this, I construct an archival genealogy of youth justice. The narrative of the youth criminal justice system attempts to explain how the system came to look as it does today by illuminating how it began and developed. I consider what the purpose of youth justice is throughout its history and what behaviour and culpability is appropriate to expect of youth. These considerations lead me to two further intellectual puzzles, which I will briefly outline.

Intellectual Puzzles
The first intellectual puzzle I address is a question of the story of youth criminal justice in Canada. How did the youth criminal justice system in Canada develop to the

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20 Ayse Ceyhan and Anastassia Tsoukala, “The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies,” *Alternatives: Global, Local, Political* 27, no. 1_suppl (February 2002): 21–39, https://doi.org/10.1177/030437540202705103; This image of securitization as linguistic only is contested by Balzacq (2005) and Stritzel (2007), but is a depiction of securitization that is suited to this project.
point it is at today? This question asks about the conditions of the possibility of youth criminal justice as we know it, following its development from the beginning of the child-saving movement in the late 19th century to its current iteration. This question also asks how the interested parties understand youth and depict youth through the story of the youth criminal justice system, including how policy, media, and citizen talk about the category youth. The conversation of youth depictions intermingles with the conversation of youth participation in the imagined social contract of criminal law by considering how youth are envisioned as kinds of citizens or as something separate from citizens. The conversation will further consider how youth are considered citizens-in-training or as normalising subjects and how those depictions of youth dictate methods of punishment. By telling the story of the youth criminal justice system, I develop a means to draw forward ideas and see how they are constructed throughout the narratives.

The second intellectual puzzle this project moves forward with questions the defensibility of the justification of the current youth criminal justice system. What other options have been and are available to use? At what points in the story of youth criminal justice may we have elected to pursue different goals? The purpose of asking this question is to uncover the underlying notions of the different iterations of youth criminal justice. This puzzle establishes the need to develop motivations behind the individual Acts and their drafts and revisions. Has the option for rehabilitation been passed over in pursuit of deterrence? How does the image of youth influence the decision to be more or less penalising? These considerations are intended to add depth to the story of the youth criminal justice system and to consider how the current system offers justifications for governing young people. The final goal of the question is to consider how the story youth
criminal justice tells of itself and appeals to the public’s notions of justice and the common good.

Methods
This project uses the tradition of Foucauldian genealogy with influence from historical epistemology to analyse data. Data was gathered from archival sources and analysed through mixed-method deductive and inductive coding. All of my data is from preserved primary sources in a combination of open and closed fonds. This section will outline my research methods, including data collection, interpretation, and analysis. This section will also include a discussion of the advantages and limitations of my approach and how they might be mitigated.

My data collection was done entirely at the Library and Archives Canada in Ottawa and focused primarily on parliamentary debates and submissions by interested parties, including academics, interest groups, legal professionals, Provincial public bodies, and public citizens. These come in the forms of reports, charts, letters, and memoranda. While there were pictures and artists’ visual and comic responses to specific acts, largely the YCJA, I elected to maintain text-based research only. As I collected data from only one archive, I was working exclusively within a single mode of locating data, beginning from online searches and further investigation through file guides. While some fonds included multiple Acts, such as the Parliament fond, most were divided by year and thus, by Act. In this way, I divided my data collection into four distinct sections. I began with the Parliament fond, RG14, and reviewed files from standing committees spanning a significant portion of my timeline, from the revision of the JDA in 1929 to the first conversations of the YCJA in the mid-1990s. Second, I reviewed the open files of all
political discussion of the YOA. Following, I received access to the original journals of John Joseph Kelso, starting in 1885 and continuing through the early 20th century to the 1920s. Finally, I received access to the closed Chuck Cadman fond and Flora MacDonald fond, both progressing from 1986-87 onwards. The Chuck Cadman fond is the most recent fond available regarding youth criminal justice in Canada, following the discussion of the YCJA until 2005-6. Collectively, these fonds generated over 100 files, 92 of which I deemed relevant to my project.21 The fonds used in this project were what was available at the Ottawa branch of the Library and Archives of Canada and which had to do with the discussion of youth justice in Canada. Files that were deemed irrelevant to this project included daily operations files for the ministries and department, journals and papers focused only on formal Child’s Aid Societies, and files which repeated previous files.

The benefit to archival research is it allows an obvious approach to a question and is well suited to developing a narrative. An archive is a place of “secular national history,” preserving a sense of collective community through time, allowing a researcher to interrogate the ideas of those past and often long dead.22 Archives, along with museums and libraries, serve to create and maintain “imagined communities” which preserve national memory and allow the present to receive the truths of the past.23 The national memories provide a kind of snapshot into past moments and allow the research

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21 Some of these files were repeats of ones I had already documented, while others were taking the conversation outside of the limits of this project.
to flesh out a conception of society as the society understood itself at a given time. Social
and cultural formations do not exist separate from the society they existed in – social
entities are “happenings.”24 Thus, it is necessary for any research projected over time to
create the fullest picture of the society at the time. For a project seeking to develop a
narrative over time, archival research is ideally suited for uncovering time-based
consciousness.

The first limitation on my research was self-imposed, as my research was limited
to the Library and Archives of Canada in Ottawa. The first limitation was due to the
location of the federal files which were of interest to the project, but a researcher could
mitigate the issue in later projects by expanding to other branches of the Library and
Archives of Canada or into provincial archives. The limitation which had more impact on
this project is a limitation which affects archival research overall. This overall limitation
of an archival method of data collection is relatively apparent: the availability of data. If
data is not available, there are few ways to work around or outline the missing data. This
limitation has impacted my research in two particular ways: my data is not entirely
recent, and there are areas of data I am unable to retrieve or access. My research
examines the development of the youth criminal justice system in Canada through the
years of 1860 to 2005-06, but this does not suggest that there have been no changes to
youth justice between 2006 and the present. Instead, the files most recently available at
the Library and Archives Canada are from 2006. More recent developments are available
through examining essential court cases like R. v. D.B., which provides a means to

address one of the limitations of archival research. While I will be using *R. v. D.B.* as a literary source, the scope of my current project is archival research only.

The second limitation, availability and access to documents, has several dimensions of consideration. The first aspect to consider regarding access to documents is about open, partially open, and closed files. While open files are reasonably simple to request and access, partially open and restricted files can present significant barriers in collecting appropriate data and in collecting data in a timely fashion. Once a file has been located and requested, an open file would be available in a matter of days, but a partially open or closed file will go through levels of ATIP processing. A partially open file will most commonly be available following an informal review, but this can still take significantly longer to reach the researcher, and there are often missing or redacted pages.25 Closed files must go through a formal ATIP process and often take extended amounts of time. This delay is something I experienced, receiving access to a set of files in January 2018, that I had requested in August 2017. Scholars in archival research have well documented the extended waiting period for access to files.26 The restricted access and time-consuming, arduous process to obtain access to files is a source of contention in

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25 Redacted files often lead to debates of ethical importance, as the words were often visible through the redaction. This required me to ask the question each time of whether I could use that information, as there are questions of personal privacy for anyone mentioned in files, but also questions of access to information as a kind of social movement. Ultimately, I elected to ATIP the unredacted files and used the files if I could access them unredacted.

academia; Walby and Larsen cite the space as a site for activism, which gives it particular significance when paired with any critical discourse analysis.27

As each section of data collection concluded, I began to code each section with an integrated approach to coding, using both deductive and inductive methods. I approached each section with five nodes developed (“crime”, “youth term”, “social”, “punishing”, “timeline”) and then generated new nodes from the data collected, including “language”, “responsibility”, and “children.” First level coding was primarily used to code deductively and generate inductive codes. Once I had collected all the data, second level coding consisted of revisiting all the documents to code inductively. This method of coding is both “data-driven” and “template” based, as the inductive approach allows the research to embody moments into their process and the deductive process encapsulates the research question and conceptual framework into the coding process.28

The benefit of an integrated approach to coding is to supplement the limitations of both forms of coding while maintaining the benefits. Deductive coding is particularly useful in “integrating concepts already well known,” allowing a researcher to build upon prior insights, and in referring the researcher back to their research questions and intellectual puzzles by moving forward from pre-existing categories.29 The faults of

29 Ibid; Elizabeth H. Bradley, Leslie A. Curry, and Kelly J. Devers, “Qualitative Data Analysis for Health Services Research: Developing Taxonomy, Themes, and Theory,” Health Services Research 42, no. 4
Deductive coding lay in forcing the data to fit specific codes generated a priori and lacking organic growth. Inductive coding allows the research to grow organically, developing from “the ground” up to reflect the concepts in the analysed data.\(^\text{30}\) Coding purely inductively, however, runs the risk of getting lost in the weeds, as it is simple to lose sight of the research questions when the researcher is thoroughly engrossed in the themes of the data. Thus, utilising an integrated approach allows me to keep my questions near at hand while fleshing out the full story of the youth criminal justice system and examining themes.

Finally, I am interpreting data through a socio-historical, genealogical method. The goal of this kind of method is to tell the story of the current model, as Michel Foucault tells the story of normal and abnormal in *Discipline and Punish*. Genealogy, as a tradition of thought, is a means through which a researcher can examine “submerged problems”\(^\text{31}\)– those problems that remain embedded in the social consciousness. A genealogical approach works to create “problematizations” and to make visible complex social states.\(^\text{32}\) This method calls for the use of historical data to be interpreted as interlaced and ongoing, taking forward influences and ideas\(^\text{33}\); it is “the erudite knowledge and local memories which allow us to establish a historical knowledge of

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\text{\textsuperscript{30} Bradley, Curry, and Devers, } \textit{supra} \text{ note 29 at p 1762.}
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\text{\textsuperscript{32} Koopman, } \textit{supra} \text{ note at p 2.}
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struggles and to make use of this knowledge tactically today."34 Foucault makes the case that no social state exists free of past influence in The History of Sexuality when he suggests that we will find the answer to the question of what makes us so persistent in our demand of sex through writing the history of the “will to truth.”35 This description is to suggest that ideas do not spontaneously come into existence, so a thing like the need to know the truth of sex must have come from the past. In this way, historical data can be used to create a picture of the present in a historical epistemology and to problematize the current moment.36

Thinkers like Foucault, Friedrich Nietzsche, and Ian Hacking are all credited as being the centre of the genealogy movement, suggested by Koopman to be “philosopher-historians,” but engaging with philosophy-history alone leaves a large gap in the telling of the narrative of the youth criminal justice system.37 There is a tendency in genealogies to address the social state of the moment without putting that moment into a wider context, leading to a kind of instantaneous snapshot. By applying the methods of historical sociology as well, I will address the tendency to snapshot historical instances, as sociology tends to be more interested in observing the broader context of the moment. To this end, this project engages in historical sociology methods by framing the relationship of subjective activity and experience with “social organisation as something

35 Foucault, supra note 17.
36 Michel Foucault, “Introduction,” in The Normal and the Pathological, by Georges Canguilhem (New York: Zone Books, 1989); Koopman, supra note 31 at p 2; In the case of this research, the near-present.
37 Koopman, supra note 31 at p 1.
that is continuously constructed in time.”  

Historical sociology examines the “process of construction” as a primary concern while taking “temporal sequences seriously in accounting for outcomes,” making it ideal to develop the construction of an institution like youth criminal justice. The genealogical and historical sociology approaches stitch together cleanly as they both proceed from the point of subjective experience and suppose that the present is “stumbled upon” as each choice opens and closes future possibilities, “leading to no predetermined ending.” This combination of methods is further developed by Mitchell Dean, who suggests the Foucauldian genealogies are an essential guide to doing historical sociology. Foucault’s method provides originality and helps sociology be “an effective, open-ended, multi-focused, present-relevant discipline,” while historical sociology serves to make Foucault’s contributions comprehensible by a wider range of readers and saves them from “ill-informed criticism.” By combining the broad view of historical sociology with the narrative of genealogy, I will provide an account of youth justice’s past to explain its present.

**Literature Review**

Previously, I discussed the core of the tension between the normalising methods and modes of operation of the youth criminal justice system and the public’s understanding of the justification of the story of the social contract. This project is unique

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39 Abrams, *supra* note 24 at p 16; Skocpol, *supra* note 38 at p 1.

40 Skocpol, *supra* note 38 at p 2; Metaphysics refers to this understanding of progression as the Possible Universe model of time and this has a large impact on why I understand these two methods as complimentary – I am genuinely excited that the class I took on the “Metaphysics of Time” has now had some benefit.

in the way it considers youth criminal justice in the form of an on-going narrative to explain how the present model came to be. My project joins on the back of the field of youth criminal justice in Canada - a field that thrives on the research of those studying the Acts which comprise the youth criminal justice system and the role of children and youth in our society. To these fields, I add the considerations of social contract theory and the literature on normalisation and discipline. In this section, I will be giving a more in-depth outline of the literature surrounding social contracts, the liberal subject, youth criminal justice, and the role of youth and children.

**Youth Criminal Justice**
Several scholars in Canada have published extensively on youth criminal justice, but primarily research has been structured around the individual Acts. In this way, all three Acts have their share of discussion, though most centre or begin from the *YOA* and the literature on the *YCJA* is often limited to its beginnings. What is missing from the literature on youth criminal justice in Canada is the ongoing story of its development and ideas, which is what this project is aiming to remedy. Regardless of format, the academic discussion of the youth criminal justice system forms an important backdrop and informs my understanding of each Act.

The *Juvenile Delinquents Act* served Canada the longest of the three Acts, from 1908 to 1982. The *JDA* was conceived alongside the child welfare system and proceeds on many of the same premises, which leads works by Tonry, Doob, and Cesaroni to consider the two systems together. The sister systems converge and diverge in exciting ways, but
they are both primarily concerned with different ways to respond to youth deviance.\textsuperscript{42} The child welfare system opts to place children in different homes and remove the child from the environment that lead to deviance. The \textit{JDA}, on the other hand, operates on a paternalistic model and calls for retraining children to perform the proper behaviour.\textsuperscript{43}

This conversation transitions into one focused on the development of the \textit{Young Offenders Act}, which began its tenure in 1982 and was very quickly subject to a large number of critiques. Within only a few years of the \textit{YOA}'s inception, there was already a push to revise the Act; this pushback was a discussion in which scholars were very interested. The movement of ideas in the \textit{YOA} pulled it away from its predecessor's tight link with child welfare, and once again, Canada had to consider anew what to do about youth criminality. Ultimately the debate regarding how to respond to youth crime becomes a question of how do we currently punish youth and how ought we to punish or manage youth?

Authors participating in the debate all seem to agree on the argument against the theory endeared to a large number of politicians and legal professionals, deterrence theory of justice.\textsuperscript{44} Anthony Doob suggests that for the courts of Canada, “faith [in


\textsuperscript{43} “The Evolution of Juvenile Justice in Canada” (Canada: Department of Justice Canada, 2004).

\textsuperscript{44} Anthony N. Doob and Cheryl Marie Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis,” \textit{Crime and Justice} 30 (2003): 143–95.; Stephen J Pfohl, \textit{Images of Deviance and Social Control: A Sociological History} (Long Grove, IL: Waveland Press, 2009).; Deterrence theory of justice assumes a rational actor participating in crime to fulfil some rational goal and thus making the punishment something which removes the gain from crime and will serve to reduce crime. It began with the work of Cesare Beccaria but has largely been absorbed by carceral logic, replacing all crime-specific punishments with incarceration for differing periods of time.
deterrence theory] may be stronger than facts,” suggesting that while facts and statistics demonstrated that deterrence theory is ineffective - particularly in youth - the Canadian courts continue to rely on deterrence logic out of simple faith.\(^{45}\) It is of interest to this project that reform theorist like Bentham and Beccaria linked deterrence theory to social contract theory in how they address crime and why the punishments are necessary; the threat of a more severe consequence is assumed to be a way to protect the aggregate of citizens from crime. While deterrence theory is treated as disproved by academics, the debate continues over what the appropriate and most effective means of punishment for youth would be, both within the literature and within parliament.\(^{46}\) Some of the different propositions for the punishment of youth who participate in crime are based on ideas of rehabilitation, like the “politically popular” but ineffective use of boot camps.\(^{47}\) Other methods of managing youth criminality are based on the ideals of prevention, calling for things like curfews, programming for families, or educational work on developing strong school bonds.\(^{48}\) These questions regarding methods of punishing continued through the development of the *YCJA*, while a second concern entered the conversation; how does youth crime look.\(^{49}\)

\(^{45}\) Doob and Cesaroni, *supra* note 42 at p 248.


\(^{47}\) Doob and Cesaroni, *supra* note 42 at p 253.


