Could "Bad Kids" Be Saved by Better Laws? A Comparison of Current Federal Legislation of the United States and Canada

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I. Introduction

A. The Importance of Studying Juvenile Crime

I remember raising my weapon and him looking back—for a split second it was as if we communicated on another level and I overstood [sic] who he was—then I pulled the trigger and laid him down. . . . The seriousness of what I had done that evening did not dawn on me until I was alone. . . . I was left then with just myself and the awesome flashes of light that lit up my mind to reveal bodies in abnormal positions and grotesque shapes, twisting and bending in arcs that defied bone structure. The actual impact was on my return back past the bodies of the first fallen, my first real look at bodies torn to shreds. . . . Upon further contemplation, I felt that they were too easy to kill.1

Although there is a rising crime rate in almost all types of crime and in almost all areas of the world, juvenile crime is an area in which the instances and types of crime are becoming both greater in number and in severity.2 Juvenile crime is particularly disturbing due to the youthful age of the offenders. Without help and rehabilitation, these children could be establishing a foothold in a life of terror and destruction. Although crime is horrific in any

1. KODY SCOTT, MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER, SANYIKA SHAKUR, A.K.A. MONSTER KODY SCOTT 13 (1993). At the time that this violence took place, ‘Monster’ was eleven years old and was taking part is his first of over eighteen years of gang experiences. Id. at 10, xiii.

2. See, e.g., Kwing Hung & Stan Lipinski, Questions and Answers on Youth and Justice (visited Nov. 4, 1998) <http://198.103.98.138/crd/forum/e07/e071b.htm> (commenting on the Canadian rise in juvenile crime).
situation, juvenile crime, more than any other, concerns the future of the world; thus, the need to help these children in any way possible is of the utmost importance.

B. Overview of this Comment

By comparing the Juvenile Delinquency Act, which is United States federal legislation, to the Young Offenders Act of Canada, which is a subset of the Consolidated Statutes of Canada, this Comment hopes to emphasize some of the areas in which each law is lacking in effective efforts to combat rising juvenile crime. While comparative articles are often useful in highlighting areas of weakness and strength, this Comment has inherent benefits due to the choice of countries compared. Many of these type of articles are internally weak because they attempt to compare two issues or areas where the cultures are totally unique from one another. Cultural diversity nullifies any analysis since differences can be contributed to a number of variables other than the structure of the legal system. However, the comparison of Canada and the United States begins on more equal footing; much of the Canadian culture is comparable to the United States culture, in ethnic diversity, class status, wealth, and educational levels. The statutes are fairly similar in scope as well, with the exception that the Canadian legislation applies to many more crimes (since many Canadian crimes are prosecuted in their federal system),3 than the United States legislation (which applies to far fewer crimes since most juvenile crimes in the United States are dealt with in state courts).4 Still, the United States federal legislation may be useful in providing a model for state legislation.5

This Comment will begin with a historical overview of both the United States and the Canadian juvenile justice systems. Following the overview, this Comment will discuss recent legislation in each country: the current version of the United States Juvenile Delinquency Act, and the Young Offenders Act, as recently amended in Canada. After outlining the basic premise of each piece of legislation, this Comment will discuss in detail the legislation dealing with both the issue of transfer from juvenile court to adult criminal court as well as the issue of available dispositions. Analysis of the comparative strengths and weaknesses of each area will

follow, with a few statistics indicating the current trend in the juvenile crime rate. Finally, this comment will propose legislation for the next amendment to the United States Juvenile Delinquency Act or the Canadian Young Offenders Act which would aid in combining the strengths of each country's current legislation.

II. History of the Juvenile Justice Systems

A. History of the United States Juvenile Justice System

The original philosophy of juvenile crime in the United States was inherited from England, before the advent of juvenile courts in America. At this time, there were no separate goals or ideals for juveniles; the understanding was simply that children who committed crimes were punished as adults.

On July 1, 1899 the first United States juvenile court was established in Chicago, Illinois. This landmark event marked the first state-wide unification of juvenile law. Juveniles were considered to be within the jurisdiction of the juvenile court from early childhood until the age of sixteen. This movement was partially the result of the work of reformers, referred to as the "Child Savers," who sought to protect and guide children through the use of firm control and imprisonment. The philosophy of this and the other quickly-emerging juvenile courts was Parens Patriae: look to the best interests of the child while considering the interests of the parents and society in general.

As the juvenile court movement arose across the nation, problems ensued. One of the difficulties was that many of the courts were unsure which rights and protections were afforded to

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7. See id. The only restrictions were that children who were under the age of seven could not be convicted of committing a crime, as they were believed to be incapable of forming the necessary intent. See id. For children between the ages of seven and fourteen there existed a rebuttable presumption that they could not be convicted of committing a crime; evidence pointing to their ability to distinguish right from wrong and to possess the requisite intent would overcome this presumption. See id. Children over fourteen were treated as adults in the criminal arena. See id.
8. See Johnson, supra note 6, at 3.
9. See id.
10. See id. at 7.
11. See id. The Child Savers lacked any political affiliations which had often weakened other movements. See id.
12. See Johnson, supra note 6, at 13.
juveniles. The Supreme Court aided the development of the juvenile justice system by ruling on a number of cases which further solidified the system’s structure.

