



Landon Pearson Resource Centre  
for the Study of Childhood  
and Children's Rights

2012

# Children's Rights Academic Network



**Carleton**  
UNIVERSITY



The Muttart Foundation

Study of Childhood and Children's Rights  
4<sup>th</sup> Annual Meeting  
November 24, 2012

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Published: August 2013

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Childhood & Children's Rights*

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The Landon Pearson Resource Centre for the Study of Childhood and Children's Rights was created with a powerful vision: every child in Canada will grow up aware of his or her rights and responsibilities and enabled to exercise them within a receptive and respectful society.

The LPRC began with a donation by the Honourable Landon Pearson to Carleton University, which included her extensive collection of books, documents and reports collected over a lifetime of engagement with children. The collection also contains archival material that documents the evolution over time of perceptions of childhood and conceptions of children's rights both at in Canada and abroad.

**The Centre has and will continue to give  
children and youth a voice in advance their  
rights by:**

- Creating practical opportunities with and for children and youth for the exercise of their civil and political rights and responsibilities
- Providing children and youth with access to fundamental citizenship rights
- Actively challenging and engaging schools, educational institutions, government and the non-profit sector to systematically and structurally respect the right to be heard of children and youth
- Demonstrating model decision-making processes that involve children and youth in important civil and political decisions
- Reinforcing and facilitating the network of agencies that shape public policy with respect to children and youth

- Nurturing in adults a culture of respect for children and youth as fellow citizens and the willingness to hear what they have to say

The Landon Pearson Resource Centre has undergone much of its work over its lifespan through the dedicated support of the Centre for Initiatives on Children, Youth and Community. CICYC is comprised of faculty from Carleton University and their colleagues in community organizations and private agencies who are dedicated to research and development, as well as related activities that promote the safety, health and well being of Canadian children and youth.

Organizations with current active support of Landon Pearson and the LPRC include:

- **North-South Partnership for Children** *Landon Pearson is on the Governing Council*

<http://www.northsouthpartnership.com/>

- **International Standards Council**

*Landon Pearson is a current and founding member.* <http://www.iicrd.org/node/496>

- **First Nations Child and Family Caring Society of Canada**

*Landon Pearson is on the Board of Directors* <http://www.fncaringsociety.com/main>

- **Arctic Foundation for Children and Youth**

*Landon Pearson is on the Board of Directors* <http://acyf.ca/>

**Previous CRAN reports and *Shaking the Movers* reports:**

*Shaking the Movers I: Speaking Truth to Power: Civil and Political Rights of Children (2007)*

*Shaking the Movers II: Identity and Belonging (2008)*

*Children's Rights Academic Network 2008*

*Shaking the Movers III: Child Rights in Education (2009)*

*Children's Rights Academic Network 2009*

*Shaking the Movers IV: Children and the Media (2010)*

*Children's Rights Academic Network 2010*

*Shaking the Movers V: Divided We're Silent, United We Speak: Standing up for Youth Justice (2011)*

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## FOREWORD

Almost everyone I know, including myself, has broken the law, particularly when we were young. Whether we had a drink underage or a speeding ticket or, on a dare, snatched a tube of lipstick from the dollar store, we crossed the line. Most of the time we did not get caught and, if we did, we sighed and paid the fine or submitted ourselves to a good talking to and moved on. This is why, I think, that so many of us reacted with dismay to the sad story of the young girl who went from pelting a postman with a crabapple to committing suicide under the watchful eyes of correctional officers barely six years later.

The tragic tale of Ashley Smith is exemplary of everything that can go wrong when a vulnerable child who is emotionally fragile is forced by law into a system that is poorly designed to help her mature into a responsible adult. Recognizing the volatile and experimental nature of adolescence the UN Convention on the Rights of the Child (CRC) has made it quite clear that a separate justice system is essential for youth who are in trouble with the law. The Youth Criminal Justice Act, which currently governs youth justice in this country, cites the CRC in its preamble and has had some success in that the number of youth taken into custody has dropped substantially. There has also been a drop in recidivism among those who have committed violent acts and been eligible for the special sentencing provisions in the act. However the supports are just not there for those who are suffering from a variety of mental health issues and who feel discriminated against at the best of times.

The young people who gathered at Shaking the Movers V to talk about their rights with respect to youth justice understood all this very well. Those who had had direct or indirect contact with the system spoke eloquently about their experiences and, along with the other young participants who had become quite passionate as the workshop continued, put forward a number of good suggestions to improve the situation. The members of the Child Rights Academic Network (CRAN) paid close attention to what they had to say and came together in November 2012 to respond.

This report is a record of those responses. I urge all of you who are concerned with the rights of young people to read not only what the academics have to say but also the original report of STM V which is available on my website ([www.landonpearson.ca](http://www.landonpearson.ca)). This is our fourth CRAN report. Thanks to the support of the Muttart Foundation, my Centre has been able to bring together child rights academics from across Canada and also from the UK not only to respond to what youth have to say about their rights in a variety of contexts, but also to build connections among themselves. It is my firm conviction that the promotion of the rights of children has to extend far beyond what is legally required and that what is really needed is a culture of respect for children woven out of constructive relationships among all of us who care about them.

- Landon Pearson

## OVERVIEW OF THE 4<sup>th</sup> ANNUAL MEETING OF THE CHILD RIGHTS ACADEMIC NETWORK

On November 24<sup>th</sup> 2012, following the success of three previous sessions, members of the Children Rights Academic Network (CRAN) met in Ottawa, Canada to discuss and celebrate children's rights. CRAN was developed by the Landon Pearson Resource Centre at Carleton University, with support from the Muttart Foundation, and is Canada's first network of academics involved in teaching, researching and advocating for children's rights.

This year, in the spirit of Articles 37 and 40 of the United Nations Convention on the Rights of the Child, CRAN's annual meeting responded to youth voices on the issue of Youth Criminal Justice expressed at Shaking the Movers V (STM). The report summarizing the outcomes of Shaking the Movers V was distributed in advance to CRAN participants who in turn prepared responses to the youth voices expressed at the STM forum. The meeting's discussion and presentations responded to:

### Article 37:

- The Right to be protected
- The Right to be informed

### Article 40:

- Humane treatment
- Rehabilitation and Restoration

The CRAN participants discussed a variety of issues within these themes, including at length the 2007 prison suicide of 19 year-old Ashley Smith, the adoption of Bill C-10 (amending in part the *Youth Criminal Justice Act*), and the unique challenges faced by aboriginal youth in the Canadian justice system. The participants stressed the need to adequately address mental health issues faced by youth in the criminal justice system, and expressed the necessity of emphasizing rehabilitation over punitive measures in the cases of young offenders. Participants also stressed the need to develop effective strategies for mainstreaming the notion that child rights are human rights and must be respected accordingly; CRAN members identified embedded stereotypes about children and childhood as key obstacles to be overcome in this respect. Thus, awareness of child rights both among youth and adults alike was stressed as a key priority in improving the welfare of children in criminal justice system. Participants highlighted both the harmful and helpful aspects of mainstream and social media in achieving this goal.

The report that follows is a compilation of the CRAN participants' responses to the Shaking the Movers V themes. Publishing them demonstrates that youth have been 'heard' and their perspectives integrated into current academic debate.

## INTRODUCTION

On November 16<sup>th</sup> and 17<sup>th</sup>, 2011, the Landon Pearson Resource Centre for the Study of Childhood and Children's Rights, in partnership with the School of Child and Youth Care at Ryerson University, supported by Ontario's Provincial Advocate for Children and Youth and the Public Health Agency of Canada had its fifth Shaking the Movers Conference. The area of focus was Youth Justice, and this related to Article 37 and 40 of the United Nations Convention on the Rights of the Child and the themes that arose from these articles. This was the first time that STM was held at Ryerson University. The program for the two day conference was co chaired by Landon Pearson and Judy Finlay. Two graduates from the School Child and Youth Care at Ryerson organized and facilitated the conference. The 40 children who participated were divided into four discussion groups.

There were two unique features of this year's conference. Firstly, a group of participants between the ages of 10 and 12 years known to the organizers were invited. Special attention was given to the information provided to these children and how they were engaged in discussion and activities about that content. Specific School of Child and Youth Care students were assigned to these children throughout the conference for continuity and all engagement of these children was meaningful to their age and unique abilities. These eight children expressed themselves very well about the topics of each day. They were creative and passionate in their presentations to the larger group when debriefing at STM, and to the audience at the National Child Day celebration. The success of involving younger children in this pilot year encouraged organizers to involve younger children at each subsequent year of STM. Secondly, classes of Child and Youth Work students were actively involved in STM V. These classes include: advanced group work and children's rights. Students facilitated all activities and discussion and were able to offer round-the-clock support to the children and youth attending the conference. This served as a valuable learning opportunity for students as well.

The two-day program included a presentation from a representative from Justice for Children and Youth who explained the changes to the YCJA. Youth participants viewed a video about the life and death of Ashley Smith. This offered a timely representation of the inability of the youth justice system to manage youth with complex needs. Problems and solutions identified in Article 37 were discussed the first day and similar discussions took place about Article 40 on the second day. Each group of youth/children made presentations at the end of each discussion. The themes that arose were: the stigma attached to youth in conflict with the law, the need for the youth justice system to treat young offenders like students not criminals, and the need for there to be one person in each young person's life who supports them unconditionally and can serve as a role model and mentor.

On day two of the conference there was an inner/outer circle discussion after the morning presentations. The inner circle was composed of 6 youth who had direct experience in the youth justice system. The discussion was incredibly powerful and moving.



The outer circle was composed of the remaining children and youth who responded with their comments about their experience of the discussion. The majority of youth in the inner circle (4) were First Nations youth from northern Ontario. They spoke about their experience of the high rate of incarceration of aboriginal youth and they shared their experiences of the challenges and circumstances of living in remote northern communities. This was a powerful revelation for the non-aboriginal youth who for the most part had no previous experience with aboriginal peoples. All participants demonstrated compassion and empathy.

The recommendation made by youth at STM V included:

- The approach to youth crime should be rehabilitative rather than correctional.
- The youth justice system should target the developmental age of the youth it serves.
- The system should have a holistic approach to youth taking into account the youth's entire situation and circumstances and offer opportunities for change.
- Rights should be written in a language that kids can understand and should be taught in school.

Generally, youth participants gained new knowledge about their rights and how to access them. They had been largely uninformed about the youth justice system and left STM V feeling somewhat enlightened. They took the knowledge they had gained and the experience of the two days back to their schools and their communities where they engaged in meaningful conversations with others.

- Judy Finlay, PhD  
Ryerson University  
Associate Professor, School of Child and Youth Care  
*Shaking the Movers V Co-Chair & Small Group Facilitator*



## PARTICIPANT RESPONSES

**MELANIE ADRIAN, PhD**

ASSISTANT PROFESSOR, DEPARTMENT OF LAW AND LEGAL STUDIES, CARLETON UNIVERSITY

*Response to CRAN 2012*

Youth responses to the two articles, the case example of Ashley Smith, and human rights more generally were very insightful.

In fact, the youth point to what I see as one of the weakest links in the human rights world: that dignity and empowerment are an integral element of what human rights are, yet are difficult to implement and realize. This is one area of human rights law that is sorely underdeveloped.

The creators of the United Nations and drafters of the human rights treaties used the terms dignity and empowerment as overarching concepts to bind the rights that were laid out in the covenants. The problem, as I see it and as the youth pointed out so clearly, is that we don't have a specific idea – certainly not in legal terms – of what they mean. How does one measure sweeping concepts such as dignity and empowerment? Does increased protection lead to dignity? If we take the case of Ashley Smith, we have to conclude that this isn't necessarily the case.

Here, the comment that “the justice system should aim to turn young offenders into students instead of criminalizing them at young ages” (Shaking the Movers Report, April 2012, p. 11.) is critical. What I understand them to be saying here is that the justice system should be teaching and helping elevate youth out of their particular situation (empowerment) so that they come to respect and value themselves (dignity).

Here, the youth are pointing to a vital connection: the meaning behind the standards and laws that we set out need to be valued in conjunction with the letter of the law. As it turns out, if we implemented some of the ideas that the youth had – such as better educational facilities in the jails and elsewhere, implementing more rigorous programs working against stigma and discrimination – then we would be working toward improving the lives of young and older people in a more comprehensive way.

Where the law, and adults more generally, get confused is in the tension that exists between treating children and youth with dignity as human beings and protecting them because they are developing into their full psychological, emotional, and spiritual selves (although I acknowledge that this is not a process does not have an end). In situations such as Ashley Smith's, the youth rightly identified that no one came to her defense in a systematic way: Ashley needed someone to stand up *for her* and *with her* to enable her to find the best way to be in this world.

Human rights law needs to take these concerns seriously and I thank the youth for their hard work and insightfulness.

### **Canada – Reservations to the CRC**

#### *Reservations:*

##### *"(i) Article 21*

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.

##### *"(ii) Article 37 (c)*

The Government of Canada accepts the general principles of article 37 (c) of the Convention, but reserves the right not to detain children separately from adults where this is not appropriate or feasible.

#### *Statement of understanding:*

##### *"Article 30*

It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language."

**SAMIRA AHMED, J.D.**

INTAKE LAWYER, JUSTICE FOR CHILDREN AND YOUTH (JFCY)

#### *Youth Criminal Justice Act Amendments included in the Safe Streets and Communities Act*

Below is a summary of the proposed changes to the YCJA included in the SSCA, formerly known as bill C-10. No date has been announced for when the amendments will come into force, but the Act received royal assent on March 13, 2012. The full text of the amendments relating to youth justice may be found on the parliament website here: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5124131&File=173#48>

### Declaration of Principle (section 3)

Paragraphs 3(1)(a), which identified the purpose of the youth criminal justice system is replaced by a new but similar declaration.

The new version re-orders protection of the public to take primacy over rehabilitation and re-integration. *Long-term* protection of the public is removed as a purpose, although prevention of crime is added.

Paragraph 3(1)(b), which identifies the need for separate criminal justice systems for youth and adults is also modified to include the principle of diminished moral blameworthiness as the primary distinction between the two systems.

### Pre-trial detention (section 29)

The prohibition against using pre-trial detention as a substitute for appropriate child protection, mental health or other social measures still exists<sup>1</sup>. Likewise, the onus remains on the Attorney general to prove that pre-trial detention is necessary<sup>2</sup>.

The old YCJA version had a presumption that pre-trial detention is not necessary whenever the accused could not, on being found guilty, be committed to custody. This provision is removed.

Instead, pre-trial detention is an option whenever the offence is a “serious offence”<sup>3</sup> or where the accused has a history that indicates a pattern of either outstanding charges or findings of guilt<sup>4</sup>.

Under the new version, the court may order detention where it finds, on balance of probabilities, the young person will not appear in court, will commit a serious offence, or whose release would undermine confidence in the administration of justice<sup>5</sup>.

Finally, pre-trial detention is only available where no condition or combination of conditions of release would suffice<sup>6</sup>.

### Sentencing principles (section 38)

The follow possible sentencing objectives were added: (i) denounce unlawful conduct and (ii) to deter the young person from committing offences<sup>7</sup>.

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<sup>1</sup> YCJA 29(1)

<sup>2</sup> SCSA 169 adding 29(3)

<sup>3</sup> SCSA 167(3) defines “serious offence” as “an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more.” See [Change/additions to definition](#) below

<sup>4</sup> SCSA 169 amending 29(2)(a)

<sup>5</sup> SCSA 169 amending 29(2)(b)

<sup>6</sup> SCSA 169 amending 29(2)(c)

<sup>7</sup> SCSA 173 amends YCJA 38(2)(f)

This is a significant change because in *R v BWP*<sup>8</sup>, the Supreme Court held that deterrence, general or specific, was not a principle under the old YCJA. The addition of deterrence as a sentencing principle, therefore, is a direct legislative reversal of the holding in *BWP*.

#### Sentencing as an adult (sections 61-81)

The old YCJA had a category of presumptive offences where the onus was on the accused to prove that he or she should receive a youth sentence. In *R. v. D.B.*<sup>9</sup>, the Supreme Court struck down the presumptive offence provisions as a violation of section 7 not justifiable under section 1<sup>10</sup>. The presumption, the court held, deprived young people of liberty in a manner not in accordance with the principle of fundamental justice that young people are less morally blameworthy.

The SSCA amendments repeal all of the sections related to presumptive offences, including the definition, special procedural instructions and requirements related to presumptive offences; publication of information; and the need for a youth to make an application for a youth sentence.

The onus for proving the appropriateness of an adult sentence under the SSCA is always on the crown<sup>11</sup>. There is no longer any circumstance in which the burden of proof is reversed.

The new test for sentencing a youth as an adult requires the crown to rebut the presumption of diminished moral blameworthiness. The new test also retains the requirement that an adult sentence is in accordance with the sentencing principles outlined in YCJA section 38 and the principle of fair and proportionate accountability outlined in paragraph 3(1)(b)(ii).

#### Change/Additions to Definitions (section 2)

**“Serious violent offence”** is changed from a discretionary judicial determination to an enumerated list of five serious charges<sup>12</sup>. The provisions relating to the judicial determination are repealed<sup>13</sup>.

Classification as a serious violent offence is less important after the elimination of presumptive offences. Under the old framework, a serious violent offence for which an adult is eligible to receive more than 2 years custody was a presumptive offence<sup>14</sup>.

However, serious violent offence classification still plays a role in sentencing and the young person’s rights during trial. The crown is obligated to consider making an application for an

<sup>8</sup> *R. v. B.W.P.*; *R. v. B.V.N.*, 2006 SCC 27, [2006] 1 S.C.R. 941 [BWP]

<sup>9</sup> [2008] 2 S.C.R. 3, 2008 SCC 25 [DB]

<sup>10</sup> The following sections were held to be unconstitutional by the court in DB: 62, 63, 64(1) and (5), 70, 72(1) and (2) and 73(1)

<sup>11</sup> SSCA 176(1) amended YCJA 64(1), which empowers the AG to apply for an adult sentence

<sup>12</sup> SSCA 167(2) amending YCJA 2(1) “serious violent offence”

<sup>13</sup> SSCA 174(4) repeals YCJA 42(9) and 42(10)

<sup>14</sup> SSCA 167(1) repeals YCJA 2(1) “presumptive offence”

adult sentence for every serious violent offence<sup>15</sup>. All violent offenders are ineligible for deferred custody and supervision orders<sup>16</sup>, but are automatically eligible for intensive rehabilitative orders<sup>17</sup>. A young person charged with a serious violent offence may be ordered to undergo a psychological assessment without consent<sup>18</sup>. Those deemed likely to commit a serious violent offence may not be released from custody prior to the termination of their sentence<sup>19</sup>.