Once the conversation turned to what youth crime looks like and what kind of crime of which it is primarily composed, observations of quantitative depictions of youth crime became very important. It became a necessary legitimating stage to discuss the increase or decrease in youth crime rates, particularly as the debate progressed through the 1990s – the literature and the public debate demonstrate this shift. The individual depictions are not of much interest to this project, except where there is a significant difference between what is being reported by statistics agencies and the language of public outcry. What is important about the conversation on statistics in this context is how quickly widespread it became – quantitative data is nearly absent through the literature through the JDA and YOA, but it is a language the underlies all the conversation on the YCJA.

**Social Contracts and Individual Autonomy**

Social contract theory has a long history of existing solely as a thought experiment, beginning with its earliest theorists. That phantasmal existence does not change when considering criminal justice, where I understand social contract theory as a lens through which we can view responses to crime. As an underlying story, the social contract is often used to justify the punishment of crime through deterrence theories of crime – by demonstrating the punishment for breaking the contract, the state ensures that the crime does not happen again.

The conversation on social contracts has been happening since the 16th century, with its earliest written rendition found in the works of Jean Bodin in 1572, *Les Six Livres de la République*. The most commonly cited beginning of the social contract followed

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50 Doob and Cesaroni, *supra* note 42; Tonry and Doob, *supra* note 42.
nearly a hundred years later when Thomas Hobbes wrote *Leviathan*. Despite the gap, the basic understanding of a social contract remained reasonably constant and continued to do so through many more renditions. The public representation of the imagined social contract in the youth criminal justice appears closest to the rendition put forward in Jean-Jacque Rousseau’s *The Social Contract*, which proposes the role of children as ‘citizens in training’ and places its citizens as individual subjects of an aggregate common good.

One fundamental tenet of any social contract is that the individual citizen has full independence and the subjective will to make rational decisions. The independence and subjective will combine to make each individual an equal threat to each other individual. This comment is not to suppose that there is no individual difference in capability, but rather to suggest that every individual is capable of making independent choices that may be detrimental to another being. The conception of will and threat is echoed in discussions of the commons – if all individuals are independently able to take things from the commons and add their labour, they must be capable of making autonomous decisions to pursue unique experiences. In his *Discourse on the Origin and Basis of Inequality Among Men*, Rousseau proposes that the worst state of social being comes about by individuals running amok with poor decisions and that the way to have a perfect society is to teach its individuals how they ought to make decisions for the good

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56 The commons are an idealised shared space found in multiple social contract theorists including Locke and Rousseau. Locke imagines a space in which all possible resources are available for any individual to claim so long as they leave as much and as good for every other individual. Rousseau’s common is the public space shared by citizens whenever they are not in their own private spaces.
of all.\textsuperscript{58} This model has the basic understanding that while the society may exist collectively, the autonomous decision-making unit is the individual living in the society. This autonomous being serves social contracts in several ways – an autonomous individual can consent to the social contract, and an autonomous individual can be held responsible for their actions.

I discussed consent earlier, but I will spend a bit more time examining the importance of consent in this section. In the most basic rendition, to participate in a social contract, the citizens give up their power to the state so that the state will govern and protect them. For Hobbes, the citizens gave power to the Leviathan; for Rousseau, the citizens bowed to and participated in the general will.\textsuperscript{59} The state is obligated to use the power the citizens surrendered to govern and protect those citizens, be that through protection of property, protection of liberty or protection from a state of war.\textsuperscript{60} For the citizen, by giving up their power and joining the social contract, they have agreed to another clause – should they break the social contract, the state has the ability and obligation to punish the citizen to protect the social contract. Importantly, the act of giving up power is a wholly voluntary act, which necessitates an autonomous individual capable of making such a decision. How the social contract imagines consent garnered is different in every philosopher; Hobbes’ Leviathan is perfectly able to gain consent through violent coercion, while Rousseau’s citizens learn to consent. Each is an image of the relationship of the citizen to the state. The Hobbesian state is a symbol of force in that it keeps the

\begin{footnotesize}
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\item\textsuperscript{58} Rousseau, \textit{supra} note 2.
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peace by holding all the violent power and the legitimate capacity for the use of violence. Thus, as the state is always necessarily just, the use of violent coercion by the state is always justified. For Mill, the state takes on a role of ensuring freedom by intervening when a citizen impedes on another's freedom. Consent, in this case, is framed as ‘forced to be free' and thus, the consent is minimally tacit and potentially coercive. The final example I will offer draws from Locke’s *Second Treatise of Government*, in which Locke’s social contract exists to do little but protect the right to property by being a legitimate body to uphold capital-based contracts. The social contract presented here also requires the use of legitimate violence but places the state in a position to be called upon but not actively involved in civic affairs. Reflecting this, Locke calls for either explicit or tacit consent, suggesting that living within an area or taking from the commons and electing not to leave is equal to explicitly agreeing to live by the contract. While each of these models of a social contract illustrates a very different kind of society, they all maintain a single core tenet – the autonomous individual consents to be governed.

The second component of social contract theory, the autonomous individual assumes that an individual is responsible for their actions. They must be autonomous and responsible for supporting the fundamental choice to consent or not to consent. This responsibility creates a space where the state assumes that all individuals in a society can and will abide by the rules the governing body decides upon and that failure to do so justifies and calls for punishment. The criminal law assumes this particular tenet by

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proceeding with punishment whenever a citizen commits a crime. When a citizen commits a crime, they have committed an act that goes against the mandated good of society. Any social contract model has at its centre the goal to protect society, which leads to a representative of the state declaring an appropriate punishment from the citizen. Without a story of a contract and the public’s consent to the contract, the adult criminal justice system would need to rely on a different form of justification, as it cannot claim to be protecting society and the common good. So long as the social contract story is accepted, however, the criminal justice system moves forward by proposing that the individual previously accepted the conditions of living in such a society and willfully disobeyed them. This story assumes the individual is capable of being entirely responsible for their actions and is therefore also entirely responsible for the consequences.

The Role of Children and Youth
Several things complicate the role of children and youth in a social contract: the role youth hold is largely within the logic of exchange, youth justice acknowledges that youth have a lower capacity for responsibility than adults, and the category of youth is a very grey knowledge space. This section will briefly outline these three particular complications. The first complication I will discuss is the roles of diminished moral culpability and doli incapax in youth criminal justice. These concepts both serve as an acknowledgement that youth are not fully capable of the responsibility assumed by a social contract model. The two concepts serve to create a stark divide between what

65 Hobbes, supra note 10 at p 289; Rousseau, supra note 2; Mill, supra note 59; Locke, supra note 14; Bodin, supra note 10.
Canadian criminal law considers a child and what it considers a youth.66 Under the law, until and including the age of 11 the child is considered ‘incapable of evil,’ or doli incapax. This presumption does not apply in the same way for youth, as “the older the child… the easier it is to prove guilty knowledge.”67 This particular concept stemmed from English common law but became a model throughout western legal systems. The role of doli incapax is twofold. First, it creates a category of the child as those who cannot be prosecuted under any circumstance, those under twelve years of age.68 Regardless evidence of actus reus, a child may not be prosecuted as the system universally assumes that the child cannot have mens rea. The second role of doli incapax is to establish an age of criminal responsibility as those who are twelve years and over.69 Doli incapax is applied somewhat informally to the youngest of the youth, aiming to place the burden of proof on the prosecution to prove beyond a reasonable doubt that the young defendant “committed the actus reus with the necessary mens rea.”70 Part of the role of doli incapax is to allow the youth’s surrounding circumstances and background to enter the court in a way that has no equal in the adult criminal justice system. It is as a method to consider the ability of the youth to understand the crime truly.

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66 For the sake of clarity, during my discussion and analysis, I will adhere to this age division to define child (11 and under) and 12-17 will be considered youth. ‘Young people’ will be used as a collective term for the two groups. The places where these rules of terms may not apply are in quotations. However, through the narrative of youth justice, I will use the terminology that reflects the understanding of the time, so as to not detract from the meaning contained in the time and space.


69 ibid at p 306.

70 Bandalli, supra note 67 at p 114.
The concept of diminished moral culpability overlaps with the informal application of *doli incapax* in regards to its use in youth justice.\(^71\) It is considered by Canadian law to be a principle of fundamental justice, as "young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgement."\(^72\) While diminished moral culpability is sometimes applied to adults for reasons such as mental illness, the concept of diminished moral culpability serves as a way to distinguish between the categories of youth and adult by suggesting that youths are fundamentally less capable of assuming responsibility for their actions.

Previously, I briefly outlined why the role of youth in a social contract imagined by the criminal justice system would be problematic by briefly looking at consent and diminished moral culpability. Another such problem is that no social contract theorist has directly discussed the role of children in a social contract except Rousseau. While this may point to a merely different understanding of what constituted a child in past theorists like Hobbes, Locke, and Mill, this gap is a bit more telling in recent theorists, including John Rawls and Hannah Arendt.\(^73\) Social contracts do not conceive of children as members. Even Rousseau, the only theorist with a role for young people, depicts the


\(^{72}\) D.B., *supra* note 5 para. 2.

role of children as not yet full citizens, but rather “citizens in training.” He argues that there is a proper way for training citizens and that is the role of children within a social contract to be so trained but to be otherwise separate from the social contract. This view of ‘learning but separate’ aligns with the idea of diminished moral culpability and doli incapax as they are present in the current youth criminal justice system, which serves to demonstrate the tension this project is working to expose. In a role of ‘learning but separate,’ young people cannot be held to the obligations of a legal citizen, but they can be constructed into legal citizens.

The final area of complication I will discuss is that the category of youth exists in a grey zone of knowledge. It is a condition of being seemingly defined more by what it is not, rather than anything that it is – youth are not able to assume full responsibility because youths are not adults, but they cannot be assumed to be fully capable of innocence either because they are not children. Aside from legal lines, the difference between an eleven and a twelve-year-old or the difference between an eighteen and a nineteen-year-old is largely intangible. Phil Cohen suggests that while there is an entire field of youth cultural studies, the actual category of youth is “imaginary,” expressing the kind of arbitrariness that seems embroiled in the question of youth.

While many models exist to understand what it is to be a ‘child’, much of the discussion ends with only an adult/child distinction, which does not hold for the current

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74 Rousseau, supra note 2 at p 61-63.
75 Rousseau, supra note 2.
legal system.\textsuperscript{77} These models are largely concerned with the nature of childhood or the concept of childhood and how that concept has changed over time.\textsuperscript{78} The most substantive discussion of ‘youth’ was from Gillian Valentine and Philippe Ariès, yet even those seemed to exclude youth from the basic model of the nature of children.\textsuperscript{79} Instead, Valentine poses the model of the Apollonian child and the Dionysian child and further questions adults’ reaction to youth as a threat.\textsuperscript{80} Ariès discusses the child as an evolving category, discussed first by the 17th-century middle class. As far as studies of categories or master statuses, youth as a unique category seems to be missing from the conversation.

Youth are not missing from the conversation of crime and deviance, however. As soon as a distinct age is included (most commonly 14 to 18 years), ‘youth’ becomes a subject of many discussions of crime and deviance. Nearly all the substantive depictions of youth as a category I located involved both youth and crime or deviance.\textsuperscript{81} In a criminal legal context, the categories of ‘youth’ and ‘child’ have taken on substantive

\textsuperscript{80} Valentine, \textit{supra} note 79.
themes, for instance, children as delinquents. Assigning these themes is challenged by authors like Bernard Schissel, Karen Foster, Dale Spencer, Alan France, and Edward Haddon, who suggest that the discourse has endowed the category of youth with qualities that are not innate to it, such as deviance and risk.

The Liberal Subject

While the public understanding of youth criminal justice through the frame of a social contract is easily complicated, it leaves space to ask in what ways does Canada justify youth criminal punishment. I propose that space is filled best by examining the operations of youth justice and the goals of youth criminal justice. While the goals of the youth criminal justice system have demonstrated shifts over time, some goals of youth justice remain more consistent. The goals of constructing youth into proper citizens are reflected through all of the acts, though the means of doing so and what a proper citizen is changes. The YCJA explicitly lists these goals, including two tenets which demonstrate the proper citizen assumed by the Act and mode of construction the Act calls for:

“the youth criminal justice system is intended to protect the public by… (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,”

and

“the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:…(i) rehabilitation and reintegration… (ii) fair

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82 Russell Charles Smandych et al., eds., Dimensions of Childhood: Essays on the History of Children and Youth in Canada (Winnipeg: Legal Research Institute of the University of Manitoba, 1991), p 2; Of note, all the children depicted in this section were between the ages of 13 and 18, which places all of them into the category of youth in terms of the youth criminal justice system.

and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity.\textsuperscript{84}

The wording of both of these goals illustrates that the protection of the public requires the re-training of the deviant young people into proper, normalised subjects.

Earlier, I stated that the liberal subject is self-constructed while being mediated by an authority figure. In this conception, the liberal subject is knowable as a malleable human body and from that “object to be manipulated and controlled.”\textsuperscript{85} The subject is contained within and shaped by the culture of the aggregate society and is socially shaped through the internalisation of norms and regulations.\textsuperscript{86} As an individual liberal subject, one can choose between modes of living within a society, but each mode will be regulated by the “modes of manipulation.”\textsuperscript{87} The modes of manipulation are an operation of bio-power enacted on the subject as a site of “sustained political attention and intervention,” which seeks to train the subject to be self-regulating.\textsuperscript{88} Contrary to the fully subjective will expected by a social contract theorist, a liberal subject’s will is moderated, even by their own internalised norms. The Foucauldian experience of being ‘subjective’ portrays an individual that is ‘subject of’ or ‘subject to’ something, opposed to the social contract’s autonomous and open subjective free will.

Through the site of the subject, some understandings of the state resembling those of a social contract play out through the state’s relation to Foucault’s liberal subject; he

\textsuperscript{84} Youth Criminal Justice Act, SC 2002, c 1; Refer to Appendix A.

\textsuperscript{85} Rabinow, supra note 17 at p 17.

\textsuperscript{86} Foucault, supra note 17.

\textsuperscript{87} Rabinow, supra note 17 at p 8-9.

illustrated how our culture produced different subjects, which includes the role of the state as a new political entity. The state has been developing since the Renaissance to be both “totalising” and “individualising,” and the power of the current state lay in its ability to objectify the individual subject and concern itself with the needs of the aggregate. This new state is interested in introducing economy and order through every aspect of social life. The care of the population is a primary concern of the state, but the care is articulated through the manipulation and control of the human body, simultaneously individualising and objectifying the subject. As an individualised and objectified being, a young person is much easier to correctly train. Thus, the modes of operation of youth criminal justice adhere to practices of normalising and regulating.

89 Rabinow, supra note 17 at p 14; The similarities between the understandings of the state may serve to indicate why the public perception of youth justice reflects the social contract model as much as it does. In large swaths, the justifications of a social contract and normalising a liberal subject can read very similarly but have very different outcomes and modes of operating. 90 Ibid.
The Story of the Youth Criminal Justice System

Genealogy asks researchers and readers to consider where something comes from to discuss how it exists now. Foucault does this in *Discipline and Punish*, offering accounts of how incarceration as punishment came to be as it is. Historical sociology asks us to step away from the individual cogs of the engine and observe the train and the tracks it follows. In both of those traditions, this project will begin by telling the story of the youth criminal justice system. To develop the youth justice system as it is currently known, I will start from the beginning of the story.

As I suggested earlier, the category of the child is not static; Philippe Ariès argues that the 17th-century middle class discovered the category of the child. Gillian Valentine reflects this sentiment by suggesting the child as we know it now was an invention of the Enlightenment. A child previous to the Enlightenment period was a slightly demonic being considered Dionysian – not necessarily inherently evil, but chaotic and capricious. They were considered to have a neutral existence, straddling a precarious line between life and death when infant mortality rates were highest. As the Enlightenment period continued and the rate of infant mortality began to decrease, more attention focused on the child. The child was then depicted as untarnished and innocent, only to be corrupted by society. As society viewed children as more innocent, deviance

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91 Foucault, *supra* note 18.
95 Ariès, *supra* note 79.
96 Ibid; Valentine, *supra* note 79 at p 3; Corsaro, *supra* note 78; Zelizer, *supra* note 78.
in children became a taboo that needed to be corrected and addressed, and thus the public began the conversation of how should we address with youth crime.

