(b) acted under the influence of a drug to the extent that he had lost control of his actions and was incapable of knowing that his act was wrong,

(c) ingested a drug knowing that its effects may be dangerous to others or at the very least unpredictable.

Because he had not the requisite mental element to be convicted under sec. 136, he has been found guilty under sec. 80A (2) and becomes liable to a maximum penalty of fourteen years in prison. Thus, instead of being convicted of rape or one of its included offences and being subject to life imprisonment and to be whipped, the accused has been found guilty of committing an indictable offence while intoxicated. The final problem for consideration is sentencing.

The proposed amendments are not limited to removing anomalies in the law. The problem of how to deal with the intoxicated offender after verdict is dealt with as well. The usual considerations insofar as sentencing will be applied, with the hope that the accused will be dealt with and punished only for acts he has committed intentionally. We will therefore find that second offenders will be harshly dealt with and the accused's knowledge of alcohol's effects or the possible effects of ingestion will be of cardinal importance. Public policy, as was earlier stated, has dictated that even if an accused has acted under the influence of intoxicants, he must be punished. There is no doubt that severe punishment may comfort the victim or their family but we should be loath to sentence on this basis. The accused must be dealt with according to the long recognized principles of criminal justice and accordingly it is hoped that the proposed amendments will enable the presiding judge to sentence only for the accused's intentional acts, i.e. either the principle offence if sufficient drunkenness is not proved, or the intentional act of becoming drunk and dangerous if sufficient drunkenness is proved.

ROBERT M. CARR*

A CRITICAL ANALYSIS OF BILL C-192: THE YOUNG OFFENDERS ACT

Small "l" liberals are perhaps the most maligned political group in America today. They draw the ire of the political right for being too permissive, and the contempt of the left for being too reactionary. In trying to be all things to all people, they please nobody. Their programs are often elaborate and costly but without firm direction. This "wishy-

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1. R.S.C. 1952, c. 160.

washy" thinking is typically reflected in the new Young Offenders Act, Bill C-192, which is designed to repeal and replace the Juvenile Delinquents Act.[2] The new Act as a whole vacillates between approaching the young offender "as a misdirected and misguided young person requiring help, guidance, encouragement, treatment and supervision . . . as nearly as may be that which should be given by such a young person's parents,"[2] and approaching him merely as a young criminal who should be liable to less harsh dispositions than adult offenders because of his tender years. This vacillation leaves one wondering about the wisdom as well as the objectives of the Bill.

The Constitutional Question

Much of the apparently confused thinking behind this Bill stems from the constitutional problem presented by the entire issue of young offenders. Under section 92(15) of the British North America Act, all welfare agencies and institutions fall into the legislative jurisdictions of the provincial governments. At the same time, section 91(27) of that Act allocates exclusive legislative power in relation to criminal law to the federal Parliament. Thus, generally, only Parliament can designate a given conduct as criminal. The provincial legislatures have exclusive legislative power in relation to the administration of justice, that is, in all matters which are, in pith and substance, procedural, rather than essential, to criminal law. Thus, the problem Parliament faces in proposing youthful offender legislation is how to treat young offenders as misguided young people requiring help, guidance and supervision "to the end that the care, custody and discipline of that young person will approximate as nearly as may be that which should be given by such a young person's parents,"[3] without encroaching on the legislative powers of the provinces. In fact, even controlling social conditions that have a tendency to encourage vice or crime, is a provincial matter. Thus it seems that the only way to bring the problem of young offenders under federal jurisdiction is to regard their conduct as "criminal" or quasi-criminal. Yet, to regard the young offenders as falling within the ambit of criminal law would be to make the Act self-contradictory and to defeat its intent and spirit.

In trying to resolve the constitutional problem in the case of *A. G. for British Columbia v. Smith*,[5] Fauteux, J., (now C.J.C.), said: "A very wide discretion is given to the [Juvenile Court] Judge under the [Juve-

2. Young Offenders Act, s. 4.
3. Ibid.
4. **Reference Re Adoption Act, etc.** (1938), 30 L.R. 497; [1938] S.C.R. 398.
5. (1968), 65 D.L.R. 82 (S.C.C.).

nile Delinquents] Act, and it is significant that, in the exercise of such discretion, the interest of the child is not the sole question to consider. On the contrary, the matters which, in principle, must receive the attention of the Judge and which he must try to conciliate are the child's interest or own good, the community's best interest, and the proper administration of justice. This, I think, qualifies the nature of the protection which the Act is meant to give to juveniles alleged or found to be delinquents and supports the proposition that the Act is not legislation in relation to protection and welfare of children within the meaning envisaged in the Adoption Act case."[6]

The Department of Justice task force report on Juvenile Delinquency in Canada,[7] in recognizing the constitutional problem said that in order for any reform in the area of juvenile delinquency to be effected, "co-operative federalism of the highest order"[8] would be required.