The meaning of “violent offence” was not enumerated by parliament prior to the SSJA, but the Supreme Court in *R. v. C.D.*<sup>20</sup> held violent offence for the purpose of section 39(1)(a) to mean “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm”. The amendment is noteworthy only for its expansion, in part (c), to include activity that “[creates] a substantial likelihood of causing bodily harm.”

Classification as a “violent offence” only matters when lifting a publication ban for youth sentences and for a sentence to custody. The court only has the option of lifting the publication ban where the offender has been found guilty of a violent offence<sup>21</sup>. Violent offences are among a list of situations in which the judge may order custody<sup>22</sup>.

#### Publication ban (section 75 and 110)

Publication of the name or any information that would identify the young person is prohibited, except for the circumstances enumerated in 110(2): (a) where the youth receives an adult sentence, (b) where the court orders the ban to be lifted under section 75, and (c) where the publication is made “in the course of the administration of justice”<sup>23</sup>.

Section 75, where the court can order the publication ban to be lifted, is amended. Under the old version, the court would consider lifting a publication ban for presumptive offences where the offender rebutted the presumption and the case was heard as a youth case<sup>24</sup>. Presumptive offences no longer exist in the new version.

Instead, the court may consider lifting a publication ban only where the young person is found guilty of a violent offence (see change in definition above)<sup>25</sup>. The publication ban will be lifted where the crown can meet the burden outlined in subsection 75(2): lifting the ban is necessary in order to protect the public against the risk posed by the young person.

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<sup>15</sup> SSJA 176(1) amending YCJA 64(1.1)

<sup>16</sup> YCJA 42(5)(a)

<sup>17</sup> YCJA 42(7)(a)(i)

<sup>18</sup> YCJA 34(1)(b)(iii)

<sup>19</sup> YCJA 98

<sup>20</sup> [2005] 3 S.C.R. 668, 2005 SCC 78 at paras 17 and 70

<sup>21</sup> SSJA 185 amends YCJA 75(1)

<sup>22</sup> YCJA 39(1)(a)

<sup>23</sup> SSJA 189 amends YCJA 110(2)(b)

<sup>24</sup> YCJA 75(a)

<sup>25</sup> SSJA 185 amends YCJA 75(1); SSJA 189 amends YCJA 110 (publication ban) to include an exception for cases ordered under 75(1)

### Eligibility for Custody (Section 39)

The SSCA modifies the custody provisions in the YCJA, expanding judicial discretion to sentence young people to custody. Parliament's intent for enacting the YCJA was to reduce the over-reliance on custody for young offenders under the previous *Young Offenders Act*<sup>26</sup>.

Section 39(1) provides that there are only four gateways to a custodial youth sentence. Two of these four gates are expanded under the SSCA.

SSCA expands 39(1) in two ways. First, the definition of violent offence is specifically defined in section 2 to be broader than the existing judicial interpretation<sup>27</sup>. Thus, gate (a) applies more broadly. Second, part (c) is amended to include "a pattern of either extrajudicial sanctions or of findings of guilt" rather than findings of guilt alone<sup>28</sup>. Repeated diversion to extrajudicial sanctions, therefore, would make a non-violent offender eligible for custody.

### Types of Sentences (section 42)

There are 18 sentences available under the old YCJA and all are retained by SSCA. Although some semantic changes are made to this section (for example by replacing a reference to presumptive offences<sup>29</sup> or adding a reference to violent offences<sup>30</sup>) there are no substantive changes to the definitions of the available sentences or any new eligibility restrictions imposed in section 42.

### Youth placement in adult prison (section 76(2))

Under the SSCA, no young person under the age of 18 will serve any portion of the imprisonment in an adult prison facility<sup>31</sup>. This is stronger than the presumption against housing under-18 youth in adult facilities in the old YCJA. In the old version, an under-18 youth could be sentenced to an adult prison where placement in a youth facility would not be in the best interests of the young person or would jeopardize the safety of others<sup>32</sup>.

### Police records (section 115)

Under the old YCJA, the local police force may keep a record of any alleged offence. SSCA adds an obligation on the part of police forces to keep a record of any extrajudicial measures.<sup>33</sup>

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<sup>26</sup> Ibid at note 27 para 49

<sup>27</sup> Ibid at note 26

<sup>28</sup> SSCA 173 amends YCJA 39(1)(c)

<sup>29</sup> SSCA 174(1) amends YCJA 42(2)(o)

<sup>30</sup> SSCA 174(3) amends YCJA 42(7)(a)(i) and (ii)

<sup>31</sup> SSCA 186 amends YCJA 76(2)

<sup>32</sup> YCJA 76(2)

<sup>33</sup> SSCA 190 amends YCJA 115(1.1)

The provisions relating to who may access records and the period of access to the records remain essentially unchanged.<sup>34</sup>

### Concluding Observations

The impact of these changes will be determined largely by the way that the Crown Attorney's, Justice of the Peace and Judges interpret the provisions. As such, time will tell what the impact will be. Cities with well established Youth Courts who have youth specific judges, justices of peace and crowns will be more inclined to continue operating the system in an approach more consistent with children's rights than what a strict interpretation of the changes would suggest.

Now that these changes are in effect, the Youth Criminal Courts are seeing an increase in youth participating in informal diversion measures to prevent any future negative consequences from participation in the formalized Extrajudicial Sanctions (EJS). This is as a result of the change that makes previous participation in EJS a factor to be considered in custodial sentences. This is the most important change that needs to be understood by the broader youth population.

The other changes will affect youth who are heavily engaged in the Youth Criminal Justice System. Knowledge of the more serious provision changes will not serve to change the actions of these youth and will only become relevant when they are already engaged in the system. Advocacy surrounding these provisions needs to be focused on legal challenges of these provisions and continued lobbying by children's rights advocates.

**NANCY BELL, PhD**  
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### *CRAN Response*

This submission responds to the Shaking the Movers V report *Divided We're Silent, United We Speak - Standing up for Youth Justice*. The report has helped me, as an academic, to learn about young people's views on issues relating to youth justice set with the context of UNCRC articles 37 (the right to be protected and informed) and 40 (the right to human treatment, rehabilitation and restoration). Young people have given 'us' – academics – the opportunity to consider what young people have said about youth justice as it relates to our own work on children's human rights. My response focuses, therefore, on those report elements that relate to my particular research interests: human rights violations arising within the context of public services, redress mechanisms (such as public services complaint processes) and accountability.

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<sup>34</sup> SSCA 191 and 192 make insubstantial changes to YCJA 119(1)(o) and 120(3)(a) and (b)



In reading the report, it was apparent that Ashley Smith's story significantly impacted young people. Their ensuing comments reflect that much needs to be done to improve UNCRC implementation and its relationship with youth justice throughout Canada. Young people's observations reminded me about the *entire* UNCRC's importance and, in particular, duty bearers' (such as governments) requirement to ensure implementation of the four fundamental principles that frame the UNCRC – expression of views, survival and development, protection and best interests. These principles are embedded in UNCRC articles, such as articles 37 and 40 that specifically refer to young people's right to be treated with dignity and respect. These fundamental human rights principles are reflected in all core international human rights instruments, including the 1948 Universal Declaration of Human Rights.

**Article 37 and the big picture: How are youth treated in the correctional system? How are mental health issues addressed? What are our rights?**

Young people observed in the report that 'knowledge is power - providing children and youth with the knowledge of what their rights are will allow them to recognize when one of their rights is being violated.' And yet, they observed that this is an unfulfilled right.

In many situations, young people are unaware of their rights, which they are assumed to know, but have never been taught.

Young people identified existing human rights violations, such as discrimination, racism, mistreatment and lack of voice, and noted that there are particularly vulnerable groups, such as Aboriginal young people, who experience these violations. They highlighted Ashley Smith's experiences, her right to be heard and the rights violations she experienced.

When I saw the public video of Ashley Smith, I saw a young person expressing concerns about the way she was treated – concerns about the taping of her wrists, medications and so on.

The jail guards were not looking out for Ashley's best interest.

No one listened to Ashley's voice. The responsibility falls on the adults to be the liaison between young people and their rights – this is the problem.

Young people asked the critical question 'what is being done to ensure that children and youth are able to express themselves?' From a human rights perspective, inherent in this question is a broader question: what is being done to ensure that children and youth are able to express their views – their concerns - about possible human rights violations and to have those concerns addressed in safe and meaningful ways? Young people noted that 'the responsibility falls upon the adults to be the liaison between young people and their rights...', drawing attention to adult obligations for ensuring UNCRC implementation of its participatory articles, such as articles 12 and 13, for promoting child rights in general, and for addressing human rights violations.

Young people commented that ‘youth thrive in environments that provide support’, including those young people with mental illness. They observed that young people require information about rights so they can recognize when their rights are violated. These central themes – rights awareness, advocacy support and opportunities to have rights violations addressed – can, and should, inform academic research that provides us with knowledge about youth perspectives on these issues. As academics, we can be led by youth posed questions, their identified ‘problems’, and conduct research that will improve our understanding about how best to proceed in the future.

**Article 40 and the big picture: How is stigmatization and discrimination addressed in the correctional system? How are people in authority held accountable for their actions?**

Young people made reference to specific human rights violations, such as discrimination, stigmatization and racism. They asked vital questions about how people in authority are held accountable, how change can happen to end discrimination, and how young people can feel safe to be who they are. The UN Committee on the Rights of the Child (‘UN Committee’) and research indicate that public services complaint processes can address these issues. A human rights approach to these processes can facilitate UNCRC implementation, address individual child/youth concerns, highlight systemic issues, and serve an essential monitoring and accountability function.

Public services complaint processes, a form of redress mechanism, can help to hold people in authority accountable for their actions, address human rights violations and promote child/youth safety through rights implementation. It is sometimes overlooked that children/youth have a right to remedies to human rights violations that they experience. The UN Declaration on Human Rights, for example, states that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (see article 8).

The UN Committee has highlighted the importance of children, particularly children in the youth justice system, having access to complaints processes and remedies:

24. For **rights to have meaning** (author emphasis), effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 (see UN Committee, General Comment No. 5).

43...Monitoring disciplinary systems and the treatment of children must be part of the sustained supervision of all institutions and placements which is required by the Convention. Children and their representatives in all such placements must have immediate and confidential access to child-sensitive advice, advocacy and complaints procedures and ultimately to the courts, with necessary legal and other assistance. In institutions, there should be a requirement to report and to review any violent incidents. (see UN Committee, General Comment No. 8).

46. Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.<sup>35</sup> Children should have the possibility of addressing an ombudsman or a person of a comparable role in all children's institutions, inter alia, in schools and day-care centres, in order to voice their complaints. Children should know who these persons are and how to access them... (see UN Committee, General Comment No. 12).

47. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment (see UN Committee, General Comment No. 12).

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

-Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms... (see UN Committee, General Comment No. 10).

As academics, we can do more research in this area to inform how a 'right to a remedy' is and should be interpreted when child/youth rights are violated within the youth justice system. As academics (and human rights advocates), we can remind primary duty bearers, such as governments, about their obligation to fully comply with the UNCRC, other relevant human rights law and UN Committee guidance. We can remind governments responsible for the youth justice system that UNCRC article 12(2) stipulates that young people have the right to express their views in judicial and administrative proceedings, including those proceedings necessary for addressing complaints about possible human rights violations related to youth-identified issues such as discrimination, stigmatization and racism.

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<sup>35</sup> See the Committee's general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 24.

## Conclusion

Michael Freeman<sup>36</sup>, a leading UK proponent of child rights, has argued that the right of children to express their views in all matters affecting their lives (UNCRC article 12) is 'perhaps the most important provision in the Convention.' It is critical that we support the young people who contributed to the report by drawing attention to the 'problem' of hearing young people's voices, including their concerns about rights violations. Ashley's experience suggests that the youth justice system lacked a human rights approach.

### Government backs bill limiting inmate complaints

All seven of the grievances inmate Ashley Smith filed before her death were dismissed, according to the office of the correctional investigator, and the last one was not opened until two months after she died. (Globe and Mail newspaper article, 17 November 2012)

A human rights approach to Ashley Smith's situation would have required that there was an '...effective, child sensitive procedure...' available to her for claiming possible human rights violations. A rights-informed procedure would have considered whether her UNCRC rights, along with other rights, were breached. If so, a rights-based response would have required '...appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39' (see UN Committee General Comment No. 5).

While is much to learn about what happened to Ashley Smith, there is existing evidence to suggest that the youth justice system did not fully comply with their UNCRC obligations. There is also evidence to indicate that not taking a human rights approach resulted in Ashley's death. As adults, therefore, we need to hear young people asking us to take more responsibility for child human rights implementation in Canada. Academics can play a vital role in contributing to future discourse about what constitutes a human rights approach to youth justice, in particular, and the importance of adopting this approach so that all young people, including the most vulnerable and marginalized, understand and fully realize their entitlements.

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<sup>36</sup> Freeman, M., (2000). The future of children's rights. *Children & Society*, 14, 277 – 293.

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*Breaking the cycle of involvement in the youth justice system*

In responding to articles 37 and 40, I decided to comment on youth justice in relation to prevention. There is a great deal of research that has examined social determinants such as: poverty and SES, historical trauma, inequality, childhood adversity, discrimination, maternal health (and also we are becoming more and more aware of the importance of paternal health via epigenetic studies) that affect children's development. Many of these variables exert their greatest effect on children who are under the age of two. In addition, the long-term outcomes on children and youth, stemming from these social determinants of health might include substance use, aggression, mental and physical health issues, and underperformance in cognition. Many of these latter are associated with individuals in the youth justice system.

Over the last two years, I have been conducting research on the impacts of intergenerational transmission of trauma stemming from a Soviet-organized genocide conducted against Ukrainians in 1932-1933. This research has shown that collective trauma can lead to mental and physical health issues, social hostility, aggression, substance use, and family functioning issues in not just the survivors of collective trauma - but also in their descendants for several generations. Translating to the Canadian context, this research has shown that the negative impacts of trauma traverses the generations when not only the individual is affected, but also when the community-society is impacted. In other words when the individual *and* the community is negatively affected, the consequences will be passed down generation after generation.

This study shows the importance of looking at not just the individual, but also at the community to gain a better understanding of the origins of social determinants and their impacts. By extension, it is important to examine both the individual and the community, in terms of intervention and breaking the cycle in order to prevent the outcomes related to individuals in the youth justice system. In this sense, the community might be a low SES community, a stigmatized community, an ethnic community, etc. in which the youth is embedded. Hence, looking at only the individual may not be enough to break the cycle. This may be why individuals embedded in certain vulnerable neighbourhoods, communities, or sub-populations might be affected intergenerationally.

Bringing our research and past studies into the realm of children's rights, Stefania Maggi and I have just published a paper that shows that increased rights and freedoms is associated with better mental and physical health. This relationship held for the sample of 34 nations that we examined in North America (including Canada), South America, Europe and the South Caucasus. Since better mental health is associated with lower involvement in

the justice system, our work has implications on today's topic. Again, this research underscores the importance of considering more than just the individual in terms of breaking the cycle of involvement in the youth justice system since, increases in and benefits derived from, rights and freedoms involve the effort of the collective.

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### *Response to Children's Rights and Youth Justice*

What I would like to offer our discussion today are a few observations on issues concerning gender. The words of the young people themselves who attended the Shaking the Movers V meeting provide an apt way to begin. While there is much that is of interest in this report, two comments are particularly insightful for they reveal a complex view of the concept of power. I quote from the report:

"As a youth, I feel I have no power and my only option is to obey authority" (p. 10).

The word *authority* arises again in their subsequent discussion of Ashley Smith: "Ashley was fighting authority so much, which made the situation worse for herself. However, she should have still had the right to have her voice heard instead of being treated so inhumanely" (p. 9).

These remarks are telling of an understanding of the complexity of power relations as they play out in different contexts in people's lives. More specifically, the comments reveal a particular model of power, one that is based on an idea of 'power over.' This model of 'power over' contrasts with a model of power that circulates, and power that enables, as in the 'power to' do something. That these words would exemplify a model of 'power over' rather than 'power to' is hardly surprising. For the most part, children and young people encounter this 'power over' configuration in many of the contexts and institutions in which they live out their lives. It is also implicated in any rights based discourse and something that anyone interested in children's rights should remain keenly aware. In my view, it is particularly salient that the young people's words expose not only recognition of this model of power but that they articulate an alternative to it as well. They understand with clarity that models of 'power over' dehumanize, an insightful and complex connection.

An understanding of 'power over' also has implications for considering the connection between questions of 'risk' and '(in)security' linked with dominant modes of conceptualizing children and childhood that serve to emphasize vulnerability and dependence. These notions effectively displace children 'out of time' and 'out of place.' By this I mean that idealized understandings of children's lives rest on a notion that they are in the process of becoming *potential* adults rather than being viewed for their presence *among* the world of adults. Childhood scholars have critiqued this displacement, arguing that by envisioning children as 'partially cultural,' they are seen and heard as less than 'fully human.' One of the consequences of this invisibility and inaudibility for children and young

people is that it makes it far easier for them to be treated inhumanely.

A final point about power concerns gender; namely, that gender - as it is wrapped around and interlocked with other social categories of difference including age, race, class, sexuality, ability, and locality - is constructed through practices of power. I'll say more about this in a moment.

The second concept that emerges from the young people's words in the *Shaking the Movers* report is the recognition of the relational aspect of children's lives. Again, it is a particularly salient counter argument to attempts to individualize and, in turn, pathologize individual young people. The comments demonstrate an understanding that the social location of the 'child' and the social location of 'adult' are two interdependent and dynamic sites that cannot exist one without the other. Conceptually, consider that when the 'child' side of this relationship is emptied, this acts to destabilize the social location of adult. I would argue that the threat of potential instability might account, in part, for the assertion of a 'power over' model. 'Threat' underpins power and power relations that institutionally ensure compliance. Ashley Smith's case provides us with an apt illustration.

In media and other accounts of this young woman's life, Ashley Smith does not appear to be imaged as a 'child' nor do her experiences resemble 'childhood' in any idealized way. In many of the media representations and accounts, ideas circulate that locate her as exceeding the boundaries of what it means to be a girl, disrupting what it means to be a child, transgressing normative femininity, and moving out of the space of childhood. At a certain level, these transgressions are attributed to Ashley's individual inability to behave in ways consistent with an idyllic image, although her initial childhood transgression as I understand, was to throw an apple at a mail carrier. Childhood scholars Allison James and Chris Jenks have argued that when people can no longer be contained within a narrow space of what children and childhood should be, they are exiled from this status and treated as an adult (James & Jenks 1996). It appears that this point resonates with Ashley's case – her behavior and actions seem to be incommensurate with any contemporary formulation of childhood; in turn, the problems that she encounters in her life are individualized. She is blamed and, in turn, pathologized.

