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Judging Youth Time

Lisa M. Kelly*

I. INTRODUCTION

Conventional wisdom holds that if one wants to respond effectively to childish misbehaviour, one had better act promptly. A parent who leaves a room and returns to find their five-year-old sobbing and the child's seven-year-old sibling gripping a favoured toy will need to assess quickly whether a lesson in sharing is in order along with the return of said toy. Modern know-how advises against delay. Waiting until the weekend to discuss the incident or place the child in a "time-out" is likely to be ineffective, even dysfunctional, because the seven-year-old will hardly associate the consequence with the original transgression.[1] Likewise, if one wants to restore peace to the home, reconciling relations sooner rather than later will surely serve everyone's interests.

But what if all was not as it seemed? What if in the unseen moments preceding the crying scene the elder child had *not* taken the toy from the younger? What if, instead, the younger child threw a fit to get their sibling to immediately surrender the toy? What if the younger child knew that parental intervention would likely follow and, perhaps, the toy would soon be theirs? In this case, a lesson against stealing toys, timely or not, would not only be lost on the seven-year-old, it would be unjust. Child psychology may caution against undue delay in responding to wrongdoing, but it does so against the background assumption that blame has been apportioned correctly in the first place.

Questions of time, culpability and reintegration permeate not only quotidian household power struggles, but, crucially also, youth criminal law, where the stakes are immeasurably higher and more diffuse. This paper examines competing claims about the meaning and constitutional significance of time and justice in youth

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[1] See Canadian Paediatric Society, "Effective Discipline for Children" (2004) 9 Paediatric Child Health 37 at 37 ("To be effective, discipline needs to be . . . consistent, *close to the behaviour needing change*; *perceived as 'fair' by the child;* developmentally and temperamentally appropriate; and self-enhancing, i.e., ultimately leading to self-discipline.") [Emphasis added].

proceedings as raised in the Supreme Court of Canada's recent decision in *R. v. P. (C.)*[2] At issue in *P. (C.)* was the constitutionality of section 37(10) of the *Youth Criminal Justice Act*,[3] a provision that requires youth to seek leave to appeal to the Supreme Court of Canada in cases where Parliament provides adults an appeal as of right. P. (C.) argued that the provision violated his section 7 right to life, liberty and security of the person and section 15 right to equality under the *Canadian Charter of Rights and Freedoms*[4] in a way that was not justified under section 1.

The Court divided in its response. Chief Justice Wagner, writing for a majority of the Court on the constitutional issue, held that section 37(10) did not breach any Charter rights as it struck an appropriate balance between resolving youth matters expeditiously and still allowing for potential Supreme Court review. Justice Abella, joined by Martin and Karakatsanis JJ., dissented and would have held that the provision violated young people's section 15 equality rights in a way that is not justified under section 1. The purpose of the right to appeal, the dissent stressed, is to guard against wrongful convictions. Denying young people an equal right of appeal in an effort to resolve youth cases more quickly amounts to an unconstitutional trade-off between time and justice, the dissent argued. Justice Kasirer would also have held the provision violated section 15 but would have upheld it under section 1. Justice Côté did not find it necessary to address the constitutional question, as she would have allowed the appeal, set aside the conviction, and entered an acquittal.

I argue in this paper that the divided opinions in *P. (C.)* reflect competing visions of how timeliness should operate as a value in the youth criminal system. Tracing the history of appellate rights for young people from the founding of juvenile courts to the present, I show that expediency claims have always been central to judicial and legislative decisions about the scope of youth appellate rights. This historical view helps to uncover what Herbert Packer referred to as the "value choices that underlie the details of criminal procedure."[5] The throughline that I trace is an enduring preoccupation with effectiveness: for both the young person and society at large, lawmakers and courts have long held that rehabilitation and punishment will be effective only when delivered expeditiously. The rationale for prioritizing expediency has changed and expanded over time as insights from child and adolescent psychology have come to sit alongside older commitments to "save" and rehabilitate young people as quickly as possible. Over the course of the 20th and 21st centuries, the terms of the trade-off between timely resolution of youth matters

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[2] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 (S.C.C.) [hereinafter "*P. (C.)*"].

[3] *Youth Criminal Justice Act*, S.C. 2002, c. 1 [hereinafter "YCJA"].

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[5] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968) at 154. See also Herbert Packer, "Two Models of the Criminal Process" (1964) 113 U Pa. L. Rev. 1.

and access to appellate review have also changed. Whereas juveniles once lacked any ability to appeal a delinquency finding, today youth appeal rights mirror those of adults, with the notable exception of appeals to the Supreme Court of Canada.

P. (C.) is a curious decision in part because so little was at stake in terms of appellate review in practice. The Supreme Court already grants leave in virtually every youth case where a judge of a provincial court of appeal dissents on a question of law, effectively adopting the standard set for adults under the *Criminal Code*.[6] Indeed, neither the Court nor any of the parties were able to cite a single case in which the Supreme Court had denied leave where an appellate judge had dissented on a question of law.[7] Chief Justice Wagner assured the public that "no member of this Court would tolerate having a dubious conviction rest undisturbed simply to ensure a prompt resolution."[8] And yet, the majority did not formally recognize the presence of a dissent at the court of appeal as a proxy for the merit of review in all cases. The majority instead lauded section 37(10) for allowing the Court "to take an individualized and sensitive approach which can also account for the harm of protracted appellate review in the youth justice system."[9] Why did the majority work so hard, often at the expense of logic, to deny a formal equality challenge that would change so little in reality?[10] To the extent that section 37(10) is a legal vestige of an earlier time, why would the Court not have taken the opportunity to simply cut dead legislative wood?

That question is impossible to answer with certainty. Doctrinal and political considerations specific to section 15, particularly in the context of young people, inevitably formed part of the background.[11] Slippery slope concerns about constitutionalizing appellate rights or setting a precedent for future challenges to the YCJA also likely played a role.[12] The deleterious impact of delays on victims who,

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[6] *Criminal Code*, R.S.C. 1985, c. C-46.

[7] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 157 (S.C.C.), *per* Wagner C.J.C.

[8] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 158 (S.C.C.).

[9] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 158 (S.C.C.).

[10] I have written about judicial work — analogizing or distinguishing precedents, framing an issue as one that should or should not invite judicial deference, or casting a right at a higher or lower level of generality — as a way in which ideologies find legal form. See Lisa M. Kelly, "The Work of Ideology in Canadian Legal Thought" (2016) 74 S.C.L.R. 27. See also Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 J. Legal Ed. 518.