In adopting exactly that approach, the Canadian Corrections Association in their report, the "Report of the Committee Established to Consider Child Welfare Arising from the Department of Justice Report on Juvenile Delinquency,"[9] issued the following as part of their official policy statement:

> "Any change in legislation should be preceded by agreement between the governments concerned that would provide for:
> (a) diagnostic services available to the courts
> (b) a range of institutional and non-institutional treatment services (including correctional) capable of handling the whole range of children's needs
> (c) power given to the court to use all types of services as required by the needs of children, and
> (d) uniformity across Canada of upper and lower age limits to ensure equality of treatment for all child citizens and permit more efficient gathering of facts for statistics and research."[10]

Under the existing constitutional arrangement, "co-operative federalism" seems to be the best solution to the thorny problem of legislative jurisdiction facing the federal Parliament in relation to youthful offenders. Undoubtedly a better situation could be brought about by placing the entire area under federal control under a new constitutional arrangement. This arrangement would place every aspect of the youthful offender under federal powers and the federal government would subsidize the provincial governments for the increased work-load placed on the provincial welfare departments and the extra facilities required.

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6. **Ibid**, at p. 90.
7. Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency (1965), Queen's Printer.
8. **Ibid**, at p. 29, para. 67.
9. 10 Can. J. Corr. 480, (July 1968).
10. **Ibid**, at p. 481.

Nevertheless, until there is some kind of constitutional reform, co-operative federalism seems to be the only way any kind of uniform Act can operate across Canada.

However, the constitutional aspects notwithstanding, the new Act leaves much to be desired.

Age and Criminal Responsibility

The Justice department's task force on Juvenile Delinquency recognized the need and desirability of raising the minimum age to which a young offenders bill would apply, and of having this minimum age uniform across Canada. They recommended that the minimum age be raised from seven years to ten, or at the most, twelve years.[11] Reaching this conclusion, the report said that there were two basic requirements to be met in selecting this minimum age:

> (1) it should be an age at which more serious offences occur with sufficient frequency to require that a quasi-criminal type of procedure be available to deal with the problem;
>
> (2) it should be an age at which the adversary features of the system, even modified as they are in a juvenile court hearing, can ordinarily be expected to function with at best a minimum degree of effectiveness.[12]

Yet, at the same time, the report says "that of the children found to be delinquent in Canada, only some three to four percent are under the age of ten. Even if the minimum age were raised to twelve, the group affected would still represent only about twelve percent of the total number of offenders involved."[13] The report goes further and approves the conclusions reached by both the Ingleby Committee[14] in England and the Kilbrandon Committee[15] in Scotland, to the effect that future dealings with young offenders should move still further away from a criminal law approach in favour of a welfare or educational approach administered through a system almost totally divorced from the courts.

However, despite the foregoing reasons and rationale for raising the minimum age of criminal responsibility, the federal government has decided to raise the minimum age to only ten.[16] Surely the best interests of both the community and the child offenders under twelve coud best be served by dealing with them in an educational manner which would

11. **Supra**, footnote 7, at p. 51, para. 114.
12. **Ibid.**
13. **Ibid**, at p. 50, para. 111.
14. Report of the Committee on Children and Young Persons (Cmnd. 1191, 1960).
15. Report of the Committee on Children and Young Persons (Scotland) (Cmnd. 2306, 1964).
16. **Supra**, footnote 2, s. 2(s).