While this point could be considered in far greater detail than I have the time to do here, we might consider that some of the representations we have seen and heard of Ashley Smith are reminiscent, I would argue, of representations of Aboriginal women more broadly in a Canadian context. One of the messages that has circulated about Ashley Smith is that she is a young Aboriginal woman. Whether or not this is the case, the comparison is an interesting one to contemplate. Specifically, consider the argument made by Debbie Wise Harris that media representations of Aboriginal women appear to be marked by what she calls 'strategic silences' (1991: 6). That is, the women appear as passive rather than actively engaged actors in their own social lives. They are silent; they are victims, and at some level, they are blamed for their circumstances. What is missing from representations are often informative and rich accounts of the conditions and contexts of their lives. These details are usually scarce, strategically receding into the background so that a picture emerges not of the ravages of Canada's colonial past with Aboriginal peoples, for instance,



or in Ashley's case, the inadequacies of the systems tasked to care for young people, but an individualized and narrow reading of complex situations. They are the 'strategic silences' that support understandings of young women such as Ashley Smith in particularly limited and harmful ways.

What might be argued is that Ashley is conceptually, as well as literally, caught by a system that makes her 'visible' at one level because of her gender, age, race, and class so that this visibility lends credibility to those who wish to highlight her 'deviance.' On another level, Ashley is rendered invisible and inaudible, which is most apparent in the inaction that we see in video footage of her lockup, in accounts of her life, and death. Viewers are left reeling from what appears to be the lack of meaningful attention she received in her journey through the youth justice system.

There is much more to say about how gender informs the way we perceive, and are seen, in the world and how it is central to how each of us configures how we dwell in the world. I will end with two brief points. The first point is that gender is a much more useful concept if it is viewed as an ongoing, contextual social process and not a static quality. As I have endeavoured to demonstrate, gender is always and necessarily already imbricated in categories of race, nation, ethnicity, sexuality, ability, age, locality and class. It is not something that someone *is* or *has* but something that is lived.

Finally, elements of the youth justice system, like other institutions with which some young people interact in their lives, are implicated in, and attempt to control and define gender. It was not lost on the young people at the Shaking the Movers gathering that the system has become progressively more punitive, lashing out at young people, and as we see in Ashley Smith's life, at young girls in particular. They understand that there is something wrong when a system purported to *protect* young women, dehumanizes and harms them in unconscionable ways.

Risky and 'at risk,' punitive and protective - the dilemmas that these pairings present are present in both the comments of the young people in the report, as well as in the story of Ashley Smith's life. They are deeply gendered notions that convey many unspoken assumptions and stereotypes. The task remains to interrogate how it is that these stereotypes persist, and how hierarchies of gender, race, and class construct young men and young women such as Ashley, as delinquent, troubled and risky. It seems to me that we must refuse messages that circulate about young people that individualize them as the 'problem' without bringing into focus the larger systemic factors that underlie their situations, including the overrepresentation of girls in a system that allows for an increasingly punitive and meaningless handling of young people's lives when they might be better served by other means. It is to make visible the ways this legitimizes the gendered violence abundantly present in young people's lives. One step forward is a conceptual one; that is, to prioritize the presence of young people amid, and not apart from, the lives of adults, so that their humanity emerges in the powerful contexts in which they meaningfully live as fully human social actors.

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*Children's Rights in relation to Child and Youth Justice in Canada*

Children's rights affirm human dignity and outline what is necessary to respect the personhood of a child. The situation of young people in the Canadian justice system demonstrates the fundamental lack of respect for these rights. As described by Shaking the Movers (STM) 2011 participants, this system currently is unable to: "treat youth in the justice system humanely instead of like "criminals"". <sup>37</sup> The UN Committee on the Rights of the Child reinforces the contributions from STM about the juvenile justice system in its Concluding Observations about Canada's implementation of the Convention on the Rights of the Child released October 2012. <sup>38</sup> Their respective efforts are complementary to describe the current situation of young people in the Canadian justice system. Accordingly, after considering the relationship between the conclusions from STM and the UN Committee, some recommendations are proposed for moving forward.

**I. Connections between the UN Committee's Concluding Observations & STM Comments**

There are many common conclusions shared by the STM participants and the UN Committee on the Rights of the Child. These concerns are categorized as: the administration of juvenile justice; lack of child rights awareness and training; non-discrimination; and child and youth participation.

**1. Administration of Juvenile Justice**

STM participants identified various issues related to the administration of juvenile

<sup>37</sup> Del Monte, A. and Akbar, L. (2012). *Shaking the Movers V: Divided We're Silent: United We Speak – Standing up for Youth Justice, CRC Articles 37 and 40, final report* Workshop held at Ryerson University, Toronto, November 2011, Landon Pearson Resource Centre for the Study of Childhood and Children's Rights, School of Child and Youth Care and Faculty of Community Services, Provincial Advocate for Children and Youth, Ontario, Toronto, Ottawa: Landon Pearson Resource Centre for the Study of Childhood and Children's Rights, [http://www.landonpearson.ca/uploads/6/0/1/4/6014680/shaking\\_the\\_movers\\_v\\_-\\_pdf\\_format.pdf](http://www.landonpearson.ca/uploads/6/0/1/4/6014680/shaking_the_movers_v_-_pdf_format.pdf), 15

<sup>38</sup> United Nations, UN Convention on the Rights of the Child (2012), "Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Canada" UN Doc. CRC/C/CAN/CO/3-4, Geneva: Office of the High Commissioner for Human Rights, 5 October.

justice in November 2011 that were subsequently highlighted by the UN Committee in its Concluding Observations about Canada's CRC implementation in October 2012. STM outlined: "The correctional system should focus more on helping youth and focusing on the 'why' instead of the 'what'." <sup>39</sup> Stereotyping and blaming of youth are inaccurate and unfair. While it is easier to blame problems on the individual, this reactive approach avoids the more difficult challenges of considering the context of this child and societal failures. It also ignores potential value of the preventative approach. "Stop blaming the youth, look at the situation they are in or the systems that have been put in place." <sup>40</sup> Such valuable insight and warning that the status quo is problematic: "Jail makes you cold and not care. Shouldn't be making youth like this." <sup>41</sup>

Nonetheless the omnibus Bill C-10, <sup>42</sup> which entered into force in October 2012, dramatically affects the administration of juvenile justice. Although STM did not address this legislation since it postdates the STM consultation, its significance demands consideration in this CRAN contribution. Government officials in Geneva largely ignored attention to the Bill's adverse effects on children's rights.

It was clear that federal government officials there were proud of YCJA reform under the Bill C-10, as young people will no longer be incarcerated with adults, the subject of Canada's reservation upon CRC ratification to a. 37(c). While a positive change, government officials in Geneva largely avoided the various problems created due to Bill C-10 (and even seemed somewhat surprised by the criticism) in the discussion and government documentation. The Canadian Coalition for the Rights of Children (CCRC) describes some concerns including: <sup>43</sup>

- Less consideration of the best interests of children to stress deterrence and denunciation;
- Increased emphasis upon the use and duration of detention contrary to CRC articles 40(3.b) and 37(b);
- Greater application of adult sentences; <sup>44</sup>
- new rules for name publication for some young people, <sup>45</sup> which violates CRC articles 40 (2 vii), 16, and other provisions;

<sup>39</sup> Del Monte, A. and Akbar, L. (2012), op cit., 14.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Parliament of Canada (2012), Statutes of Canada 2012, Chapter 1: *An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Protection Act and other Acts*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 2011-2012, 13<sup>TH</sup> MARCH, 2012, BILL C-10, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5465759>

<sup>43</sup> Canadian Coalition for the Rights of Children (CCRC) (2012), "Implementation of the Convention on the Rights of the Child: Response to List of issues concerning additional and updated information related to the combined third and fourth periodic report of Canada (CRC/C/CAN/3-4)" <http://rightsofchildren.ca/wp-content/uploads/CCRC-Response-to-List-of-Issues-from-UN-Committee.pdf> accessed 20 November, 29-30.

<sup>44</sup> This provision now *requires* the Crown to consider seeking an adult sentence for youth convicted of a "serious violent offence" namely murder, attempted murder, manslaughter or aggravated sexual assault.

<sup>45</sup> This change now requires judicial consideration of lifting the name publication ban for some "youth convicted of a violent offence and given a youth sentence, "when the protection of society requires it"; CCRC, 30.

- Disproportionate impact on Aboriginal children, already overrepresented in the criminal justice system (CRC articles 2, 30); and
- Compromising the growing success of child rehabilitation through alternative measures.<sup>46</sup>

In light of these significant issues, the CCRC describes how there appears to be “a lack of understanding within the federal government about what compliance with the Convention means. Government declarations of compliance with the Convention remain contested by provincial children’s Advocates and most children’s rights experts in the country.”<sup>47</sup> As the CCRC affirms, Canadian civil society (including legal, penal and child-service experts) comprehends these significant changes lead to more incarcerations and away from a restorative and rehabilitative justice model.

Accordingly, the UN Committee noted the name of Bill C-10 (Safe Streets and Communities Act of 2012) does not reflect any concern for children. It describes this bill as “excessively punitive for children and not sufficiently restorative in nature. The Committee also regrets there was no child rights assessment or mechanism to ensure that Bill C-10 complied with the provisions of the Convention.”<sup>48</sup> The Committee noted numerous concerns about youth justice including:<sup>49</sup>

- Low minimum age of criminal responsibility
- Children under 18 tried as adults in relation to their offence;
- Increased use of detention, reduced privacy protection and use of extrajudicial measures; and
- Excessive use of force against children during arrests and in detention.

Moreover, it recommends that Canada improve the juvenile justice system in line with the standards in the CRC and other relevant international instruments.<sup>50</sup> In sum, these changes will only aggravate the concerns raised by STM.

## 2. Lack of Children’s Rights Awareness and Training

Both the UN Committee and STM participants highlighted the lack of child rights awareness and training that continues to exacerbate the situation of young people in conflict with the law. The Committee outlined its particular concern:

<sup>46</sup> YCJA Section 115(1.1) is amended to require police to “keep a record of any extrajudicial measures that they use to deal with young persons”, which may mean less use of these measures.” CCRC, 29-30.

<sup>47</sup> CCRC, 3.

<sup>48</sup> United Nations, UN Convention on the Rights of the Child (2012), “Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Canada” UN Doc. CRC/C/CAN/CO/3-4, Geneva: Office of the High Commissioner for Human Rights, 5 October, 2012, 20, para. 85.

<sup>49</sup> Ibid.

<sup>50</sup> These instruments are enunciated in the Concluding Observations to include: including “the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee’s General Comment No. 10 (2007) (CRC/C/GC/10); *ibid.*, 20, para. 86.

“that personnel involved in juvenile justice, such as law enforcement officers, prosecutors, judges, and lawyers, lack understanding and training on the Convention.”<sup>51</sup> This gap is evident in the systemic problems that STM participants identified including the quick judgment and unjust treatment of Ashley Smith and the need for more gentle and understanding of her.<sup>52</sup> For example, many “were confused by how Ashley Smith’s mental health issues could go undiagnosed and unaddressed.”<sup>53</sup> Yet, the fact is that other youth are in similar desperate situations in the juvenile justice system.<sup>54</sup> Follow-up should be an urgent issue demanding attention and effective response.

STM also repeatedly highlighted the issue of authority and abuse of power<sup>55</sup> due to the significant problem with the overbearing power and authority of the various officials involved in the criminal justice system. A participant stated: “Most police officers do not even tell youth their rights and many times the United Nations Convention is broken.”<sup>56</sup> The realities hidden behind institutional walls are not always so captured for all of Canada to see as we saw in recently released videos of Ashley Smith. Yet horrible things are happening behind these walls: another famous example of inexcusable treatment behind institutional walls is Omar Khadr, while outside Canada, Canadian officials condoned his treatment and facilitated the extensively lengthy period of his extraterritorial incarceration.

In response, STM highlighted again and again about the importance of awareness.<sup>57</sup> Thus, Canada should follow the UN Committee’s recommendation: “to develop an integrated strategy for training on children’s rights for all professionals, including, government officials, judicial authorities, and professionals who work with children in health and social services.”<sup>58</sup> Such training should not be a rote exercise but challenge the status quo in terms of thinking, understanding, systems, practices and processes and stress that rights are not zero-sum. As the Committee outlines, training should be comprehensive “on the use of the Convention in legislation and public policy, program development, advocacy, and decision making processes and accountability.”<sup>59</sup> Moreover, there is another obligation in improving rights awareness in order to support the position and protection of young people within society as the STM participants highlighted. Rights language should be accessible and provide the knowledge to children and youth so that they can recognize when one of their rights is violated.<sup>60</sup>

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<sup>51</sup> Ibid., 5, para. 26.

<sup>52</sup> Del Monte, A. and Akbar, L. (2012), op cit., 8.

<sup>53</sup> Ibid, 9.

<sup>54</sup> It has been reported that there are 39 similar inmates across the Canadian justice system; Vincent, D. (2013).

“Ashley Smith one of about 40 similar inmates in system, says psychologist” The Toronto Star, March 6, 2013, [http://www.thestar.com/news/canada/2013/03/06/ashley\\_smith\\_showed\\_harmful\\_effects\\_of\\_segregation\\_psychologist\\_tells\\_inquest.html](http://www.thestar.com/news/canada/2013/03/06/ashley_smith_showed_harmful_effects_of_segregation_psychologist_tells_inquest.html)

<sup>55</sup> Del Monte, A. and Akbar, L. (2012), op cit., 8.

<sup>56</sup> Ibid., 9.

<sup>57</sup> Ibid., 4.

<sup>58</sup> UN, UN Convention on the Rights of the Child (2012), op. cit., 5, para. 27,

<sup>59</sup> Ibid., 6, para. 27.

<sup>60</sup> Del Monte, A. and Akbar, L. (2012), op cit., 15.

### 3. Non-Discrimination

It is clear that the CRC principle of non-discrimination is not respected as STM and the UN Committee outline. Both contributions elaborate the reality of the issues related this CRC general principle in Canadian youth criminal justice.

During Canada's review process, the Committee noted that many Canadians are distressed about the situation of Aboriginal children, which much evidence confirms. However, the UN Committee was also concerned about limited or absence of attention to other populations of young people. This phenomenon meant that the issues and circumstances of other groups were not examined or appreciated adequately, resulting with the common impression that only Aboriginal children deal with discrimination in Canada. The UN Committee outlines that discrimination is manifested by the fact there is not only Aboriginal but also "significant overrepresentation" of "African-Canadian children in the criminal justice system".<sup>61</sup> Nevertheless, Aboriginal youth have a higher risk of incarceration as STM report acknowledged and stereotypes and misunderstandings about Aboriginal youth are pervasive and negatively affecting them.<sup>62</sup> Consequently, Canada is tasked to take "urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care".<sup>63</sup> The Committee also responded to the youth representatives from Justice for Girls in Geneva who highlighted gender concerns related to girls in mixed-gender youth prisons.<sup>64</sup>

STM participants identified that discrimination against young people is pervasive, reflecting societal assumptions "that they are automatically assumed to be in the wrong". While this type of discrimination against young people underpins the understanding and efforts of the UN Committee, STM identify and explain the implications in relation to criminal justice. STM participants identified that youth in the justice system are not treated as a youth but criminalized, and also their shock about how they are treated.<sup>65</sup> STM enunciated that young people are assumed to be "lazy, irresponsible, too young, uneducated, guilty, 'bad kids', Criminals".<sup>66</sup> Moreover, STM acknowledged stigmatization and labeling as a serious issue. One stated that: "Labeling is unfair because they only look at what people have done and not what they will do or who they are – people can change."<sup>67</sup> Consequently, much effort is needed to improve implementation and respect of the CRC non-discrimination principle in Canada.

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<sup>61</sup> UN, UN Convention on the Rights of the Child (2012), op cit., para. 32(a).

<sup>62</sup> Del Monte, A. and Akbar, L. (2012), op cit., 14.

<sup>63</sup> UN, UN Convention on the Rights of the Child (2012), op cit. 7, para. 33(a).

<sup>64</sup> Ibid., 20, para. 85.

<sup>65</sup> Del Monte, A. and Akbar, L. (2012), op cit., 8.

<sup>66</sup> Ibid., 9.

<sup>67</sup> Ibid., 12.

#### 4. Child and Youth Participation

Child and youth participation has much room for progress in Canada as both the UN Committee and STM participants outlined. The Committee highlighted its General Comment No. 12<sup>68</sup> to stress the importance of the child's right to be heard across all official decision-making processes. STM participants acknowledged significant problems in the practice of this CRC general principle. For example, one young person stated that: "Ashley [Smith] was fighting authority so much, which made the situation worse for herself. However, she should have still had the right to have her voice heard instead of being treated so inhumanely."<sup>69</sup> Another STM participant stated that: "No one listened to Ashley's voice. The responsibility falls upon the adults to be the liaison between young people and their rights – this is the problem."<sup>70</sup> If participation was a societal and government priority, we would not only listen but need to give due weight in our policy and programming decisions. Hence, the Committee specifically urged Canada "to ensure that children have the possibility to voice their complaints if the their right to be heard is violated with regard to judicial and administrative proceedings and that children have access to an appeals procedures."<sup>71</sup>

## II. Recommendations and Conclusion

There are many important reasons why the international community has elaborated and adopted the human rights framework and why this framework has been specifically enunciated for children. These reasons help us understand for instance, why we have a separate justice system and why young people should be detained separately from adults. However, these reasons are conveniently ignored when it is political expedient to impose harsh penalties on young people who may have made mistakes in order to appear "tough on crime" without considering the implications of these measures. STM stressed the problems created by labels and stereotypes and when children are invisible. Consequently, misunderstandings about youth in conflict with the law abound in Canadian society and policy-making. For instance, media coverage about Ashley Smith reflect surprising and disturbing language choices: Ashley is described as "choking to death as guards stood watch" rather than dying from suicide.<sup>72</sup> In this way, it seems that her loss of hope and utter frustration as well as society's responsibility are minimized. Young people in juvenile justice are literally cut off from society and thus, suffer various rights violations. Yet, issues facing these young people are too often ignored. The lack of, or weak commitment and practice of child rights is reflected in ongoing issues that have not progressed since Canada's last CRC review. The UN Committee reminded Canada to take action on those recommendations:

<sup>68</sup> UN Convention on the Rights of the Child (2009), "GENERAL COMMENT No. 12 (2009): The right of the child to be heard", UN Doc. CRC/C/GC/12, Geneva: United Nations, 20 July 2009  
<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.doc>

<sup>69</sup> Del Monte, A. and Akbar, L. (2012), op cit., 7.