[11] See *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 176 (S.C.C.), *per* Kasirer J. concurring (citing Professor P.W. Hogg with respect to age-based legal distinctions: "a minority defined by age is much less likely to suffer from the prejudice of the majority than a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess" (*Constitutional Law of Canada*, 5th ed. Supp., vol. 2 at p. 55-66) and para. 142, *per* Wagner C.J.C.

[12] Justice Abella wrote in dissent that slippery slope concerns raised at oral argument

as in this case, are often young persons themselves also undoubtedly weighed in the balance.[13]

However, perhaps what most influenced the outcome in *P. (C.)* was an enduring, if unstated, sense that that the state's relationship to young people in the youth system is qualitatively different from its relationship to adults in the criminal system. If a prevailing vision of the adult criminal system is one of a "battle" pitting the state against individuals, with the accused afforded procedural protections to offset state power, an alternative vision of the youth system as welfarist, rehabilitative, even "familial", exists alongside it.[14] I am not suggesting here that either of these ideological visions are complete, mutually exclusive, or even consciously held. However, as the history of youth appeals suggests, restrictions on juvenile appellate review have always been rooted in a paternalistic *quid pro quo*: juveniles were denied procedural rights in delinquency hearings in return for a promise of favourable and beneficent treatment.[15] When it became apparent over time that juveniles were, in fact, often subject to arbitrary, biased, and even abusive treatment, due process advocates clamoured for an end to this one-sided bargain. Yet even as the youth system underwent a "rights revolution" over the course of the 20th century that tracked and eventually exceeded that of adults, these paternalistic moorings have continued to yield unexpected exercises of deference to Parliament.[16]

I develop this argument by tracing the genealogy and evolution of youth appellate rights and expediency claims over the 20th and 21st centuries. In Part II, I discuss

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about future challenges to the YCJA are incompatible with the purpose of the Charter and would require the Court to rule on hypothetical future claims rather than the case before it. See *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at paras. 110-116 (S.C.C.), *per* Abella J. dissenting. With respect to appellate rights, Wagner C.J.C. wrote (at para. 133): "This Court has steadfastsly affirmed in various contexts that 'there is no constitutional right to an appeal' let alone an automatic one at the apex of the justice system . . . ."

[13] See *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 135 (S.C.C.), *per* Wagner C.J.C.

[14] I draw here from the work of legal sociologist John Griffiths who argued that Herbert Packer's classic "due process" versus "crime control" models were based on an unstated ideological vision of the criminal system as a site of "battle." Griffths argued that an unrealized alternative vision might be a "family model," which he noted was professed rhetorically but never realized by the juvenile court movement. See John Griffiths, "Ideology in Criminal Procedure *or* A Third 'Model' of the Criminal Process" (1970) 79 Yale L.J. 359.

[15] For a critical discussion on the gap between the rhetorical ideals of the American juvenile court movement and the working of the system in practice, see Francis A. Allen, "The Juvenile Court and the Limits of Juvenile Justice" in S. Fox, ed., *Modern Juvenile Justice* (St. Paul, Minn.: West, 1972) at 167.

[16] American literature tends to use the language of "due process revolution" to describe a series of judicial decisions that expanded procedural rights for criminal defendants, including juveniles. See Fred P. Graham, *The Due Process Revolution: The Warren Court's Impact on Criminal Law* (New York: Hayden Book Co., 1970).

the historical purpose of appellate rights in the adult system and contrast this with the paucity of appellate access under the *Juvenile Delinquency Act*.[17] I show how dominant understandings of the juvenile system as paternalistic and rehabilitative worked to promote and justify a procedurally lax regime. Part III traces a series of intellectual and political changes that moved the needle on how juvenile appeals and expediency in the youth system were conceptualized in the post-war era. Insights from developmental psychology began to coexist with older interests in speedy rehabilitation. At the same time, juvenile rights movements in Canada and the United States cast growing doubt on the therapeutic and beneficent claims of the juvenile system. When Parliament passed the *Young Offenders Act* in 1982,[18] it equalized youth and adult appellate rights, with the exception of appeals to the Supreme Court. Part IV examines two Supreme Court cases — *R. v. C. (T.L.)*[19] and *R. v. P. (C.)*[20] — in which the Court upheld this limit on youth appeals under the former YOA and the current YCJA respectively. Whereas the Court in *C. (T.L.)* emphasized the state and social interest in timely rehabilitation, the majority in *P. (C.)* stressed the benefits of expediency to young persons themselves. I argue that the connecting thread across this jurisprudence is an enduring view that the state should be granted deference in matters of time and youth justice. In the conclusion of this paper, I note that appellate cases such as *P. (C.)* are outliers in both the youth and adult criminal systems. Although appellate cases predominate in law schools, plea resolutions overwhelmingly populate courtrooms where distinct trade-offs between time and justice proliferate.

II. "SAVING" JUVENILE DELINQUENTS

On July 13, 1899, the Honorable Richard Tuthill, a U.S. Civil War Veteran and circuit court judge, informally adjudicated the case of 11-year-old Henry Campbell in Cook County, Illinois. Henry's mother, who had had her son arrested for larceny, cried before the judge telling him that her son was "not a bad boy at heart" but had been led astray by others. After questioning Henry's parents, Judge Tuthill agreed that the boy should be sent away to live with his grandmother in the hopes that he would escape the environment that had led to the mischief. With this decision, the juvenile court movement in North America was born.[21] Less than a decade later, in 1908, Canada's Parliament passed the *Juvenile Delinquents Act*.[22] The JDA, which promised to extend "aid, encouragement, help and assistance," superseded the

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[17] *Juvenile Delinquents Act*, S.C. 1908, c. 40 [hereinafter "JDA"].

[18] *Young Offenders Act*, R.S.C. 1985, c. Y-1 [rep.] [hereinafter "YOA"].

[19] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 (S.C.C.).

[20] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 (S.C.C.).

[21] For a leading history on the Cook County, Illinois juvenile court, including the Campbell case, see David S. Tanenhaus, *Juvenile Justice in the Making* (Oxford, UK: Oxford University Press, 2004) at 23-24.

[22] *Juvenile Delinquents Act*, S.C. 1908, c. 40 [hereinafter "JDA"].