The backdrop to consider for the youth criminal justice system in Canada is that much of the Canadian criminal legal system developed from the British tradition and the French tradition. To address this, I will be beginning the story of youth criminal justice in England, considerably before youth were treated separately from adults, but at the same time as the idea of the innocent child was beginning to take hold. This story starts in England with the use of *doli incapax* in the mid-18th century. The understanding of children at the time was that children were born pure but were corrupted through their lives and eventually reached a tipping point; the thought was that innocence had a point of no return from which the young person was too corrupted ever to be considered fully clean again. For criminal justice in England, the tipping point to be considered capable of doing evil was seven years old, at which point one was expected to face penalties. These penalties could be less harsh up until the age of 13, attributed to an extension of *doli incapax*, but the “protection from impunity” was capable of being dismissed by providing evidence that the child was sufficiently capable of understanding their actions and their consequences. Thus, many children under the age of 13 were convicted under English criminal law and given the same punishments as adults who had committed the same crime, including incarceration in the same facilities and hanging.

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97 Department of Justice Canada, *supra* note 43 at p 1.
99 Department of Justice Canada, *supra* note 43 at p 1.
100 Ibid; I use the term child here which significant hesitation. The depiction of the teen or youth as a separate entity does not really come to be until the 1950s, so child seems most appropriate in context, despite being in the same age group I will call youth.
14, one was considered unquestionably a corrupted adult, and therefore, the accused had no defence of doli incapax. Criminal law considered them full adult citizens.

At the same time that the model of the innocent child was taking traction in English criminal law, there was a mass migration of colonists from England to Canada. The colonisation of Canada contributed to a larger number of children being considered “at risk for delinquency,” as many children lost parents to sickness and starvation on the 2- and-a-half-month-long sea journey. 101 “A ship that landed in Halifax in 1752 had eight orphans on board whose parents had died during the voyage; additional deaths – no doubt all due to shipboard ailments – soon increased this number to fourteen.” 102 Orphaned children were often left on their own once disembarking in Canada, which would leave them to face difficulties finding food, shelter, and resources. The presence of military bases in each settlement further complicated the lot of child colonists. In 1761, the Acting Governor of Nova Scotia Jonathan Belcher wrote a report, making a “special note of the number of children who had been deserted by their parents due to the great concourse of dissolute abandoned women, the regular followers of the Camp, Army and Navy.” 103

Between death and desertion, there was a rise in the number of young people in precarious circumstances, which in turn leads to the beginning of independent and informal child agencies in Canada. By the 19th century, one agency in York was responsible for the care of 535 orphans over a period of 2 years. 104 By the time the Irish famine immigration and typhoid crisis created a second mass influx of children, orphans

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101 Ibid at p 2-3; The language of “at risk” was not present in the lexicon of youth delinquency until the late 1980s, but it is the language used in the Department of Justice report.
102 Ibid at p 2.
103 Ibid at p 3.
104 Ibid.
flooded individual and religious agencies. The last straw in developing the role of youth in the criminal justice system in Canada post-Enlightenment was the action of the English and French courts and social agencies. Crown agencies sent many children who were considered troublesome or delinquent to the colony, along with “society's unwanted members, ranging from criminals to poor… [the] inhabitants of slums, jails, [and] poorhouses,” often as indentured servants. More than 95,000 children are documented to have come to Canada between 1873 and 1903, having been sponsored by British child immigration agencies.

Surviving reports suggest that similar to current trends, crime by young people were most often petty theft, vandalism, or other petty crimes like brawling and swearing. There is an apparent gendered aspect to charging crimes, as the Department of Justice report makes evident. It was common to charge young women with abortion or infanticide; both were regarded as more serious crimes, and both carried a heavy stigma. The report further discusses the tendency of young men to be charged with brawling, larceny, trespass, and disorderly conduct, which were all considered petty. Only those young men involved in the fur trade seemed to be considered truly concerning, as “[the] volatile combination of fierce competition for furs together with the generous consumption of liquor created a situation wherein theft, assault, brawls and murder were common features.” There are, however, cases of more serious crimes being committed by young people which have been documented, including:

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105 Ibid at p 2.
106 Ibid.
107 Ibid at p 3.
In 1843 Grace Marks, a 16-year-old servant girl working on a farm outside Toronto, helped a male servant murder the housekeeper and their employer. In 1849 an 11-year-old adopted boy living on a farm in the County of Peterborough hacked his 5-year-old adopted sister to death with a hoe because of jealousy of the attention paid to the little girl by the adoptive parents.\footnote{Ibid.}

The treatment of such young people when they committed a crime was the same as the treatment of an adult. The criminal justice system viewed children and young people past the age of \textit{doli incapax} as effectively “little adults,” so courts awarded penalties often regardless of age.\footnote{Ibid at p 5.} For example, “on 19 January 1649 a young girl of 15 or 16 was hanged for theft in the town of Quebec.”\footnote{Ibid.} In some ways, there was consideration of age in penalties awarded – it was more common to whip children than to execute them – but the penalties were still severe by current standards. The penalties are reported to be inconsistent – a report by André Lachance discussed the punishment of a 13-year-old girl confined for three months and a 14-year-old girl confined for six years.\footnote{Ibid.} In communities without jails or detentions, it was common to employ corporal punishment or humiliation-based theatrical punishments like lip-slitting for repeated swearing. As the population grew and more prisons constructed, the theatre of punishment shifted to comply with the logic of prisons, and by the 1835 opening of the prison in Kingston, magistrates imprisoned young people with little to no hesitation.\footnote{Ibid at p 7; Foucault, supra note 18; Pfohl, supra note 44 at p 85-95.} The Brown Commission report in 1849 discussed at length the extreme punishments enacted in prison with no consideration for age.\footnote{Ibid; Bob Gaucher and John Lowman, “Canadian Prisons,” in \textit{Comparing Prison Systems: Toward a Comparative and International Penology}, ed. Robert P. Weiss and Nigel South, International Studies in}
corporal punishment… and feeble attempts at rehabilitation.” While the Brown Report did have a limited impact on the prevalence of corporal punishment within the prison walls, the punishments remained within policy until 1972.

J.J. Kelso and the Era of Child-Saving

In June of 1891, many upper-class homes in Toronto received notices, inviting them to a Public Meeting at the Y.M.C.A. Lecture Hall on Friday, July 3rd sent by then-reporter John Joseph Kelso. The advertised topic of the meeting was “the advisability of organising a Children’s Aid Society and Fresh Air Fund combined.” The invitation marked the inauguration of the group known as the Toronto Humane Society: A Society for the Prevention of Cruelty to Animals and Children, but it was not the first of such notices had been delivered nor the first action Kelso had coordinated.

Kelso’s story as a child crusader begins a few years earlier. Following one interaction with two young children begging on a street corner, Kelso had sent out for a collection to establish the Fresh Air Fund in February 1887. After the collection went exceedingly well and the collection established a program for sending young people out on trips to the country, Kelso moved on to a larger scheme – addressing cruelty to children and childhood delinquency. These invitations requested the attendance of those


114 Weinrath, supra note 113.
115 Ibid.
117 Pamphlet by John Joseph Kelso, 1887, MG 30 C97, Vol 36, File 248, John Joseph Kelso Fond, Library and Archives Canada, Ottawa, Ontario, Canada; Andrew Jones and Leonard Rutman, In the Children’s Aid: J.J. Kelso and Child Welfare in Ontario (Toronto ; Buffalo: University of Toronto Press, 1981); Refer to Appendix B.
interested in addressing things such as crime in young people, education, and the establishment of industrial schools. The meeting on July 3rd, 1891, had as its mandate that there was “need of a strong Society to deal with all matters affecting neglected or criminally-disposed children." The invitations specify that while all members of the household are welcome, the women of the household are particularly welcome. Once at the meeting, guests are asked to consider what it is to be a child. What does a child know? What can a child be expected to do? How, as a society, ought the members help correct children? At one such meeting, Kelso gave an address declaring it morally wrong to punish children for crimes “they but faintly understand, and to which they have been trained or driven by immoral parents or guardians, or lack of guardianship.” The people who joined this cause came to be known as the Child-Savers.

Though declared non-denominational, child-saving in Canada has a distinct flavour of Christianity and often relies on tenets of charity and goodwill. The movement called for delinquent youth to be taught correct behaviours through education and better parenting. This call has the complication, however, of having to cast a model of the proverbial poor parent. Kelso documents his thoughts on the matter in the late 19th century.

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118 Industrial schools employed orphaned or abandoned children to produce factory-made goods on assembly lines. They are now understood to be cruel but were viewed as a way to teach underprivileged children how to contribute meaningful to capitalist society.
119 Kelso, supra note 117.
120 This is only one of many instances in which gender has an important role in the conversation of youth criminality, as demonstrated by role of gender in crimes charged above. The roles of gender, race, and disability will be something I may occasionally point to but will not engage with fully. That is outside of the scope of this project and will be the subject of further exploration in later projects.
century, describing in a journal the lot of a child who had too young of a mother. He describes the child as necessarily delinquent or possessing poor mental capacities, owing not to any inherent trait of the child but to “the mother [being] undeveloped in body and impure in mind.” The largest factor Kelso and the Child-Savers identify in the production of delinquency is a poor maternal parent. This understanding lent itself well to the role child-saving began to play in the creation of more established child welfare agencies and home-finding agencies.

In 1880, the Toronto Humane Society took its first shot at entering the political arena when Kelso presented to the Royal Commission regarding prisons and reformatories on November 14. By 1893, the Child-Savers had gained enough traction to step from the social sphere to the political sphere. The group lobbied Parliament for a law to defend children from cruelty as a means to address neglect and abuse. Parliament passed the “Children’s Charter,” and later that same year the Act for the Prevention of Cruelty to and Better Protection of Children passed. This Act created the position of a Superintendent to oversee the care and welfare of Ontario’s children. With the public’s wide acceptance of his child-saving views, Kelso was the ideal candidate. He was appointed Superintendent of Neglected and Dependent Children by Premier Mowat in 1893.

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124 Prior to the creation of the JDA, most child welfare agencies did not find foster homes for children and instead placed children in institutions and orphanages. Often local chapters of Child-Savers elected to find foster homes themselves for children identified by child welfare agencies.
125 Jones and Rutman, supra note 122 at p 3 of chapter 3.
126 Ibid at p 58-59 of chapter 3.
127 Ibid at p 60 of chapter 3.
The provisions of the *Act for the Prevention of Cruelty to and Better Protection of Children* gave voluntary child welfare societies much more power to remove children from the home if volunteers felt the homes were neglectful or abusive; this practice established a formalised use of the foster care system.\(^{128}\) In the early years of being superintendent, Kelso strived to found recognised child welfare agencies across Ontario and develop a public relations campaign to fund the pursuit of child protection.\(^{129}\)

While the Child Saver developments to child welfare quickly gained recognition, Kelso struggled to gain traction on the side of child delinquency, despite how connected the two are in his movement. In 1893, visiting Chicago for the World Columbian Exposition, Kelso spoke about the progress Ontario was making on the treatment of children and spent a great deal of the talk discussing progress towards entirely separate juvenile courts in Ontario.\(^{130}\) During the address, Kelso suggested that courts were already moving in the direction of juvenile-only courts, “conveying the impression that separate courts for children were an accomplished fact.”\(^{131}\) At the time of the announcement, separate courts were not yet a reality, though not for lack of effort and advocacy on the part of Child-Savers. Kelso’s statement was the first documented announcement on the mission Kelso and his Child-Savers had embarked on a year previous when they began to lobby Minister of Justice, Sir John Thompson to introduce separate trials for matters involving neglected and delinquent children.\(^ {132}\) The introduction of separate trials would go a long way towards addressing the critiques in the

\(^{128}\) *Ibid* at p 59 of chapter 3.

\(^{129}\) *Ibid* at p 99 at p 1-6 of chapter 4.


\(^{131}\) Jones and Rutman, *supra* note 122 at p 72 of chapter 4.

\(^{132}\) *Ibid* at p 68 of chapter 4.
1891 Ontario inquiry report, which directed 16 of its 48 revisions specifically at the treatment of juveniles. These included a call for industrial schools in every city, the recommendation to separate young people aged 14 and younger from the ordinary criminal court and to address such young offenders privately. The Minister’s expressed support and subsequent revision to the Criminal Code is the first legal indication that the image of youth was once again shifting. The revision stated:

The trials of all persons apparently under sixteen years shall, so far as it appears expedient and practical, take place without publicity, and separately and apart from that of other accused persons, and at suitable times to be designated and appointed for that purpose.

While progress is visible in the increase in age considered young people and the acknowledgement of specific needs for trials of young people, Kelso expressed his disappointment at watching a trial in an article for the Toronto Mail on July 8. He found that there was little in the way of a mandate to enforce the provision and most judges deemed such accommodations impractical and slow.

The Exposition in Chicago was also where Kelso met Harvey B. Hurd, the person credited with drafting the first juvenile court legislation in Illinois, later appointed the founding judge of the Illinois Juvenile Court established in 1897. It is the first such institution to be found in the United States, and lent strength to Kelso’s campaign. The campaign came to a head in 1894 when Kelso and the solicitor of the Toronto Humane

133 Department of Justice, supra note 43 at p 16.
135 Jones and Rutman, supra note 122 at p 70 of chapter 4.
136 Ibid at p 73-74 of chapter 4.
Society attempted to intervene in the case of two girls charged with larceny, which was
denied by the magistrate on the grounds of expediency.\textsuperscript{137} Regardless of the rejection of
the magistrate, the conversation in public and Parliament led to the introduction of the
Youthful Offenders Act in 1894, which calls for the full separation of young offenders
from “older offenders and habitual criminals, alongside a further amendment to the
Criminal Code.\textsuperscript{138} Despite once again giving the image of apparent progress, it is not for
another decade that separate trials truly become policy in Ontario.

While fighting the legislative battle with the Ontario courts, Kelso also
approached the problem of youth in prison in two practical ways; establishing
guardianship alongside industrial schools and diverting juvenile boys from Toronto’s
central prison. The first action was to have legally declared, in 1900, that inmates of
industrial schools would return to their parents’ or a foster home’s guardianship at the
end of three years. This transfer of guardianship from the school to an external guardian
established the tradition of sentence lengths in the youth criminal justice system.\textsuperscript{139}

The second approach served to protect children from sentences in a way that was
highly effective, if questionably legal. Reportedly, he carried out a scheme with a
Toronto-based warden who was employed at the central prison in Toronto to redirect
young boys from the prison to willing foster homes. As it was common practice to send
children through the central prison on to reformatories and industrial schools, the warden

\textsuperscript{137} Ibid at p 75-76 of chapter 4.
\textsuperscript{138} Ibid at p 77-78 of chapter 4; Department of Justice, supra note 43 at p 18.
\textsuperscript{139} Amendment to the Industrial Schools Act, “Amendment,” 1900, MG 30 C97, Vol 36, File 312 Legal
Aspects, John Joseph Kelso Fond, Library and Archives Canada, Ottawa, Ontario, Canada; Refer to Appendix C.
would have the opportunity to alert Kelso to any incoming juveniles, who in turn would attempt to locate a foster home to take in the child.\textsuperscript{140} This subversion of policy would serve as a base for the development of the \textit{JDA} and would inform the way the state would interact with young people for nearly a decade.

The \textit{Juvenile Delinquents Act} and the Paternal State

All of these practices and publicity came together in the \textit{Juvenile Delinquents Act}, which calls for the state to act as a disciplinarian parent or adhering to a doctrine of \textit{parens patriae}.\textsuperscript{141} This Act served to develop the first juvenile-only court in Canada and made legal stipulations for treatment of an offender by age. For instance, the \textit{JDA} stated that an accused who is 16-years-old or younger needs to be tried in a private court, separate from any adult trials and must be kept in separate custody.\textsuperscript{142} An officer of a newly established child welfare society was supposed to be alerted and immediately connected with an accused boy under 12 years old or an accused girl under 13 years old. That officer is in charge of investigating the child’s life and offering advice to the court.\textsuperscript{143} Agencies outside of the criminal justice system were invited to weigh in on the treatment of the child. These are only a few of many places where the fingerprints of Kelso and the child-saving movement are visible on the \textit{JDA}.

\begin{itemize}
\item \textsuperscript{140} Department of Justice, \textit{supra} note 43 at p 17.
\item \textsuperscript{142} Department of Justice, \textit{supra} note 43 at p 18.
\item \textsuperscript{143} \textit{Ibid} at p 19.
\end{itemize}
The philosophy of the Child-Savers - that any behavioural issues were not inherent problems of the child but impacts of a poor environment and poor upbringing twines throughout the first Act of Canada’s youth criminal justice system. Under the *JDA*, the image of the young offender is premised on the idea of a constructed subject, one who is purely the subject of their environment and not exhibiting inherent traits. The image of the young person evokes the construction of the liberal subject in a way that is more reminiscent of training by a school or parent than through a penal method, which is evident in the concerns that dominated the Act. The Act worried about many of the same things the Child-Savers worried about, including the privacy of the young children in the court, the influence adults could exert over children, and the need for compatible punishments. As a response, the *JDA* allows for sentences at reformatories or industrial schools but also allows for fines, suspended sentences, or foster care. It assumed that children who committed crimes were more often than not children who “were more to be pitied than blamed.”\(^{144}\) By having the courts take on the role of the parent, the courts also made a similar assumption to the one the Child-Savers made – they assume a specific kind of upbringing and poor parenting. While surveys indicated problematic upbringings for many of the young people and informed the assumption, the image of the poor parent remains largely the same through the initial years of the *JDA*.\(^{145}\) Thus, in keeping with the model of parent and the tradition from which it was born, the Act declares that “every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child.”\(^{146}\)

\(^{144}\) *Ibid* at p 20.