The issue of due process for juveniles was first addressed in *Kent v. United States*, 383 U.S. 541 (1966). In *Kent*, a juvenile was waived from juvenile court to adult court, without a hearing (even though one was requested by the juvenile), without giving the juvenile’s counsel access to his records, and without stating the reasons for the waiver. Although the Court refused to characterize the proceedings as criminal and therefore grant the juvenile the full protections of the criminal system, the Court did invalidate the waiver due to the lack of procedural safeguards included in this process.

Quickly following this case, the Supreme Court decided *In re Gault*, 387 U.S. 1 (1967). The Court concluded that juvenile proceedings that may lead to commitment in a state institution must meet procedural due process requirements. Included in these requirements were (1) written notice of the charges; (2) notification of right to counsel, including right to appointed counsel if unable to afford one’s own; (3) application of the privilege against self-incrimination; and (4) the right to cross-examination. Thus, the

13. See id. at 17.
16. Id. at 555.
17. See id. The Court stated:

> [t]he Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness. Id.

19. See Gault, 387 U.S. 1 at 33. In so holding, the Court noted that “[a] proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.” Id. at 36.
20. See id. at 33.
21. See id. at 36.
22. See id. at 55.
23. See Gault, 387 U.S. at 56. In holding that these due process protections applied to juveniles, the Court remarked that “[u]nder our Constitution, the
Supreme Court expanded the scope of protections within the juvenile system to encompass many of the rights included in the adult criminal system.

Subsequently, the Court decided *In re Winship*, 387 U.S. 358 (1970), ruling that the standard for conviction in juvenile court must meet the adult standard of proof beyond a reasonable doubt. The Court followed this large grant of protection by *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), in which the Court held that there was no right to a jury trial in a juvenile court.

The Court decided that the punishment of juveniles needed to be limited according to their age at the time of offense. The Court found, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), that the Eighth and Fourteenth Amendments prohibit the sentence of death upon a child who was under the age of sixteen at the time he committed the offense. In accordance with that decision, the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), held that the imposition of the death penalty on a juvenile found guilty of committing murder at the age of sixteen or seventeen does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.

The Juvenile Delinquency Act, discussed more thoroughly in this Comment, is federal legislation which coincides with the aforementioned cases in establishing the laws and procedures utilized in dealing with juveniles in federal court.

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24. *In re Samuel Winship*, 397 U.S. 358, 368 (1970). In providing the reasoning for its opinion, the Court stated:

> [t]he reasonable doubt test is superior to all others in protecting against an unjust adjudication of guilt, and that is as much a concern of the juvenile court as of the criminal court. It is difficult to see how the distinctive objectives of the juvenile court give rise to a legitimate institutional interest in finding a juvenile to have committed a violation of the criminal law on less evidence than if he were an adult.

*Id.* at 367 (citing Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 Fam. L. Q., No. 4, 1, 27 (1967)).

25. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). “If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.” *Id.* at 551.


B. History of the Canadian Juvenile Justice System

The Canadian system of juvenile justice is organized somewhat differently. Similarly to the United States Juvenile Delinquency Act, which structures juvenile proceedings in federal court, Canada has a Young Offenders Act, which provides a comparable structure and applies throughout the country. However, most juvenile proceedings in the United States are handled in the state courts, although, juveniles are being prosecuted in the federal system more often in recent years. In contrast, most of the crimes in Canada that are considered federal crimes, and thus under the visage of the Young Offenders Act, are those typically considered state crimes in the United States: shop-lifting, breaking and entering, drug possession, car theft, and assault, for example. Thus, many crimes traditionally prosecuted in state courts in the United States are prosecuted in federal courts in Canada. Although the provinces have their own separate laws, these mostly concern less severe crimes, such as underage drinking, trespassing, and traffic offenses.

The juvenile structure of the criminal courts in Canada began in 1857, when the first legislation dealing with juvenile offenders, the 'Act for the more speedy trial and punishment of juvenile offenders,' was passed. This Act mainly served to hasten the trial procedure, so that juveniles would no longer suffer the long pre-trial detentions to which they were accustomed.

Beginning in 1869, the various provinces started to provide for the establishment of reform schools and detention centers, in an effort to keep the family unit together. This was the beginning of recognizing juvenile crime as more than the problem of 'bad kids,' but rather, children who had grown up lacking some of the essentials to ensure their successful development.

30. See, for example, 18 U.S.C.S. § 5032 (1998), specifying certain violations of the Controlled Substances Act which are sufficient to establish federal jurisdiction and are increasingly resulting in federal prosecutions.
31. See id.
32. See id.
34. See id.
35. See id. at 56.
36. See id. This development began to focus on the environment of the child; if he or she had become delinquent, it was assumed that he or she had lacked the affection or attention that should come from a family. See id. Thus, in trying to help these children, the law made efforts to repair both their homes and their
Finally, in 1908 this increasingly paternalistic view towards helping the child was codified in an Act which increased the range of jurisdiction over juveniles, thereby delaying their entry into the adult criminal system. The Juvenile Delinquents Act gave jurisdiction to a court exclusively for juveniles, and extended its jurisdiction to any child under the age of sixteen who had committed any offense that was covered by the Criminal Code. The idea behind the Act originated from the United States; however, after the child was found guilty, the system in Canada focused on help and treatment, rather than emphasizing punishment.