<sup>70</sup> Ibid., 8.

<sup>71</sup> UN, UN Convention on the Rights of the Child (2012), op cit., 8, para. 37.

<sup>72</sup> The Canadian Press (2012), "Toews criticized for suggesting Ashley Smith was not a victim", *Toronto Star*, November 7, 2012, A3; and The Canadian Press, 'Vic Toews denounced over Ashley Smith comments', Tuesday, Nov. 06, 2012, <http://www.theglobeandmail.com/news/national/toews-denounced-over-ashley-smith-comments/article5017001/> (accessed 16 November, 2012).



“that have not been implemented or sufficiently implemented” in a variety of areas that include “the administration of juvenile justice.”<sup>73</sup>

Child and youth justice reflects the role and impact of child rights upon a society. If child rights are reflected in more than rhetoric, there should be stable, consistent and effective supports and protections in place for young people in conflict with the law. However, it is clear that politics, stereotypes and other concerns continue to motivate Canadian approach to justice issues related to young people regardless of our commitment to child rights, the evidence base, and the resources involved in reacting to, as opposed to preventing societal problems. Canada continues to blame, punish and criminalize the individual as illustrated in the Ashley Smith case. It is worrisome, as the CCRC points out, that pertinent cross-country roundtable consultations were ignored in the legislative “reform” process for Bill C-10 because they concluded that the original YCJA was working as it should and that “improvements must focus not on the legislation but on the related services and systems such as youth mental health, early risk intervention and the expansion and effective functioning of alternatives to incarceration.”<sup>74</sup> Young people need more support before and after coming into the justice system as evidenced by the horrible experiences of Ashley Smith. Yet, as a society, we just do not seem to be listening.

However, it is encouraging that there is some reaction to problematic understandings in the public sphere. For example, opposition critics attacked the comment from Public Safety Minister Vic Toews when he appeared to suggest that Ashley Smith was not a victim. In deflecting questions about her death, he repeatedly referred to the importance of caring for victims, rather than prisoners.<sup>75</sup> He seems to consider prisoners as the “other”, as if prisoners are not part of society, not part of someone’s family, thoughts or concerns. He seems to lack understanding that prisoners are human beings and that if treated poorly, the unaddressed issues of incarcerated youth will likely cause more problems. Hence, STM attention is so important to illustrate the knowledge and experiences of young people as well as the realities of the system.

While we cannot consider STM as the definitive exercise in youth consultation in relation to this subject (for instance they did not talk about the age of criminal responsibility or Canada’s reservation to CRC a 37(c)), it does provide valuable insight and comment into the realities that young people are experiencing – the human dimension – that are not explored in the UN Committee’s Concluding Observations. Thus, the two outcomes are complementary in describing and monitoring the situation of young people in the Canadian criminal justice system.

As a response to these important contributions to the Canadian discourse about children, several recommendations are proposed to support progress for child rights.

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<sup>73</sup> United Nations, UN Convention on the Rights of the Child (2012), op cit., p. 2, para. 8.

<sup>74</sup> CCRC, 31.

<sup>75</sup> The Canadian Press (2012), op cit., A3.

- Greater commitment to young people in Canadian society: For example, the limited attention to National Child day on November 20<sup>th</sup> highlights the need for more than rhetoric about how children are important.
- Importance of child rights awareness and education: The traditional approach, using limited numbers of posters in some areas for instance, does not appear to make an impact on how people think and react to situations. We must overcome the understanding that child rights simply an ideological perspective and reflect only “special interest”. The successful child rights campaign in British Columbia is a model that should be emulated and supported across the country.<sup>76</sup> As members of civil society, we need to be more vocal and coordinated in our efforts to support children’s rights.
- Creative approaches to children’s rights understanding and building support: In order to get appropriate and effective responses to the situations in youth justice, perhaps it is not enough to rely on the human rights argument in relation to the implementation and violation of rights. Without abandoning our commitment to rights, it may be time to advance strategies that reflect the language of, and make sense to our political leaders and policy-makers. In addition to the human rights case, perhaps in the Canadian context, we should also consider other arguments including the business case and social justice arguments in favour of children. Perhaps these frameworks and language associated with them will resonate with greater number of people.
- Ongoing monitoring is necessary to expose the realities of the criminal justice system upon child rights.
- We need to advance the evidence-base so that others can see the importance of children’s rights to understand and respond to societal issues.

It is critical that the Movers in Canadian society not just listen but also respond appropriately and effectively to the powerful words and insights from the STM participants about the justice system and its impact upon child rights. We need to ensure that attention is paid to STM’s contributions. After all, one STM participant noted that: “I felt that adults were actually listening to me and doing something about it”.<sup>77</sup> CRAN should do all it can to ensure that Canada is listening to the Shakers and that there is progress with the Movers.

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<sup>76</sup> As EveryChild explains, “Child rights needs to be part of our daily lives. Instead of being just a ratified document our government signed once upon a time, we want to change the basic attitudes and assumptions about children and their role in society.” Society for Children and Youth of BC, Representative For Children and Youth (BC), BC Centre for Safe Schools and Communities, Reel Youth, everychild.ca, <http://www.everychild.ca/campaign>.

<sup>77</sup> Del Monte, A. and Akbar, L. (2012), op cit., 4.

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*Juvenile Justice and Mental Health: The Need for a Prevention Focus*

The case of Ashley Smith, as the young people realized, reflects two of the many Convention violations experienced by Canada's children. First and most obvious is that her experiences typify the horrific treatment – and often tragic outcomes – of children who come into conflict with the law. Over an 11 month period, Ashley was transferred 17 times to different facilities where she spent the majority of her time physically restrained in isolation cells. To control her behavior she was forcibly restrained, sometimes with duct tape, and injected with anti-psychotic drugs. Hardly the rehabilitation called for in the Convention. And Ashley's experiences were not isolated. In youth detention centres, children report gang violence, verbal and physical assaults from peers and staff, and the routine use of chemical and mechanical restraints. Second, and perhaps less obvious, is that Ashley's short life highlights the lack of care in Canada for children with mental health issues.

There is compelling evidence that the majority of children who are in correctional settings in Canada have one or more mental health disorders. In fact, the prevalence of adolescents with mental health disorders in justice facilities is two to four times that of the general adolescent population. Most common among these disorders are conduct disorder, substance abuse disorder, clinical depression, and Fetal Alcohol Spectrum Disorder (FASD).

Many of these children have been on a developmental pathway to juvenile justice involvement since birth. They may have been born with a genetic predisposition to the development of mental health disorders. Their rights may have been violated in their families and in their communities, and by the institutions that are supposed to protect them. Many have been exposed to toxic substances such as alcohol or environmental toxins *in utero*, or to toxic experiences, such as abuse, neglect, or rejection in childhood. Toxins, both environmental and social, affect the children's brain development such that without early and sometimes extensive interventions, they are on a pathway to problems.

There is no question that the environment is the architect of the brain, and there is no question that when the brain is mis-wired in its period of early and rapid development (the first four years of life), the developmental effects are pervasive. The child is at risk of difficulties with reasoning, emotion regulation, social interaction, and learning, and is highly vulnerable to the development of antisocial behaviors, and mental health disorders. In essence, the early violation of their right to conditions that optimize their healthy development precludes the possibility of abused or neglected children enjoying their rights through development. These early challenges are intensified by the lack of services to children with mental health disorders.

The Canadian Mental Health Association estimates that up to 20 percent of Canadian children – that’s an astonishing 1 in 5 – have some diagnosable mental health disorder. Unfortunately few will be diagnosed, and even fewer will receive treatment.

Neither provincial, territorial, nor federal governments, nor child protection agencies, have policies that address the problem of mental illness among children and youth. Not surprisingly, across the country, mental health services for young people are woefully inadequate and difficult to access. Where they do exist, wait lists are long, and key developmental periods can be passed before the child receives treatment. In addition, there is a notable lack of competence to diagnose or treat mental health issues in children among primary care providers, in child care settings, in foster or group homes, or in schools. The general ignoring of children’s mental health needs suggests that people still believe that “kids grow out of it”. They don’t.

Researchers agree that mental health disorders in early childhood play a key role in leading to and sustaining criminal behavior. And although overall rates of youth crime and incarceration are lessening in Canada, there remain children whose undiagnosed and untreated mental health disorders result in their detention in juvenile justice institutions. Their experiences while there too often lead to further, and adult, incarceration.

One hopes that not all institutions and prison guards are like those Ashley Smith experienced. But even at their very best, the juvenile justice system and its institutions are not designed to provide the mental health diagnoses and treatments the children need. And the reality is that rehabilitation of disorders such as FASD is very difficult.

To be in closer compliance with the Convention on the Rights of the Child, Canada needs a comprehensive mental health strategy specifically for children and youth. Such a strategy would include a strong focus on prevention. Re-wiring the brain is much more difficult than is creating conditions that get it right the first time. Much could be done to prevent the escalation and intergenerational transmission of mental health problems and criminality by having widespread and adequately resourced supports for parents and families, and by taking measures to promote the prenatal health care of to-be-born infants. Child mental health specialists need to be well trained and to be available in every community, in schools as well as in primary health care settings, and in child protection agencies. Mental health professionals should be mandated in schools, and they should help develop and coordinate a systematic network with mental health providers in the community to create seamless and timely care. Detention in justice facilities must be used as a very last resort, and when detention is necessary the focus must be on providing appropriate treatment. Where treatment is difficult, for example, in the case of severe fetal alcohol disorder, then ongoing supports need to be provided. Child impact assessments should be undertaken on all mental health policies and practices, and the youth justice system.

Finally, parents, teachers, and all those who work with or for children need to be educated not only on the rights of the child, but also on children’s mental health. If children with FASD are simply understood to be acting up wilfully, if children with depressive

disorder are assumed to be sulky, if substance abusing adolescents are seen as just being teens, change is unlikely. The best legacy of Ashley Smith would be the mandating and coordination of exemplary mental health services across all agencies and institutions of relevance to children. The aim would be to ensure early intervention and, as necessary, the initiation and continuation of appropriate treatment through development.

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*Populist Punitiveness and Locking Kids Up:  
The Role of the General Public in Responses to Youth Crime*

In Canadian criminal justice, the pendulum has historically swung back and forth between a welfare and rehabilitative approach to youth crime, and a crime control “get tough” approach. However, for the past several decades, despite the creation of the YCJA and its emphasis on de-carceration, as a nation, we continue to treat youth harshly and in contravention with the *UN Convention on the Rights of the Child* (CRC). The introduction of Bill C10 is but another example that the pendulum is continuing to move toward harsher sanctions for youth in conflict with the law, alongside a lack of understanding concerning the structural factors behind youth crime - poverty, unemployment, discrimination, institutional and systemic racism - and a lack of emphasis on prevention.

British criminologist Anthony Bottoms coined the term – “populist punitiveness” to connote the public’s harsh and unforgiving attitude when it comes to responding to crime, particularly youth crime. Populist punitiveness has been and continues to be alive and well in Canada, as is indicated in the statistical realities below:

- A nationwide petition circulated in 2000 generated almost one million signatures of individuals demanding harsher sentencing for youth (Tufts & Roberts, 2002).
- Nearly two thirds of the Canadian public supported lowering the age of criminal responsibility from 12 to 10 years (Angus Reid Group, 1998).
- Approximately two thirds of the public opposed the existence of a separate youth justice system and 93% thought that youth court sentences were too lenient (Sprott, 1998).

However, fear of rising youth crime has not always coincided with actual trends. Although 60% of the public polled in 2000 believed that youth crime was on the rise, these rates had been in decline for almost a decade (Roberts, 2003). Recent crimes stats show a similar decline. Both the rate and severity of youth crime decreased in 2010, down 7% and 6% respectively. The severity of violent crime committed by youth also decreased, down 4% from 2009 (Statistics Canada, 2012).

These public perceptions and views on the criminal justice system are important as they have a powerful impact on the shaping of Canadian policies on youth crime. The public's views loom large and heavily influence election platforms and government policy-making and decisions.

### ***Public Education and Sensitization***

There is evidence that a better-informed public is a less punitive public (Covell & Howe, 1996). We therefore need to devote greater attention to public education regarding the realities of juvenile offending, particularly the unique experiences and circumstances of youth in conflict with the law including the reality of youth crime rates, as well as the evidence that punishment does little to reduce recidivism, and is destructive to youth development. As a young person in *Shaking the Movers* thoughtfully explained:

*"Being in the system changes people – youth are at their prime developmental stage, it has made me who I am today – I inherited the jail mentality. This is why I always get into fights and physical altercations – not because I want to, but because I have that mentality"...jail makes you cold and not care."*

The public also needs to be made aware of the fact that a focus on "the protection of society" (which is central to the new crime Bills), at the expense of "the best interest of the child" contravenes the principles of the CRC.

### ***Bifurcation of Youth in Conflict with the Law: The Creation of two categories of young offenders within the YCJA***

The YCJA has created a potentially dangerous bifurcation among young offenders (Denov, 2007), which is further reinforced within Bill C-10. On the one hand, minor offending is increasingly being decriminalized, and minor offences, including first time offences, are less and less subject to formal sanctions under the YCJA. On the other hand, the YCJA reserves increasingly serious sanctions for those who commit more serious offences by lowering the age of eligibility for a presumptive adult sanction from 16 to 14 years. It has also extended the reach of a presumptive adult sentence to those who have committed a third or serious violent offence.

This bifurcation into two groups of "serious" and "minor" offenders has important implications. It suggests that youth who commit minor offences are deemed worthy of the investment of time and resources on the part of the state, while the more violent offenders are excluded from society – they are perceived as beyond help and essentially warehoused (Denov, 2005). This clearly contravenes the spirit of the CRC which advocates for the rights and protections of all children in conflict with the law. Ashley Smith, in many ways, is a representation of a "warehoused" youth whose fundamental needs and rights were ignored.

***Power & Positionality: Separated Refugee Youth and Conflict with the Law***

*As a youth, I feel I have no power and my only option is to obey authority. If the police were more gentle and understanding [to Ashley Smith], this never would have happened (Youth in Shaking the Movers V).*

Separated refugee children<sup>78</sup> represent an important, although largely invisible population of new-comers to Canada. While recognized for their resilience and capacity to overcome adversity, upon their arrival to a new context, separated asylum-seeking and refugee children often contend with the realities of psycho-social challenges (Halcon et al., 2004), difficulties in school (Kia-Keating and Ellis, 2007), and limited access to appropriate social services and support (Van Ngo, 2009). In Canada, in 2005, the *Standing Senate Committee on Human Rights* noted that “migrant children [across Canada] face a number of obstacles to settlement and integration into their new homeland, too often slipping through the cracks in service provision and education” (as cited in Crowe, 2006, p.12). Denov and Bryan found similar challenges to resettlement among this population in Canada, including the challenges of facing a complicated refugee determination system, social isolation, economic hardship, and feelings of guilt for having left loved ones behind in their countries of origin (Bryan and Denov, 2011; Denov & Bryan, 2010; Denov and Bryan, 2012). Research has also shown that upon resettlement in Canada, these youth may experience varied forms of racism, discrimination and conflict with the law. For example, in their study of separated children in Canada, Bryan and Denov (2011) note that study participants’ experiences with police ranged from being arbitrarily pulled over while driving, to being followed, harassed, degraded, and unjustly accused of criminal activity. One participant, Manuel, recounted a particularly disturbing encounter with a police officer:

I was driving and the police officer was like “do you know why you were stopped?”, and I was like “No officer”. He starts asking my girlfriend “How long have you known this guy? Is he pimping you?”. Then he said “We don't trust 'the N-word', “We don't trust 'the N-word'. They're like dogs”, and blah blah blah. I didn't get upset and all. What I wanted to say was “You're an idiot”. And then I don't know, whatever, he gave me a ticket (Bryan and Denov, 2011).

Having not yet received landed immigrant status, Manuel paid the ticket and kept the experience to himself. Most of the African male separated children interviewed for the study shared similar stories. Hassan, a separated youth from East Africa, was pulled over three times by the same police officer in one day. The first two times the officer inquired if the vehicle he was driving was “really his car”. The third time, the officer followed Hassan through a back alley to his residence, citing a traffic violation as his reason for doing so. Nijam, also from East Africa, shared the following experience which poignantly highlights the intersection of age, race, and the perception of risk and criminality:

<sup>78</sup> The UNHCR defines a separated child as “a person who is under the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier and who is separated from both parents and is not being cared for by an adult who by law of custom has the responsibility to do so” (as cited in Ayotte, 2001, p. 6).



We got pulled over because they thought we had a gun because somebody 20 blocks away at a gas station said: “Those people who left, one of them had a gun”. And it wasn’t even that we got pulled over. It was a police take-down: one wrong move and you’re shot. There was a helicopter and five police cars. Finally, it turns out that the people at the gas station - the people with the gun - were not even Black people. But the police see five Black people in a car, and they gun you down. There’s this thing they have in their minds about Black people (Bryan and Denov, 2011).

Reflecting Wortley and Tanner’s (2004; 2005) work on racial profiling, the youth in Bryan and Denov’s study noted that these experiences were recurrent. Because of this, participants were forced to learn how to navigate altercations with police and other authority figures in relation to their perceived “risk”. The experiences of youth participants highlight the ways in which issues of race, ethnicity, and age shape and inform interactions of law enforcement and other community members. These examples confirm the statements made by the young people in *Shaking the Movers* that “*many times, people in positions of authority break laws instead of enforcing them – this is due to their position of power and this is what happened with Ashley Smith.*”

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### *Punitive public opinion versus youth justice in Canada*

Youth at the Shaking the Movers V workshop were quite correct to express concern about the toughening up of Canada's youth justice system. I would like to address the problem of the new toughness, the source of the problem, and possible solutions.

First is the problem of the new toughness, a development that is very much at odds with the Convention on the Rights of the Child and with the evolution of Canadian law. According to the Convention, the main focus of youth justice should be on the age-appropriate treatment and rehabilitation of young people in conflict with the law. Article 37 states that detention and imprisonment should be used only as a last resort and for the shortest possible time. Article 40 states that whenever possible, rehabilitative alternatives

to custody should be used, which are appropriate to the well-being of youth and proportionate to their circumstances and the offense.