\(^{146}\) *Juvenile Delinquents Act*, SC 1908, c 40; Department of Justice, *supra* note 43 at p 21.
The JDA served to limit the kinds of carceral punishment used for most children, but it also introduced a new kind of sentence into the Canadian legal system: the presumptive sentence. Presumptive sentences called for the transfer of a young person from the juvenile court to the adult court for indictable sentences. Thus, starting at the age of 14, for crimes like treason and murder, a youth could be charged as if they were an adult and be incarcerated with adults.¹⁴⁷ These transfers happened at the discretion of the juvenile court judge, at which time authorities would detain a young person in a juvenile institution, foster home, or juvenile shelter until their new trial. Opposed to typical adult trials, however, trials of youth in adult court were considered to be as private as the trials in the juvenile court, allowing for no public viewing and prohibiting the publication of the youth’s identity.¹⁴⁸

While the Juvenile Delinquents Act was (and is) regarded as a necessary improvement to how we criminally punish youth, it was still heavily criticised and saw more than one set of revisions. The first such revision was not a revision of the Act itself, but a revision to the Children’s Protection Act in April 1913. Kelso put forward the provision as he sought to address juvenile delinquents under the purview of the Superintendent of Neglected and Dependent Children of Ontario. The revision added section 21, “Juvenile Offenders,” which makes provisions for the treatment of children charged with offences in Ontario by the trial judge, police, and Children’s Aid Societies, beginning with:

(1) A child charged with an offence against the laws of Ontario or who is brought before a Judge under any of the provisions of the Act, shall not before trial or examination be confined in a lock-up or a police cell used for persons charged

¹⁴⁷ Department of Justice, supra note 43 at p 21
¹⁴⁸ Ibid.
with crime, nor, save as hereinafter mentioned, shall such a child be tried of have its case disposed of in the police court room ordinarily used...

(4) Where a Children’s Aid Society possesses premises affording the necessary facilities and accommodation, a child may, after apprehension under the provisions of this Act, be temporarily taken charge of by the society until its case is disposed of; and the Judge may hold the examination into the case of such child in the premises of the society."149

The revision to the Children’s Protection Act attempted to solidify the role of child welfare in the youth criminal justice system and further enforce the consideration of youth circumstances into the criminal trial of the child.

The second major revision of the youth criminal justice system was a revision to the *Juvenile Delinquents Act* itself in 1929, though its character remained relatively unchanged.150 While there are references to this revision in interest reports regarding the *Young Offenders Act*, I could not locate any documentation of the revisions themselves.151

In the early 1960s, the federal government “reassessed its long-range plan for the development of federal correctional services,” leading to the creation of a committee specifically to address the *JDA*, the MacLeod Committee formed in 1961.152 The committee submitted their report, *Juvenile Delinquency in Canada*, in 1965, drawing attention to problems including uniformity across Canada, the staffing, the location and

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149 Revision to the *Children’s Protection Act*, “The Children’s Protection Act,” 1913, MG 30 C97, Vol 36, File 312 Legal Aspects, John Joseph Kelso Fond, Library and Archives Canada, Ottawa, Ontario, Canada; Refer to Appendix D.


condition of facilities, and the policies for administering the operation of training schools. The report, once tabled in Parliament, lead to a draft bill that was circulated in a limited group in 1967 and later brought to a federal-provincial conference in 1968. The report called for more non-judicial measures, treatment of delinquent behaviours, more limitations on court powers, and the use of more sentencing options. It called for more standardised programs across Canada and mandatory pre-sentence reports. Parliament tabled Bill C-192 in 1970. The report ultimately lead to no change, outside of individual provinces like Quebec attempting their own revisions. Interested parties criticised the attempted revision as “too legalistic and punitive,” and nicknamed the draft the “Criminal Code for children.” A new committee formed in 1975 and its report, Young Persons in Conflict with the Law, generated discussion Canada-wide, culminating in the Solicitor General publicly introducing a new draft bill in 1977. The report included 108 recommendations, discussing legal representation and youth rights, minimum age (14-years-old) and protection while giving statements to police. The new bill was introduced to Parliament in February of 1980.

The Young Offenders Act and the Beginnings of Youth Rights

The Young Offenders Act is in many ways the foil of the Juvenile Delinquents Act, as the YOA was developed to address many issues that the JDA was unwilling or unable to do so. One of the first indications that the Bill C-61, the YOA, would be a

153 Trépanier, supra note 152; Department of Justice, supra note 43 at p 22.
154 Trépanier, supra note 152.
155 Department of Justice, supra note 43 at p 22.
156 Ibid.
157 Trépanier, supra note 153; Department of Justice, supra note 43 at p 22.
158 Department of Justice, supra note 43 at p 22-23.
different entity was the initial debate. While the discussion of the of the JDA reportedly lasted less than an hour in House of Common’s discussion, its successor was subject to many interest group reports and academic scrutiny. The new Act was intended to address the role of the state as parens patriae, shifting it from “a broad umbrella which allowed society to assist young people who were having a wide variety of problems,” to a legalistic response to youth crime.\(^{159}\) In the new model, a judge is intended to be a symbolic representation of the law and the embodiment of societal values.\(^{160}\) The goal of the new direction was to “balance… the due process rights of young people, the protection of society and the special needs of young offenders.”\(^{161}\)

Some aspects that separated youth from adults under the JDA remained the case under the YOA, including the publication ban. As the technologies of media had changed significantly since the early 1900s, the implementation of privacy happened through a publication ban, enacted following the court’s ruling on the Southam case in 1984. The courts ruled that a “blanket ban on publication of the identity of a young person could be justified in the new Young Offenders Act.”\(^{162}\) The maximum sentence length, introduced by Kelso’s 1913 revision to the Children’s Protection Act, was maintained the YOA with the imposition of a two-year maximum sentence.\(^{163}\) The new Act also continued to use presumptive offences, though in a more formal manner. Under the YOA, young people 14

\(^{159}\) Ibid at p 24; Canadian Pyschological Society, supra note 149; Interest group report submitted by Michel Jasmin to the Standing Committee on Justice, 1999-2000, RG14-D-4, Boxes 41, File 4, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.

\(^{160}\) Department of Justice, supra note 43 at p 24.

\(^{161}\) Department of Justice, supra note 43 at p 25

\(^{162}\) Interest group report submitted by the Canadian Broadcasting Corporation to the Standing Committee on Justice, 1999-2000, RG14-D-4, Boxes 40, File 3, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.

\(^{163}\) Trépanier, supra note 152.
years and older could be charged with a presumptive sentence if there was no hope to rehabilitate them. Finally, the *YOA* still allowed players in the justice arena to use a fair amount of discretion in the application of youth justice. These players included professionals from police officers to judges and gave the parties the opportunity to close files without taking legal action. While the discretionary powers were more formalised than they had been under the *JDA*, which was written to be broad and vague, the *YOA* allowed for the same kind of execution of power.

While the *YOA* pulls through essential threads from the *JDA*, there were a great many changes which serve to make Bill C-61 a revolutionary moment in the youth criminal justice system. Three of the most significant changes made to the youth criminal justice system with the implementation of the *YOA* was the introduction of rights into the conversation, the image of youth as individuals, and the introduction of the protection of society. In 1982, the federal government enacted the *Canadian Charter of Rights and Freedoms*, as a part of the *Constitution*. The *Charter* served to bring the individual into the conversation of politics in Canada by beginning the conversation about rights and freedoms of citizenship. It also proved to be a strong push to revise youth criminal justice, insofar as of the *JDA* “appeared to ignore the legal rights guaranteed in the *Charter.*” On April 2, 1984, the *Young Offenders Act* officially replaced the *Juvenile Delinquents Act*. As the idea of rights permeated the conversation, offenders’ rights also become a prominent point of contention. Questions regarding legal representation and

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164 Institut Philippe-Pinel De Montreal, *supra* note 15.
165 Ibid.
166 Department of Justice, *supra* note 43 at p 24.
protection of statements made to police are both framed as issues of rights, which also comments on the depiction of the imagined youth who is subject to those rights.

Contrary to the idea of the young person assumed by the JDA who was a product of their situation and wholly dependent upon an adult, the YOA imagines a youth as a fully capable individual, if not an entirely self-responsible one. This individual is subject to rights and freedoms, if not all the same rights and freedoms as adults, and “subject [to] appropriate legal measures.” This movement in the image of youth is indicative of a move to responsibilise youth in a new way – rather than being responsible for aiding the household in the way of a ‘little adult,’ the youth is reimagined to be different from adults in understanding consequences but equally responsible for their actions. The youth are subject to responsibilisation as securitization. Reimagining young people as securitized youth in a way they had not been previously – they were expected to account for their own risky behaviour and to self-regulate. If the young person behaved deviantly in this model of punishment, it was not the sole fault of background or upbringing, and the young person needed to be retrained. To account for the responsibilisation, the YOA introduces a formal age of responsibility; the newly introduced minimum age of prosecution set the age of responsibility as 12-years-old, alongside a maximum age set at 17-years-old Canada-wide.  

The role of protection of society in the YOA serves as a reflection of the image of youth at the time – youth are both responsible for their action and are now introduced as a

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168 Department of Justice, supra note 43 at p 25.
group to be feared, rather than a group to be protected. This image casts society as needing to be reassured of public security, which gives purpose to the rehabilitation of the youth.\(^{169}\) Despite the re-casting, there remains some of the spirit of the Child-Savers in opening more options to address youth crime, including fines, which embodies the shared responsibility model.\(^{170}\) Such a model claims that the offender is considered legally accountable for committing a crime, thus punishment is justified, but “society shares responsibility for causes and incidence of crime.”\(^{171}\) Shared responsibility results in society having an obligation to all of its members, which includes the victim of the crime and the offender.\(^{172}\) Ultimately, the protection of society is an equal priority to the youth being held responsible. This balance served only to generate criticism suggesting that Bill C-61 lacked clear priority or indication of importance.\(^{173}\)

While the \textit{YOA} was incredibly influential in shaping the way the youth criminal justice system looks currently by introducing such ideas as protection of society, responsibility of youth, and rights, it was also very short lived. Lasting roughly a third of the time of the \textit{JDA} (only 19 years, from 1984-2003), interest groups heavily criticised the \textit{YOA} from its inception. Many citizens and several interest groups like the Canadian Association of Chiefs of Police felt the Act was too soft on offenders, while many children’s advocates and academics outlined their concerns regarding the overuse of

\(^{169}\) Centre D’accueil la Cite des Prairies, \textit{supra} note 167.
\(^{171}\) \textit{Ibid}.
\(^{172}\) \textit{Ibid}.
\(^{173}\) Department of Justice, \textit{supra} note 43 at p 25.
incarceration as the method of punishment.\textsuperscript{174} Often found in the criticisms that the \textit{YOA} was far too soft on youth offenders was a distinct undertone of fear. The early 1990s saw a distinct shift in the discussion of youth crime, as the conversation draws attention to the danger youth crime poses to the public and new ideas of violence in youth. Instead of being assumed to be misbehaving or acting out, youth are acting dangerously.\textsuperscript{175} In one interest report from the time, Bala points to how political players mobilise fear of youth, rather than address any social conditions that may contribute to youth crime.\textsuperscript{176} The public fear was very easy to mobilise - a fact independently addressed by Schissel, Valentine, and Bala.\textsuperscript{177} The public fear became particularly tangible in the discourse of youth justice following the events of February 12, 1993, in Kirkby, England. 2-year-old James Bulger was abducted, tortured, and murdered by two 10-year-old boys, Robert Thompson and Jon Venables. Public dialogue throughout Canada, the United States and the United Kingdom centred on this act, and the young adult or teenager became the subject of intense surveillance and fear.\textsuperscript{178} Much of the media representation of youth through the 1990s sensationalised the idea of “kids who kill,” and “teen terror[s],” which served only to heighten the scrutiny of youth.\textsuperscript{179}

\textsuperscript{176} Interest group report submitted by Nicholas Bala to the Standing Committee on Justice, 1999-2000, RG14-D-4, Box 40, File 2, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.
\textsuperscript{177} Schissel, \textit{supra note} 74; Schissel, \textit{supra note} 175; Valentine, \textit{supra note} 79; Interest group report submitted by Nicholas Bala to the Standing Committee on Justice, 1999-2000, RG14-D-4, Box 40, File 2, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.
\textsuperscript{178} Cadman, \textit{supra note} 8.
\textsuperscript{179} Schissel, \textit{supra note} 84; Newspaper article, 1995, R13269, Vol 28, File 7, Chuck Cadman Fond, Library and Archives Canada, Ottawa, Ontario, Canada.
In light of both intense public fear and the criticisms of child advocates, it was merely a matter of time before the YOA faced heavy revisions. Having already been revised in 1986 (increasing sentence length for first-degree and second-degree murder) and again in 1992, the YOA faced significant revisions in a proposal presented in November 1994. These revisions included decreasing the minimum age to 10-years-old, automatic transfer to adult court for any indictable offence, and the lifting of the publication ban. While the revision was backed by many of those who felt that the YOA was too easy on offenders for its tilt to victim compensation, it was ultimately left aside in favour of a review. Thus, a short ten years after its full inception, the YOA faced its first review, beginning in July 1995 when the House of Commons Standing Committee on Justice and Legal Affairs called for a review of the Act.\(^\text{180}\)

The outcome of the review of the YOA suggested that while no one could agree on why the YOA was an imperfect bill, everyone could agree that it needed significant changes. The options were to overhaul the Act through significant revisions or to replace Bill C-61. Following that, the Standing Committee on Justice reviewed many new variations and revisions. One suggestion that gained significant traction also served to politicise the youth criminal justice system in a way it had not been previously. Chuck Cadman, a Conservative MP from North Surrey, and the then Justice Minister from British Columbia fought to put forward Bill C-68, a major revision of the Young Offenders Act. Cadman had a great deal of success mobilising the public to support the Act, as he had a very marketable story. Before entering politics, Cadman had a teenage son who was beaten and killed by other young adults. Reportedly, some of the offenders

\(^{180}\) Department of Justice, supra note 43 at p 25.
had been previously charged and released into their parents’ custody under a supervision order. Following the death of his son, Cadman became involved with the youth criminal justice system as a private citizen. Having made the leap to politics and having run on a campaign comprised of mainly youth fear, the YOA remained a central tenet of his political career. Using localised stories, he frequently rallied the Canadian public around the conversation of youth justice.

The proposed Bill C-68, later re-named Bill C-3, was backed by the Conservative Party of Canada. Cadman and other Conservative Party members suggested that the Liberal Party would not acknowledge more than minor flaws in the YOA that might be corrected, so the political debate over significant changes began. The Bill served to entangle the youth criminal justice system in politics more so than it had ever been. By taking a stance as a party on a revision of the YOA, Cadman and the Conservative Party introduced youth justice as a political conversation, very different from the bureaucratic, socially-based project it had been until that point. Youth justice was no longer a matter of a single man sitting at a desk in the corner of a government office, as it was for Kelso, and it was not a collegially agreed upon code developed by a multi-party committee. Youth justice was now a subject of visible political contention, even within multi-party

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181 Cadman, supra note 1; A supervision order is an agreement between the parents/guardians of the young offender and the judge, committing to maintain active supervision. This is intended as an alternative probation measure to a full sentence of incarceration enacted in one of the YOA revisions.

182 Presentation notes by Chuck Cadman, 1995, R13269, Vol 29, File 5 Youth Justice – Bill C-68 p.III, Chuck Cadman Fond, Library and Archives Canada, Ottawa, Ontario, Canada; Refer to Appendix D.; In 1995, Cadman worked to pass Bill C-260, which increases the penalty should guardians who have taken on a supervision contract fail to maintain active custody of delinquent children. Bill C-68 later encompassed Bill C-260.