In addition, the 1908 Act made the “sacred” rights of parents subservient to the greater rights of the child to have their basic needs satisfied (education, parenting, etc.). In 1921, the scope of the 1908 Act was enlarged to further raise the jurisdictional age limit from sixteen to eighteen years of age.

Today, the focus is still on the combination of the individual and the environment in contributing to delinquency, with the emphasis on the environment. The Young Offenders Act has replaced the Juvenile Delinquents Act. The process utilized under the two acts has been evaluated and criticized by proposed bills and recommendations which attempted to formalize the process.
particular, since the Young Offenders Act was first enacted in 1984, it has undergone at least three amendments. The amendments are continuously providing for greater protection of the public, by way of harsher sentences and more automatic transfers to adult courts.

I. Controlling Federal Legislation in the Area of Juvenile Justice

A. Current United States Federal Juvenile Justice Legislation

1. Overview.—The Juvenile Delinquency Act [hereinafter the Juvenile Act] is a compilation of twelve statues contained in the United States Code, encompassing Sections 5031-5042. The Juvenile Act was first enacted on June 25, 1948, and has since been amended many times. The most recent amendment to the Juvenile Act was made in 1996.

The Juvenile Act encompasses various phases and procedures for managing juveniles prosecuted in federal court. Additionally, the Juvenile Act is beneficial in that states may refer to or consult the Act when enacting their own juvenile legislation. Although the Juvenile Act deals with many areas of juvenile criminal procedure, this Comment will be focusing on the issues of transfer to adult court and the issue of available punishments, and how effective these procedures are in implementing the goals of the entire juvenile justice system.

2. Transfer to Adult Court.—The provision of the Juvenile Act concerning transfer of juveniles to adult criminal court is 18 U.S.C.S. § 5032. Since this is federal legislation, all proceedings under this statute, and the Juvenile Act in its entirety, occur in the relevant district court of the jurisdiction.

See CARRIGAN, supra note 3, at 249-251. The amendments were made in 1986, 1992, and 1997. See id.

See id. at 250. However, since the Y.O.A. was first enacted, one of the goals has been to use incarceration only as a last resort. See CARRIGAN, supra note 3 at 244.

See ESKRIDGE & FRICKLEY, supra note 5.
Id.
In order to be able to transfer to adult court, the district court must first establish jurisdiction over the juvenile. The district court will obtain jurisdiction if: (i) the State does not have jurisdiction over the juvenile or refuses to assume their jurisdiction; (ii) the State does not have adequate programs or services to deal with the juvenile; or (iii) the offense is one of the specifically enumerated offenses and the federal court has a substantial interest in the case which warrants the jurisdiction.

The statute provides for transfer to adult criminal court through a few different avenues. First, the juvenile can elect to be transferred to adult court, as long as he has discussed the decision with his attorney. Secondly, the statute provides that if a juvenile has committed an act after his fifteenth birthday, which would have been a felony crime of violence if committed by an adult (specific violent offenses), the prosecutor can make an application for transfer to adult court. After the application is filed, the court must hold a hearing to determine whether the transfer would be in the interests of justice; if this requirement is met, the transfer will be approved. Additionally, if the juvenile allegedly committed an offense at a time following his thirteenth birthday, and the crime is one of a certain type of violent offense or the juvenile possessed a firearm during commission of the offense, the juvenile can be transferred to adult court following the aforementioned hearing.

Finally, if the juvenile is charged with an offense that was committed after he was at least sixteen years of age, and had been previously found guilty of an offense which, if committed by an adult, would have been one of a number of enumerated offenses, or

53. See id. at para. 1.
54. See id. The 'enumerated offenses' include crimes of violence which are felonies, certain crimes dealing with the importation or exportation of controlled substances, and certain offenses involving the transferring of a handgun either to a juvenile or across state lines. See, e.g., id.; 21 U.S.C.S. § 841 (1998); 18 U.S.C.S. § 922(x) (1998); 18 U.S.C.S. § 924(b),(g),(h) (1998).
56. See id. See supra note 48 (describing the offenses).
58. See id.
59. To fall under this section, the offense must have involved the use, attempted use, or threatened use of physical force, or have involved a substantial risk of physical force, or have been a certain enumerated offense. See id.
60. The use of the word “he” is not meant to provide a specific reference to the male gender; the use of “he” throughout this Comment should be construed as including both the male and female gender.
was a State felony that could have given rise to federal jurisdiction, he would be automatically transferred to adult court.\footnote{61}

The following is a list of considerations that the statute dictates should be made when determining whether a transfer would be in the interests of justice:

- the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.\footnote{62}

The statute also provides some procedural protections for the juvenile in regard to the issue of transfer. The juvenile must be given "reasonable notice" of the transfer hearing, and be represented by counsel at the hearing.\footnote{63} In addition, statements made by the juvenile before or during the transfer hearing are not admissible in any subsequent criminal prosecution.\footnote{64} However, if the juvenile is transferred to adult court but is not convicted of the crime for which he was transferred, or another crime which warranted transfer, he shall be returned to juvenile court and processed in accordance with the Juvenile Delinquency Act.\footnote{65}

\footnote{61. See \textit{id}. The enumerated offenses are generally centered on an offense involving the importation or exportation of controlled substances. See \textit{id}.}

\footnote{62. 18 U.S.C.S. § 5032, para. 5 (1998). The statute notes that when considering the nature of the alleged offense, the court should consider whether the juvenile assumed a leadership role in the commission of the offense, and whether the juvenile influenced other persons to engage in the act, "involving the use or distribution of controlled substances or firearms." \textit{Id.} Finally, the statute states that although such factors, if found, would weigh in the favor of transfer to adult court, the absence of such factors would not preclude a transfer. See \textit{id}.}

\footnote{63. See \textit{id}. at para. 6. "Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings." \textit{Id.}}

\footnote{64. See 18 U.S.C.S. § 5032, para. 8 (1998).}

\footnote{65. See \textit{id}. at para. 9.}

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter [18 USCS §§ 5031 et. seq.]. \textit{Id.}
3. Available Dispositions.—Two United States Code Sections are useful in examining the available dispositions for a juvenile who has been adjudicated delinquent. Section 5037 provides that a dispositional hearing must be held within twenty days following the adjudication of delinquency. At this hearing, the court may either suspend the findings of juvenile delinquency, order the juvenile to pay restitution, put the juvenile on probation, or commit the juvenile to official detention.

If the juvenile is ordered to probation, and is less than eighteen years of age, the time for probation must be the least amount of time that is either the maximum time that he would have received had he been tried and found guilty in adult criminal court, or the date at which he will reach twenty-one years of age. If the juvenile is between the ages of eighteen and twenty-one years of age, he shall be given probation for the least amount of time that is either three years, or the maximum time he would have received if he had been convicted in adult criminal court.

If ordering official detention, the same provisions apply for a juvenile who is less than eighteen years of age. He can be sentenced to the least amount of time between the time when he reaches twenty-one years of age or the maximum term that would have been authorized had he been convicted in adult criminal court. However, if the juvenile is between the ages of eighteen and twenty-one, and if his offense is one which would have resulted in a conviction of a Class A, B, or C felony in adult criminal court, the disposition cannot extend for more than five years. Otherwise, the disposition is the least amount of time that is either three years, or

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68. See id.
69. See id., ¶ (b)(1)(A-B).
70. See id., ¶ (b)(2)(A-B).
73. See id., ¶ (c)(2)(A). A Class A felony is one in which the possible punishment is either life imprisonment or death. See 18 U.S.C.S. § 3559, ¶ (a)(1) (1998). A Class B felony is one in which the possible punishment is at least twenty-five years of imprisonment. See id., ¶ (a)(2). A Class C felony is one in which the possible punishment is less than twenty-five years imprisonment but is at least ten years imprisonment. See id., ¶ (a)(3).
the maximum term of imprisonment that would have been authorized if he had been convicted in adult criminal court.\textsuperscript{74}

The final provision of this section dealing with possible dispositions provides that if the court determines that they need more information about the juvenile, they may, after a hearing, commit him to the custody of the Attorney General so that he may be observed and studied by an appropriate agency.\textsuperscript{75} This study must be done on an outpatient basis unless the juvenile and his attorney consent to inpatient observation.\textsuperscript{76} Within thirty days of commitment the Attorney General must submit to the court the results of the study, including "his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors."\textsuperscript{77}

The Code requires that when committed, a juvenile may not be placed in an adult jail or correctional institution where he would have regular contact with adult inmates.\textsuperscript{78} This section also provides that if possible, the Attorney General shall commit the juvenile to a foster home or community-based facility that is in a location near his home and community.\textsuperscript{79} Finally, when a juvenile has been committed, it is mandated that he be provided with "adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment."\textsuperscript{80}

B. Current Canadian Federal Juvenile Justice Legislation

1. Overview.—The comparable Canadian legislation, the Young Offenders Act [hereinafter Y.O.A.] is broader in scope than the Juvenile Delinquency Act. The Y.O.A. applies to all federal prosecutions of young offenders in Canada;\textsuperscript{81} comparably, the Juvenile Delinquency Act applies to all federal prosecutions of juveniles in the United States.\textsuperscript{82} However, federal prosecutions in Canada are much more inclusive; a majority of young offenders are

\textsuperscript{74} See 18 U.S.C.S. § 5037, ¶ (c)(2)(B)(i-ii).
\textsuperscript{75} See id. at § 5037, ¶ (d).
\textsuperscript{76} See id.
\textsuperscript{77} Id.
\textsuperscript{78} See 18 U.S.C.S. § 5039, para. 1 (1998). This provision applies whether the adult inmates have already been convicted or are awaiting trial on criminal charges. See id.
\textsuperscript{80} Id. at para. 2.
\textsuperscript{81} See Canadian Bar Association, supra note 29.
\textsuperscript{82} 18 U.S.C.S. § 5037.
prosecuted in the federal system, and thus the Y.O.A. is used on a more extensive basis.  