Until recently, the evolution of Canadian law and practice has been in the direction of the principles of the Convention. Under our current Youth Criminal Justice Act, as originally stated, the use of custody was to be lessened and the use of extrajudicial alternatives and community programs increased. Moreover, the older principle of punishing young offenders for reasons of deterrence and public denunciation was deleted, in accord with a greater focus on rehabilitation and reintegration. All of this is consistent with the Convention.

But against these progressive developments, there has been a recent movement in the other direction. Even in the Youth Criminal Justice Act, there were elements of a new toughness that didn't exist in previous law. For serious violent offenders and repeat offenders, a youth was liable to an adult sentence imposed directly in youth court. This could occur as early as age 14 except for Quebec where it was age 16.

This element of toughness was greatly expanded by the Harper government through amendments to the Criminal Code and Youth Criminal Justice Act in 2012 (Bill C-10). The principle of deterrence and public denunciation of young offenders has been brought back, the category of violent offenses has been expanded, release of the identities of young offenders has been made easier, and mandatory minimums for young offenders -- as well as adult offenders -- have been increased.

What explains the new toughness? An important part of the explanation is in the growth of punitive public opinion, which provides fuel for a tougher approach. National Gallup polls and surveys, including the 2008 National Justice Survey on youth justice, show that a significant segment of the Canadian public believes -- at least in the abstract -- that youth court sentencing and the youth justice system are too lenient in responding to youth in conflict with the law. Public confidence in the system is in fact quite low. But that said, the research also shows that public opinion on crime and youth crime is complicated and nuanced. When people are presented with background information on incidents of crime, they are less supportive of punishment and more supportive of rehabilitation. And when they are asked to think about alternative responses, they are more likely to favor prevention and rehabilitation over tougher punishment.

However, in very general terms and in the abstract, many Canadians do support a tougher and more punitive approach. These feed what some criminologists call "penal populism". Penal populism simply means a situation in which politicians, mindful of punitive public attitudes, promise a tougher response to crime in order to gain wider political support. This helps to explain initiatives by the Harper government to toughen up the youth justice system. It also helps to explain the lack of serious public backlash against the initiatives. The Harper government would not have acted had it known it did not have substantial public support.

Behind all of this is the influence of the media. A large body of research shows how the media functions to promote punitive public opinion about crime. Short, dramatic, simplistic, and sensationalistic news stories about serious incidents of crime, without the benefit of context and background information, provoke negative public attitudes and the common view that youth crime is increasing and that offenders deserve tougher punishment, especially for violent crime. The stories also provoke the view that current law and sentencing are overly lenient – otherwise, there would not be so many incidents of hideous crime.

What is the solution? To promote more responsible and contextualized media coverage of youth crime stories would be a difficult and perhaps impossible task. The media are a business in search of profits and freedom of the press is a well-established constitutional principle. But one thing that child and youth advocates can do is to take a public stand against punitive approaches. Research shows that when members of the Canadian public are given more knowledge and more background information about crime, they are more supportive of a rehabilitative and preventative approach. This suggests that public opinion is amenable to educational efforts. Youth advocates need to educate the public about the level of youth crime – that official rates have been declining in recent years. They need to educate about the risk factors for youth crime – factors such as lack of supports, inadequate parenting, and mental health issues. They need to educate about the benefits of crime prevention programs and the cost savings of prevention. And they need to educate about the benefits of restorative justice and rehabilitative programs and about the costs and recidivism rates associated with lengthy prison terms.

Finally, they need to educate Canadians about the Convention on the Rights of the Child and the rehabilitative focus of the Convention. They need to get out the message that when children's rights are respected in families and society, the likelihood of youth becoming involved in serious crime is greatly diminished.

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### *The Pursuit of Meaningful Collaborative Consultation, and the Need to Do Better*

CRAN has proven to be an important network for likeminded academics to come together and discuss children's rights issues from children's perspectives. For those of us who are geographically isolated from others engaging in this type of work, CRAN has enabled a communing of ideas, insights, shared experiences as well as a providing a space to share our distinct specialisms within the very wide field of children's rights. Having said this, I believe that as a group we need to engage in reflection, self-critique and to respond reflexively in areas where we feel we need to do better. It is a sign of our maturity as a group, when we are able to embrace our work from a critical perspective. This enables us to evolve in ways that promote the rights of children whilst eschewing adultism within our own work, in addition to critiquing the ways in which adultism plays itself out within the structures and practices in our country.

As such, my response to the fifth Shaking the Movers report focuses on the process of listening to and engaging in collaborative consultation with children as much as it does on the contents of the thoughts elicited in this report. In focusing on the process, I am inevitably led to the asking of many questions; many questions that may not be answerable because they need to be asked of children, specific children who have the lived experience to allow them to respond. When I read the Shaking the Movers (V) report, I was surprised by some of what I read because some of the responses did not seem to link to lived experience within the juvenile justice system. After enquiring, I learned that of the 40 children that participated in the children's workshop, roughly only 3 children, or 7.5%, had experience with the juvenile justice system. This lack of representation of children with lived experience of the juvenile justice system at a workshop to discuss children's rights within the juvenile justice system not only is at odds with our own policies in relation to the formation of these yearly workshops (see, for example, page 9 of the wonderful report written by Landon Pearson and Tara Collins that details the Shaking the Movers model and specifies that "there must be over-representation"<sup>79</sup> of participants with lived experience of the issue under discussion), it also raises a whole cascade of other crucial questions in relation to process. (I will return to these crucial questions later). Given the over-representation of Indigenous children within the juvenile justice system, representation of Aboriginal children in these workshops may have at least led to more direct or indirect lived experience of the juvenile justice system. However, roughly only 4 of the 40 participants, or 10%, at the workshop identified as Aboriginal. Where is the voice of our marginalized children? With only 10% of the children who were consulted regarding children's rights within juvenile justice being Aboriginal and less than 10% having direct lived experience of the juvenile justice system, we need to do better. We need to do better.

### Crucial Questions

Given the underrepresentation of children with lived experience of the juvenile justice system in this workshop, added work needed to be done to inform those who were involved about issues in relation to a) the juvenile justice system, b) children's rights in this area, and c) some of the difficulties experienced by children in this institution. This inevitably leads to an increased adult influence on what is discussed, what the issues are, and how they are framed. Shouldn't we be working at removing the adult influence as much as feasibly and letting the children set the agenda? If so, we need to ask: How are the issues under discussion conceptualized and put to the children? Who formulates what issues are important? Who decides which articles from the CRC to apply? In a context of needing to educate children, because of their lack of lived experience, in this case within the juvenile justice system, the content of that education remains adult-centric (or adultist) and hence removed from children's lived experience from their perspective. If the education is adultist, do we not run the risk of teaching children to reproduce adultist knowledge and understandings within the space of the workshop? Do the children's responses in the report resonate with the experiences of

<sup>79</sup> Pearson, L. and Collins, T. (2011). *Shaking the Movers: A Model for Collaborative Consultation with Children and Youth on Public Policy*. Ottawa: Carleton University and the Landon Pearson Resource Centre for the Study of Childhood and Children's Rights.

marginalized children within the juvenile justice system? We will only know the answers to these questions when we ask children who have that lived experience. We need to do better.

Who is better able to describe, deconstruct and make suggestions for change in relation to the state-sanctioned and adult-perpetrated violence against children within the juvenile justice system than children who have been caught within this system? Who is better able to deconstruct the pathologization of their thoughts and behaviour – through the naming of a child's response to trauma as a 'mental illness' rather than as a 'normal reaction' to oppression, violence and adultism – than children who have been labeled 'mentally ill' either within the juvenile justice system itself, or prior to sentencing, within other oppressive institutions that these marginalized children find themselves in (such as social services and child psychiatry). By consulting children who have not been within these systems, do we not risk reproducing adultist knowledge and/or knowledge based on privileged children's perspectives? For example: What do incarcerated girls think about children's rights in juvenile justice, violence by prison employees and the labeling of children's reactions to a marginalizing world as 'mentally illness'? We don't know because we haven't asked them. We need to do better. For example: What do colonized children, who perhaps have experienced intergeneration trauma in relation to colonialism, and who have been labeled as 'mental illness' as a result and/or who may have been labeled 'dangerous criminals' perhaps because of their violent reactions to a violent and racist white/settler society, think about children's rights within the juvenile justice system? We don't know because we haven't asked them. We need to do better.

Riddled through the report is what appears to be some adultist and privileged notions of children's distressed behaviour, always framed as illness, with suggestions for diagnosis and treatment. What do children who have been psychiatrized within the juvenile justice system think of this? We don't know because we have not asked them. We need to do better.

I believe that we need to ask ourselves as a group whether our biggest goal is learning from children or teaching children. Although the two may necessarily intertwine, it is important to know which represent our main focus, and how to go about realizing it through meaningful collaborative consultation and authentic participation. I believe we need to think about how social dominance intersects within different experiences of childhoods, and thus how power relations play themselves out within the production of knowledge not only between children and adults but also between children from different social locations.

I end this with some final thoughts from Henry Giroux:

"Society is at war with its children....We live in an era that breaks young people, corrupts the notion of justice and saturates the minute details of everyday life with what we might call, if not the threat, the reality of violence. A return to violent practices and other medieval types of punishment inflict pain on the psyches and bodies of young people. Equally disturbing is how law and order policies and practices....appear to take their cue from a past era of slavery...The prevalence of institutionalized violence...suggests the need for a new conversation and politics that address what a fair and just world might look like. And, until educators, intellectuals,

academics, young people and other concerned citizens and social movements address how a metaphysics of violence and war have taken hold...the forms of social and political and economic violence that young people are currently protesting against, as well as the violence waged in response to their protesting, will become almost impossible to recognize and act on” (Giroux, 2012, “War on Youth”, Histories of Violence, 2<sup>nd</sup> Annual Lecture).

I believe that we need to critique the underlying ideological forces that embrace violence and pathologization as a mode of governing our children within (and outside of) the juvenile justice system. Arguably, we can only do so in a meaningful and relevant way if we do so in conjunction with children who have experienced this pathologization and violence first hand.

I trust that my critique will not be dismissed but will be considered seriously and will be taken in the spirit in which it has been written, a spirit that values the continued work of CRAN in engaging in collaborative consultation with children.

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### *Accountable Children: Rights, Vulnerabilities and the Carceral Archipelago*

#### **Introduction**

The youth justice reforms enacted in Bill C-10 may mark the end of the beginning of a Canadian youth justice system based on the rights of the child. I begin this essay with a brief discussion of origins and developments in youth justice, in order to highlight the dangers and inconsistencies of reforms and the cynical politics accompanying its passage. I then turn to the carceral archipelago of child protection and youth justice, using the Ashley Smith and Phoenix Sinclair cases to highlight neo-colonial policies affecting Aboriginal youth and behavioral and cognitive disorders affecting criminally involved youth. I conclude with an observation on children’s desire for connectedness and the aptness of the epithet “hug-a-thug”. The essay is guided and informed by the comments of children and youth participating in the Children’s Rights Academic Research Network conference Shaking the Movers V: Youth Justice (“SMV”), held November 18 and 19, 2012.<sup>80</sup>

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<sup>80</sup> *Shaking the Movers V: Youth Justice Report* (2012) available at <http://www.landonpearson.ca/shaking-the-movers.html>



### *From Roman law to the dark politics of Bill C-10*

Roman law declared those under seven *infantia*, incapable of (legal) speech, and required proof of *doli capax*, capacity for evil, in those seven to 14.<sup>81</sup> The test was that for mental disorder — capacity to appreciate the nature and quality of an act or know the act is wrong. This scheme was taken up by the common law. Seven marked the onset of criminal accountability in the 1892 Canadian Criminal Code. The terms of confederation made provinces responsible for children and jails and Canada for criminal law and penitentiaries. Children were tried and sentenced as adults. The 1908 Juvenile Delinquents Act, a Progressive-Era vision of child welfare under a kindly *parens patriae* jurisdiction, inaugurated the youth court in which “every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child” and the sole offence, delinquency, was satisfied by sexual immorality or breach of any federal, provincial or municipal law. Judges had broad discretion to assign children to foster care, impose Borstal-style industrial schooling or make any other order in the child’s interests. Children over 14 charged with serious offences were sent to adult court. In this age of hygiene, the child’s body was examined for signs of congenital, social and physical disorder — enuresis, non-intact hymen, venereal disease, parasites, injury. The body was better heard than the child.

The 1984 Young Offenders Act brought reforms recommended since 1965 including a stress on extra-judicial proceedings and protection of children’s legal rights. The vague “delinquency” was gone. The age of accountability was raised to 12. It was a valiant but doomed attempt to unite disparate streams of welfare, rehabilitation and limited accountability with rights to representation and procedural certainty and with protecting society. Proclamation triggered an orgy of child-blaming. Soft on crime hug-a-thug anti-youth rhetoric became a quick route to political success, despite falling youth crime rates. Amendments toughening-up the act — speedier routes to adult court, longer sentences — failed to appease. Youth crime was now a staple of conservative politics and public discourse and childhood had become a lightning-rod for social ills.

Youth gathered at Shaking the Movers V: Standing Up for Youth Justice (“SMV”) are familiar with the stigmatizing labels — “lazy, irresponsible, too young, uneducated, guilty, bad kids, criminals” — equating youth with crime:

People are quick to judge young people and assume they are up to no good.  
Labels are mostly used negatively — but there are positive labels, too.  
Labeling is unfair because they only look at what people have done and not what they will do or who they are. People can change.

The act was replaced with the 2002 Youth Criminal Justice Act (“YCJA”). Its get-tough face is seen in the regime for presumptive offences and the three-strikes rule. Its milder and less-

<sup>81</sup> Anne McGillivray, “Childhood in the Shadow of *Parens Patriae*” in Hillel Goelman, Sheila Marshall and Sally Ross, eds., *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (University of Toronto Press, 2004) 38-72. Reduced accountability has now come to mean a separate court system, reduced or alternative sentencing and a focus on rehabilitation.

visible face is a progression of off-ramp warnings that, prior to Bill C-10, left no record should the youth later be charged. Youth over 14 remain eligible for adult sentencing but are no longer transferred to adult court. Youth bore the burden of showing why adult sentence ought not be imposed. A triumph of sleight-of-hand, the act hid its non-judicial welfare approach behind its toughness. It was not enough.

In 2005, the Supreme Court of Canada cited article 37(b) of the Convention on the Rights of the Child in upholding YCJA restrictions on arrest, detention and imprisonment, citing children's diminished maturity and developmental needs.<sup>82</sup> In 2008, the court cited article 40 in determining that the presumption of diminished moral culpability is a principle of fundamental justice protected under section 7 of the Charter.<sup>83</sup> Canada has "a separate legal and sentencing regime for young people" because they "have heightened vulnerability, less maturity and a reduced capacity for moral judgement."<sup>84</sup> It was not enough.

Despite recommendations from expert consulting groups across Canada that nothing in the act be changed,<sup>85</sup> despite the continuing fall in youth crime<sup>86</sup> and opposition from such core rights groups as UNICEF,<sup>87</sup> Bill C-10 reforms to the YCJA were proclaimed in force October 23 2012. The bill toughens treatment of youth convicted of violent offences by requiring judges and prosecutors to consider adult sentences and lift publication bans, and by reducing pre-trial release.<sup>88</sup> In a cynical word-play on the Supreme Court declaration that reduced criminal accountability is a principle of fundamental justice, Justice Minister Rob Nicholson stated, "With these new measures of accountability for violent and repeat young offenders, we are highlighting the protection of society as a fundamental principle of the Youth Justice Act." This uncoupling of the protection of society from the rehabilitation

<sup>82</sup> R. v. C.D.; R. v. C.D.K., [2005] 3 S.C.R. 668, 2005 SCC 78.

<sup>83</sup> R. v. D.B., [2008] S.C.J. No. 25, 2008 SCC 25 at 41. Putting the onus on the accused to show why he or she should not be transferred to adult court offends the principle. See Cheryl L. Milne, "The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of R. v. B. (D.) and C. (A.) v. Manitoba" (2009) 47 Supreme Court L.R. (2d.) 235-251.

<sup>84</sup> The "constitutionalization of adolescence" (Nicolas Bala's term for recent Supreme Court Charter cases on rights-claims of older children) may erode children's entitlement to Charter rights. The court's focus on vulnerability and its limitation of rights in the child's best interests rather than rights is disturbing. Children's rights under the Charter are the same rights "given to everyone" (per Justice Binnie in dissent, C. (A.) v. Manitoba (Director of Child and Family Services) 2009 SCC 30; see Milne, supra note 3. Justifying limitations on rights by an assumed or presumed disability denies the equality guaranteed by the Charter.

<sup>85</sup> Their reports were not circulated, contrary to the usual procedure for government-initiated consultations.

<sup>86</sup> Youth court caseload declined by 7 percent in 2010-11, a second straight annual drop. Youth courts heard 52,900 cases involving more than 178,000 charges, compared with adult criminal courts at 403,000 cases involving 1.2 million charges. Almost 3 in 4 completed youth cases involved non-violent offences, most commonly theft, failure to comply, and break and enter. The median time to complete juvenile cases last year was 113 days, up from 70 days ten years earlier. "Youth courts caseloads falling: StatsCan" Canadian Press, Monday May 28, 2012 at <http://www.thestar.com/news/canada/article/1201590--youth-courts-caseloads-falling-statscan>

<sup>87</sup> UNICEF Canada, *Bill C-10: A Rush to a Stricter Youth Criminal Justice System. Brief submitted to the House of Commons Standing Committee on Justice and Human Rights*, 25 October 2011, at [http://www.unicef.ca/sites/default/files/imce\\_uploads/TAKE%20ACTION/ADVOCATE/DOCS/bill\\_c-10.pdf](http://www.unicef.ca/sites/default/files/imce_uploads/TAKE%20ACTION/ADVOCATE/DOCS/bill_c-10.pdf)

<sup>88</sup> Kim Mackrael, "Violent young offenders to start facing tougher treatment" *The Globe and Mail* (October 23 2012). <http://m.theglobeandmail.com/news/politics/ottawa-notebook/violent-young-offenders-to-start-facing-tougher-treatment/article4631105/?service=mobile> "Several provinces and territories have spoken out against the measures." For an excellent critique of the full implications of the changes, see UNICEF, supra note 5.

of youth is a regression to the spirit of the law as it was over a century ago. It is deeply troubling.