184 Jones and Rutman, supra note 122 at p 2-3 of chapter 4.
committees. It remained a subject of political importance throughout the shift from \textit{YOA} into \textit{YCJA}.

The \textit{Youth Criminal Justice Act} and the Beginning of the Present

The \textit{Youth Criminal Justice Act} is currently the Act making up youth criminal law, having come into force 2003. Following the tradition of its predecessor, the \textit{YCJA} spent substantially more time being debated and considered than the Act before it. In the case of the \textit{YCJA}, there was debate from 1995 through to 2003, as revisionary Bill C-68 turned into Bill C-3. Topics of debate included another push to lift the publication ban, prioritising the protection of the public over the individual needs of the youth, and attempting to address over-incarceration by using alternative measures of punishment. While the Act was intended to be an entirely new approach to youth crime, balancing the criticisms of child advocates and those who deemed the \textit{YOA} too easy, the \textit{YCJA} is a reflection of the \textit{YOA}. Ultimately, the \textit{YCJA} was more of an “evolutionary” Bill than a “revolutionary” one, as it shares many of the same core tenets as the \textit{YOA}.\footnote{Bala, supra note 177.}

In the vein of the \textit{YOA}, youth are imagined to be independent and capable of full accountability and responsibility. Coupled with a new interest in alternative measures of rehabilitation, youth as a fully accountable citizen causes some new conversations regarding consent, which appears to lean into the public story of a social contract. While the \textit{YOA} seemed to understand itself as an Act by which the youth of Canada had consented to be governed, the \textit{YCJA} calls for very explicit consent when pursuing
alternative measures.\textsuperscript{186} For youth to engage in any formal alternative measures, be that community programming or rehabilitation efforts, the youth must first willingly admit to a crime and further consent to the rehabilitation or program. In this way, the \textit{YCJA} also follows the tradition of the \textit{YOA} by continuing to formalise the process through which we address youth crime, drifting farther from the situation-based response advocated for by the \textit{JDA}.

One clear difference the \textit{YCJA} had from both of its predecessors was in the new Act’s listed priorities. While the newest Act was written as a compromise between two nearly irreconcilable positions, it also states a claim on the priorities of the Acts goals. The \textit{YCJA} attempts to “respond to both the public concerns about a lack of accountability and protection from adolescent offenders,” as well as research that suggests that informal, community-based measures are more “cost-effective” than the previous responses.\textsuperscript{187} Simultaneously, it outlines its primary priority as protection of society.\textsuperscript{188} The development of priorities is an attempt to account for a major critique of the \textit{YOA} attempting to balance society and the young person.\textsuperscript{189} Here too, the \textit{YCJA} is more of a reaction to the previous criticisms than a genuinely new system.

The prioritising of the protection of society interacts with the ongoing conversation of youth in two ways: 1) it depicts youth as a source of threat society needs

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\textsuperscript{186} Interest group report submitted by Ministry of Justice and Attorney General Saskatchewan to the Standing Committee on Justice, 1999-2000, RG14-D-4, Box 41, File 4, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.

\textsuperscript{187} Bala, supra note 185.

\textsuperscript{188} Interest group report submitted by Ministry of the Attorney General (ON) to the Standing Committee on Justice, 1999-2000, RG14-D-4, Box 41, File 4, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.

\textsuperscript{189} Government fonds, RG14-D-4, Library and Archives Canada, Ottawa, Ontario, Canada.
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protection from, 2) and the language of protection of society tells a story about young people’s place in an imagined social contract in a more explicit way, while simultaneously exposing the normalising measures of the YCJA. The fear that permeated the end of the YOA and festered throughout the 1990s did not spontaneously conclude with the beginning of the 21st century. It was written into the YCJA by way of the language of “risk” and by making allowances for things that may address the public’s perceived fear. I will address the language of risk more in-depth in chapter 4, to discuss the impacts and evolution of the use of the term, but I will give a brief outline here. Before the round of 1999-2000 reports, “risk” was not a word associated with youth crime, but 1999-2000 interest group reports are all inundated with talk of risk and levels of risk. This trend displays a depiction of youth as an inherently risky kind of person to society, which betrays the fear with which Canadian society viewed youths. The newest Act seeks to mitigate that fear by including measures to make the public feel safe. One such measure includes allowing the publication of the youth’s details once they are deemed guilty of an adult crime and tried as an adult in the case of a presumptive offence.

190 Schissel, supra note 175.
192 Government fonds, supra note 189.
193 It is for this reason I identify the fear as perceived – it is statistically less likely to be in any real danger of being a victim of youth crime, so concerns are more about the feeling of security and insecurity.
194 Canadian Broadcasting Corporation, supra note 162.
By labelling youth as “risky,” the language of the Act individualises and separates the young person from the collective society – the story this tells suggests that the young person is inherently against the general will and thus, needs to be removed. This story views young people as accountable and a threat - two primary aspects of both Bodin’s and Hobbes’ citizens - the YCJA often appears to mirror the understanding of crime and offenders from the Criminal Code.\textsuperscript{195} Contrary to the story told by the language of the Act though, the debates regarding the YCJA spend an inordinate amount of time erecting barriers between young people and adult citizens.\textsuperscript{196} Further, the prescribed methods of addressing “risky” young people, including confessing for access to alternative measures, rely far more on normalising the youth person into a self-regulating liberal subject.\textsuperscript{197}

Due to the constraints of available documents, the data to be gathered on the YCJA strictly from the Library and Archives Canada is limited, as the most recent youth criminal justice data dates 2005. Thus, there is little more detail I can provide based on my collected data. However, that is not the end of the story of youth criminal justice, and there is one final moment I will include. In 2008, the Supreme Court of Canada heard the case of D.B., a young person charged with a presumptive sentence of manslaughter after a parking lot fistfight lead to the death of another young person.\textsuperscript{198} The Court ruled that the use of presumptive offences was unconstitutional as it did not comply with the intention of the onus of the right to be innocent until proven guilty. The youth and the youth’s defence were required to prove the youth ought not to be charged as an adult,

\textsuperscript{195} Bodin, \textit{supra} note 10; Hobbes, \textit{supra} note 10.  
\textsuperscript{196} For example, many documents in Government fonds, RG14-D-4, discuss making youth into responsible citizens or youth growing up to be active citizens.  
\textsuperscript{197} The role of risk and the prescribed actions for risk will be elaborated on further in chapter 4.  
\textsuperscript{198} \textit{R. v. D.B.}, \textit{supra} note 5 at para 1.
rather than the prosecution having to prove that the youth ought to face such charges.\textsuperscript{199}

The case recognises diminished moral culpability directly, in a way that is largely left out of the debates surrounding the implementation of the \textit{YCJA} and to a lesser extent the \textit{YOA}.\textsuperscript{200} Following this case, despite the Court allowing for the use of adult sentencing once policy addressed the problem of onus, presumptive sentencing was repealed from the \textit{YCJA} in 2012.\textsuperscript{201}

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\textsuperscript{199} \textit{Ibid} at para 2-3.  \\
\textsuperscript{200} \textit{Ibid}.  \\
\textsuperscript{201} \textit{Youth Criminal Justice Act}, supra note 84.
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Promises and Hope for the Future

In my previous chapter, there is a substantial conversation examining the work of John Joseph Kelso and the Child-Savers. This chapter will seek to develop further the promises of J.J. Kelso and the child-saving movements alongside a predominant theme in Kelso’s journals – hope for correcting the future. Kelso identifies behaviour problems in youth as a result of the situation the youth is in; poor behaviour is a result of poor parenting, poverty or bad influences. Following this notion, the child-saving movement sought to remove children from unfortunate situations. This understanding gave rise to both the child welfare system and the youth criminal justice system. The idea of hope for the future that is present in this notion proposes that there is an opportunity to fix the future adult generation by correcting the behaviour of the current children. The discussion involved in correcting the future generation will also serve to develop the way the youth criminal justice system in Canada has related the story of a social contract while engaging in subject construction as it began.

Hope and Futurity

It is important to note why I began by depicting the beginnings of both the youth criminal justice system and the child welfare system – they both start from the same place. Both systems represent two thoughts: 1) they both were born out of a desire to address cruelty, and 2) they are both intended to help young people grow into better adults. At their cores, both the child welfare system and the youth criminal justice system stem from a desire to fix the future by saving the present.\textsuperscript{202} The promise of the child-saving movement was one of a better future due to the reformation of the young people in

\textsuperscript{202} John Joseph Kelso Fonds, MG 30 C97, Library and Archives Canada, Ottawa, Ontario, Canada.
the present, to prevent placing “all neglected children hopelessly and unfairly in the penal class.” That promise is following the tradition of reformers worldwide, who aimed to make criminal justices something productive rather than retributive. The reform moment drew upon the works of thinkers like Cesare Beccaria and Jeremy Bentham to develop reform and training schools and while those institutions were subject to problems like abuse of authority, the fundamental belief of a reform system is that every person is redeemable if given the correct training. This fundamental belief comes from a first principle claim that deviant humans are not inherently evil, but rather poorly taught, which envisions the child as a body which can be re-shaped and reconstituted. Thus they can be re-educated and can be socialised to self-regulate as a normal member of society, a model of a subject that is a premonition of Foucault’s liberal subject. The Child-Savers adopt this tenet as being even more so the case for children and young people. Kelso indicates these beliefs when he writes, “[t]hese rough lads, even though criminally disposed have tender hearts beneath a forbidding exterior, and kindness can reach and win them when prison bars only make them more hardened and desperate.” Descriptions such as this display Kelso’s vision for the “rough lads” as far from his concerns of a hopeless and unfair placement of neglected children. The characterisation

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203 Journal by John Joseph Kelso, 1899-1926, MG 30 C97, Vol 8, Notebook – [1899-1926], John Joseph Kelso Fond, Library and Archives Canada, Ottawa, Ontario, Canada; “Penal class” may be “poorer class,” the word was nearly illegible.


205 Given that Foucault had not yet written on the liberal subject.

206 Kelso, *supra* note 122.
of the placement of neglected children lead me to consider his depictions as ‘hopeful,’ and thus, I have called it the language of hope.\textsuperscript{207}

This image of young offenders is apparent in the address by Judge William H. DeLacy, a Juvenile Court judge in Washington, D.C. associated with the child-saving movement in the United States. He considers “Juvenile Courts as an Aid to Good Citizenship,” envisioning childhood as “formative” and malleable.\textsuperscript{208} By acting as \textit{parens patriae}, the court can address incorrect and delinquent behaviour, using legal power to address infractions by giving correction, rather than punishment.\textsuperscript{209} The goal of enacting the law on to children is much the same as the goal of removing children from neglectful or abusive homes – to save the child.\textsuperscript{210} The only real difference is from whom the child is saved: in the instance of the neglectful or abusive home, the child is directly saved from their environment; in the instance of criminal justice, punishment is to save the child from themselves.\textsuperscript{211}

Kelso writes that one of the “charms” of childhood is that it is “naturally imitative,” that the child will act out the good in their “budding character if helped and encouraged in the right direction.”\textsuperscript{212} If that good is not encouraged and is instead “ignored or hindered,” children will “drift away from the good and find an outlet in

\textsuperscript{207} The term ‘hope’ is actually most common in the discussion of the YCJA, but it is present in a different way. I discuss that further in the next chapter.
\textsuperscript{208} Newspaper article, 1907-1931, MG 30 C97, Vol 8, Notebook – Charity, Child Saving [1907-1931], John Joseph Kelso Fond, Library and Archives Canada, Ottawa, Ontario, Canada.
\textsuperscript{209} Ibid.
\textsuperscript{212} \textit{Ibid}.
wicked and mischievous acts.”\textsuperscript{213} The use of the word ‘mischievous’ is telling in and of itself, when compared to later uses of terms like ‘evil,’ ‘dangerous,’ and ‘risky’ to describe the behaviour of young people. Much like comparing the terms ‘delinquent’ and ‘offender,’ there is a clear connotation difference. ‘Delinquent’ and ‘mischievous’ both embody a lack of evil intentions, and thus an easily redeemable person.

There is a distinct understanding of hope wrapped up in the message of the child-saving movement and the language it employs. Part of the understanding of hope comes from the idea that children are future adults – the fluidity of the condition of the child is pointed out by Kelso in his discussion of encouraging good character and by DeLacy when he discusses good citizenship. The nature of a child as fluid engages with the idea of childhood and youth as a border-zone or a transitional zone, which suggests that the nature of the child is one which is in constant flux. One way of interpreting that fluid state is as the “becoming-adult.”\textsuperscript{214} By imagining the child as the becoming-adult, childhood is “a process always in the middle,” and always in the process of understanding themselves in the complex space they inhabit.\textsuperscript{215} The movement of the understanding shapes the emergence of the individual through affect, relationships, experiences, and drives, serving to have the child define and redefine themselves over and over in the process of becoming-adult.\textsuperscript{216} This understanding of childhood suggests that the environment intimately shapes the child, something the Child-Savers embody throughout their work. The becoming-adult model of childhood allows the child-saving

\textsuperscript{213} Ibid.
\textsuperscript{215} Ibid at p 90.
\textsuperscript{216} Ibid.
movement to propose that removing a child from an environment and proper reteaching behaviour is what will result in the best results for the future. In searching for the best future results, the child-saving movement offers a promise of what the youth criminal justice system will be.

The promise is one rooted in hope – hope for the individuals to lead a better life, hope for the future to be better because of it. In the case of reforming youth delinquency, it is a kind of “grand hope” that has been placed on to the children by adults, rather than any hopes the children may have for themselves.²¹⁷ Kraftl understands the grand hopes of adults through an understanding of a “simple, ‘universal’ kind of utopian impulse,” suggesting that statements of intent regarding policy-making and charities on behalf of children tend to hold “public representations of the kinds of attitude[s] they have about children.”²¹⁸ These include values such as peace, equality, and tolerance ²¹⁹- all referring some future utopia that cannot exist in the present. The idea of the child gets conflated with “our world’s future” or, in the case of youth criminal justice, Canada’s future.²²⁰ Thus the narrative the child-saving movement presents, and which remains present through the JDA, plays out both the focus on preparation and the focus of society’s anxieties of the future.²²¹

In the process of growing into an adult, the reformer’s stance suggests that sometimes an individual will stray and needs to be put right again – that very language of

²¹⁸ Ibid at p 72-73.
²¹⁹ Ibid.
²²⁰ Ibid at p 75.
²²¹ Ibid.
‘fixing’ the children betrays both focuses. While it is clear that the child can be corrected, it is also clear that the child needs preparation for some goal for the future and that any deviation could cause this to fail. The role of youth justice system in this model then is one who monitors the transition period, through which children and youth have come to represent a boundary object, endowed with the current aspiration for the future.\textsuperscript{222} By endowing children with the hope for the future, the threats to the future “are ‘made real in the present’ through attention to and projections of the condition of future social spaces.”\textsuperscript{223}

This understanding indicates that while the promises of the child-saving movement were hopeful and based on the principle of redeemable individuals, there is a layer of anxiety embedded in the futurity. There is an understanding of a threat that should the current trend continue - the future will not shape into whatever the current goals may be.\textsuperscript{224} Thus, the youth criminal justice system serves as a planning tool or a technique to predict and realise a specific future goal. Interested parties employ this kind of future-thinking in an attempt to control transition and “hold the future together.”\textsuperscript{225} “Anticipatory thinking” is used to compel actions in the present, leading to and justifying ideas like ‘saving children from themselves.’\textsuperscript{226} Through this logic, social institutions and interventions serve to govern children and youth. Foster and Spencer identify this is happening in a variety of “generalised institutions,” including mandated education, as

\textsuperscript{223} Ibid at p 1608.
\textsuperscript{224} Ibid; Kraftl, \textit{supra} note 215.
\textsuperscript{225} Brown et al., \textit{supra} note 220 at p 1608.
\textsuperscript{226} Ibid; Kelso, \textit{supra} note 202.
well as in particularised institutions like the youth criminal justice system. As a 
particularised institution, youth justice is used to target specific behaviours, a trait which 
is still the case today. In the case of Kelso and the Child-Savers, the use of an Act like the 
_JDA_ would be to address specific behaviours like larceny or disorderly conduct as a kind 
of intervention.