Criminal Code for any offences committed by a juvenile and remained in force, with some amendments, until 1984.[23]

Progressive-era reformers in Canada and the United States held faith in the ability of professionals and experts to solve social problems through pragmatic reforms that would be administered by the state.[24] This trust in benevolent state power, along with changing cultural ideas of childhood and childrearing, led many advocates to "child-saving work through which they lobbied for compulsory schooling laws, child labour laws, child welfare laws, and the development of a juvenile court system."[25]

"Child-savers" espoused a welfarist and familial ideology that in theory would effect a sharp philosophical and procedural break with the adult penal system. "No child should be punished for the purpose of making an example of him, and he certainly can not be reformed by punishing him," explained Cook County's first chief probation officer. "The parental authority of the State shall be exercised instead of the criminal power."[26] In the eyes of early juvenile court advocates and officials, traditional penal sentences would not solve the social problem of delinquency.[27] Poverty, urbanization, immigration, exposure to "vicious habits" at home and in the street, and most of all parental neglect, indifference and drunkenness were seen as the root causes of juvenile vice.[28] What was needed was a professionalized juvenile court and probation system, staffed by paid officers rather than volunteers, that would teach juvenile delinquents to "avoid bad habits . . . and crime."[29] The stakes were high and called for moral suasion through care. As the Preamble to the JDA explained, "the welfare of the community" demanded that "youthful offenders . . . be guarded against association with crime and criminals, and should be subject to

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[23] *Juvenile Delinquents Act*, S.C. 1908, c. 40, s. 31. The JDA was repealed and replaced in 1984 by the *Young Offenders Act*, R.S.C. 1985, c. Y-1.

[24] For a discussion of Progressive-era ideology and advocacy in the context of juvenile delinquency law and courts in the United States, see Barry C. Feld, "Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court" (1984) 69:1 Minn. L Rev 141 at 145.

[25] See Anthony Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977).

[26] Cited in David S. Tanenhaus, *Juvenile Justice in the Making* (Oxford, UK: Oxford University Press, 2004) at 2.

[27] See J.J. Wilson, "Observations" *The Globe* (October 19, 1888); "Juvenile Waifs and Strays" *The Globe* (November 27, 1889), reprinted in J.J. Kelso, ed., *Early History of the Humane and Children's Aid Movement in Ontario, 1886-1893* (Toronto: LK Cameron, 1911) at 48-50.

[28] See, for example, J.J. Kelso, *Laws Affecting Children* (Toronto 1895) at 1.

[29] See Andrew Doerr, *The State and the Reproduction of Social Control: A Study of the History of Canadian Juvenile Justice Reforms* (M.A. Thesis, University of Windsor, 1996) at 46 [unpublished].

such wise care, treatment and control as will tend to check their evil tendencies and strengthen their better instincts."[30]

In exchange for this ideal of benevolent, redemptive and rehabilitative treatment, juveniles were expected to give up basic procedural rights accorded to adults in the criminal system.[31] Section 14 of the JDA provided that "on the trial of a child the proceedings may, in the discretion of the judge, be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice."[32] As criminologist Jean Trépanier observes, the classical criminal law model where rules of procedure served to protect accused persons against the possibility of unjust punishment did not fit the theory of juvenile delinquency law.[33] If decisions were to be made in the child's best interest, why would juveniles need procedural protections against judges and probation officers who were there to save them?[34] Indeed, when a member of Parliament objected to the denial of the right to a jury trial during debate of the JDA, the response was the same: "we are passing an enactment for the benefit of the juvenile delinquent."[35]

This procedural laxity extended to appeals. When Parliament passed the JDA in 1908, it provided juveniles no avenue to appeal a finding of delinquency.[36] This stood in stark contrast to the adult system where concerns with wrongful convictions had led to expansions of appellate rights in Anglo-Canadian law. As Peter D. Marshall writes in his comparative review of appellate rights in common law and civil law jurisdictions, the "primary function of the modern right of appeal is to protect against miscarriages of justice."[37] Criminal appellate jurisdiction built on earlier measures of jury control in English law, including the emerging law of evidence and jury instructions, as a means to correct for jury errors.[38] Although

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[30] *Juvenile Delinquents Act*, S.C. 1908, c. 40.

[31] See John Griffiths, "Ideology in Criminal Procedure *or* A Third 'Model' of the Criminal Process" (1970) 79 Yale L.J. 359 at 400-401.

[32] *Juvenile Delinquents Act*, S.C. 1908, c. 40, s. 14.

[33] Jean Trépanier, "Juvenile Delinquency and Youth Protection: The Historical Foundations of the Canadian Juvenile Delinquents Act of 1908" (1999) 7 Eur. J. Crime, Crim. Law & Crim. Justice 41 at 61.

[34] The JDA specified that no action of a juvenile court was to be set aside because of any "informality or irregularity where it [appeared] that the disposition of the case was in the best interests of the child." *Juvenile Delinquents Act*, S.C. 1929, c. 46, ss. 7, 37.

[35] *House of Commons Debates* (July 8, 1908) (Leighton Goldie McCarthy).

[36] In cases where a parent or guardian was ordered to pay a fine or give security for a juvenile's good behaviour, the parent or guardian enjoyed the same right of appeal from such an order as if the order had been made on the conviction of the parent or guardian.

[37] Peter D. Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22:1 Duke J. Comp. & Int'l L. 1 at 3.

[38] Benjamin L. Berger, "Criminal Appeals as Jury Control: An Anglo-Canadian Historical

efforts to introduce this form of jury control failed in 19th century England, they succeeded in Canada. Indeed, the appellate right at issue in *R. v. P. (C.)*, where a court of appeal judge dissents on a question of law in an indictable criminal case, has existed for adults since the Supreme Court of Canada was established in 1875 and was transferred to the first *Criminal Code* in 1892.[39]

In the case of juveniles, Parliament instead accepted a far higher risk of unjust verdicts in exchange for expediency. The rehabilitative nature and high stakes of timely youth proceedings justified this trade-off, which linked delinquency to prolonged exposure to social ills. As Nicholas Bala and Sanjeev Anand have explained, "this restrictive approach [to appeals] was premised on the view that it was important to have a speedy, final resolution of cases involving adolescent offenders."[40] In an era when reformers believed juvenile delinquency was inherently social — both a reflection of malign social influences and a threat to the social order — intervening quickly was of paramount importance.[41]

Even this beneficent reading could not justify a total denial of appellate review for long, however. In 1928, the Canadian Council on Child Welfare and the Canadian Conference of Child Protection Officers urged the Liberal Minister of Justice, Ernest Lapointe, to convene a conference to discuss a revised JDA.[42] Among the delegates whom Lapointe met with were provincial representatives, superintendents of industrial schools, juvenile court judges, probation officers and social workers. Although a press release from the event stated that their suggested revisions were "largely of a technical nature," the Minister later acknowledged in Parliament that the committee had recommended that the revised JDA contain a right of appeal.[43] When members of Parliament debated the appellate amendments in 1929, the leader of the Conservative opposition expressed concern that without sufficient disincentive, "there is always a desire to exhaust the courts to which [an appeal] may be taken."[44] In other words, expedient finality should be prioritized by limiting and disincentivizing appeals.