Bill C-10 is an insidious erosion of children's rights. It shows a callous disregard for the principles of fundamental justice that for centuries gave at least some measure of protection to youth in the courts and penal institutions. It contravenes Article 37 of the UN Convention on the Rights of the Child, which requires that "arrest, detention or imprisonment of a child shall be ... shall be used only as a measure of last resort and for the shortest appropriate period of time" and that "[e]very child deprived of liberty ... be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age." Bill C-10 ignores or rejects empirical and experiential knowledge of child development, adolescence, crime prevention and the efficacy of alternative justice measures. The premise that harsh treatment reduces crime finds no support in the literature or in any of those who work with criminally-involved youth, including judges. Harsh measures do not deter youth crime. They make children angry and distrustful. They weaken respect for rights and law. Youth are particularly vulnerable to stigmatizing alienating messages underlying Bill C-10.

The shift marked by Bill C-10 was foreshadowed by Canada's years of refusal to repatriate Omar Khadr, a 15 year old Canadian held in Guantanamo Bay, despite orders from Canada's highest courts.<sup>89</sup> Public Safety Minister Vic Toews continues to assert that Khadr is "not a child soldier".<sup>90</sup> Whether he is or is not, Khadr's right to assistance under international law is the same and the point is moot.<sup>91</sup> As Justice Minister, Mr. Toews sought public and professional support for reducing the age of criminal accountability to 10 on the

<sup>89</sup> On April 23 2009, the Federal Court upheld Khadr's constitutional challenge to Canada's decision not to request his repatriation from Guantanamo Bay, ruling that Prime Minister Stephen Harper must do so in compliance with principles of fundamental justice. On Canada's appeal, the Federal Court of Appeal upheld the order on August 14. On August 25, Canada appealed to the Supreme Court of Canada. Khadr was transferred from Guantanamo in November to be tried by a US military commission for terrorism. The Supreme Court ruled January 29 2010 that Khadr's human rights were, and are, violated by Canada but overturned the Federal Court order as ultra vires with respect to the executive branch. The Prime Minister's Office stated it has no plans to push for repatriation February 3. Khadr was sentenced to 40 years imprisonment October 31, reduced to eight years as per a pre-trial agreement. Two years later, September 29 2012, ten years after his imprisonment in Guantanamo at 15, Khadr was transferred a maximum security prison near Kingston ON, at <http://www.cbc.ca/news/politics/story/2012/09/30/omar-khadr-timeline.html>

<sup>90</sup> Natalie Stechyson, "Toews: Canada has duty to Khadr, says 'terrorist' must be rehabilitated" Postmedia News (October 22, 2012) at <http://www.ottawacitizen.com/news/Toews+Canada+duty+Khadr/7424738/story.html> "I don't agree he was a child soldier in the sense that he was somehow misled. The evidence is very clear. He's a convicted murderer, he's a terrorist and that's the basis I brought him back on ... I do believe we have an obligation to rehabilitate him even though he is not a child soldier in the technical sense of that word." For the transcript of the psychiatric interview of Khadr obtained by Canada, see <http://www2.macleans.ca/2012/09/27/the-secret-khadr-file/#more-295257>

<sup>91</sup> The 2002 *UN Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* ratified by Canada and the US requires under Art 4.1 that "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years." Khadr was 15 and a member of the non-state group Al Qaeda. Art 6.3 requires that "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. State Parties shall, when necessary, *accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration*" (emphasis added). Although not a child soldier under the Geneva Conventions, he is a child "used in hostilities" under the Protocol and has the same right to assistance.

specious argument that this would give younger children access to treatment.<sup>92</sup> As Public Safety Minister, he stated that Ashley Smith (below) was not a victim<sup>93</sup> and accused opponents of a surveillance bill that would criminalize youth who ‘sexted’ of “siding with the pornographers” — presumably those same youth.<sup>94</sup> At the close of SMV, children were “assured that their voices would be heard and would be taken seriously by professionals making decisions”. Their voices will need considerable amplification to reach the present government.

### ***The carceral archipelago — child protection and youth justice***

In 2007, 19 year old Ashley Smith choked herself to death in front of prison guards at Grand Valley Institution for Women after four years of punishment and isolation in young offender and adult facilities. That she had severe cognitive and behavioural disorders and suffered from mental illness induced or exacerbated by her treatment as a young criminal was ignored in the mad pursuit of her punishment and the institutional focus on worker, not inmate, security. This case is a brutal introduction to youth justice, itself a tough topic for children who tend to believe in choice even where they know little choice is available. Their perceptions of crime and criminality may be shaped by primitive video pay-back notions of justice that are a bewildering contrast to the fair play rules taught at home and school. Although the circumstances of youth in the justice system elicit their compassion, and they may be aware of problems facing children othered by poverty, racialized ethnicity, cognitive disorder and the cruelty of caregivers, the horrors of some children’s lives are beyond their comprehension.

Ashley’s case holds the unfulfilled promise of transformation of the treatment of mentally-disordered incarcerated children. The 2008 *The Ashley Smith Report*, New Brunswick Child Advocate Bernard Richard’s investigation of two of the carceral facilities housing Ashley, took as her mental illness and behavioural disorders as the starting-place for his recommendations for youth justice reform.<sup>95</sup> In June 2008, federal Corrections investigator Howard Sapers published *A Preventable Death*, using Ashley’s case to expose the inadequacy of mental health resources in federal prisons and recommending dramatic

<sup>92</sup> Ottawa Citizen, “Take 10-year-olds to court: Children aged 10 and 11 who run afoul of the law should be brought before the courts, Justice Minister Vic Toews said yesterday in a controversial and surprise proposal to expand the age of criminal responsibility, which currently kicks in at age 12” (August 15, 2006). “We need to have a special way for the courts to intervene in a positive fashion in the lives of these children in some type of treatment program and I think that needs to be discussed. We need to find ways of ensuring that children are deterred from crime,” Mr. Toews told the Canadian Bar Association. “We need to give courts jurisdiction to intervene in the lives of these young people.” He did not reject incarceration of children under 12. CBA lawyer Heather Perkins-McVey responded: “Does he want the death penalty for them, too? This concerns me that we’re going back to the Dark Ages. Maybe we should have workhouses. The criminal justice system is not a place to obtain treatment for anyone” at <http://www.canada.com/ottawacitizen/news/story.html?id=09ebe56b-6bf9-487f-98ae-153685cedbb4>

<sup>93</sup> Canadian Press, “Public safety minister suggests teen prisoner Ashley Smith not a victim” Winnipeg Free Press (November 6, 2012).

<sup>94</sup> Toronto Star, “Vic Toews accuses bill’s opponents of siding with child pornographers” (Monday February 13, 2012) at <http://www.thestar.com/news/canada/politics/article/1130846--vic-toews-accuses-bill-s-opponents-of-siding-with-child-pornographers>

<sup>95</sup> “Getting the truth, finally, on Ashley Smith”. Waterloo Region Record; repub. Winnipeg Free Press (Thursday November 15 2012) A17.

change. In October 2012, Sapers reiterated the need for Corrections Canada to help inmates with mental health problems, noting the “alarming” rise in self-injury in female and male prison populations and urging a mental health response that would ban such security measures as segregating inmates at risk of self-harm. An Ontario coroner’s inquest with an expanded investigative mandate will begin in 2013. Interim Liberal leader Bob Rae has called for a full federal inquiry.

In 2005, after a lifetime of severe torture, five year old Phoenix Sinclair was killed by her mother and step-father and buried in a reserve dump.<sup>96</sup> The Winnipeg Free Press edition reporting on the update on Ashley’s case also carried an update on the public inquiry into the role of Manitoba child protection in Phoenix’s death.<sup>97</sup> Presiding Judge Ted Hughes reminded the much-delayed inquiry of its goal: “The centrepiece of our work, as a lasting memorial to the short life of little Phoenix Sinclair, is the protection of all children, particularly the most vulnerable of them.” Phoenix’s mother, now serving a life sentence for murder, was once among them — abused as a child, made a permanent ward of the court, involved with the youth criminal justice system for acts of violence, young, Aboriginal, angry, impoverished and ill-prepared for parenting despite parenting intervention. She may have suffered from prenatal alcohol exposure, although no such finding was made. Ashley Smith was another vulnerable child. Adopted shortly after birth by caring parents, her legal troubles began with a minor incident at 14 — tossing crab apples at a mailman — that should not have led to criminal charges. Her behavioral disorders may have resulted from prenatal alcohol exposure, although no such finding was made. Phoenix was apprehended at birth, returned to her birth parents at four months of age, and later to her mother and step-father. Had her abuse been seen, she too would have been apprehended permanently, perhaps also to become lost in the labyrinths of child protection and youth justice, a scarred and disordered child.

Child protection and youth justice form islands in Foucault’s carceral archipelago stretching from the family to the school to youth corrections and to the prison.<sup>98</sup> In Canada’s penal islands of the family<sup>99</sup> and youth corrections,<sup>100</sup> children of First Nations

<sup>96</sup> Step-father Karl McKay’s two adolescent sons reported the death to police nine months after, in 2006. Key witnesses for the Crown, they described McKay and Kematch as equal partners in “frequent beatings, making her sleep naked in the cold basement, confining her to a makeshift pen, shooting her with a pellet gun, refusing to let her use the bathroom and making her eat her own vomit”. Phoenix had lived with her father and an aunt before being reassigned to her mother. Mike McIntyre, “‘I failed her’ — but child-killer Samantha Kematch remains defiant” Winnipeg Free Press (December 15 2008).

<sup>97</sup> Carol Saunders, “Hearings the most expensive ever: legal challenges compound delays. Winnipeg Free Press (Thursday November 15 2012) A2.

<sup>98</sup> Michel Foucault, *Discipline and Punish: the Birth of the Prison* tr. Alan Sheridan (New York: Pantheon, 1973).

<sup>99</sup> “Analysis of data from the 1998 and 2003 Canadian Incidence Study of Reported Child Abuse and Neglect revealed that despite accounting for only 5 per cent of Canada’s child population, Aboriginal children represent approximately 25 per cent of children in government care. Indian and Northern Affairs Canada estimated that 6% of On-Reserve Registered Indian Children were in care in 2003-2004, substantially above the national rate of less than 1% estimated for the 2007 calendar year (9.2 children per 1000).” Canadian Council of Provincial Child and Youth Advocates, “Aboriginal Children and Youth in Canada: Canada Must Do Better” (June 23, 2010) at <http://www.rcybc.ca/Images/PDFs/Reports/Position%20Paper%20June%2016%20FINAL.pdf>

<sup>100</sup> “The Census Day incarceration rate for Aboriginal youth was higher than for non-Aboriginal youth in all reporting jurisdictions.” Alberta’s rate was seven times that of non-Aboriginal youth, Ontario’s four times and Newfoundland-

descent are overwhelmingly over-represented. As youth at SMV observed, “Aboriginal youth are seen as troublemakers ... People see drugs and crime as part of the culture instead of as a result of colonialism, racism ... There is open discrimination against First Nations people.” Colonial government policy sought to remake Aboriginal childhood through the “civilizing” tutorial regime of the Indian residential school.<sup>101</sup> There, ties to family, language and culture were deliberately eroded through isolation, acculturation into Euro-Canadian norms, corporal punishment, emotional and cultural abuse and, often, sexual abuse and exploitation. Deprived of children, subjected to the infantilizing wardship regime of the reserve and the Indian agent, their traditional economies destroyed and their isolation reinforced by prohibition of such traditional practices as the potlatch and the sun-dance, Aboriginal adults began to lose hope. Just as traditional family systems were replaced by residential schooling and Western norms, traditional systems of dispute resolution premised on restitution and reintegration were replaced by the guilt- and punishment-oriented criminal justice system. The consequent anomie, a combination of alienation, isolation, anxiety and purposelessness, abetted child maltreatment in micro-cultures springing up within Aboriginal communities that subject new generations of children to the self-hate and abuse introduced by residential schooling and the criminal justice system.<sup>102</sup>

Neo-colonialism is the continuing power relationships of settler societies with indigenous peoples. In the neo-colonial attempt to solve the problem of children damaged by colonial policies of residential schooling and criminal justice, the state drew on the same ideology underlying the residential school — the removal of children from parents deemed unfit. The resulting apprehension of thousands of Aboriginal children in turn became a problem to be resolved by Aboriginal agencies and “like” placements.<sup>103</sup> This pits the child’s right to cultural identity against the child’s right to a (functioning and protective) family. Because no-one can predict with any degree of certainty whether a child will be safe in a given placement and cultural continuity can be determined with absolute certainty, the dice

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Labrador and New Brunswick’s rate twice that of non-Aboriginal youth. D. Calverley et al., “Youth custody and community services in Canada, 2008/2009” at <http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.htm> “Aboriginal youth [are] criminalized and jailed at earlier ages and for longer periods of time than non-Aboriginal young people.” Office of the Correctional Investigator Canada, “Background: Aboriginal Inmates: The Numbers Reveal a Critical Situation” at <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20052006info-eng.aspx>

<sup>101</sup> Anne McGillivray, “Therapies of Freedom: The Colonization of Aboriginal Childhood” in Anne McGillivray, ed., *Governing Childhood* (Aldershot: Dartmouth, 1997) 133-199.

<sup>102</sup> Cf. Manitoba Giesbrecht Inquiry, in McGillivray, *Therapies*, supra note 18.

<sup>103</sup> The Manitoba Child and Family Services Act C.C.S.M. c. C80, assented to July 11, 1985. The Declaration of Principles states “11. Indian bands are entitled to the provision of child and family services in a manner which respects their unique status as aboriginal peoples.” The best interests principle set out in s. 2.1 requires that “in determining best interests the child’s safety and security shall be the primary considerations. After that, all other relevant matters shall be considered, including Among these is 2.1. (h): “the child’s cultural, linguistic, racial and religious heritage”. Manitoba’s intertribal child protection agencies [under tripartite agreements between Canada, Manitoba and First Nations initiated in 1982] provide child and family services to band members both on and off-reserve. This “has increased the need for agencies to work together in a more collaborative manner to ensure child safety and well-being”. Sixteen mandated agencies deliver services to 63 Manitoba First Nations. Aboriginal and Northern Affairs, “Children and Families First: Manitoba First Nations Early Intervention and Prevention Services Enhancement Framework — July 2010” at <http://www.aadnc-aandc.gc.ca/eng/1326401146054/1326401192715> On the contested history, see McGillivray, *ibid*.



are loaded in these competing visions of the best interests of the child.<sup>104</sup>

Child apprehensions have nearly doubled since 1999 but there is little evidence that children are better cared for. The number of child apprehensions in Manitoba was 5,358 in 1999. It is now 9,730, an increase of 80 percent and a rate of 40 children in state care per 1000, four times the national average of 9.2 per 1000.<sup>105</sup> Children in poor urban areas are 47 times more likely to be apprehended than other Manitoba children. Aboriginal children account for 5 percent of Canada's child population and 25 percent of children in care.<sup>106</sup> Child protection expert and pediatrician Dr. Charles Ferguson attributes "skyrocketing" Manitoba apprehension rates not to injury or neglect, but to poverty, chaotic living conditions and behavioural disabilities.<sup>107</sup> Placing children in culturally-familiar homes is compromised by the fact that the new home is often affected by the same conditions as the original one. For abused children, inter-generational maltreatment is the norm. "The irony is that many parents, having suffered dreadfully in their childhood, swear never to repeat but they almost invariably do. They fall in with, or choose, blighted partners of a similar fate, and the cycle repeats itself, often with even more diabolical outcomes."<sup>108</sup>

Cognitive and behavioural disorders also contribute to juvenile offending, as does being in care. The British Columbia study *Kids, Crime and Care* confirmed that "a large and very vulnerable group of children and youth, many of whom are Aboriginal and in the care of the government, are at a higher risk of ending up in jail than their peers".<sup>109</sup> Abuse or neglect makes children "at least 25 percent more likely to display a variety of problem behaviours during adolescence" including "serious violent behaviours, substance abuse, teen pregnancy, low academic achievement and mental health problems" and "nearly doubles a child's chance of having a youth justice record". Over 7 in 10 youth in care who are involved with the justice system have school reports identifying severe behavioural problems or serious mental illness, compared with just over two per cent for the general youth population studied, and over 6 in 10 in continuing youth custody had been earlier diagnosed at least once with a mental disorder.

Fetal alcohol spectrum disorders are a consequence of maternal alcohol use in pregnancy. Few if any preventive programs are in place other than liquor store signage. Failure to diagnose leaves children without the specialized support needed in families,

<sup>104</sup> McGillivray, *Therapies*, supra note 101.

<sup>105</sup> Jon Gerrard, "Invest in families, not CFS apprehensions" *Winnipeg Free Press* (November 19 2012) A13.

<sup>106</sup> Council of Child and Youth Advocates, supra note 99.

<sup>107</sup> Dr. Charles Ferguson, Director, Winnipeg Child Protection Centre, correspondence with the author, 26 July 2012. Dr. Ferguson pioneered examination of young children for sexual abuse, serves as expert witness in cases across Canada, and believes children should not be deprived of the right to their guardian's care without clear and compelling evidence.

<sup>108</sup> Most child homicide victims are under three years of age in Manitoba, according to Dr. Ferguson, *ibid.*, and the average Manitoba sentence for child-killing is three years.

<sup>109</sup> The study included 50,000 children over a ten-year data collection span. British Columbia Representative for Children and Youth and British Columbia Office of the Provincial Health Officer. Joint Special Report, *Kids, Crime and Care – Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes* (February 23 2009, executive summary, at <http://www.rcybc.ca/Images/PDFs/Reports/Youth%20Justice%20Joint%20Rpt%20FINAL%20.pdf>



schools and the justice system.<sup>110</sup> The presumption that people have the capacity to choose not to offend, understand the consequences of their acts and benefit from punishment does not hold true for FASD-affected youth, many of whom have low IQs and language difficulties and all of whom have damaged executive functioning. A Winnipeg justice project aimed at identifying FASD-affected youth in the system has begun to make a difference.<sup>111</sup> While numbers are small, it has been a success for those youth who obtained a diagnosis,<sup>112</sup> although it is unclear how far the courts can go in ordering one.<sup>113</sup> Section 39.5 of the YCJA prohibiting custodial sentencing as “a substitute for child protection, mental health or other social measures” is routinely breached by the courts for youth with severe behaviour disorders.<sup>114</sup> There are few treatment and support alternatives for affected youth with IQ exceeding Manitoba services cut-off. The youth criminal justice system is emphatically not one of them.