Kraftl complicates the notion of saving children from themselves when he looks 
at the ways the “form of childhood-hope” is problematic by suggesting that it is both as 
“universalising affective condition” and wholly separated from the “everyday 
articulations of hope by young people.” In the construction of childhood as an 
“enduring repository of hope” the picture of the child is apparent:

> In our children, we see (or we imagine we see) the future. Children have the 
> chance to make the world anew. Children are pure and innocent; they have yet to 
> learn; we can fill them and the very idea of childhood with our hopes and 
> dreams.

Moreover, therein lays the complex challenge of a system which is born of hope – how 
do we avoid endowing children with so much of our dreams for the future that we 
conflate a very concrete child with an abstract hope? While seemingly innocuous, or even 
praiseworthy, there is a danger to this kind of future hope; we remove the agency of 
future adults. Future hope asks policy-makers and parents to make decisions regarding 
the future on behalf of the children before their children have any capacity to weigh in on 
the matter and often the actions taken will affect them before they are adults. In the case

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227 Foster and Spencer, _supra_ note 81 at p 9.
229 _Ibid_ at p 82.
of youth justice, it allows the image of what could be to form a seemingly logical basis for what should be, as “the biological ‘given’ of childhood represents firm - and logical - ground on which to construct hopeful visions.” However, these hopeful visions allow a “back door” for problematic tropes to crop up, as deviant children become “folk devils” and boogiemen that threaten the very future of humanity.

The Future Generation in a State of Dependence

There is a tension between the role of future hope and the agency of the children as future adults. This notion is wrapped up in the idea of the children as current dependents who will one day be independent. There is a temporal shift in the idea of dependence in youth criminal justice – due to being dependent currently, young people are not allowed to make decisions regarding the world’s future, but this will not always be the case. As suggested above, childhood is considered in this model to be a transition period, which complicates the incontrovertible nature of the universal future hope through introducing a manner of future autonomy and future consent. When discussing future autonomy and future consent, I am viewing the child in the frame of becoming-adult and suggesting alongside Kratfl that the goals and hopes youth may have for the future may not align with the goals and hopes of Kelso or the other architects of the youth criminal justice system. However, part of being in a transition period is that one is not quite at the end, so there is justification for suggesting that a child not be quite prepared for making decisions on the future of the world yet. So, the movement and other

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230 Ibid at p 84.
232 Kraftl, supra note 226; Curti and Moreno, supra note 212.
authorities invoke the image of the dependent child to legitimise their choosing on behalf of young people.

The dependent child is not considered responsible or accountable for the situation in which they might find themselves – this understanding forms the basic understanding of children in the model of the Child-Savers and carries through the JDA. Kelso tells the story of a delinquent boy he encountered soon after accepting his position as Superintendent of Neglected and Dependent Children in Ontario:

Word was sent to me from a town, some fifty or sixty miles away, that there was a neglected boy, who had been arrested several times and sent to gaol, and that he should really be committed to the Industrial School, but the local authorities opposed this, because [they were] unwilling to pay for his maintenance. Finding that the boy had been driven to wrong-doing, as in the case of so many others, by defective home life, I requested that he be sent to me, and I would be responsible for his future. The boy came along in due time, closely guarded by a constable, whose parting remark when leaving the boy in the office was, “Better keep a sharp eye on him or he will get away from you.” After waiting a few moments to allow the lad to collect his thoughts, I looked up and said, “Well, Joe, what do you think is going to become of you now? He replied with pathetic indifference, “The reformatory, I guess.” ‘No,” I said, “not the reformatory, if I can do anything to keep you out of it;” and going over to him I said: “Joe, do you not think there is something better for you than the reformatory – don’t you think if I will be your friend, and help you, that you can get along without either gaol or the reformatory?” Then I explained exactly what I would do for him – that I would get him a boarding pass, some good clothes, and after a time, when he was rested, [I] would get him a home in the country, where the people would take a genuine interest in him. This was something new altogether, and more to his taste than his former treatment, and over his sullen countenance came that indefinable, indescribable glow of a soul awakening to high and noble aspirations.233

The purpose to me relating this story is to illustrate the way in which children in the view of Kelso and the child-saving movement had a limited capacity for responsibility. Kelso disagreed fundamentally with the actions of the authorities in Joe’s hometown and cited

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the capacity of the soul to “awaken” as the reason why. This logic embodies the very heart of the future hope model and also serves to illustrate how the engaging in the future hope model is understood by those within it as “doing good.” Further, the passage displays the way Joe’s goals for the future is never really taken into account or mentioned past his “pathetic indifference” at the thought of going to a reformatory, even when Kelso works to try and help him. As it is, Joe is a dependent member of society, rather than an autonomous one and is thus, solely an observer to the decisions regarding the future world.

This understanding of Joe’s role in the process of decision-making serves to illustrate the initial story youth justice told about young people and the imagined social contract by depicting him as akin to Rousseau’s character Emile. Joe, like Emile, begins as fundamentally good and only through the contamination of man and the lack of education does Joe become a delinquent. Rousseau proposes that “all that we lack at birth… is the gift of education.” The education of a child in the public sphere is concerned with matters which concerns the collective society. Youth justice and crime is a public institution; thus the education which is involved in the teaching of how we live together in common and the proper behaviour for the benefit of all. Children need to learn “the duties of man” to get along in society. By sending Joe to a home in the country, Kelso is seen to be re-educating Joe in “duties of man” and how to get along in society. I

235 Rousseau, supra note 2 at p 5.
236 Ibid at p 6.
237 Ibid at p 8.
238 Ibid at p 19.
suggest that the idea behind placing a neglected child into a new home is akin to a “re-do,” in which the child is sent to try to be socialised by another family.

The final goal of the education in both cases is fundamentally the same: both Rousseau and Kelso are looking to develop the child into the full and proper citizen. Contained in the stories of Joe and Emile, however, are methods of training which depict a process of normalising and training into subjects: Joe as a liberal subject and Emile as subject to the general will. The story of the “citizen-in-training” employs a model of normalisation to ensure the goals of the future, through both social training and discipline. The development of a proper subject is an essential aspect of understanding the becoming-adult as a dependent. At the heart of all the conversation is the notion that children are not citizens yet and are instead a kind of ‘citizen-to-be’ or ‘citizen-in-training.’ Thus, in the future hope model, the youth does not have a voice in the world’s future because they do not yet exist politically.
Broken Promises and Ideals Redeemed

Despite problems with the model of future hope, there are distinctly different problems when that hope no longer forms the backbone of the youth criminal justice system. While the JDA carried forward the hope of the child-saving movement, the beginning of the YOA lost the bulk of that model. Beginning with the development of the YOA and developing further into the YCJA, policy-makers and interest groups were vested in removing the child protection aspect of the JDA and focusing the Acts on the offender taking responsibility for their actions. The use of the language of hope never wholly disappeared but was primarily mobilised to different ends through the YOA and YCJA than the language had been in the JDA. During this shift, there are several other changes in the way youth justice understood crime tied to responsibilising and responsibilisation as securitisation, including the introduction of rights, a change in the discussion of young people, and the limited introduction of youth to the public.

Youth Criminal Justice and Securitization

The language of the YOA and YCJA harkens back in many ways to the language of a contract model – as the YCJA, in particular, discussed concerns of “balance[ing] the rights of society at large with the rights and needs of youth.” Much of the public sentiment surrounding the two latest Acts relies on the language of the state protecting the collective society. This language seems to call upon the logic of exchange as would be found in a social contract. However, the ways youth justice is called to address the problem of youth crime strains the connection the language makes to the logic of a social

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contract. Youth justice is asked to work in a very different way than any social contract logic could ask the system to respond. Youth justice in the *YOA* and *YCJA* was asked to transform youth into self-governing liberal subjects by responsibilising them in ways more penal than the methods already employed in normalisation by families and schools, which serves to invoke the variation of securitization.\(^{240}\) A social contract theorist like Hobbes would defend the right of the citizen to do as they please under the governing control of the Leviathan, including defending oneself from state-ordered death. Even Rousseau, who does see the youth subject as a project of construction, would still see the young person as dependent and therefore not capable of being fully responsible.

The practice of responsibilisation as securitization develops individuals as self-responsible subjects expected to mitigate their own risky behaviours and self-govern. Despite being a prominent theme in the ongoing story of the youth criminal justice system, the securitization of young people in the criminal justice system is mostly missing from youth justice literature in Canada and has only limited discussion elsewhere. The most substantial discussion focused on the securitisation of youth offenders in England and Wales. This discussion includes work by Bandalli, in which she describes the process as it happened in England and Wales. She suggests that the drive to securitize youth has been growing throughout the 20\(^{th}\) century, a suggestion which is consistent with my findings in Canada.\(^{241}\) She critiques the shift to securitizing as it happened in England and Wales as fundamentally misunderstanding the role of *doli*

\(^{240}\) Donzelot, *supra* note 19 at p 41-95.

\(^{241}\) Sue Bandalli, “Children, Responsibility and the New Youth Justice,” in *The New Youth Justice*, ed. Barry Goldson (Lyme Regis, Dorset: Russell House, 2000), 81–95; Her language is of ‘responsiblelation,’ however for clarity’s sake, I will refer to all instances of this kind of responsibilising as securitizing
incapax and diminished moral culpability, as she suggests that “better formal education and apparent maturity at a younger age do not necessarily guarantee that the child can more readily distinguish between right and wrong.” Bandalli maintains that, as a child’s maturity and capacity to understand good and bad decisions grows through time, notions like doli incapax and diminished moral culpability are necessary for youth criminal justice. The second primary contribution to the discussion of securitization comes from Phoenix and Kelly’s article “You Have to Do It for Yourself,” which poses that securitization of the youth criminal justice system constitutes an absence of any caring relationship. Securitization serves to turn young offenders into a “series of subject effects,” closing off the ability to know the subjective experiences of the young person. The authors make the claim that youth justice acts as the vehicle of neo-liberal governance over young people through three avenues: 1) risk thinking as a dominant mode of thought combined with the logic of penology; 2) policy which “individualises and dematerialises” social risk; and 3) securitisation strategies seeking to turn the young offender into the self-governing, risk managing “young citizen.” By making the young offender a knowable object, securitization serves to absolve the state of the need to govern their bodies and instead requires that the young person govern themselves. The practice works to make a young person “accountable.”

242 Bandalli, supra note 67.
243 Jo Phoenix and Laura Kelly, “‘You Have to Do It for Yourself’ Responsibilization in Youth Justice and Young People’s Situated Knowledge of Youth Justice Practice,” The British Journal of Criminology 53, no. 3 (May 1, 2013): 419–37, https://doi.org/10.1093/bjc/azs078; Also uses that language of resposibilising.
244 Ibid at p 419.
245 Ibid at p 421.
246 Ibid at 422.
247 Government fonds, supra note 189.
youth crime is “dematerialised” as the young offenders are “discursively decontextualised” from the surrounding social, political, and economic structures following the trend of responsibilisation. Through securitization strategies, government and agencies can “work together” to address youth crime without ever examining any social, political, or economic conditions or marginalisation. Phoenix and Kelly mobilised the idea of governance “at a distance” from Rose and Miller in light of youth criminal justice and suggest that responsibilisation (securitization) works through the creation of the ‘ideal’ subject of norms in the development of policy and practices. By creating such an ideal subject, the “coercive, exclusionary… interventions” appears to be an appropriate response to deviant subjects.

While the literature on responsibilisation in the form of securitisation is limited in regards to youth criminal justice, authors addressed responsibilisation in other areas. Foster and Spencer identified the trend in determining the eligibility of the Ontario Works Act, as the “responsibility for demonstrating eligibility” transferred to the young applicants. It has also been identified in branches of security studies, though those are more interested in the securitization of the public. E-safety education is an example of the securitization of the parents to prevent their children from coming to harm on the internet, and the “Respect Yourself” movement is a site of securitization of young women.

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249 Phoenix and Kelly, supra note 241 at p 432; Goldson, supra note 246.  
252 Foster and Spencer, supra note 81 at p 90.
over purported harms of sexting. At its core, responsibilisation as securitization is a trend of shifting the responsibility to address something from the governing institution to the individual as a rational, self-interested neoliberal subject. This understanding can be seen in the shift from the JDA into the YOA as the language shifts from notions of education and ‘schooling’ to the discussion of ‘accountability’ and ‘responsibility.’ With the implementation of the YOA, a formalised system centred on young people as individuals replaced the welfare and protection-inclined legislation the made up the JDA. This replacement coincided with the development of individual rights and freedoms in the Canadian legal system and only developed into a more individualistic system with the implementation of the YCJA, as it mobilised the language of risk.

The YCJA served to demonstrate responsibilisation as securitization in the fullest form demonstrated by Canada’s youth criminal justice, as it is depicted by Pat O’Malley, through the language of risk. O’Malley uses Foucault’s understanding of disciplinary power, as it works on and through individual subjects, constituting the subject as an object of knowledge. The unique traits of individuals are categorised and known which leads to the development of clear norms. The development of categories aids in developing a social and political “casual knowledge of deviance,” and each such deviant

255 Ibid at p 71.
behaviour has a corresponding risk-factor.\textsuperscript{257} By electing to focus on behaviours and their policing, rather than individuals and their circumstances, the risk model brings into play the assumptions of the “insurance” or “actuarial” model. The concern moves away from the individual as an individual and instead focuses on the opportunities they may have to commit a crime.\textsuperscript{258} This model of managing crime cares little for how “inner thoughts” or causal factors, and replaces those with interest in an interest in crime’s temporal-spatial aspects, including “ecology” and “defensible space.”\textsuperscript{259} This method relies less heavily on direct coercion and is, therefore, less likely to encounter resistance.\textsuperscript{260} Cohen and O’Malley both discuss the practice of “situational crime prevention” as an example of the actuarial model of addressing crime, in which the model “deals hardly at all with individual offenders, is uninterested in causes of crime, and is hostile or at best, is agnostic towards correctionalism.”\textsuperscript{261} This kind of model is sceptical of any concrete rehabilitation and does not contribute developing a policy to address social, economic, or political factors of crime. In such a system, imprisoning subjects would do little more than removing them from society, which, at best, serves to keep them from causing society harm for a limited period until they are released. Thus, the best way to address crime in such a model would be to prevent the criminal act before it occurs.

The \textit{YCJA} introduces “high-risk youth” into the conversation of young offenders.\textsuperscript{262} The Act introduces the idea of “developing safer communities” by

\begin{thebibliography}{9}
\bibitem{257} Ibid.
\bibitem{259} Cohen, \textit{supra} note 229 at p 146.
\bibitem{260} O’Malley, \textit{supra} note 252 at p 73.
\bibitem{261} Ibid at p 81; Cohen, \textit{supra} note 229.
\bibitem{262} Ministry of Justice and Attorney General of Saskatchewan, \textit{supra} note 186.
\end{thebibliography}
attempting to identify potential offenders in “intensive community monitoring” and to
deal with them by engaging in practices of pre-charge screening.\textsuperscript{263} This kind of practice
suggests the Act develops a category of youth that is the subject of ‘pre-crime’ or
“predictive factors.”\textsuperscript{264} Young people with this kind of label are associated with an
inherent level of risk which defines the nature of the individual as abnormal or deviant.
However, the practice of labelling did not begin with the \textit{YCJA}; the \textit{YOA} has significant
themes of labelling. An example of this is the development and presentation of reports
which becomes a focus for contention during the development of the \textit{YOA}.\textsuperscript{265} These
reports would contain court-relevant information, including medical and psychological
reports. The first draft of the \textit{YOA} specifically refused to make these reports available to
the youth, but this aspect was pushed against by many of the groups responding to the
draft, including the Canadian Psychological Association.\textsuperscript{266} The Canadian Psychological
Association proposes that not only should the young person have access to review these
files, but they should also have clinical professionals review the files with them.\textsuperscript{267}
Having access to the files would allow the young person to understand the court’s process
and reasoning better.\textsuperscript{268} The goal of having the “young accused” understand the court’s
process contains in it the seeds of securitization; the core purpose of needing youth to
understand is to promote accountability and responsibility. Other penal logics, like

\begin{itemize}
\item \textsuperscript{263} \textit{Ibid.}
\item \textsuperscript{264} O’Malley, \textit{supra} note 252; Richard Jochelson et al., \textit{Criminal Law and Precrime: Legal Studies in
Canadian Punishment and Surveillance in Anticipation of Criminal Guilt}, Directions and Developments in
\item \textsuperscript{265} Government fonds, \textit{supra} note 189.
\item \textsuperscript{266} Canadian Psychological Association, \textit{supra} note 150; Interest group report submitted by Doob, Dozios,
and Trépanier to the Standing Committee on Justice, 1981-1982, RG14, Box 108, File A-17, Government
fonds, Library and Archives Canada, Ottawa, Ontario, Canada.
\item \textsuperscript{267} Canadian Psychological Association, \textit{supra} note 150.
\item \textsuperscript{268} \textit{Ibid.}
\end{itemize}
demonism and the spectacle, don’t require the accused to understand themselves about the crime, only to accept the punishment for their actions.\textsuperscript{269} The protectionist model of the Child-Savers and the \textit{JDA} did not much require the youth to understand themselves about their crimes, but instead to move on in a new environment; the protectionist model takes for granted that the youths will understand their status as saved and that understanding will be enough to justify actions taken. By proposing that the youth need to review the court’s clinical report and understand their representation in writing, the \textit{YOA} asks youth to accept a label of deviant, and therefore, criminal.\textsuperscript{270}

Securitization and Visibility

The action of labelling the youth as deviant feeds into responsibilisation as securitization by developing youth as a subject of concern and therefore, a subject of knowledge that is defined by fear. As a subject of concern, youth are subjected to much higher levels of scrutiny than many other categories would be. Valentine proposes this when she discusses the different spaces a young child or an adult may freely inhabit and the lack of these spaces for youth.\textsuperscript{271} She points to the fear that inhabits the regulation of youth in many public spaces, which leads to heightened visibility of the young people in those spaces.\textsuperscript{272} Brighenti proposes that the visibility of youth is both a metaphor for the knowledge of youth and a category in itself, as the process of generating the image is a

\textsuperscript{269} Pfohl, \textit{supra} note 4 at p 16-35; Foucault, \textit{supra} note 18. By referring to ‘the spectacle,’ I am referring to the description by Foucault in which the leader puts on a graphic theatre of punishment in order to display his power on the bodies of criminals.