By way of compromise, the government granted juveniles a limited opportunity

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Perspective on the Rise of Criminal Appeals" (2005) 10 Can. Crim. L.R. 1 at 35.

[39] *Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 49; *Criminal Code*, 1892, 55-56, Vict., c. 29.

[40] Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed. (Toronto: Irwin Law, 2012) at 13. See also Sanjeev S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999) 24:2 Queen's L.J. 515 at 537.

[41] See Janet Bolton *et al.*, "*The Young Offenders Act:* Principles and Policy - The First Decade in Review" (1993) 38 McGill L.J. 939 at 947.

[42] See Jeffrey S. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) Osgoode Hall L.J. 71 at 103.

[43] *House of Commons Debates* (May 20, 1929) (Ernest Lapointe).

[44] *House of Commons Debates* (May 20, 1929) (Richard Bedford).

to seek leave to appeal. Section 37 of the revised JDA provided for an appeal to the Superior Court or the Court of Appeal of a province with leave only where a judge believed that "it [was] essential in the public interest or for the due administration of justice that such leave be granted."[45] No provision was made for appeal to the Supreme Court of Canada, although leave to appeal could potentially be sought under section 41 of the *Supreme Court Act*.[46] Juvenile law was still firmly stacked in favour of expediency and finality, but the needle was starting to move.

III. THE POST-WAR RISE OF RIGHTS AND PSYCHOLOGY

By mid-century, a new set of pragmatic and psychological claims about the value of expediency in youth matters began to shape discussions about appeals. Commentators on both sides of the Atlantic weighed in on the matter. In a 1947 collection entitled *Lawless Youth: A Challenge to the New Europe*, criminologist Herman Mannheim penned an influential essay on juvenile court procedures.[47] Mannheim, who along with fellow Jewish European émigrées Max Grünhut and Leon Radzinowicz pioneered the study of criminology in Britain, was a theoretically eclectic and problem-driven scholar whose work incorporated insights from sociology, psychology, law, history and statistics.[48] Unlike Progressive-era reformers, Mannheim was less concerned about the societal implications of delay. Instead, he focused on the impacts of delay on young people themselves. For Mannheim, juvenile appeals raised a temporal concern because in cases where they were not successful, and a sentence was ultimately imposed, the juvenile might lose sight of the connection between the original wrongful act and the consequence. "It has been rightly stressed by experts on child psychology as well as by criminologists," Manheim wrote, "that any punishment imposed on a juvenile should be carried out as quickly as possible after the commission of the offence. Delay is detrimental as it is likely to dim the juvenile's understanding of the legal and moral connexion between offence and penalty."[49] Like the seven-year-old placed in a time-out days after misbehaving, the worry was that the deterrent and signaling function of law would be lost if the juvenile no longer connected discipline with wrongdoing.

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[45] *Juvenile Delinquents Act*, S.C. 1929, c. 46, s. 37.

[46] *Supreme Court Act*, R.S.C. 1970, c. S-26. See *R. v. T.L.C.*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 at 1016 (S.C.C.).

[47] Hermann Mannheim, "The Juvenile Court: Its Procedure" in Margaret Fry *et al.*, *Lawless Youth: A Challenge to the New Europe* (London: George Allen & Unwin Ltd., 1947) at 50.

[48] See Roger Hood, "Hermann Mannheim and Max Grünhut: Criminological Pioneers in London and Oxford" (2004) 44:4 British J. of Criminology 469 at 487; Paul Rock, "Introduction: The Emergence of Criminological Theory" in Paul Rock, ed., *History of Criminology* (Aldershot: Dartmouth Publishing Co., 1994) at xviii.

[49] Hermann Mannheim, "The Juvenile Court: Its Procedure" in Margaret Fry *et al.*, *Lawless Youth: A Challenge to the New Europe* (London: George Allen & Unwin Ltd., 1947) at 77.

This temporal concern did not lead Mannheim to recommend limiting or disincentivizing juvenile appeals, however. If delay was a potential downside, it had to be weighed against the obvious upside of appeals as a safeguard against injustice. The balance to be struck was between "the established principle of criminal justice that the accused should be able to appeal against conviction and punishment," Mannheim wrote, "and the wish to avoid any infringement of recognized psychological truths."[50] The compromise solution lay in judicial expediency, not state efforts to disincentivize youth appeals. Mannheim argued that appellate courts should be duty bound to hear appeals in juvenile cases "with the utmost expediency."[51]

Two years later, in a speech to the National Probation and Parole Association, the American jurist Roscoe Pound likewise advocated institutional reforms to facilitate timely youth appeals.[52] In his sociological jurisprudence, Pound had long urged lawyers to attend to the relationship between law and society, with the former serving as an important driver or "engineer" of the latter.[53] For Pound, juvenile courts represented social efforts to move beyond "criminal law and criminal procedure" by developing "preventive justice and preventive measures of social control" that would promote "inner balance and self-control."[54] Given his view that juvenile courts might serve as "agenc[ies] of preventive justice" and progressive "social control," it is hardly surprising that he cautioned against "expensive and time consuming" appeals.[55] Like Mannheim, however, Pound did not suggest that the procedural answer was to deny or limit youth appellate access. Instead, he recommended institutional reform. "A hearing before a bench of three judges in the court of which the juvenile court is a branch can be as individualized as the exigencies of the juvenile delinquency jurisdiction demand," Pound wrote, "and if only a question of law is involved, can be as formal as a proper determination of a

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[50] Hermann Mannheim, "The Juvenile Court: Its Procedure" in Margaret Fry *et al.*, *Lawless Youth: A Challenge to the New Europe* (London: George Allen & Unwin Ltd., 1947).

[51] Hermann Mannheim, "The Juvenile Court: Its Procedure" in Margaret Fry *et al.*, *Lawless Youth: A Challenge to the New Europe* (London: George Allen & Unwin Ltd., 1947).

[52] Roscoe Pound, "The Juvenile Court in the Service State" in *Current Approaches to Delinquency* (National Probation and Parole Association, 1949), reprinted in (1964) 10 Crime & Delinquency 516 at 519.