***Conclusion: “Someone to be supportive of me”***

Waves of reform periodically sweep across child protection and youth criminal justice. Cycles are most visible over longer time spans — from exporting children to the colonies to Victorian anti-cruelty movements to the charitable Children’s Aid Society to the agency model and such variations as Aboriginal management; from trying children at the Old Bailey to the welfare courts of the Progressive Era, to the age of children’s rights. It is the lesser oscillations within systems pushed by politics, indifference or system failures that are more difficult to see, the Ashleys and Phoenixes who slip through these systems to their deaths, the children not helped and not rehabilitated. The ‘reforms’ of Bill C-10 are obnoxious in view of the real needs, and the real rights, of children.

<sup>110</sup> Department of Justice, “Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper” at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_yj6-rr03\\_jj6/toc-tdm.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_yj6-rr03_jj6/toc-tdm.html); Department of Justice, Victims of Crime Research Digest. Charlotte Fraser, “Victims and Fetal Alcohol Spectrum Disorder (FASD): A Review of the Issues” at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/rd-rr/rr07\\_vic4/p4.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/rd-rr/rr07_vic4/p4.html)

<sup>111</sup> Mary Agnes Welch, “Youth program battles ‘sausage-factory justice’” *Winnipeg Free Press* (April 17, 2012) at <http://www.winnipegfreepress.com/local/youth-program-battles-sausage-factory-justice-91180244.html> Also see Department of Justice, “The FASD Youth Justice Pilot Project” at <http://www.justice.gc.ca/eng/pi/yj-jj/fund-fond/rep-rap/r4.html> On FASD at the sentencing stage, see “Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper” at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_yj6-rr03\\_jj6/p5.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_yj6-rr03_jj6/p5.html) and

<sup>112</sup> “They gave me the results and I found out from there I was F.A.S I knew it wasn’t my fault it was my moms for doing drugs or drinking while I was a baby in her stomach. Then when I appeared in court for my outstanding charges I was given a sentence conference which lots of my supports had to make a plan to keep me out of trouble and keep me busy every day while I was in the community,” a youth stated. Another said, “Before I had my f.a.s.d assessment I used to get into a lot of trouble and get kicked out of school lots I had trouble staying focused on the positive stuff I could be doing ive always thought like “Why be good and look stupid” while I was doing bad stuff it made me look even stupider.” A third wrote, “I was not accepted in sisler high school but when they brought up my F.A.S.D. assessment papers the school had no choice but to let me back into school so they finally found out that I had a problem not staying focused on certain stuff I was always brought into negative behavior by my negative peers around me. I also had a problem learning on certain stuff I can learn easy using my hands and not my eyes or ears some people learn stuff very differently. We are all different I found out and nobody is the same nobody can ever be better then anyone else.” Quoted, Mary Kate Harvie, PCJ Manitoba, *FASD and the Justice System — Challenges and Recommendations* at <http://www.ihe.ca/documents/026-Harvie.pdf>

<sup>113</sup> “Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper” 5. Sentencing, at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_yj6-rr03\\_jj6/p5.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_yj6-rr03_jj6/p5.html)

<sup>114</sup> Ontario Bar Association, *Roots of Youth Violence: Working Group Submission* at 7, at <http://www.oba.org/en/pdf/Roots%20of%20Youth%20Violence%20Final.pdf>

Whatever the system in place for child care and youth justice, whatever its politics and failures, there is one unvarying constant — the child. There is one unvarying need — the child's need for a supportive adult. "I need ... someone to be supportive of me," a participant in SMV said. This need is the "need for consistent caregivers" emphasized in the report *Kids, Crime and Care*:<sup>115</sup> "Every child should have a loving, supportive relationship with one or more adults to help guide them through the important transitions from birth to adulthood, and to develop the resilience required to deal with life's adversities." While the majority of children in care show "incredible resilience", others become part of the youth justice system (and, with a high degree of probability, the cycle of inter-generational intra-familial abuse). Why?

Part of the answer may lie in denial of equality and labeling combined with lack of intimate support. As a law student in my Children and the Law course at the University of Manitoba put it:<sup>116</sup>

I cannot agree that the way to resolve such an issue and bring about change is simply funding. As simplistic as it may sound, I go back to the research we discussed which paired positive impacts on children with the presence of a meaningful or significant adult in their lives. Through my facilitation work with young 'offenders' in restorative justice, I have witnessed time and time again how powerful human relationships are when social constructs such as 'offender versus victim' and 'adult versus child' are removed and each person is on equal footing with the others. Too often we constrain ourselves by roles and labels that society creates and we act according to what we assume are the expectations of such roles.

As SMV children put it, "The correctional system should focus more on helping youth and focusing on the 'why' instead of the 'what' ... look at the youth's developmental age and see the youth as an individual ... jail makes you cold and not care. Shouldn't be making youth like this." They said, "I want to be heard. I have the right to be treated as a human." A youth who had been incarcerated said that he did not know the last time he had been hugged.<sup>117</sup> A member of Youth in Care Canada put the question to me during the question period at a crowded academic conference, "Is there a right to a mother, like a real mother?"<sup>118</sup> The epithet "hug-a-thug" tossed around in the anti-child rhetoric of today's politics of crime ironically and perfectly expresses this over-arching and deeply-embedded need of children.

<sup>115</sup> British Columbia, *supra* note 109 at 12.

<sup>116</sup> Shelley Ball, Law II, University of Manitoba. Journal entry, November 14 2012. Quoted with permission.

<sup>117</sup> The comment is echoed in the CBC documentary film "The Trouble with Evan" (Original air date:

Tuesday, April 12, 1994) in a scene in which youth in a justice treatment advise Evan's abusive parents to give the child a hug.

<sup>118</sup> Canadian Law and Society Association, Learned Societies Congress, Concordia University, 3 June 2010 responding to my presentation "Paternal Power, Fiduciary Duty and Children's Rights in the Supreme Court of Canada".

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### *Juvenile Justice*

#### *Action needed to comply with the Convention on the Rights of the Child*<sup>119</sup>

The rights of children in conflict with the law tend to be afforded very low priority. If anything, there is a commonly held perception that they already have too many rights and what is needed is more punishment. There are well developed international standards, legal principles and detailed guidance to assist states seeking to reform their approach to juvenile justice. These need to guide the introduction of systems which are effective and rights-based, and secure the well-being of children and young people in conflict with the law. However, the Committee on the Rights of the Child has expressed deep concern that most states are failing to achieve compliance with basic standards in their juvenile justice systems. Even among children's rights advocates, juvenile justice reform tends to get marginalized and ignored. Urgent action is needed. No society can lay claim to being a civilized, humane and compassionate culture while it continues to disregard or violate the rights of its most vulnerable children.

## **1 Prevention of crime**

Although preventing delinquency is an essential part of crime prevention, far too little effort is generally invested in addressing the factors that lead to youth crime. Juvenile offending is linked with many underlying factors, such as poverty, educational disadvantage, child abuse, lack of family support and drug/alcohol misuse. Strategies to prevent offending must address these problems. For example, this might include measures to: target families and children most in need; adapt the school curriculum to prevent early school-leaving; support those with mental health problems; provide addiction and counselling programmes and mentoring; develop restorative justice models which empower families to identify children's needs, take constructive measures to meet them, and ultimately divert them from offending; provide family therapy and liaison programmes to help families under pressure to cope and respond effectively to children's risky behaviour; introduce quality early childhood education; support youth organisations; and provide a wide range of recreational facilities and services of particular interest to young people.

<sup>119</sup> This paper draws on the international principles and standards on juvenile justice including the CRC, the UN Guidelines on the Prevention of Juvenile Delinquency ('the Riyadh Guidelines') 1990, the UN Standard Minimum Rules on the Administration of Juvenile Justice ('the Beijing Rules') 1985 and the UN Rules for the Protection of Juveniles deprived of their Liberty ('the Havana Rules') 1990. It also relies on analysis of the work of the Committee on the Rights of the Child and Council of Europe Commission for Human Rights

## 2 Diversion - alternatives to court proceedings

Wherever possible, children caught up in the criminal justice system should be dealt with without resorting to judicial proceedings. In other words, governments should aim to divert children away from the courts, and support them through activities designed to prevent further offending. This can be achieved by, for example, referring them to social services which should have a focus on children's needs rather than their criminal behaviour, or through systems of police caution or police diversion. However, diversion should be used only where there is strong evidence that the child has committed an offence, and freely and voluntarily acknowledges responsibility. Children must have the opportunity to defend themselves if they say they are not guilty.

## 3 Sentencing

If prevention and diversion are not successful in preventing further offending, and the child does have to be sentenced for a crime, the process must respect the rights of the young person involved. Article 3 of the CRC states that the best interests of the child must be a primary consideration in all decisions concerning the child. The Committee on the Rights of the Child argues that this means that the aim of the criminal justice system must focus on helping the child rehabilitate and make amends rather than simply providing punishment. Courts should take into consideration not only how serious the offence was but also the child's personal circumstances.

- **Non-custodial measures:** Wherever possible, the courts should give non-custodial sentences such as care, guidance and supervision orders; counselling and therapy; probation; foster care; education and vocational training programmes; community service orders. Consideration can also be given to providing adult or peer mentors for young people and their families. All efforts should try to help the young person play a more constructive role in society and enhance a sense of responsibility towards their family and community.
- **Detention as a measure of last resort:** Far too many children continue to be given custodial sentences. Detention should only be used as a last resort. This will only happen if the law requires that alternative community-based responses are provided. Political support for the use of detention only as a last resort is crucial to the achievement of this goal. It is important to raise awareness that imprisonment of children is not only ineffective in addressing offending behaviour: it can also be very harmful to children's development and health.
- **De-politicisation of youth crime:** With the increasing politicisation of youth crime, more punitive responses, including longer and harsher sentences, are being introduced in many countries to satisfy the public appetite for 'tougher' sanctions, especially for those convicted of serious crime. In such cases, it is argued that the seriousness of the crime and the need to protect public safety must be prioritised. These are legitimate concerns. However, it is also vital to raise public and political

awareness of the problems often experienced by young offenders, and to broaden support for responses to youth crime that are based on evidence and respect young people's rights. The media have an important role and responsibility here and they should be encouraged to communicate the positive contribution young people make to society. Effort is needed to depoliticise the juvenile justice process, in order to promote impartial, evidence-based decision-making, rather than knee-jerk responses to populist demand.

#### 4 Detention of non-offenders

The Committee on the Rights of the Child has expressed particular concern about the placement of children in pre-trial detention for long periods. Such detention should only ever happen in exceptional circumstances, for example, to ensure the child's appearance at court proceedings, when the child is an immediate danger to himself or herself or others, or is likely to receive a lengthy custodial sentence on conviction. Alternative measures, for example, bail fostering, mentoring programmes and residential alternatives should be made available to minimise the use of pre-trial detention. Where pre-trial detention is unavoidable, it is vital to keep its length to a minimum, and regularly review the need for such detention.

#### 5 Conditions in Detention

Children in detention are entitled to the same rights as children in the community. For example, they have the right to protection from harm, to health and health care, to maintain contact with their family, to education and training and also to play and leisure.

- **The Right to be Safe:** The most basic rights of children in detention include the right to life, survival and development and the right to be protected from harm. However children in custody often experience high levels of violence both from staff and from other young people. In order to make sure that children are safe, a range of measures need to be in place: a ban on physical punishment; strict limits on the use of physical restraint and banning any restraint designed to deliberately hurt children; no solitary confinement as a means of punishment; effective anti-bullying policies and clear codes of conduct/behaviour; children who are vulnerable to bullying must be protected or provided with separate accommodation. Facilities should be inspected regularly by independent qualified staff.
- **Children with mental health problems:** More and more children in conflict with the law suffer from significant mental health problems or severe behavioural problems. These children should receive appropriate treatment and care in special centres. It can also help to provide activities to prevent boredom, and psychological support, counselling, therapy and other mental health services.
- **Facilities Suited to Children:** Children must be separated from adults in detention. Facilities should be small and organised into small living units. It is important that

children are placed facilities that their families can visit easily. Placements must be guided by the best interests principle, including the provision of the type of care best suited to the child's particular needs.

- **Health and Education:** Children should be assessed as soon as possible after they are admitted to decide their health, education and other needs, and a care plan should be drawn up and shared with the child. Facilities should provide education, personal and social development, vocational training, rehabilitation and preparation for release, anti-drugs services, as well as anger management, physical education and sport.
- **Reintegration Services:** Re-offending rates among children who are placed in custody are very high, and too little tends to be done to help them reintegrate back into society once they are discharged. Far more emphasis is needed on reintegration of children following placement in detention, with a focus on welfare and care. Efforts must be made to support and maintain contact with families during detention, as well as other links with the outside world, including education, training, and community activities, to help prepare for a return to normal life. Buddy systems, with those who have successfully coped with life after detention, can be effective.
- **Monitoring, Inspection and Complaints:** Institutions, services and facilities responsible for the care and protection of children must conform to reasonable standards, particularly in the areas of safety, health, the number and suitability of staff and supervision. There should be regular, independent inspection and monitoring, training and support for staff, right of access by children to independent complaints procedures, and availability of independent advocates for children in custody.

## Summary

The international standards on juvenile justice provide a comprehensive and objective set of benchmarks against which states can measure themselves, and be measured, with regard to their juvenile justice system:

- Tailor-made prevention programmes to prevent offending should be developed. They should be guided by evidence-based approaches, and regularly adapted to the changing needs of children.
- Diversion from judicial proceedings should be a core objective of every juvenile justice system.
- Diversion should focus on children's needs and be offered to first-time and repeat offenders.

- Sentencing process should be based on the best interest of the child. Both the gravity and the circumstances of the offence must be taken into account. Judges should be trained and supported by relevant experts to assist them in their decisions.
- Non-custodial and community-based measures must be prioritised as an alternative to detention. They should have an educational and restorative goal.
- Detention must be a measure of last resort, and children must always be detained separately from adult detainees.
- In detention, children are entitled to all their rights and particular attention should be put on their security and health, their education as well as the preservation of their ties with friends and relatives. Independent and effective mechanisms should be available to address their complaints.
- Small facilities with sufficient and trained staff offering both educational and reinsertion programmes are fundamental to prepare the child's reintegration in the society.

**MICHEAL MONTGOMERY**

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*Dignity, Worth, Fear, Threats and Assumptions**A personal reflection on the comments from young people on Article 40*

Upon reading the Shaking the Movers V report on "Standing up for Juvenile Justice" I was immediately struck by "the common sense" opinions of the young people involved. When it comes to children (under 18's) who come in contact with the Juvenile Justice System, a lot of assumptions (based on fear) are made as to who these young people are and the threat(s) they are making to society in the immediate and long term.

In making these points I am not condoning actions which cause harm to others – I am however questioning the subsequent sets of societal actions which are taken in response to these actions by young people as evidenced through the workings of the Juvenile Justice System. These societal actions can in consequence lead to an immediate erosion of the dignity and sense of worth of the children and young people involved, and in the longer term, develop into a challenge to their potential to be positively contributing members of society.



In elaborating let me provide a context for my comments. I worked for 10 years in Northern Ireland and Scotland for Save the Children UK, managing Alternative to Custody Juvenile Justice programmes in the 1980's and 90's. During that time, having met hundreds of young people in court, in prison, in residential homes and in the projects I managed, I came to a number of conclusions which defy the common assumptions about these young people –

- that young people were young people first and not criminals first;
- that their actions were complex and based on their lived realities of individual, family, community and societal dysfunction;
- that in most cases the likelihood was that they would move away from criminal activity by the time they were coming out of their teens;
- most importantly, if we treated them as criminals - and not young people who were in a transitional/exploratory state - then we would confirm them in their criminality and set up further problems for them, their families and communities further down the line.

It was refreshing therefore to be reminded by the Report of how differently young people see their world in comparison to most adults – in the Report “youth expressed feelings that they are automatically assumed to be in the wrong, instead of given a chance to prove their innocence”. In particular the voice of young people is strong on how they see adults treating and labeling them – as lazy, irresponsible, too young, uneducated, guilty, bad kids, and as criminals. This all sounds familiar to me - nothing much has changed from my time as a young person (so very many years ago) - and the attitudes of my elders, based on their fear of course, that my generation would end up on the scrap heap or in prison – which of course most of us did not.

Some of the ideas presented by young people in the Report are a clarion call as a starting point for action on making the Juvenile Justice system more aware of itself, more humane and ultimately more effective. The young people in the Report suggest that we might just start with a change in language based on the dignity and worth of the evolving person that all young people are – that young people should not be seen through the harsh, fear based aggressive language of the Juvenile Justice System where punishment, offenders, criminals exist but through a lens of respect, love and care which all young people have a right to. In particularly the young people make a powerful final request to all of us, which is that they and the young people who end up in the system should be listened to.

From where I have come from, as an evolving person who ended up on one side of the Juvenile Justice system, and from my many experiences of watching, listening, reflecting and making sense out of a system that much of the time did not make sense – I think that would be a very good place to start.

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### *Shaking the Movers V*

A doctor, a neighbour, a bureaucrat, a social worker, an academic and a parent encounter an upset child. Who discovers what is the matter? It sounds like the beginning of a joke. Unfortunately, it is no laughing matter.

After reviewing the latest Shaking the Movers report, “Divided We’re Silent: United We Speak”, it is clear that there is nothing simple about the topic of youth criminal justice. In fact, every conversation I had about youth justice and this report led me in a different direction:

A social worker emphasized the need to increase protective factors and decrease risk factors in every child’s life;

An academic spoke about focusing on resilience rather than self-esteem;

A bureaucrat spoke about integrated service provision, monitoring and evaluation;

A lawyer observed that prison or a youth centre can be the best place for a young person with severe mental health issues today, because at the very least he or she “should” be pushed to the front of the long line for health care services;

And, the corrections officer I listened to questioned why it is clear that she should not perform open heart surgery on an inmate, and yet is often expected to provide emergency mental health services in a correctional institution.

Of significant concern arising from these conversations was the abundance of knowledge juxtaposed with lack of capacity, be it of individuals or the system at large, to ask a child involved in the justice system, “What is wrong?” With respect to criminal justice, an action rather than the actor can quickly become the centre of attention. This may lead us to ask, when a child is no longer at the core of the conversation, does the discussion need to be re-focused?

On this topic, we can look to the drafters of the Convention of the Rights of the Child as having been quite prescient. The Convention captures the immensity of the factors to be dealt with, while allowing for the specifics to be worked out on a case-by-case basis. The upcoming General Comment concerning the article and principle of the best interests of the child will be important in outlining the substantive and procedural elements of its implementation, including its relevance to youth criminal justice.