2. Transfer.—The Young Offenders Act discusses transfer in section 16. 

The Act provides that in order to be transferred, a young person must be at least fourteen years old and have committed almost any of the indictable offenses in Canada’s Criminal Code. Application for transfer may be made by the young person himself, by his counsel, by the Attorney General, or by an agent of the Attorney General.

The Y.O.A. mandates transfer to adult court (referred to in Canada as “ordinary court”) when a young person was sixteen or seventeen years of age at the time of the alleged offense, and is being charged with either first degree or second degree murder, attempt to commit murder, manslaughter, or aggravated assault.

The Y.O.A. requires transfer to adult court in these circumstances unless the young person, his attorney, the Attorney General, or an agent of the Attorney General applies for an opportunity for the juvenile to remain in youth court, and the youth court grants that application.

Under the Y.O.A., if one party files an application for the juvenile to remain in youth court, and the application is unopposed, the youth court must grant the application. If the application is opposed, the youth court shall hold a hearing, wherein it must “consider the interest of society, which includes the objective of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court.”

83. See Canadian Bar Association, supra note 29. The crimes to which the Young Offenders Act applies are those covered in the Canadian Criminal Code. See id.


85. Id. at § 16(1).

86. See id. at § 16(1)(a-d).

87. Id. at § 16(1.01).

88. Id.

89. Young Offenders Act, R.S.C., ch. Y-1, § 16(1.04).

90. Id. at § 16(1.1). However, where an application is made... by the Attorney General or the Attorney General’s agent in respect of an offence [sic] alleged to have been committed by a young person while the young person was being proceeded against in ordinary court pursuant to an order previously made under this section or serving a sentence as a result of proceedings in ordinary court, the youth court may make a further order under this section [for transfer] without a hearing and without considering a pre-
these interests can be reconciled, the court shall order the youth to be proceeded against in youth court; if not, the youth will be transferred and prosecuted in adult court. The burden of proof in this hearing rests with the party making the application.

In considering whether the interests of society and the child can be reconciled, the Y.O.A. instructs the court to take into account the following points:

(a) the seriousness of the alleged offense and the circumstances in which it was allegedly committed;
(b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the Juvenile Delinquents Act... or previous findings of guilt under this Act or any other Act...;
(c) the adequacy of this Act and the adequacy of the Criminal Code or any other Act of Parliament that would apply in respect of the young person if an order were made under this section, to meet the circumstances of the case;
(d) the availability of treatment or correctional resources;
(e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and
(f) any other factors that the court considers relevant.

In addition, the Y.O.A. mandates that the court making the determination of transfer consider the contents of the pre-disposition report.

The Y.O.A. further orders the youth court to state the reasons for its decision on the issue of transfer. When a juvenile is transferred, the adult court has jurisdiction only over the offense for which the juvenile was transferred. In addition, no statement made during the transfer hearing is admissible in any civil or criminal proceeding subsequent to the hearing.

3. Available Dispositions.—The Y.O.A. provides for a number of different dispositions for young offenders. The court can

Id. at § 16(4).
91. See id. at § 16(1.1)(a)(i-ii).
92. See id. at § 16(1.1)(b)(i-ii).
94. Id. at § 16(2)(a-f).
95. Id. at § 16(3).
96. Id. at § 16(5).
97. See id. at § 16(8)(a-c).
98. See Young Offenders Act, R.S.C., ch. Y-1, § 16(12).
order the young offender be discharged completely, if it finds that such discharge is in the best interests of the juvenile and is not contrary to the public interest. The court may also order a conditional discharge, a fine not exceeding one thousand dollars, or compensation to the victim for loss or damage to property or personal injury. In addition, the court may order restitution (either return of property, payment for the cost of property, or compensation by services), community service, or probation for not more than two years. The court can also commit the juvenile to custody for not more than two years, or three years if the punishment in the Criminal Code would be imprisonment for life.

The court can also order specific sanctions for a finding of guilt of first or second degree murder. If the juvenile is found guilty of first degree murder, he can be sentenced to ten years, comprised of not more than six years in custody, followed by a community placement with conditional supervision. If the juvenile is found guilty of second degree murder, he can be sentenced to seven years, comprised of not more than four years in custody, followed by a community placement with conditional supervision.

In Canada, these dispositions will continue after the age at which the young offender becomes an adult. However, the punishment is limited in that it cannot be greater than the authorized maximum punishment that would be imposed upon an adult who was convicted of the same offense.

IV. Analysis

A. Comparison of the United States Juvenile Delinquency Act and the Canadian Young Offenders Act

1. Overview.—Both the Juvenile Delinquency Act and the Young Offenders Act are federal legislation. However, this means two different things for the different countries. In the United States,

99. See id. at § 20(1)(a).
100. See id. at § 20(1)(a.1-c).
101. See id. at § 20(1)(d-g),(j).
102. See id. at § 20(1)(k)(i-ii).
104. See id. at § 20(1)(k.1)(i)(A-B).
105. See id. at § 20(1)(k.1)(ii)(A-B).
106. See id. at § 20(5).
107. See id. at § 20(7).
the federal juvenile legislation is rarely used. In Canada, the Young Offenders Act is the main, and often the only legislation used to prosecute juvenile offenders, with rather minimal offenses prosecuted by the provinces. Thus, the Canadian legislation is much more broad and more encompassing in scope. However, in the United States federal legislation is useful in that it can be examined when the states are enacting their own legislation; thus, in this way, the Juvenile Delinquency Act may also have considerable influence.