[53] See Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 Harv. L. Rev. 56; Julius Stone, "Roscoe Pound and Sociological Jurisprudence" (1965) 78 Harv. L. Rev. 1578.

[54] Roscoe Pound, "The Juvenile Court in the Service State" in *Current Approaches to Delinquency* (National Probation and Parole Association, 1949), reprinted in (1964) 10 Crime & Delinquency 516 at 522.

[55] Roscoe Pound, "The Juvenile Court in the Service State" in *Current Approaches to Delinquency* (National Probation and Parole Association, 1949), reprinted in (1964) 10 Crime & Delinquency 516 at 516.

question of law demands."[56] In other words, appellate review furthered the juvenile law project, in Pound's view, so long as the state innovated to limit delay and cost.

Within a few years, procedural and appellate rights for juveniles also became the subject of renewed debate in Canada. Political interest in juvenile delinquency law in the early 1960s was driven less by public fears about youth offending than by demographic changes.[57] Infants born during the postwar baby boom were becoming teenagers. In 1956, 38% of Canada's population was 19 years old or younger. By 1961, that figure had risen to 42%.[58] Lawmakers were concerned that without renewed and systematic efforts to address delinquency in its early stages, the adult prison population would soon swell.[59] Other critics of the JDA also questioned whether a welfare-oriented philosophy should be the exclusive guiding principle in society's response to juvenile offending. In true Canadian political fashion, then Minister of Justice Lucien Cardin struck a committee to study the problem of juvenile delinquency and suggest reforms. Chaired by Allen J. MacLeod, the Committee tabled its report on February 9, 1966.

The MacLeod report urged a break with the philosophical commitments and informality of the juvenile delinquency system.[60] It set off a firestorm of debate, commentary, and reform efforts that eventually bore legislative fruit two decades later with the passage of the *Young Offenders Act* in 1984. In place of a paternalistic emphasis on immoral social influences and procedural laxity, the MacLeod Committee endorsed a theory of youth vulnerability grounded in developmental psychology and social and economic dependency, which, in its view, mandated more procedural rights for young people, not less.[61] The Committee's recommendations came at a time when the American due process movement was in full swing and organizations such as the American Civil Liberties Union were litigating juvenile

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[56] Roscoe Pound, "The Juvenile Court in the Service State" in *Current Approaches to Delinquency* (National Probation and Parole Association, 1949), reprinted in (1964) 10 Crime & Delinquency 516 at 528.

[57] Sanjeev S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999) 24:2 Queen's L.J. 515 at 539-540.

[58] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 2.

[59] See Department of Justice, *Report of the Correctional Planning Committee* (Ottawa: Queen's Printer, 1961) at 5-6.

[60] For a discussion of the MacLeod Report in the context of juvenile law reform, see Christopher Manfredi, "The Young Offenders Act and Juvenile Justice in the United States" (1991) 6 Can. J. L. & Soc. 45 at 49-50; Sanjeev S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999) 24:2 Queen's L.J. 515 at 539-544; Marjorie Montgomery Bowker, "Juvenile Court in Retrospect: Seven Decades of History in Alberta (1913-1984)" (1986) 24:2 Alta. L. Rev. 234 at 249-252.

[61] See Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 57-58.

rights cases before the U.S. Supreme Court.[62] Civil liberties and children's rights advocates challenged the paternalistic view of the juvenile system as merely helping young people, emphasizing that juveniles were subject to a highly discretionary process and serious consequences if judged delinquent.[63] In Canada, most juvenile court judges were not even legally trained and lawyers rarely appeared.[64] Although training schools in theory promoted the "best interests" of juveniles, many children were subjected to serious physical and sexual abuse in harsh institutions.[65] The MacLeod Committee endorsed these critiques and rejected the paternalistic compromise at the heart of Canadian juvenile delinquency law. "It does not follow, of course," the report concluded, "that acceptance of what has been called the 'rehabilitative ideal' means that the question of civil liberties can be safely ignored. So beguiling, in fact, is the language of therapy that all the more care must be taken to ensure the protection of these liberties."[66] The therapeutic promise of the juvenile system, with all the vagueness and discretion it entailed, suggested a greater need for due process safeguards.

As part of this case for due process rights, the Committee urged Parliament to expand juvenile appellate rights. The Committee opened its discussion of youth appeals by acknowledging the importance of resolving juvenile cases expediently. Citing Mannheim and Pound's writing, the Committee recommended that "any measures of a corrective nature ordered by the court should be commenced almost immediately because, as experts on child psychology have emphasized, such measures will tend to lose their effect if there is delay in carrying them out."[67] The Committee concluded, "it is thought to be generally undesirable for court proceedings involving children to be unduly protracted."[68] In the context of appeals, however, this interest in expediency had to be balanced against the civil liberties concerns about which youth advocates were sounding the alarm. Reviewing the

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[62] See, for example, *Kent v. United States*, 383 U.S. 541 (1966); *Re Gault* 387 U.S. 1 (1967); *Re Winship* 397 U.S. 358 (1970).

[63] For a history of *Re Gault* and the advocacy work of the American Civil Liberties Union in the case, see David S. Tanenhaus, *The Constitutional Rights of Children: In* re Gault *and Juvenile Justice* (Lawrence, Texas: University of Texas Press, 2011).

[64] See Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed. (Toronto: Irwin Law, 2012) at 10.

[65] Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed. (Toronto: Irwin Law, 2012) at 11. See also Ronda Bessner, *Institutional Child Abuse in Canada* (Ottawa: Law Commission of Canada, 1998).

[66] See Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 87-88.

[67] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 154.

[68] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965).