To be sure, the Convention on the Rights of the Child and existing Canadian legislation set a strong foundation for a just society. However, the UN Committee on the Rights of the Child, in its most recent review of Canada's implementation of the Convention, stated that Canada's Youth Criminal Justice Act complied with international standards until changes were introduced in 2012. The international body found that Bill C-10, an omnibus crime bill that includes more severe penalties for youth and makes it easier to try them as adults, no longer conforms to the Convention or other international standards. The committee referred to Bill C-10 as being "excessively punitive for children and not sufficiently restorative in nature" (Committee on the Rights of the Child, 2012).

Ashley Smith, whose life was outlined briefly in the STM V report, was more than a temporarily upset child whose life ended in custody. Her life encompassed many complexities, as all do; hers perhaps more than others. Particularly disturbing, in addition to the failings of multiple systems and rights, a portion of Article 40 of the CRC seems to have been forgotten, specifically the "desirability of promoting the child's reintegration and the child's assuming a constructive role in society." Extended periods spent in isolation, 'do not enter' orders placed on her cell and repeated transfers between prisons are difficult to imagine enduring as Ms. Smith did, but imagine we must.

A professor, Jeffrey Ogbar, stated, "A compassion for justice precipitates anger, but it is the empathetic impulse that inspires people to remain committed to a movement." The details of Ms. Smith's death may elicit compassion and anger, but courage and honesty to imagine Ms Smith's last horrific moments may be required to facilitate change. To turn a blind eye to her experience may be to become the sower of seeds of more injustice.

The inquest into Ashley Smith's death can draw the attention of the Canadian public towards the topic of youth criminal justice and its intersection with building safer communities for all. The process can be an important window of opportunity to lobby for positive changes in Canada's youth criminal justice system. As a subject that is at the core of our social fabric, and the identity of every Canadian as well as our nation as a whole, it deserves the attention not only of its government, but also of its citizenship. Engaging young people in the discussion through Shaking the Movers and related initiatives is a meaningful step forward.

#### **Addendum: The intersection of mental health and criminal justice**

Of particular concern with respect to Ms. Smith's imprisonment was the intersection of mental health care services in Canada and the criminal justice system. The Canadian parliamentary report titled, "Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada", offers a useful historical perspective on the evolution of mental health care services in Canada (Parliament of Canada, 2004), as does the Senate of Canada report, "Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada" (Senate Standing Committee on Social Affairs, Science and Technology, 2006).

In order to build safer communities, services need to meet the rights of the individual and not reflect a dichotomy between citizens and criminals. Re-thinking our approach to mental health care in Canada requires courage and honesty. In an age of relative austerity, we need the political will to address the intersection of mental health and the youth justice system and to realize the difference between the two.

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*Some Thoughts Concerning Shaking The Movers V and Articles 37 and 40 of the United Nations Convention on the Right of the Child*

*Shaking the Movers V* (STM V) brought together a group of young people aged 10 years and older to discuss articles 37 (torture and deprivation of liberty) and 40 (administration of juvenile justice) of the United Nations Convention on the Right of the Child (UNCRC). A summary of participants' contributions was later put together<sup>1</sup> and distributed widely. What follows are some brief reflections on selected statements that stood out for me and are aimed to contribute to ongoing dialogue.

1. *"Many of the youth were confused by how Ashley Smith's mental health issues could go undiagnosed and unaddressed."* (p. 11)

In Canada, 1.1 million or 14 percent of young people experience mental health issues<sup>2</sup> and only one-in-five of them currently receives mental health services<sup>3</sup>. Anxiety, behavioural, and depressive disorders are among the most common mental disorders among children and youth<sup>4</sup>. Access to mental health services is further complicated for youth from ethno-culturally diverse backgrounds due to language, stigma and lack of awareness of appropriate health and community resources<sup>5</sup>. Supportive mental health services and conditions are even more elusive for refugees and refugee claimants in Canada given recent cuts to the Interim Federal Health Program (IFHP) as well as the adoption of Bill C-31, the Protecting Canada's Immigration System Act. Bill C-31 requires mandatory detention of refugee claimants designated as "irregular arrival", including children 16-18 years. Not only is the mental health of refugee claimants likely to aggravate (depression, post-traumatic stress disorder or self-harm are common conditions) but the separation of children from their parents is of particular concern; when there are no relatives to take care of them, children may be placed in the care of child protective services or detained with their mothers in immigration detention centres<sup>6</sup>. The restriction of liberty of children should only be used as a last resort and for the shortest duration (art. 37 UNCRC) and alternatives to institutional care should always be sought (art. 40 UNCRC).

Despite insufficient epidemiological research on the prevalence of mental disorders among incarcerated Canadian young people, there is accumulating evidence that young people with mental illness are over-represented in the juvenile justice system. For example, studies have documented high rates of depression, anxiety and PTSD among incarcerated young people in Canada; comorbidity is high too <sup>7</sup>. Their conditions often remain unidentified <sup>8</sup>. Comparatively in the USA, the prevalence rate of any DSM-IV disorder is estimated at twice the rate of the normative population (i.e., 70-100%), and 20% of incarcerated youth meet diagnostic criteria for a serious mental health disorder <sup>7</sup>. Furthermore, referral rates are often low and may vary depending on socio-demographics, criminal history, and clinical characteristics <sup>9</sup>. Aboriginal youth, who face some of the most difficult social and economic problems, are over-represented in the justice system as well as in the rates of substance use and suicide <sup>10,11</sup>. Aboriginal people are also over-represented as victims of crime in Canada <sup>12</sup>. As disparities grow in wealth, health, and available supports <sup>13</sup>, the need to create programs to prevent the entry of mentally ill youth into the juvenile justice system <sup>14</sup> should start with a consideration of the living conditions and social circumstances in which young people grow. Listening to young people and supporting their agency are crucial to success <sup>15</sup>. Some innovative, holistic approaches involving tribal elders and cultural healing practices have been developed in First Nations and Inuit settings to help youth regain their 'sense of self-worth and belonging'. <sup>16</sup>

2. *"The youth felt that Ashley Smith was stigmatized: she was labeled as a criminal and not as a youth in need of support."* (p. 14)

Stigma and discrimination affects many though not all people with mental illness. According to Graham Thornicroft (Kings College, UK), stigma is a complex social issue that consists of three levels: (a) knowledge (ignorance & misinformation), (b) attitudes (prejudice), and (c) behavior (discrimination) <sup>17</sup>. Most people have limited knowledge about mental illness and much of that knowledge is wrong. Negative feelings towards people with mental illness are generalized; even people with mental illness can accept and internalize common negative stereotypes and we call that "self-stigmatize" <sup>18</sup>. People with mental illness experience adverse reactions by family (e.g., lazy) and friends (e.g., disappearance), are excluded from services such as clinical care but also getting or maintaining a job or a promotion or housing. As a result of self-stigmatization, people may also withdraw (e.g., not apply for a job because you anticipate that you will not get it and you do not want to disclose).

In order to support individuals and family members to reduce stigma, Thornicroft and his colleagues propose that mental health professionals and service user groups provide "information packages to family members to explain the causes, nature and treatments of different types of mental illness; actively provide factual information against popular myths; and develop accounts of mental illness experiences that do not alienate other people" <sup>19</sup>. Other professionals can help people at critical points such as preparing job applications. The role of the media (news, entertainment, cartoons, etc) in perpetuating stigma... and combatting it is significant. Much of media coverage is discriminatory and often present people with mental illness are dangerous and unpredictable.

3. *“Many youth from remote northern Ontario communities are moved to bigger cities, such as Thunder Bay, in order to complete their high school education. For many of these youth, they have to leave behind their family, friends, and home in order to finish school.”* (p. 15)

This statement stood out for me as my program of research focuses largely on children without parental care or adequate supervision. In order to complete their schooling, many children worldwide travel long distances daily or relocate from rural, remote areas to bigger towns or cities during the academic year. My study of youth-headed households (YHHs) in Namibia, for example, surfaced the existence of what I called “functional YHHs”, i.e., “unaccompanied households headed by non-orphan children created to facilitate children’s access to education. (...) Children visit their parents during the holidays or, if the parents live within one day’s walking distance, they go home at the weekends to collect food for the rest of the week” (p. 242-243)<sup>20</sup>. While some young people display significant agency and sense of responsibility in these circumstances, others resort to non-adaptive coping mechanisms. Similarly, young people who spend time alone unsupervised may engage in risky and antisocial behaviors; those with pre-existing mental illness are more likely to experience fear, loneliness, and intrusive thinking as well as to engage in risky behaviors such as self-mutilation, suicidal ideation or attempt, and substance abuse<sup>21</sup>.

4. *Other interpretations of Articles 37 and 40: Corporal punishment and the duality of rights and responsibilities*

Surprisingly, young people’s discussion of Articles 37 and 40 of the UNCRC did not include a reflection on corporal punishment. The prohibition on torture and cruel, inhuman or degrading treatment or punishment has been interpreted by the Human Rights Committee and the Committee on the Rights of the Child to extend to corporal punishment whether it is used as punishment or as an “educative or disciplinary measure” (Human Rights Committee, General Comment 20, HRI/GEN/1/Rev.2, p. 30). This is in line with Art. 19 of the UNCRC which protects children “from all forms of physical or mental violence”, including in school settings (Art. 28.2). Corporal punishment of children by parents (not teachers) in Canada is common despite evidence that spanking increases the risk for aggressive behavior and is of limited use for reducing unacceptable behaviors<sup>13,22</sup>. A recent review of legislative bans on corporal punishment in 24 countries since the passage of the UNCRC revealed a reduction in endorsement and use of this practice<sup>23</sup>. Much remains to be done, however, in other countries as the use of corporate punishment remains widespread around the world<sup>24,25</sup>.

While focused on children in conflict with the law, I believe that the reference made in Article 40.1 to the right of every child “to be treated in a manner (...) which reinforces the child’s respect for the human rights and fundamental freedoms of others” is often underplayed in child rights discussions. The duality of human rights as responsibilities is often not underlined sufficiently. The need to educate young people and adults on their rights should always be accompanied by a reflection on the accompanying responsibilities. This often requires close work with adults in a position of authority (whether they are

parents or community leaders), so that they do not feel threatened and thus hinder or forthrightly block any advancement of children rights (e.g., the Liberian Children's Law (2011) was, as a Bill, blocked in Senate for more than a year under assertions of objectionable Western influence in relation to cultural practices such as FGM/C, corporal punishment, and child labour).

5. *"The leaders were amazed by how forthright and honest the youth were in their communication about these difficult issues."*

What is surprising is not that young people can engage actively and provide meaningful input but rather, that many adults are still astonished by that! STM-V involved children ages 10-12 years as participants for the first time. The experience was so positive for participants and organizers recommended "younger youth and children be offered the opportunity to participate in the conference in a meaningful way each year" (p. 14). STM makes an important contribution in securing a space where young people are able to express themselves. With due attention to ways to communicate effectively (according to children's maturity and cognitive level), future STM workshops are encouraged to engage a diverse group of even younger people.

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### *Child Welfare and Youth Justice*

Once again, I'd like to congratulate Landon and all those involved in the Shaking the Movers V workshop for encouraging and supporting youth participation in discussing the important topic of youth justice. Two new features of the conference represent, I think, important initiatives moving forward: the inclusion of younger children (10-12 this year); and the participation of the Child and Youth Care students. What a great opportunity to bring the university 'classroom' to children and the children to the 'classroom' – a wonderful learning experience for both groups.

Throughout my brief comments, I'll incorporate youth perspectives from the workshop. I would like to focus on the following theme: the unfortunate 'connection' or symbiotic relationship between the child welfare and youth justice systems. So 'close' is this relationship, or this link, that the two systems have been referred to as "two sides of the same coin."<sup>120</sup> After exploring the connection between these two inter-related areas, I'll refer primarily to Article 40, both in terms of its content and spirit. Comments from youth demonstrate a clear awareness of factors associated with youth justice involvement, – of what makes youth more likely to be at risk of being in 'trouble' with the law in the first place – and the youth identified 'at risk' groups, particularly Aboriginal children and youth. Since I believe that many commentators today will focus on our lack of substantial commitments on the proactive, preventative 'side' of the equation at the societal level, my main focus will be children either requiring or coming from the child welfare system who end up having youth justice involvement because of child welfare's inability to provide a better quality of placements (example: caregiver competencies etc.), and support youth adequately, particularly in terms of advocacy while in care. Thus, while Article 40 demands that we attempt to divert and/or 'reintegrate' such at risk youth from escalating forms of youth justice involvement, and provide substantial, more youth-friendly alternatives and options (40:3 (b) & 4), – for example, short of institutional settings, and including foster care, group care and so on – the child welfare system has not been productive enough in this regard and indeed often contributes to the opposite result. A serious upgrade of the state's role as 'parent' is required, along with a more productive working relationship between child welfare and youth justice.

### ***The Connection: Child Welfare and Youth Justice***

The connection between child welfare and youth justice has been made on numerous occasions. But in terms of studies undertaken in the Canadian context, the report that came out of B.C., co-authored by the Representative for Children and Youth and the Office of the Provincial Health Officer is particularly good in establishing the links between these two systems. It is entitled, "Kids, Crime and Care."<sup>121</sup> There were more than 50,000 children in the cohort group, a 10-year span of data, and a wide variety of outcomes measured – including justice outcomes for children in care, Aboriginal children and youth, and other vulnerable youth. Therefore the focus is 'spot on' in terms of what I want to emphasize. Just a few facts and observations: 36% of the youth in care (aged 12-17) had formal involvement with the youth justice system (this includes remand, lockup, alternative measures, bail supervision, probation and sentencing), compared with 4.4% of the cohort (representing the general population), and by the age of 21, this increased to 41% compared to 6.6%; a higher proportion of children and youth in care became involved with the justice system (36%) than graduated from high school (25%); at the time of the study (2009), over 50% of the children in care in BC were Aboriginal, and one-third of the youth in the youth justice system were Aboriginal; in the cohort studied, of those involved in the

<sup>120</sup> Nash, M. and Bilchik, S. (2009). 'Child Welfare and Juvenile Justice – Two Sides of the Same Coin, Part II,' *Juvenile and Family Justice Today* (Winter), pp. 22-25.

<sup>121</sup> B.C. Representative for Children and Youth and Office of the Provincial Health Officer (2009). *Kids, Crime and Care: Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes* (February 23), pp. 1-88.

youth justice system, over 30% were Aboriginal youth, and 27% were youth in care in care; and finally, – of importance in relation to youth's need for advocacy support – 41% who spent some time in care were recommended for charges by the police, in contrast to just over 6% of the general population.

The study establishes the overlap between each of these groups. During the course of their lives, many of the youth in care also had been in contact with the justice system. It is important to recognize that a majority of children in care do not become involved in the justice system, despite all the risk factors in their lives – both preceding their lives in care and afterward. In short, it is not as though strength and resilience is not apparent. But the numbers are deeply troubling, and the connection between the systems is evident. The child welfare system certainly isn't 'corrective', offsetting other risk factors. While it clearly helps and supports some, too often it seems to exacerbate the risks and heighten the chance of youth justice involvement.

### ***Recovery, Reintegration, and the Role of Advocacy***

UN Convention Articles related both to the child welfare and youth justice systems concern the principles of recovery and reintegration – for example, Articles 39 and 40. Both systems should be constructively 'working together' towards these goals. I want to focus on what in my view continues to undermine such efforts, and I'll restrict my comments to three areas of concern:

**1) Youth in the workshops referenced **labeling and stigmatization**** as real concerns for youth involved in the justice system. They comment that the correctional system changes youth in this regard, labeling them as "bad kids" and so on. Unfortunately, the child welfare system can provide youth with similar experiences, providing an ironic 'training ground' for later justice involvement. Why? Negative stigmatization of this nature has already been internalized. As I have noted in the past,<sup>122</sup> much of the terminology in child welfare is institutional in nature, and has far too much in common with justice settings. There are 'intake workers'; children and youth are 'wards of the state'; and they are 'cases' with 'supervised visits' and 'records'. Case files document 'bad' behaviours and attitudes. Youth in the care of the child welfare system also have identified stigmatization as an overriding concern;

**2) A lack of quality alternative settings and options** makes reintegration and recovery a significant challenge. UN Convention Article 39 complements 40 here in calling on states to promote the physical and psychological recovery and social reintegration of children who have been abused or neglected, in an environment which fosters the health, self-respect and dignity of the child. The problem: Canada has yet to come close to meeting such standard when it comes to quality alternative care. The system is characterized by shortages of homes, lack of placement options, – including culturally appropriate options – and

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<sup>122</sup> Waldock, T. (2007). 'The Rights of Children in Care: Consistency With the Convention?' In Covell, K., & Howe, R. B. (Eds.), *Children's Rights in Canada: A Question of Commitment*, Waterloo, Wilfrid Laurier University Press, pp. 287-317.

instability for children, often characterized by multiple moves. Indeed, the aforementioned report notes the importance of stability, and the need for qualified caregivers with adequate training to meet the youth's needs and therefore decrease the likelihood of youth justice involvement. But in reality, the child welfare system has always struggled to enhance the role of caregivers<sup>123</sup> to the degree warranted;

**3) The relative absence of crucial advocacy support** embedded in the lives of these youth has left them to fend largely for themselves far too often as they interact with both of these systems. These youth need every available support and opportunity to overcome their situations, including caregivers with the skills to advocate on their behalf. I have identified this as one of the areas most lacking: caregivers with strong advocacy skills and the ability to navigate complex systems, including the child welfare and youth justice systems. This has become even more important given the evolution of social work and the inability of social workers to give much time to their advocacy role, a commonly acknowledged reality (caseloads, paperwork etc.), and yet rarely followed up with the question: How can we recognize the declining nature of this role, and yet never seek to resolve the problem of who takes up the slack, especially since family may not be in a position to provide this support.

Many real concerns are identified in *Kids, Crime and Care*, and significant questions are raised as to exactly how these systems (child welfare and youth justice) are 'working together'. In relation to higher charge rates, for example, they ask: a) Is the youth justice system being used to reinforce disciplinary measures in child welfare settings?; b) Are these youths being charged when they would not have been if they were not in care, and is the lack of advocacy – of the type just alluded to – a big factor here; and c) Are inappropriate caregiving arrangements, and the lack of options in this regard leading to increased charges – like assault, for example.

### **Conclusion**

The connection between the child welfare and youth justice systems is evident – like 'two sides of a coin'. Without substantial improvements to the child welfare system, and in particular to systems of care, this connection will continue to thrive, and hopes for reintegration and recovery for these marginalized children will not be based on solid foundations.

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<sup>123</sup> Waldock, T. (2011). 'Enhancing the Quality of Care in Child Welfare: Our Obligation Under the UN Convention on the Rights of the Child,' *Relational Child and Youth Care Practice* 24 (3), pp. 50-61.