\textsuperscript{272} \textit{Ibid}.
social process. She discusses “asymmetrical” fields of viewing, in which there is a reciprocal but unequal relationship between watching and being watched. That which is normal is effectively invisible, and therefore the watcher is “at ease,” while that which is abnormal is highly visible due to the watcher’s alarm. Goffman explains how the public was once a space of safety, so the alarm of the watcher increases the visibility of the subject at the same time that it increases the fear. As the watcher now feels they are in a space that is less safe, they respond with more scrutiny. Brighenti expands on this by proposing that there are ways of seeing which are “socially and interactionally crafted.” One such crafting is through high visibility sites; consider the general public as a site of high visibility for youth. Not only is the behaviour of the group heavily scrutinised, but the actions of a single young person is representative of the entire group. The public watches the youth deemed representative in a spectacle which is mediated by those representations. The news articles used by the 1990s Conservative Party campaign demonstrate this process as media define young people as the object of public fear due to the actions of only a few, as visibility is used to classify persons and “monsters”. In the asymmetrical field of sight, youth participate in the active and

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274 Ibid at p 325-326.
276 Goffman and Davidson, *supra* note 273.
277 Brighenti, *supra* note 271 at p 329.
278 Ibid; Valentine, *supra* note 79.
280 Ibid at p 333-334.
“disempowering” behaviour of being seen in a disciplinarian society by responding to the stigma with which youth find themselves painted.282

Victim Centering

Connected with the notion of risk and securitization of the offender is the re-centring the victim as the sole party of concern. 283 In calling for the youth to be responsible for their actions and to face punishment to be held accountable to the victim, risk poses a new central pivot of the policy and actions. Under the JDA, young people were considered misguided and poorly raised, with removes the lion's share of the agency for the crime and understands the offender as at least one other primary party to the victim. Under a securitization model, however, the offender is assumed to have much more agency which means that they are required to be understood in relation to the party that was harmed by their action. The re-centring “short-circuits” the connection between social justice and criminality by removing all consideration for the offender as an individual subject to political, economic, and social strain.284 Centring criminal justice on the victim in a securitization model poses the second problem, as the victim can be asked to shoulder the responsibility as well as the offender. As autonomous, self-interested subjects, individual citizens are tasked with minding their interests and are therefore responsible for protecting themselves from crime. The victim is framed as responsible for their own well-being, and therefore the victim is responsible for the prevention of crime.285

282 Brighenti, supra note 271 at p 331, 336; Goffman, supra note 229.
283 O’Malley, supra note 252 at p 84-85.
284 Ibid at p 84.
285 Ibid; Karaian, supra note 251.
While there is evidence of the shift to victim-centering in the discussion of the YOA and more so in the discussion of the YCJA, the location of rehabilitative measures in the YCJA suggest that there is not yet full securitization. While the YOA and YCJA both require that restorative and rehabilitative measures only be accessed in a responsibilised manner based on a confession and consent model in which the young person is asked to first confess to the crime committed – to take responsibility for their actions – and then is required to consent to the measures taken, both alternative methods utilise collective methods of addressing crime. Phoenix and Kelly use situated knowledge to suggest that there are limits to how meaningful a choice can be in the case of an “agentic social actor who is able to make sense of the world around them and make choices, but in conditions not of his or her own choosing.” This suggests that the rehabilitative or restorative methods of justice are not free of responsibilisation as securitization, but the methods do provide an slightly less securitizing means of addressing youth crime.

Incomplete Securitization

The presence of rehabilitative measures and restorative measures in the YOA and YCJA points to some interest remaining in the rehabilitation of the offender and some concern over the individual’s conditions. This development does not negate responsibilisation as securitization, but it does suggest that securitization is incomplete in youth criminal justice. There is a push through the YCJA to engage in practices of “meaningful consequences” through more “diversion programs,” rather than strictly incarceration. Often these “meaningful consequences” served to be further securitizing,

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286 Trépanier, supra note 152.
287 Phoenix and Kelly, supra note 241 at p 419.
such as paying restitution to the victim or incompletely securitizing, like mandatory community service. Both measures call for the youth to understand themselves in relation to their deviant actions, but mandatory community service serves some restorative purposes as well. However, some of the measures still look to develop programs with more tilt towards education.\(^{289}\) One such alternative measure proposed in the first draft of the \textit{YCJA} is the use of probation and check-ins after a mandatory release from prison when the young person had served two-thirds of their sentence.\(^{290}\) Probation, as a practice, assumes that the process of reintegrating into society must be learned. Similar in ways to the \textit{JDA} and Child-Savers understanding of an offender as someone who simply needs to learn better behaviour, probation does call for a kind of re-education of incorrect behaviour. This view is not completely devoid of responsibilisation or responsibilisation as securitization, as the youth face incarceration first, but it is an instance where education is a clear priority. By including such a measure, the \textit{YCJA} once again indicates that the securitization of youth is not truly complete in the youth criminal justice system.

The telling way the Act indicates that youth criminal justice is not entirely securitized is through the language of the Act. In both the \textit{YCJA} and the \textit{YOA}, youth are asked to take responsibility and be accountable, as one would expect of any liberal subject, yet they are treated as wholly separate from citizens in the legislation. Both Acts maintain the language of the \textit{JDA} in suggesting that young people will grow into responsible citizens or are growing to be active and contributing members. As discussed

\(^{289}\) Government fonds, \textit{supra} note 189.

\(^{290}\) Interest group report submitted by Manitoba Department of Justice to Standing Committee on Justice and Human Rights, 1999-2000, RG14-D-4, Box 41, Wallet 5, File Manitoba Department of Justice, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada.
in the previous chapter, the ‘citizens of tomorrow’ are not the citizens of today.\textsuperscript{291} At best, the young people are ‘citizens in training,’ which suggests that youth and the citizen are separate and suggests that there is a distinctly regulated way in which the two interact.\textsuperscript{292} Given that responsibilisation assumes the creation of a self-serving liberal subject, separating youth from citizenship indicates a tension with responsibilisation and responsibilisation as securitization.\textsuperscript{293} By othering the youth from the citizen, the language of the \textit{YOA} and the \textit{YCJA} both indicate that responsibilisation is incomplete by moving youth outside of the citizen system.

**The Evolution of the Language of Hope**

The language of the \textit{YOA} and \textit{YCJA} indicated more than the incompleteness of responsibilisation as securitization; it also indicated an evolution of the language of hope. Under the \textit{JDA}, the ideas of the Child-Savers survived, suggesting that youth were the hope for the future. With such an understanding, to correct the youth is to correct the future. The hope is embodied in the young person and is also for them as an individual, as such a model hopes the best for the becoming-adult as a way to have some tiny piece of the future the best it can be. In this understanding, the individual’s social, political, and economic realities matter and addressing those realities is often the first way one might try and address the youth’s deviant behaviour. Kelso demonstrates the method of address as using youth criminal justice in a protection-based fashion, electing to remove young people to adopted homes over imprisoning them.

\textsuperscript{291} Rousseau, \textit{supra} note 2.
\textsuperscript{292} Comité de Citoyen de la Core Juvénile, \textit{supra} note 150.
\textsuperscript{293} O’Malley, \textit{supra} note 250; Doerksen, \textit{supra} note 254.
The language that separates youth from citizens reveals the shift in the language of hope. The hope is still presented as hoping for individual young people to “grow up to become ideal and worthwhile adults and a pride to the community,” or as having characters which can be “altered and reformed.” 294 There is a change in the understanding of the benefit of those things, however. While previously, the hope was reaching forward, the hope here seems to be redirected from the individual offender and instead transitioned to point at the protection of society. The YOA attempted to balance the needs of the individual offenders with the protection of society; 295 the YCJA prioritised the protection of society over the goals and needs of the young offender. The shift is seen in the priorities of the Acts also indicates a shift in the object of hope – rather than the young offender being the object of hope, society becomes the object of hope. Further, the transition removes the futurity of the hope. No more is the benefit of the corrective actions to the benefit of the future. Instead, the object of hope and the recipient of the benefit is the current society.

As demonstrated in the discussion on securitization, youth are framed as a thing to fear, as something “dangerous,” and as inherently risky. 296 By defining the primary priority of youth justice to be the protection of society, the Acts further inform the population that there is something to be afraid of, as there is something from which they need protecting. In this framing, the language of hope is mobilised to mean something

295 Albeit rather unsuccessfully given the amount of critique the Act received over the balancing of the two principles.
296 Government fonds, supra note 189; Government fonds, supra note 286; Phoenix and Kelly, supra note 241.
different than it previously did; now the language of hope is mobilised to be hope for protection of society. This change is demonstrated concretely in the debate regarding changing the publication ban under the *YCJA*. Before the first draft of the *YCJA*, there was a blanket publication ban on any information regarding youth offenders or their families, regardless the level of crime committed. The first draft of the *YCJA* proposed, however, that the publication ban would only extend as far as youth charged as a youth and would not cover any young person convicted with a presumptive offence.\(^{297}\) The question I pose here is who benefits from sharing this information with the public? The Canadian Broadcasting Corporation attempts to make the case that everyone will benefit, including the youth as they will understand themselves better in the framework of the story and that giving the public the story will save the rest of the population of young people from excessive speculation.\(^ {298}\) Most of the interest groups arguing for the rights of the offender or the rights of children pushed back on the proposition, arguing that it did not serve the best interests of the youth to be the subject of a media story, particularly given the sensationalising youth crime received during the 1990s.\(^ {299}\) Bala describes the identifying publicity as “potentially harmful and unnecessary.”\(^ {300}\) If we accept the argument of Bala and others that there is no benefit to youth to have their names publicised, the question of who benefits remains. The priority of the protection of society suggests that it is the current society who would benefit. Members of the current society

\(^{297}\) Government fonds, *supra* note 286.

\(^{298}\) Canadian Broadcasting Corporation, *supra* note 162.


\(^{300}\) Bala, *supra* note 185.
would be allowed to feel safer, and thus, the language of hope takes on a new
connotation. Instead of being mobilised to help the individual young person, the language
of hope is instead mobilised to justify penal measures against the young people in the
name of societal protection. For all the use of hopeful language, the framing of the hope
and shift to responsibilising as securitization suggests a deficiency of individualised hope.
Rather than being optimistic on the nature of the young people as malleable and
changing, the YOA and YCJA instead take on an attitude of ‘this is the best we can do,’
and focus on protecting the current society instead of looking forward.
The Justification for Youth Punishment

If there is one theme that has run through the entirety of the youth criminal justice system since its inception, it is that youth are separate from full citizens, but are considered ‘citizens in training.’ While this does provide some connection between young people and their eventual citizenship, it also problematizes the punishment of youth when the criminal justice legislation assumes a social contract model. Without a place as a citizen and therefore, without ever giving the consent to be governed that a social contract assumes as its justification, youth have no place in the acting out of a social contract. The designation of citizen and non-citizen is something that is explicitly acknowledged throughout the discussion of youth criminal justice, as the JDA begins from a model which conceives youth as ‘becoming-adults’ or as developing into contributing citizens. Kelso and the Child-Savers saw children as individual pieces of the puzzle, each of which needed to be shaped and developed into the best versions of themselves to develop the best possible future. This view remained through the JDA and caused the Act to serve as a kind of extension of the child welfare program. The YOA and YCJA saw the role of youth changing as the youth became more securitized and remastered of as more of a threat, but still, the youth remained separate and other from the citizens. With that all considered then, I return to my original question: what is the justification of youth criminal punishment and is it defensible?

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301 John Joseph Kelso fonds, supra note 202; Government fonds, supra note 189; Government fonds, supra note 286; Curti and Moreno, supra note 212.
Necessity and Justifications of Criminal Punishment

Throughout the debates regarding the Acts, interested parties put forth various proposals that attempt to justify youth criminalisation. Each justification serves a different model of punishment and results in different proposed responses, as each imagines crime in a slightly different way. Throughout the debates, there is substantial reliance on deterrent theory and reformation models of crime, both models which view the best response to crime through a social contract lens as an exchange and thus develop the public story of criminal justice as an external justification. These models weave through conversations regarding the nature of children and youth, the need for youth criminal justice, and the interests of society. The justifying story does not reflect the logic of normalisation that is present in the modes of operation the conversation around youth justice requires. The practice of normalisation rests on the tenet that young people can be taught to be self-regulating liberal subjects and this assumes a malleable, trainable body, which does not always sit well with the independent, autonomous being of the social contract story. Public language provides evidence of the social contract, such as the petition by Bruce and Dorothy McGloan demanding “government… make significant changes to the Young Offenders Act that will hold violent youths fully accountable,” and demanding the YOA serve as a tool for deterrence. The petition asks the government to treat young offenders more like adults through publishing names and higher maximum sentences, serving as an example of the story of youth justice in public.

Counter to the story the public uses to understand youth justice, at the centre of much of the conversation on youth criminal justice is the question of whether youth can

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302 Cadman, supra note 1.
be fixed or not. This question resides in the presentation of hope and futurity, as the hope assumes that the youth can be fixed and the lack of hope assumes that youth cannot be fixed. The question is present in the discussion of responsibilisation and responsibilisation as securitization, as it is made the responsibility of the youth to become better or to alter their circumstances. Finally, this question develops the first of the justifications for youth criminal punishment, as it asks about the fundamental nature of youth. Valentine depicts one image of the fundamental nature of youth as “Dionysian,” in which the young person, by their nature, is a heathen.\textsuperscript{303} In this model, the core understanding of youth is that they are at best amoral and are potentially violent and capricious, but that they will eventually grow to be properly behaved adults.\textsuperscript{304} Donzelot outlines the methods that would develop a properly behaved adult as the training of young people in their families as a form of normalisation and regulation.\textsuperscript{305} As a child, the young person would act on desires as they have them, with little consideration for the outcome of those desires and with little conception of consequences. The Dionysian understanding of the nature of young people creates a need to control their “destructive” appetites.\textsuperscript{306} While Kelso and the Child-Savers understand children in a way that mirrors this understanding, they do not view that nature as inevitable or unchangeable, but instead malleable and trainable. This understanding is displayed in the discussion of hope, as the system of punishment through the JDA continues to attempt to correct youth

\textsuperscript{303} Valentine, supra note 79.
\textsuperscript{304} Ibid.
\textsuperscript{305} Donzelot, supra note 19.
to ensure a better future. Ultimately, the *JDA* and the Child-Savers make the case that every child can be fixed and retaught how to behave in society.