keep them out of the courts entirely, and ultimately out of contact with older young offenders whose effect on the children could be detrimental to their rehabilitation. One of the more important progressions to be made in the area of juvenile offenders is to distinguish between "child offenders" and "young or youthful offenders." It is no more desirable to place ten year old offenders in the same training schools and institutions as sixteen or seventeen year old offenders as it is to put sixteen or seventeen year olds in with adult criminals. Yet this is exactly what the new Act proposes to do. Except for certain rare instances where differentiation is made between those who are actually or apparently over the age of fourteen (such as section 24 of the new Act dealing with waiver of Juvenile Court jurisdiction), the adjudication and disposition processes are exactly the same for a ten year old as they would be for a sixteen year old. This naturally paves the way for the common but extremely undesirable situation whereby child offenders, through contact with older offenders, learn to idolize the older offenders, have their own attitudes of contempt for rules and authority reinforced by the older and tougher offenders, and even learn new and more sophisticated modes of criminality from them. In a recent article, [17] Dr. Tadeusz Grygier, Director of the Centre of Criminology at the University of Ottawa, said on this subject:

> It seems the age of twelve years should be adopted as the minimum for the new Act to be applied. In most modern jurisdictions it is higher, but it is the age at which, statistically, anti-social behaviour, that would amount to crime if committed by an adult increases rapidly, and at which most people enter a period of psychological change. It is on these grounds that Ontario has adopted the age of twelve years as the minimum for admission to a training school on the basis of his having committed an offence; a younger child may be admitted only on welfare grounds.[18]

Thus it seems that the new federal legislation, which should be the vanguard of an enlightened approach towards young offenders, is actually retrogressive to legislation already in effect in Ontario.[19] In the final analysis, raising the minimum age for criminal responsibility from seven years to ten years is a step in the right direction, but it is too small a step in view of the psychological and sociological needs of the child offender.

Jurisdiction of the Court

Another area in which the old Act is substantially changed by the new one is the area of jurisdiction of the Juvenile Court, or more explicit-

17. Grygier, Dr. T., Juvenile Delinquents or Child Offenders: Some Comments on the First Discussion Draft of an Act Respecting Children and Young Persons, 10 Can. J. Corr. 458, (July 1968).

18. **Ibid.** at pp. 461-462.

19. Training Schools Act 1960 R.S.O. c. 404 s. 8, as amended 1961-62 c. 139; 1965 c. 132, sup.; 1968 c. 138.

ly, when and under what circumstances may the Juvenile Court waive its jurisdiction to hear a case and pass that case on to the adult courts?

The Juvenile Delinquency Act gave exclusive jurisdiction over juveniles to the Juvenile Court, but where the act complained of was an indictable offence, and the young person was actually or apparently over the age of fourteen, the Juvenile Court judge could, if both the interest of the child and the good of the community demanded it, waive the case to adult court. [20] The new Act, on the other hand removes the prerequisite of "indictable offence" from the Act, and gives the Juvenile Court judge power to waive any case to the adult courts if the accused is actually or apparently over the age of fourteen and if he, (the judge) is satisfied after an investigation carried out under his supervision that the young person is not subject to committal to an institution for the mentally ill or mentally deficient, is not suitable for treatment in an institution designed for the care and treatment of young persons, and finally, is satisfied that it is in the interest of both the young person and community to waive jurisdiction.[21]

The main difference between these two sections, besides the fact that the new Act expressly outlines what a juvenile court judge would probably have done on his own initiative anyway under the old Act, is that under the new Act an offence does not have to be indictable before the judge can waive jurisdiction. The judge is given more discretion in waiver cases.

If we must have waiver of jurisdiction clauses at all, then it is probably a progressive change. The old law assumed that the seriousness of the offence indicated the amount and kind of rehabilitation required. This is a faulty assumption. It seemed to say that a fifteen year old, who had never before broken the law, and who had clumsily tried to rob a gasoline station using an unloaded gun, is less amenable to corrective rehabilitation through the juvenile courts than a fifteen year old who has appeared before the courts on a wide range of offences, but who, on a given particular appearance is not charged with an indictable offence. Another danger was that, if the Crown, when dealing with this second type of offender, had the choice of proceeding against him with either a less serious non-indictable offence, it often chose to proceed with the more serious charge just to give the juvenile court judge some legal basis for waiving the case to adult court. This was an unfortunate state of affairs and one which the deletion of the "indictable offence" restitution sought to correct.

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20. **Supra**, footnote 1, s. 9.
21. **Supra**, footnote 2, s. 24.