JDA's limited appeal provision, the Committee wrote: "the restrictive character of the existing provision has caused much concern, having regard in particular . . . to 'the vast powers held by the presiding officers of such courts and the fact that these courts are closed to the public.'"[69] The privacy of juvenile courts coupled with their vast discretionary power and lack of procedural protections created a perfect storm for potential injustice. The Committee viewed appellate rights as one essential check: "It would help to ensure that the juvenile court performs its proper role: the administration of a system of individualized justice according to law."[70]

For these reasons, the Committee urged Parliament to extend appeal rights to juveniles that would "parallel those that are established for review in [adult] criminal cases."[71] Although they were silent on the question of ultimate appeals to the Supreme Court of Canada, the Committee recommended that both the accused and the Crown be given a direct right of appeal to the Court of Appeal on any question of law and with leave "on any other ground that appears to that Court to be sufficient."[72] Crucially, the Committee did not believe that expediency and appeal rights created a zero-sum game. Rather than restricting or disincentivizing appeals in the name of timeliness, the Committee urged institutional accommodation: "We would hope that the Court of appeal would arrange to hear appeals from juvenile court decisions as quickly as possible."[73]

Nearly two decades passed before Parliament finally repealed the JDA and replaced it with the YOA. Provincial wrangling over cost-sharing measures as well as resistance by interest groups across the political spectrum sank earlier legislative efforts, including Bill C-192, which died on the Order Papers in 1972.[74] Eventually, the logjam was broken. The enactment of the *Charter of Rights and Freedoms* in 1982 provided further impetus for federal action. As Bala and Anand have written, "the informality and lack of legal rights for youths in the *JDA* were inconsistent with the legal protections recognized in the *Charter*, while the interprovincial variation allowed by the *JDA* was inconsistent with the equal protection of the law guaranteed

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[69] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965), citing Ontario Probation Officers Association, *Report on Juvenile Delinquency of the 1962 Legislation Committee* (1962) at 7.

[70] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 154.

[71] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 162.

[72] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 155.

[73] Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) at 154.

[74] For a discussion of this interim period, see Sanjeev S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999) 24:2 Queen's L.J. 515 at 545-551.

by s. 15 of the *Charter* . . . ."[75] The YOA was enacted in 1982 with the unanimous support of all members of Parliament and entered into force on April 1, 1984.

The YOA ushered in a legalistic regime that established rights and responsibilities for young offenders. Where non-legally trained juvenile judges, probation officers, and social workers had populated the juvenile delinquency regime, the YOA turned decisively toward legal expertise with a "vast increase in the number of judges, prosecutors, defence lawyers and closed-custody institutions."[76] As Bala and Anand write, "the *YOA* was unquestionably criminal law, not child welfare legislation."[77] With this juridical and criminal law turn came procedural rights and stricter regulation of each stage of the youth process including arrest and police questioning, diversion, access to counsel, public disclosure of information, sentencing, and possibility of transfer to adult court for those charged with very serious crimes.

Amongst the legal rights extended to young offenders was a much expanded right to appeal. Section 27 of the YOA provided young people and the Crown an initial appeal as of right from a finding of guilt, an order dismissing an information, or a disposition.[78] Commentators and lawmakers at the time expressed approval that young people would now enjoy appellate rights equal to those of adults. In Parliamentary debates, Conservative M.P. and Deputy House Leader of the Official Opposition, Erik Nielsen, welcomed the changes. He noted that the JDA had not provided any "additional protection for young offenders" but had instead simply "restrict[ed] the right of appeal."[79] The requirement under the JDA that a judge find an appeal "essential to the public interest or for the due administration of justice" before granting leave had kept appeals to "a minimum," Nielsen stated, "which was the apparent intention of the language used then."[80] Nielsen continued:

> This bill [the *YOA*] gives youths the same right of appeal as adults under the *Criminal Code*. The ambiguities and balancing problems inherent in the wording of the *Juvenile Delinquents Act* are dispensed with. The appeal procedure in the *Code* is clear and well established so it is with a great deal of approval that we greet this provision in the legislation. It will certainly alleviate the potential abuses of and infringements upon the basic rights of young people that have in the past consistently occurred.[81]

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[75] See Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed. (Toronto: Irwin Law, 2012) at 13.

[76] Jim Hackler, "An Impressionistic View of Canadian Juvenile Justice: 1965 to 199" (2001) 20 Can. J. Comm. Mental Health 17 at 17-21.

[77] See Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3d ed. (Toronto: Irwin Law, 2012) at 13.

[78] *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 27(1)(a), (b).

[79] *House of Commons Debates* (May 28, 1981) (Erik Nielsen).

[80] *House of Commons Debates* (May 28, 1981) (Erik Nielsen).

[81] *House of Commons Debates* (May 28, 1981) (Erik Nielsen).

Nielsen's comments revealed two things: he appeared to believe that the YOA had granted young people appellate rights equal to those of adults and he believed that the purpose for doing so was to prevent rights abuses and infringements. In other words, appeals represented one safeguard against injustice and that safeguard should apply equally to young people and adults.

What Nielsen did not seem to recognize was that the drafters had not in fact granted full and equal appellate rights to young people. Section 27(5) of the YOA limited youth recourse to the Supreme Court of Canada. In the case of adults, section 691(1)(a) of the *Criminal Code* gives a person whose conviction for an indictable offence is upheld at the court of appeal an automatic right of appeal on any question of law on which a judge at the court of appeal dissents.[82] Section 691(2) gives a person whose acquittal is overturned at the court of appeal an automatic right of appeal on any question of law on which a judge of the court of appeal dissents, or on any question of law if the court of appeal enters a guilty verdict against that person.[83] Neither of these automatic rights of appeal were extended to young people. Instead, section 27(5) of the YOA stated that no appeal would lie to the Supreme Court unless leave was granted within 21 days of a court of appeal judgment.[84] This same provision, minus the 21-day time limit, was later incorporated into the YCJA as section 37(10).

IV. A LAG IN YOUTH APPEALS

A decade after the YOA became law — and three decades prior to *P. (C.)* — the Supreme Court of Canada released a statutory interpretation decision on youth appeals. C. (T.L.), a young offender who had been found guilty of common assault and possession of a weapon, initially appealed his guilty verdict to the British Columbia Court of Appeal where a majority dismissed the appeal.[85] One judge dissented on a question of law, however, and C. (T.L.) filed a notice of appeal to the Supreme Court of Canada pursuant to section 691(1)(a) of the *Criminal Code* and section 27(1) of the YOA.[86] The Crown informed C. (T.L.) that it planned to take

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[82] *Criminal Code*, R.S.C. 1985, c. C-46, s. 691(1)(a).

[83] *Criminal Code*, R.S.C. 1985, c. C-46, s. 691(2).

[84] Under s. 27(5), an appeal to the Supreme Court lay only in regard to adjudication for an indictable offence and not for a disposition, disposition review, or adjudication for a summary conviction offence. Even in these cases, the young person had to receive leave from the Supreme Court within 21 days unless the Court granted an extension for "special reasons." *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 27(5). For discussion, see Nicholas Bala & Heino Lilles, *The Young Offenders Act Annotated* (Ottawa: Ministry of the Solicitor General of Canada Policy Branch, 1982) at 224-225.

[85] *R. v. C. (T.L.)*, [1994] B.C.J. No. 149 (B.C.C.A.).