2. Provisions for Transfer.—The requirements for transferring a juvenile in the United States are more oriented towards protecting the rights of the juvenile than are the Canadian transfer provisions. While the Young Offenders Act requires transferring a juvenile in certain circumstances, the Juvenile Delinquency Act only mandates transfer where the juvenile is a prior offender that has committed a serious, violent offense. Although a juvenile must be fourteen years of age to be transferred in Canada, in general, only juveniles fifteen years of age or older at the time of the offense will be transferred in the United States. And while children in the United States who were thirteen years of age or older at the time of the offense may be transferred in certain circumstances, this is limited to certain severe offenses or offenses committed while in possession of a firearm.

While the United States holds a hearing in every case of possible transfer, Canada only holds a hearing where the application for transfer is formally opposed. Both the United States and Canada look to the same type of requirements for transfer: the United States considers whether the transfer would be

108. The goal is to utilize state prosecutions for traditionally state or locally prosecuted crimes. See H.R. 3, 105th Cong. § 201 (1997).
110. See CARRIGAN, supra note 3 at 243.
111. See Canadian Bar Association, supra note 29.
112. See ESKRIDGE & FRICKEY, supra note 5.
113. See also supra note 29 and accompanying test (referring to the increasing amount of drug crimes and resulting federal prosecutions).
114. Young Offenders Act, R.S.C., ch. Y-1, § 16(1.01) (1998) (Can.).
116. See Young Offenders Act, R.S.C., ch. Y-1, § 16(1).
118. See id.
119. See id. at para. 5.
120. See Young Offenders Act, R.S.C., ch. Y-1, § 16(1.1) (1998) (Can.).
in the "interests of justice,"\textsuperscript{121} while Canada looks to see whether the interests of society can be reconciled with the interests of the juvenile within the juvenile court.\textsuperscript{122} The Canadian standard appears to be a more precise definition of the United States' "interests of justice" standard.

The United States and the Canadian courts examine many of the same factors to determine whether transfer would serve justice, including the age and maturity of the juvenile, his prior record, and the nature of the alleged offense.\textsuperscript{123} However, the Juvenile Delinquency Act requires consideration of the juvenile's response to past treatment efforts\textsuperscript{124}, while the Canadian legislation makes no mention of this factor. This is a highly important factor, since the possible failure of a previous treatment effort provides practical information to a court attempting to determine which program will best serve the needs of the child. The United States also considers the intellectual development of the child,\textsuperscript{125} another factor which is highly important in considering the juvenile's possible success in a system designed for adults, and therefore conceivably beyond his capacity. Although not specifically mentioned, it is possible that these factors are examined in the Canadian hearing, since the Young Offenders Act states that any other "relevant factor" can be considered when deciding the issue of transfer.\textsuperscript{126} However, the inclusion of these two specific provisions in the legislation (intellectual capacity and response to past treatment efforts) is important, as they require the court to examine these factors.

In providing due process protections to the child, the Young Offenders Act mandates that the court provide its reasons for its decision on the issue of transfer.\textsuperscript{127} This is important, both for issues of appeal as well as providing an automatic check on the reasonableness of the deciding judge. While both courts require that any statements made by the juvenile at the transfer hearing cannot be held against him in a subsequent criminal proceeding,\textsuperscript{128} the Young Offenders Act also extends this protection to any future civil

\begin{itemize}
\item \textsuperscript{121} 18 U.S.C.S. § 5032, para. 5.
\item \textsuperscript{122} See Young Offenders Act, R.S.C., ch. Y-1, § 16(1.1).
\item \textsuperscript{123} See 18 U.S.C.S. § 5032, para. 5 (1998); Young Offenders Act, R.S.C., ch. Y-1, § 16(2)(a),(b).
\item \textsuperscript{124} 18 U.S.C.S. § 5032, para. 5.
\item \textsuperscript{125} See id.
\item \textsuperscript{126} Young Offenders Act, R.S.C., ch. Y-1, § 16(2)(f) (1998) (Can.).
\item \textsuperscript{127} Young Offenders Act, R.S.C., ch. Y-1, § 16(5).
\item \textsuperscript{128} See 18 U.S.C.S. § 5032, para. 8 (1998); Young Offenders Act, R.S.C., ch. Y-1, § 16(12).
\end{itemize}
The United States strips the juvenile of some protections, however, by requiring that if the juvenile is not convicted in adult court for a crime for which he was transferred, he will be returned to juvenile court and processed under the Juvenile Delinquency Act. The United States strips the juvenile of some protections, however, by requiring that if the juvenile is not convicted in adult court for a crime for which he was transferred, he will be returned to juvenile court and processed under the Juvenile Delinquency Act.