One recommendation put forth by the Department of Justice task force report but ignored by the legislators was to the effect that "the law should also provide, by way of a supplemental procedure to the present provisions relating to waiver of jurisdiction, that a case can be referred from the juvenile courts to the ordinary courts for trial and, on proof of the allegations against the young person, the case will then be remanded to the Juvenile court for disposition. A young person charged with an offence, or the Crown, should have the right to insist upon trial in the ordinary courts under this procedure . . . and, further, that he should not have to incur the risk of subjecting himself to the full penalties of the criminal law in order to exercise that right."[22]

If there is to be waiver of jurisdiction at all, that recommendation, not included in the new Act, seems to be the only method available of having a given case transferred to adult court and yet still maintaining a certain degree of consistency with the aims and philosophy of the treatment of young offenders. But the real issue should be: is it necessary to allow waiver of Juvenile Court jurisdiction to the adult courts at all?

Originally, the rationale for putting waiver of jurisdiction sections into the Juvenile Delinquency Act was that it was felt that the juvenile courts were new "experimental" courts, and to ensure that the civil rights of the accused would not be violated and that due process of law would be served, it would be desirable to have the more serious cases, i.e. indictable offences, heard in ordinary courts.[23] In commenting on this attitude towards the juvenile court, Graham Parker said in a recent article:[24]

> Obviously, the "experimental" label was simply a judicial excuse for waiver, but the juvenile court has always (at least in the last forty years) suffered from the patronizing attitude of the regular courts which are often antagonistic to the rehabilitative approach even in their own adult trials. Some stigma seems to be suggested by this label – as if the juvenile court was not a success and could not possibly be a success and was merely a sociological toy which could be used to deal with the 'mischievous' as opposed to the 'criminal' children. The legally trained judges presiding over the superior courts took a suspicious attitude to that court's flirtation with the behavioural sciences. In the recent case of Simpson ([1964] 2 C.C.C. 316), where a fifteen year old was charged with murder which he had allegedly committed while he was thirteen and a half years old, the court held that although the juvenile court was experimental, a proper trial could still be conducted by the juvenile court.[25]

More recently, the superior courts have gone even further in endorsing the judicial capabilities of the juvenile courts to hold fair trials.

22. **Supra**, footnote 2, pp. 81-82, para. 169, 171).
23. **Re L.Y. 1** (1944) 382 C.C.C. 105 (Man. C.A.).
24. Parker, G., The Appellate View of the Juvenile Court, 7 Osgoode Hall L.J. 155 (1969-70).
25. **Ibid**, at p. 168.

In *Re Liefso*,[26] Jessup J. said, "the presumption must be that an accused will receive a fair trial before a Juvenile Court judge and I do not think there can be any presumption that he will have a better or fairer trial before a Supreme Court judge and jury."[27]

Going just as far in this direction is the decision in a Manitoba case, *R. v. Sawchuk*,[28] in which Wilson, J., of the Manitoba Court of Queen's Bench dismissed on appeal by the Crown from a decision of Stringer, Juv. Ct. J., refusing to transfer a juvenile case involving the discharge of a firearm with resulting bodily harm. In this case, Wilson J., said that it was no longer necessary to refer to the juvenile court as an experimental court, and that the decision as to whether or not to waive jurisdiction from juvenile court to ordinary court is in every case essentially a matter in the discretion of the Juvenile Court judge."[29]

Thus it seems that, generally, the consensus is that the juvenile courts have matured and developed to the point where they are fully equipped to handle trials fairly and judiciously. Considering how much more experience the juvenile court judge has in dealing with young persons, and considering the wide range of rehabilitative dispositions available to the juvenile court judge which are not available in the ordinary courts, perhaps it is time the waiver of jurisdiction sections of our law relating to young persons were abolished, and that with the exception of the area of appeals from a juvenile court decision, the juvenile courts were severed from the ordinary courts entirely. This would allow the juvenile courts to move even further away from the whole "crime-and-punishment" psychology associated with our judicial system, and closer to an education and rehabilitation approach, desirable from both the standpoint of the individual young offender and the community at large.