The fixable, malleable young person persists in some places through the *YOA* and the *YCJA*, as the *YOA* allows for discretionary powers and the *YCJA* proposes alternative measures for addressing youth crime. Doob, Dozois, and Trépanier propose in their discussion of the first draft of the *YOA* that one of the strengths of the *JDA* was its allowance for the discretionary power of police and courts to opt to do nothing instead of punishing the young person.\(^\text{307}\) By allowing this conversation, the authors open a conversation on the nature of children as something that has been fundamentally changing in the way Valentine describes - a chaotic child will mature into a good adult. Opting to do nothing on an individual case basis hails to the trainable nature of youth and indicates that the idea of youth the child-saving movement moved forward with continued to influence youth criminal justice. Duraj proposes something similar in her discussion of the *YCJA*, in which she states, “it would certainly be more effective to use the natural desire of the youngsters for creative activities, such as sport or art, to prevent their destructive behaviour rather than deal with its consequence.”\(^\text{308}\) The understanding of young people proposed here suggests that young people are going to act on their desires regardless of their consequences, so the most effective way to address youth deviance is to redirect it into an activity that is considered productive and healthy; in other words, to provide young people with an avenue of normalisation. Eventually, the redirection will socialise the young people into choosing to engage in those behaviours without needing direction.\(^\text{309}\)

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\(^\text{307}\) Doob, Dozios, and Trépanier, *supra* note 264.

\(^\text{308}\) Duraj, *supra* note 304.

understanding suggests that an important part of being young is learning to behave correctly, something Kelso also points at in his pamphlet on reforming juvenile delinquents in the story of a young woman who was in constant conflict with the directors of a summer camp until she was redirected to care for younger children.\footnote{310 Centre D’accueil la Cite des Prairies, \textit{supra} note 166; Kelso, \textit{supra} note 231.}

The question of whether youth can be fixed has permeated the conversation of youth justice from its inception, but the answer has not always been a resounding “yes, they can!” as it is in the child-saving movement and the \textit{JDA}. Despite aspects of the malleable child being present in later Acts, starting with the \textit{YOA}, there appears to be a general acceptance that the youth criminal justice system is something necessary to regulate young people, but not as a teacher or parent. Instead, youth criminal justice gets framed as necessary to protect the public from the menace of young people and accepts that the interests of young people and society are not always aligned and ought to be given different weight.\footnote{311 Doob, Dozois, and Trépanier’s discussion of adult courts for presumptive sentences, which are a “necessary evil.”\footnote{312 \textit{Ibid.}} While the authors maintain that the option ought to be rarely used, the option needs to exist for the benefit of society. A justification of necessary evil calls on the basic principle of deterrence theory, supposing that the rational calculation of punishment will deter future deviance but counters the idea that “doing time” will teach correct behaviour.\footnote{313 Pfohl, \textit{supra} note 44; Beccaria, \textit{supra} note 203.} Instead, the rational calculation is made on the benefit of society and assumes that some young people cannot be fixed.\footnote{314 Doob, Dozois, and Trépanier, \textit{supra} note 264.}}
The final case to be made for the necessity of the youth criminal justice system is often made through the use of statistics. Before the 1980s, statistics were completely absent from the conversation of youth justice, and pamphlets and speeches relied on personal stories and morality claims. Beginning in the 1980s and overrunning the conversation in the 1990s, interest groups and political parties mobilised statistics as a primary means of supporting the arguments of interest groups and political parties. One stance statistics were mobilised heavily for was to propose that young were inherently bad and that society and law needed to prepare for the worst as youth crime was growing and would only continue to grow.\textsuperscript{315} This stance proposes that youth criminal justice is necessary to protect society from the inherent evil of young people, but also to make society feel safe. This affective role likely serves more purpose in the justification of youth justice, as laws viewed as weak are subject to public complaints, and the courts have already declared that deterrence as a goal of punishing is largely ineffective.\textsuperscript{316}

Necessity serves as a guard from further need to justify the means. When Hobbes told his story about the Leviathan, he constructed a basic prisoners’ dilemma and added a third person to the problem.\textsuperscript{317} The third person (the Leviathan) possessed all the capacities of violence of the prisoners to ensure the prisoners abide by the agreement they previously reached. Thus, the third person’s actions are deemed necessary regardless the lengths to

\textsuperscript{315} Interest group report submitted by the Victims of Violence to Standing Committee on Justice and Human Rights, 1999-2000, RG14-D-4, Box 41, Wallet 4, File Victims of Violence, Government fonds, Library and Archives Canada, Ottawa, Ontario, Canada; CACP, supra note 156.
\textsuperscript{316} Manitoba department of Justice, supra note 288; Ministry of Justice and Attorney General Saskatchewan, supra note 186.
\textsuperscript{317} The prisoners’ dilemma considers two prisoners being separately offered a self-interested choice. If they both choose not to take it, the outcome is best for both. If one chooses self-interest and the other doesn’t, the first gets a decent outcome and the second gets a bad outcome. If they both choose self-interestedly, the outcome is worse for both. The dilemma is used to demonstrate self-interest and serves to show the problem of cooperation by self-interested parties.
which they might go. Under this metaphor, the discussion surrounding the youth criminal justice system does a very similar thing. By calling back on the nature of youth, the system can make some claim to be necessary - either for youth or society - and is therefore protected from any need to justify itself morally. A necessary evil is still considered necessary. Regardless the means, the ends require youth be regulated. The discussion of the means is not quite so definitive, as debates still rage through academia and policy about appropriate means, but ultimately, parties of the federal discussions seem to accept punishment as necessary.\textsuperscript{318} Thus, it falls to the legal system to regulate the bodies of youth. A phantasmal story of a contract is not empowered actually to punish, however. Thus, the modes of discipline and training come into effect to develop the young person into a responsible liberal subject, to protect the future or to protect society.

This project is a genealogy – as such the purpose of this project is not to propose policy or submit a decision on the methods in which we could or should address something, only to reflect on the state of how things stand today. This project is not equipped to offer suggestions or propositions for means of correction, this is a larger project that would be an area of further exploration. Further research would be able to examine the means through which the liberal subject is constructed on the frontlines of youth justice in Canada by researching the provincial discussions and implementations of the Acts. This discussion would have a greater ability to explore aspects of race, gender, class, and ability and would serve to better flesh out the important moments of the youth criminal justice story. Further research may also be interested in examining the story of

\textsuperscript{318} See debates involving Doob, Sprott, Bandalli, Phoenix and Kelly, and Foster and Spencer. Also see the court’s \textit{ratio decidendi} in \textit{R. v. D.B.}.  

youth criminal justice in active comparison with adult criminal justice to expand on any overall themes and shifts in the conversation of justice in Canada. With this further information, the future project may be more equipped to offer policy suggestions or solutions.
Appendices
Appendix A: *Youth Criminal Justice Act*, “Declaration of Principles”

Declaration of Principle

Marginal note: Policy for Canada with respect to young persons

- **3 (1)** The following principles apply in this Act:
  - (a) the youth criminal justice system is intended to protect the public by
    - (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
    - (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
    - (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
  - (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
    - (i) rehabilitation and reintegration,
    - (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
    - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
    - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
    - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time;
  - (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
    - (i) reinforce respect for societal values,
    - (ii) encourage the repair of harm done to victims and the community,
(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person’s rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Marginal note: Act to be liberally construed

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

2002, c. 1, s. 3; 2012, c. 1, s. 168.
PREVENTION OF CRUELTY.

DEAR SIR,—

You are invited to be present at a Public Meeting in Shaftesbury Hall, on Thursday Evening, Feb. 24th, to consider the matter of organizing in Toronto a Society for the Prevention of Cruelty to Animals and Children. Addresses will be delivered by Mayor Howland, Canon Dumoulin, and other prominent citizens. Mr. John Macdonald will preside.

There is need for such a Society, and as it is desirable that the Inaugural Meeting should be a large and enthusiastic one, you would aid considerably by interesting your friends in the movement and securing their attendance.

Ladies are particularly invited, and their cooperation is solicited.

February 21st, 1887

J. J. Kelso,
Secretary, pro tem.
Appendix C: *Industrial School Act, “Amendment”*

**AMENDMENT.**

The following Act giving to the Industrial School Association guardianship over pupils until they are eighteen years of age was passed by the Ontario Legislature in April, 1900, and approved by the Lieutenant-Governor on April 27, 1900.

**HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—**

1. (1) Every child herefore committed to an Industrial School under any Act of the Legislature of Ontario, who has been or who will have been within six months after the passing of this Act, an inmate of such industrial School for a period of three years, shall at the expiration of the said period of six months be given over to the custody of his or her parents or shall be apprenticed or be placed out in a foster home as the Industrial School Board may deem advisable.

(2) Every child committed to an Industrial School under any Act of this Legislature who is at present an inmate of such School and who will not have completed the period of three years from the date of his or her commitment before the expiration of the said period of six months, and every child hereafter committed to an Industrial School, shall at the expiration of three years from the date of his or her commitment be given over to the custody of his or her parents to be apprenticed or be placed out in a foster home as the Board or other body having the management of such Industrial School may deem advisable.

2. Every child who has heretofore been or who shall hereafter be committed to an Industrial School under any Act of this Legislature shall remain under the guardianship of the said Board or other body having the management of such School until such child is 18 years of age, and such Board or other body shall possess and exercise all the rights and powers of the parents in regard to such child until such child shall attain the age of 18 years.

3. After a child has been given over to the custody of his or her parents or has been apprenticed or placed out in a foster home as provided by this Act the Board or other body having the management of the Industrial School may if it deem it necessary in the interest of such child, cause the child to be returned to such School and thereafter such Board or other body shall have the right to collect the amount for maintenance directed to be paid when such child was committed, provided that before being entitled to recover the costs of such maintenance such Board or other body shall obtain the certificate of the Inspector that it is necessary in the interests of the child that he or she shall be again received or cared for in the said School.

4. This Act shall be read with and as part of *The Industrial Schools Act,* and any provisions of *The Industrial Schools Act* inconsistent with the provisions of this Act are hereby repealed.
Appendix D: *Children's Protection Act*, "Juvenile Offenders"

(1) The council of every local municipality shall make provision for the separate custody and detention of such child prior to its trial or examination, by arrangement with some person or society willing to undertake the responsibility of such temporary custody or detention on such terms as may be agreed upon, or by providing suitable premises entirely distinct and separated from the ordinary lock-ups or police cells.

(3) The Judge shall try such child or examine into its case and dispose thereof in premises other than the ordinary police court premises or, where this not practicable, in the private office of the Judge, if he have one, or in some other room in the municipal building.

(4) Where a Children's Aid Society possesses premises affording the necessary facilities and accommodation, a child may, after apprehension under the provisions of this Act, be temporarily taken charge of by the society until its case is disposed of, and the Judge may hold the examination into the case of such child in the premises of the society.

21. — (1) A child charged with an offence against the laws of Ontario or who is brought before a Judge under any of the provisions of this Act, shall not before trial or examination be confined in a lock-up or a police cell used for persons charged with crime, nor, save as hereinafter mentioned, shall such child be tried or have its case disposed of in the police court room ordinarily used.
(5) Where a child, or a parent of a child under this Act is being tried the Judge shall exclude from the room or place where such person is being tried or examined, all persons other than the counsel and witnesses in the case, officers of the law or any Children's Aid Society, and the immediate friends or relatives of the child or parent. 8 Edw. VII c. 59, s. 24.

TO NOTIFY SOCIETY'S AGENT.

22.—(1) Where a complaint is made or pending against a child the police official having charge of the child shall at once cause notice in writing to be given to the executive officer of the Children's Aid Society, if there be one in the county or district, who shall have opportunity allowed him to investigate the charge.

(2) Upon receiving such notice the officer may enquire into and make full examination as to the parentage and surroundings of the child and all the circumstances of the case and report the same to the Judge.

(3) Where it appears to the Judge that the public interest and the interest of the child will be best served thereby, an order may be made for return of the child to its parents or friends, or the Judge may place such child under the guardianship of the Children's Aid Society, or of an industrial school. 8 Edw. VII c. 59, s. 26.

DISPOSAL OF OFFENDERS.

23.—(1) The Judge instead of committing a child to prison may hand over the child to the charge of a home for destitute and neglected children, or Industrial School, or Children's Aid Society, and the managers of such home, school or society may permit its adoption by a suitable person, or may apprentice it to a suitable trade, calling or service, and the transfer shall be as valid as if the managers were the parents of such child.

(2) The parents of such child shall not remove or interfere with the child so adopted or apprenticed, except by permission in writing of the home, school or society. 8 Edw. VII c. 59, s. 26.
CHILDREN UNDER ARREST.

24. No child held for trial or under sentence in any gaol or other place of confinement shall be placed or allowed to remain in the same cell or room in company with adult prisoners, and the officer in charge of such place of confinement shall secure the exclusion of such child from the society of adult prisoners during its confinement. 8 Edw. VII. c. 69, s. 27.

COMMISSIONERS.

25. The Lieutenant-Governor may appoint Commissioners with the powers of Police Magistrates to hear and determine complaints and to enforce any of the provisions of this Act or against juvenile offenders apparently under the age of sixteen years. 8 Edw. VII. c. 69, s. 28.

DOUBT AS TO AGE.

26. Where a person is charged with an offence under this Act in respect of a child who is alleged to be under a specified age, and the child appears to the Judge to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved. 8 Edw. VII. c. 69, s. 29.

APPEAL TO HIGH COURT.

27.—(1) Where a parent applies to a Judge of the High Court Division for an order for the production of a child committed under this Act, and the Judge is of opinion that the parent has neglected or deserted the child, or that he has otherwise so conducted himself that the Judge should refuse to enforce his right to the custody of the child, the Judge may, in his discretion, decline to make the order.

(2) If at the time of the application, the child is being brought up by another person, or has been placed out by a Children's Aid Society, the Judge if he directs the child to be given up to the parent, may order that the parent shall pay to such person or society the whole of the expense properly incurred in bringing up the child, or such portion thereof as may seem just.
(3) Where a parent has
(a) Abandoned or deserted his
child, or
(b) Allowed his child to be brought
up by another person at
that person's expense, or by a
Children's Aid Society, for
such time and under such
circumstances as to satisfy
the court that the parent was
unmindful of his parental
duties,
the Judge shall not make an order
for the delivery of the child to the
parent unless he satisfies the Judge
that having regard to the welfare of
the child, he is a fit person to have
the custody of the child.

(4) If the Judge is of opinion
that the parent ought not to have
the custody of the child but that the
child is being brought up in a dif-
ferent religion from that in which
the parent has a legal right to re-
quire that the child shall be brought
up, the Judge shall have power to
make such order as he may think fit
to secure that the child be brought
up in that religion.

(5) Nothing in this section shall
affect the power of the Judge to con-
sult the wishes of the child in deter-
mining what order ought to be made,
or any right which a child now pos-
sesses to exercise its own free
choice. 8 Edw. VII. c. 59, s. 13.

RELIGION OF CHILD.

28.—(1) Notwithstanding anything
in this Act, no Protestant child shall
be committed to the care of a Roman
Catholic Children's Aid Society, or
Institution, nor shall a Roman Cath-
oblic child be committed to a Protec-
tant Children's Aid Society or Insti-
tution, and in like manner no Pro-
testant child shall be placed out in
any Roman Catholic family as its
foster home, nor shall a Roman
Catholic child be placed out in any
Protestant family as its foster home.

(2) This section shall not apply to
the care of a child in a temporary
home or shelter in a municipality in
which there is but one Children's
Aid Society. 8 Edw. VII. c. 59, s.
30 (1, 2).
RECOVERING PENALTIES.

29. The penalties imposed by or under the authority of this Act shall be recoverable and may be enforced under The Ontario Summary Convictions Act, and the provisions of that Act shall apply to prosecutions for a violation of this Act.

RIGHT OF INSPECTION.

30. Every society or person to whose care a child is committed under the provisions of this Act, and every person intrusted with the care of any such child, shall from time to time permit such child to be visited and any place where such child may be or reside to be inspected by the Superintendant or any person duly authorized in that behalf. 8 Edw. VII. c. 59, s. 15.

JUVENILE IMMIGRATION.

31.—(1) The Lieutenant-Governor in Council may authorize any Society or Agent to carry on the work of bringing into this Province neglected or dependent children, who are not feeble-minded and who before arrival in Ontario are certified by a regularly qualified medical practitioner to be free from disease of any kind, for the purpose of providing foster homes for such children or binding them as apprentices or otherwise. R.S.O. 1897, c. 262, s. 2, amended.

(2) Authority to bring such children into the Province shall only be granted on condition that if any such child becomes within five years of his immigration an inmate of a prison, hospital, or other charitable institution where such child is likely to become a permanent charge, the Inspector of Prisons and Public Charities shall notify the Society or Agent under whose auspices the child was brought into the Province in order that such child may be deported.

32.—(1) Every such Society or Agent shall keep a record in a register-prescribed by the Superintendent for that purpose of the names of all children brought into Ontario, their ages, and such particulars as may be required to indicate the provision made for each child’s adoption or apprenticeship; and a copy of the records made by each Society or
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