3. Available Dispositions.—While it appears at first glance that the dispositions available for juveniles are much harsher in the United States than in Canada, one must remember that many serious juvenile offenders in Canada are automatically transferred to adult court under the Young Offenders Act. Thus, Canada is often sentencing juveniles for much less severe crimes than is the United States, which does not provide for automatic transfer.

While both the United States and Canada provide for restitution, probation and detention, the Canadian court also can impose fines, community service, compensation for loss, and conditional discharges.

In imposing both probation and detention, the United States Juvenile Delinquency Act takes into account the age of the juvenile, and the effect of his age on the length of his sentence. When sentencing a child to detention, the most he can receive if he is between the ages of eighteen and twenty-one is five years. If he is under the age of eighteen, he will receive the lesser of either the sentence he would have received if convicted in adult court, or the time until he reaches twenty-one years of age. Under the Young Offenders Act, a juvenile will not be sentenced to custody for more than two years, unless he committed a crime for which he would receive life imprisonment if he was convicted as an adult, in which case he would be sentenced to three years. Thus, although it

129. Young Offenders Act, R.S.C., ch. Y-1, § 16(12).
130. 18 U.S.C.S. § 5032, para. 9.
131. Young Offenders Act, R.S.C., ch. Y-1, § 16(1.01) (1998) (Can.).
133. See Young Offenders Act, R.S.C., ch. Y-1, § 20(1)(a.1), (b),(c),(g).
134. 18 U.S.C.S. § 5037, ¶¶ (b),(c). Since the juvenile court in the United States automatically loses jurisdiction over juveniles when they reach twenty-one years of age, a sentence which extends past this age is ineffective. See 18 U.S.C.S. § 5031 (1998) (stating that the jurisdictional limit on juveniles is twenty-one years of age for issues of proceedings and dispositions).
137. Young Offenders Act, R.S.C., ch. Y-1, § 20(1)(k)(i-ii). In very limited circumstances, a juvenile in Canada could be confined for a greater number of years. See supra test accompanying notes 103-104. However, this is rare because as a result of the automatic transfer provision for these crimes provision for these
appears that a juvenile receives a much lighter sentence in Canada than in the United States, it is really the opposite: the possible sentences are relatively equal, but the crimes for which the juveniles are receiving those sentences in the United States are often much more severe than those in Canada.

B. Proposed Legislation.

Although it is difficult to find a specific description of the goals of either the United States or the Canadian juvenile justice system, it is not very difficult to imagine what such goals are. Lowering crime is a primary goal of almost any civilized society. For juveniles, another common goal is ensuring that the needs of the child are met. Included in these needs is education, food, shelter, and most importantly, but unfortunately often disregarded, mental and emotional support.

While it is often difficult to find accurate statistics of crime, it does seem that juvenile crime is lowering in both countries in recent years. In the United States, the juvenile arrest rate for all offenses combined reached the highest level in two decades in 1996, before it began its decline in 1997. Another source provided further elaboration, explaining that the arrest rate for juveniles between 1988-94 experienced a 60% increase, but then decreased by 23% between 1994-97. Similarly, in Canada, the number of juveniles arrested for all offenses experienced a continuous decline from 1994 to 1998. Finally, in the Canadian youth courts, the number of guilty findings also decreased, with 76,969 guilty findings in 1994-95, crimes, the only time in which a juvenile would be sentenced under the Young Offenders Act for one of these crimes is if he successfully opposed the automatic transfer to adult court. See Young Offenders Act, R.S.C., ch. Y-1, § 16(1.01)(a) (1998) (Can.).


140. Statistics, Canada. “Youths and adults charged in criminal incidents, Criminal Code, and federal statutes, by sex” (visited Oct. 8, 1999) <http://www.statcan.ca/english/Pgdb/State/Justice/legal14.htm>. Specifically, 143,268 juveniles were arrested in 1994, while only 117,036 juveniles were arrested in 1998. Id. While the overall crime rate declined, violent juvenile crime experienced a slight increase, and juvenile property crime experienced a significant decrease. Id. Additionally, it should be noted that there was an increase in juveniles arrested under federal statutes during this same time period, with 7,470 arrested in 1994, and 10,052 arrested in 1998. Id. However, this increase does not compensate for the drastic decrease in overall juvenile crime during that same time period.
and 74,527 guilty findings in 1997-98.141

The Juvenile Delinquency Act and the Young Offenders Act go far in providing legislation that aims to meet these goals, and seem to be proving somewhat effective in lowering juvenile crime. However, there are some areas in which either or both are weak, and some areas in which they are totally without direction. This proposal aims to address those areas so that the next piece of legislation may be more comprehensive in providing for the juvenile while still ensuring the protection of society and justice.