[86] *R. v. C. (T.L.)*, [1994] B.C.J. No. 149 at paras. 19-43 (B.C.C.A.), *per* Rowles J.A. dissenting (citing the rule against multiple convictions for the same delict is set out in *R. v. Kienapple*, [1974] S.C.J. No. 76, [1975] 1 S.C.R. 729 (S.C.C.)).

the position that the appeal could not proceed without leave to appeal being granted. The Crown brought a motion to quash the appeal on this ground.

C. (T.L.) argued before the Supreme Court that section 27(5) should not be interpreted as requiring leave in cases where an appellate judge dissents. If it were to be interpreted this way, C. (T.L.) argued that this would violate section 15 of the Charter by producing an anomalous and discriminatory distinction between young people and adults. The Supreme Court dismissed the appeal from the bench and followed up with a brief seven pages of reasons. Writing for a unanimous Court, Sopinka J. asserted that "a brief history of these provisions shows that there is no anomaly" and, in any case, because C. (T.L.) was responding to a motion to quash and had not given notice to the federal or provincial Attorneys General, it would be inappropriate for the Court to entertain a constitutional challenge.[87]

Telegraphing the reasoning of the majority in *P. (C.)*, Sopinka J. insisted that appellate rights could not be assessed outside of the larger adult and youth regimes of which they are a part. Given the "fundamental differences between the treatment of young offenders and adults who commit criminal offences," Sopinka J. wrote, it is "difficult to accept that a young offender can select one aspect of the scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied adults."[88] This reasoning suggested that because the youth system serves a distinct and ameliorative purpose and imposes shorter sentences on youths, young people cannot "select" certain benefits from the adult system. In return for the promise of differential treatment, young people had to accept certain trade-offs.[89]

In the case of appeals, specifically, the Court observed that Parliament had long made procedural trade-offs to promote expedient rehabilitation. The rationale for granting juveniles fewer appellate rights under the former JDA, Sopinka J. noted, "lay in the fundamental difference in the nature of the proceedings."[90] The purpose of juvenile proceedings was rehabilitative rather than punitive. No formal convic-

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[87] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 (S.C.C.).

[88] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 at 1017 (S.C.C.).

[89] Of course, this beneficent ideology need not and did not accord with reality. At the time *C. (T.L.)* was decided, Canada was sending youth into custody at twice the rate of American courts, even though the youth homicide rate was six times higher in the United States. Most cases going to court under the YOA were minor and most youth being sentenced to custody had committed minor offences. See Department of Justice Canada, *A Strategy for the Renewal of Youth Justice* (Ottawa: Department of Justice, 1998) at 20; and J. Hornick, Nicholas Bala & Joe Hudson, *The Response to Juvenile Crime in the United States: A Canadian Perspective* (Calgary: Canadian Research Institute for Law and the Family, 1995); Anthony N. Doob & Jane B. Sprott, "Changing Models of Youth Justice in Canada" in M. Tonry & A.N. Doob, eds., *Youth Crime and Youth Justice: Comparative and Cross-national Perspectives* (Chicago: University of Chicago Press, 2004) 185 at 186, 215-217.

[90] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 at 1016 (S.C.C.).

tion attached to a finding of delinquency and "the stigma attaching to the proceedings and their result was minimal in comparison to proceedings in adult courts."[91] Procedural laxity and appellate restrictions went hand in hand because they made proceedings "less formal and less protracted."[92] On this reading, the cost of not extending to young people the same appellate rights as adults was justifiable because the juvenile system was helpful not harmful, redemptive not stigmatizing. To Sopinka J.'s mind, the rationale for the lingering disparity between youth and adult appellate rights under the YOA was the same as applied to the JDA: "the policy favouring the early resolution of the adjudicative stage in order to facilitate commencement of rehabilitation would explain why Parliament did not extend appeals as of right to this Court."[93] According to the Court, section 27(5) of the YOA served this interest while also safeguarding youth rights by granting them an option to seek leave to appeal from the Supreme Court.

Today, nearly three decades since *C. (T.L.)*, the legislative landscape for young people has changed since the YCJA was enacted in 2004. Still, the limit on youth appeals to the Supreme Court of Canada remains. On the matter of ultimate appeals, the YCJA carried on where the YOA left off. Section 37(5) of the YCJA continues to require youths to seek leave from the Supreme Court even in cases where adults enjoy an appeal as of right under the *Criminal Code*. This was the procedural barrier that P. (C.) ran up against in 2019 when he was in the process of appealing his case to the Supreme Court.

The appellate trajectory in *P. (C.)* mirrored that of *C. (T.L.)*. P. (C.) was convicted at trial of sexual assault of another minor and then appealed the verdict to the Ontario Court of Appeal. A majority of the Court of Appeal dismissed the appeal, but one judge, Nordheimer J., would have allowed the appeal, set aside the conviction and entered an acquittal on the basis that "proof of the offence beyond a reasonable doubt was not an available verdict" on a "fair and balanced review of the evidence as a whole."[94] Following this decision, P. (C.) filed a notice of appeal to the Supreme Court of Canada pursuant to section 691(1)(a) of the *Criminal Code*. The Crown filed a motion to quash based on section 37(10) of the YCJA. In response, P. (C.) filed a notice of constitutional question and argued that section 37(10) violates sections 7 and 15 of the Charter.[95]

With only the Chief Justice addressing and denying P. (C.)'s section 7 claim in his

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[91] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 (S.C.C.).

[92] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 (S.C.C.).

[93] *R. v. C. (T.L.)*, [1994] S.C.J. No. 70, [1994] 2 S.C.R. 1012 (S.C.C.).

[94] *R. v. P. (C.)*, [2019] O.J. No. 664, 2019 ONCA 85 (Ont. C.A.).