Disposition of Sentence

Perhaps one of the most amazing and frightening aspects in the new Act is to be found in section 30(1)(k) read in conjunction with section 30(4). This provides that where a young person is charged with an act which, if committed by an adult would constitute a crime punishable either by life imprisonment or death, and if that young person's case is not waived to adult court but heard in juvenile court, then the juvenile court judge can commit the young person to a training school until he reaches the age of twenty-one, at which time the young person

26. [1965] 2 O.R. 625 (Ont. Sup. Ct.).
27. Ibid, at p. 627.
28. (1967) IC. R.N.S. 139, (Man. Q.B.).
29. Ibid, at p. 141.

can be brought back before an ordinary court and be sentenced again without a trial for the same act. This provision is so obviously self-contradictory that one wonders how supposedly intelligent men could draft and approve it. It says on one hand that a person of fourteen or fifteen years who commits, for example, murder, has, because of his young age, a diminished responsibility and should be dealt with as a young person in need of guidance and supervision. Then, on his twenty-first birthday, he is brought back before the court for the same type of disposition he would have received had he been fully responsible for his action under criminal law when he was still a young person within the meaning of the Act. Besides subjecting the young person to a double-disposition, this provision ignores entirely clinical evidence to the effect that children of fourteen and under who commit murder are the most amenable to rehabilitation; most of them can be safely returned to the community by the time they are eighteen. This section of the Act can only be described as medieval in philosophy and effect.

There are other sections of the new Act which appear to be retrogressive to the development of a rational policy regarding young offenders. Under the present Juvenile Delinquency Act, young offenders cannot be finger printed and photographed for the purposes of the Identification of Criminals Act. Under the new Act, where the juvenile court judge so orders, a young person can be photographed and finger printed,[30] a process which, more than any other single aspect of court and detention procedure, may cause that young person to adopt and internalize the self-image of "criminal." These records could also be considered by criminal courts should the young person be brought before the court as an adult for committing a crime.

Conclusion

Throughout the new Act there are philosophical inconsistencies and potentially harmful innovations, only some of which are outlined in this paper. To be sure, the Act has merits also, such as sections 15 and 16 which state that when a young person is arrested or ordered to appear in court, a notice shall be sent to his parents outlining the date of his appearance, the offence alleged, the fact that the accused has the right to be represented by counsel and the requirement that the parent accompany the young person in court; section 78 which keeps the *doli incapax* rule as part of our law despite the recommendation of the task force that it be deleted;[31] and sections 30(1)(g) and 30(1)(i) which limit the number of years a young offender can be committed to a foster

30. **Supra**, footnote 2, s. 74.
31. **Supra**, footnote 7, at pp. 53-54, para. 119.

home to two, and the number of years he can be committed to a training school to three. In criticizing these particular sections of the Act, Harold Greer, an editorialist for the Winnipeg Free Press, said:

> Perhaps [the Act's] greatest fault from a practical point of view, however, is that it appears to preclude the indefinite or indeterminate sentence, or at least makes it more difficult for provincial rehabilitative programs to work in those provinces which have such sentences . . . this [indefinite sentence] is essential for the effective operation of a rehabilitation program. It permits the release of a young person under care, training and treatment at the optimum time, not holding him beyond his point of maxium progress, not letting him go before he is ready.[32]

Mr. Greer's criticism would be valid if all the provinces had the facilities and staff required to determine optimum time for release. However, outside of British Columbia and Ontario, which have excellent facilities for dealing with young offenders, and Saskatchewan and Alberta, which have adequate facilities, the provincial welfare departments do not have the money, facilities, or personnel to properly administer an indefinite or indeterminate sentence program, and until they do, it is hypocritical to subject young offenders to this type of program.

Ultimately, the new Young Offenders Act fails. It fails because the Bill attacks the problem from a legal standpoint rather than from a welfare and education standpoint. The Bill goes to great lengths to guarantee civil rights and due process of law to the young offender (a commendable aim, but does so at the expense of welfare and rehabilitative progress, and, in the final analysis, ensures the young offender of neither. One hopes that Bill C-192 will be seriously overhauled before it becomes law, or else Parliament will again be guilty of proudly putting obsolete notions into our law.

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JUDICIAL PROCESS IN THE LAW OF OBSCENITY

The year 1970 witnessed a disturbing development in the criminal law dealing with obscenity. On two occasions in 1970 the Manitoba Court of Appeal was confronted with cases involving section 150(1) of the Criminal Code under which the possession of obscene material for the purpose of publication, distribution or circulation, is made a criminal offence. The two cases *Regina* v. *Great West News et al.*[1] and *Regina* v. *Prairie Schooner News Ltd. and James Powers,*[2] raise difficult and interesting questions in the evidentiary area of judicial notice.

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32. Greer, H., A Retrogressive Bill, Winnipeg Free Press, December 23, 1970.

1. (1970) 72 W.W.R. 354 (Man. C.A.).

2. (1970) 75 W.W.R. 604 (Man. C.A.).