Initially, concerning the issue of transfer, it must be remembered and always considered that transfer is usually not in the best interests of the child. Many children who commit crimes do not have the familial support necessary to learn how to be a proper citizen. Subjecting such children to the types of punishment traditionally reserved only for adults cannot facilitate in providing either this support or the necessary education for the child to become productive. Thus, transfer should be regarded as a rare device, one to be utilized only in the harshest of circumstances.142

Similarly, the age of the juvenile needs to be given great force in the consideration to transfer. One must question the origin of a child of eleven years who has committed atrocious crimes.143 Overwhelming, juveniles who commit crimes are lacking the requisite family support needed to ensure their proper development.144 Transferring a child who commits a crime to an


142. However, a proposed Senate Bill would require transfer under 18 U.S.C.S. § 5032 (1998) if the juvenile was at least fourteen years of age and was alleged to have committed an offense that would be a serious violent felony or serious drug offense if committed by an adult. See H.R. 3, supra note 107, at § 5032.

143. See SCOTT, supra note 1 (referring to 'Monster' Kody Scott and his young acts of violence).

144. See CARRIGAN, supra note 3 at 283.

Accustomed, in many instances, to witness at home nothing in the way of example, but what is degrading; early taught to observe intemperance, and to hear obscene and profane language without disgust; obliged to beg, and even encouraged to acts of dishonesty to satisfy the wants induced by the indolence of their parents C what can be expected, but that such children will in due time, become responsible to the laws for crimes, which have thus, in a manner, been forced upon them?

adult court bent on punishment is thus, in effect, punishing the child for his being born into the wrong family.

These are hard issues to consider, and even harder issues to address in the context of the criminal or juvenile justice system. In order to ensure their consideration, an in-depth review of each child's familial background should be conducted before a child is transferred to adult court. Although the argument can be made that this type of study is financially overburdening, setting a child on the right path at this stage will save a great amount of money by keeping him out of the adult system in his later years. A finding of a poor family background may present the option to commit the child to a group home or to foster parents where he can be provided with the support and education necessary to grow into a responsible adult.

While some due process protections are afforded to the juvenile at the transfer hearing, there are a few areas lacking protection. A special caseworker should be assigned to do the aforementioned study, and his opinion should be given great weight on the advisability of transferring the juvenile. With the aid of someone who has spent some time with the child and is familiar with his history and present life, a more thorough review will be available. In addition, the juvenile court should not automatically transfer any juvenile, regardless of his age or alleged offense, without this examination. When one considers this issue, one can see that keeping a child who may be able to be "saved" in a system designed to provide rehabilitation (rather than sending him to a system that merely provides incapacitation and punishment), will better serve both the juvenile, as well as the protection of society.

In considering available dispositions for the juvenile, one must take into account many different factors. Often the only benefit of restitution is to restore the victim to his status before the offense. The juvenile's parents often pay the restitution, rather than the juvenile himself. In addition, mere money does not mean much to many children. Thus, restitution should only be imposed where it is necessary to compensate the victim, and fines should not be utilized in the juvenile justice system.

Probation is another area of concern. Probation, without further guidance or counseling should never be used in the juvenile justice system. This is regarded as merely a slap on the wrist, and many kids regard it as "cool" to "get away with" only probation. As a result, probation usually does not teach the child a lesson, plus it may leave the child lacking in his desperate need for education and other services.
Commitment, detention, and confinement should be used when necessary either for the protection of the juvenile or for the protection of society. However, unlike the adult criminal system, these dispositions should not be used alone, but should be combined with programs specifically addressed to the needs of each juvenile. When a juvenile needs education, it should be provided. When a juvenile needs familial support, he should be provided with a type of family-like environment.

In many situations, (disregarding the situation in which the juvenile is a member of a gang), an in-home program may be the most successful. Working with both the child and his family may result in a high success rate, as the family members can provide support to one another even after the end of the program. Teaching parents how to be proper parents is important, especially at a time when there are so many young mothers and fathers. In addition, it is important for a child to learn how to survive and develop in his community. In the gang situation, however, the most important objective is to pull the juvenile away from the gang and develop his skills in other areas.

Generally, it is important for the child who has gone astray to be reminded that he is still a child, and needs to be taught what being a child involves. When a child is lacking in support, his chances for success are slim; if the particular needs of each child can be addressed, his chance of growing to be a productive adult will greatly increase. Thus, an individual plan is important for each child, developed by someone who has spent time with the child and can identify the areas in which support is needed. In addition, although public perception and attitudes generally push for harsher sentences and tougher laws, the lawmakers must not be easily persuaded. If these children can be reformed and shown to be the young children that they really are, perhaps they will be welcomed back into an accepting society, rather than pushed towards the brink of destruction.

V. Conclusion

The United States' Juvenile Delinquency Act and Canada's Young Offenders Act are both important pieces of legislation. However, like any statute, there are some areas in which each are weak. This Comment proposes that most importantly, both in the area of transfer and in the area of disposition, the life of the individual juvenile needs to be examined. After examination, when looking at the issue of transfer, it can be decided if transferring a
child to adult court is proper in the particular case. After examining the child’s life, a suitable program for disposition can be designed to address the particular areas in which that child needs help. By doing the most we can to save our children, we are really saving ourselves and our futures. Kody Scott\textsuperscript{145} saved himself, with only the help of a few well-meaning friends and adults. If an eleven year old gangbanger can change his life, largely by his own determination, why is it so impossible for an entire country to save its children?

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\footnote{145 \textit{See SCOTT, supra note 1.}}