[95] I focus my analysis on arguments raised in the s. 15 context because it was here that the Court was most divided. Justice Kasirer agreed with the Chief Justice that s. 37(10) does not violate s. 7 of the Charter. Justice Abella, in dissent, did not find it necessary to address s. 7 after finding an unjustified s. 15 violation.

majority opinion, the Court divided primarily on the section 15 question. Writing for the majority, Wagner C.J.C. held that any equality analysis of section 37(10) had to consider its place within a larger scheme balancing distinct interests and extending to young people specific benefits. Just as Sopinka J. cautioned against comparing specific provisions of youth legislation to adult criminal law in *C. (T.L.)*, the majority in *P. (C.)* insisted that Parliament is owed deference in how it distributes rights and obligations in the youth system. Chief Justice Wagner cited *C. (T.L.)* as properly advising against "artificially cherry-picking individual features from a multifaceted legislative scheme in order to reveal inequities between fundamentally distinct systems."[96] In the words of the Chief Justice, "an approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the *YCJA*" would be contrary to a contextual equality analysis.[97]

Justice Abella, in dissent, resisted this supposedly contextual frame, calling the Chief Justice's suggestion that her approach might require line by line parity between the YCJA and the *Criminal Code* a "hyperbolic proposition."[98] For the dissent, the idea that Parliament had granted young people certain "benefits" not given to adults lay at the heart of the problem. "In short," Abella J. wrote, "the enhanced procedural protections afforded to young people in the youth justice system are not gratuitous benefits. They are directly responsive to the vulnerability and concomitant disadvantage that inheres in young people because of their age."[99] In other words, the limit on youth appellate rights should not be treated as an acceptable trade-off in exchange for beneficial treatment, but rather an unjust anomaly within a contemporary system designed to address youth vulnerability through greater procedural protections rather than less.

The majority insisted that they were not in fact legitimating such a trade-off. Even as Wagner C.J.C. acknowledged that young people are more vulnerable than adults to miscarriages of justice, he resisted the suggestion that section 37(10) might sacrifice justice for timeliness. Rather, he maintained that the limit on youth appeals reflected an attempt by Parliament to balance young people's *own* interests in preventing miscarriages of justice *and* having youth matters resolved expeditiously. "In creating a separate youth system with distinct procedures," the majority wrote, "Parliament has acknowledged that, while young persons are uniquely vulnerable to miscarriages of justice, they are also uniquely vulnerable to harms resulting from

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[96] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 144 (S.C.C.).

[97] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 145 (S.C.C.), *per* Wagner C.J.C.

[98] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 85 (S.C.C.), *per* Abella J. dissenting.

[99] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 85 (S.C.C.).

protracted legal proceedings."[100] The majority worked to erase any tension between time and justice by portraying the impugned provision as balancing competing harms to young people themselves.

The majority attempted this move by collapsing two distinct senses of timeliness as a value in the youth system. Citing Canada's international obligations and the Court's recent decision in *R. v. M. (K.J.)*, a case concerning young people's section 11(b) Charter right to be tried in a reasonable time, the Chief Justice emphasized "the long-recognized need for enhanced timeliness and promptness in the resolution of youth cases."[101] In doing so, he failed to distinguish between timeliness-as-effectiveness claims, which have long insisted that the speedy resolution of youth matters is important if sanctions and rehabilitative measures are to be effective, and more recent timeliness-as-due-process arguments that seek to protect trial fairness. Whereas the former have been used to justify limits on appellate review that involve trade-offs between time and justice, the latter extols timeliness as a means of ensuring justice. As a general proposition, delay concerns at the trial stage cut in favour of enhanced procedural rights, for example through a more robust section 11(b) standard, whereas at the post-conviction stage, expediency concerns cut in favour of fewer rights including appellate rights.[102] Curiously, in *M. (K.J.)*, the Court did *not* actually establish a more robust section 11(b) standard for youth, even as it affirmed expediency concerns that were said to justify more limited appeal rights in *P. (C.)*[103] Timeliness proved an ineffective sword for young people in *M. (K.J.)*, but an effective constitutional shield for the state in *P. (C.)*.

The manipulability of expediency claims was perhaps most evident in the very temporal premises that structured the majority and concurring opinions. Both opinions presupposed that section 37(10) would in fact expedite at least some youth matters. In fact, the opposite is likely true. This is because the Supreme Court is likely to grant leave in virtually every youth case where an adult would enjoy an appeal as of right. As Abella J. noted in her dissent, citing political scientist Peter H. Russell, the principal aim of appeals as of right is "to rectify legal errors committed by lower courts in the trial of serious offences."[104] "A difference of opinion among the members of the provincial appeal court or between the provincial court of appeals and the trial court (as where the appeal court sets aside the trial court's

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[100] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 151 (S.C.C.), *per* Wagner C.J.C. [emphasis added].

[101] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 148 (S.C.C.). See *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55 (S.C.C.).

[102] For a discussion of the additional prejudice of trial delay for young people, see Palma Paciocco, "The Hours are Long: Unreasonable Delay After *Jordan*" (2017) 81 S.C.L.R. 233 at 248.

[103] *R. v. M. (K.J.)*, [2019] S.C.J. No. 55, 2019 SCC 55 (S.C.C.).

[104] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 59 (S.C.C.), *per* Abella J. dissenting.

decision to acquit),” Russell wrote, “is considered to constitute *prima facie* evidence of the possibility of such error, and hence as sufficient grounds for Supreme Court review.”[105] Parliament has used differences of opinion among members of provincial appeal courts as a proxy for determining that an adult case merits Supreme Court review. Although the Supreme Court is not bound by this proxy reasoning in its youth leave decisions, it would be exceptional for it to depart from it. This is because, as Kasirer J. emphasized in his concurrence, “the public importance criterion” for the Supreme Court to grant leave “is engaged not only by jurisprudentially important legal issues that qualify as issues of public importance on that basis, but also by those that raise serious questions of law about the safety of the verdict in criminal matters.”[106] The specter of a wrongful conviction haunts the system as a whole. Where an appellate judge has dissented on a question of law, including with respect to the soundness of a verdict as in *P. (C.)*, it surely raises a “red flag,” as Kasirer J. wrote. “[I]t serves as a signal to the possible seriousness of the appeal for which leave is sought.”[107]

The import of this reasoning is that it is highly unlikely a panel would deny leave in a case in which a provincial appellate judge dissented on a question of law and risk a miscarriage of justice. As evidence of this, none of the parties or the Court were able to point to a single case where the Supreme Court had refused leave in a youth case where a court of appeal judge had dissented on a question of law.[108] Given this, in all likelihood where a youth case fits one of the circumstances in which Parliament has granted adults an appeal as of right, the Supreme Court is likely to grant leave. The effect of section 37(10) is that the process of seeking and receiving leave will take several additional months. In the exceptional case that the Supreme Court denies leave to a young person in these circumstances, the youth will be left with the worst of both worlds. They will have been denied an opportunity for appellate review that is guaranteed to adults and they will have spent more time and resources in the process.[109]

All this judicial work to recast a rather archaic limit on youth appeals as beneficial

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[105] Peter H. Russell, “The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform” (1968) 6 Osgoode Hall L.J. 1 at 14.

[106] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 201 (S.C.C.), *per* Kasirer J. concurring.

[107] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 206 (S.C.C.), *per* Kasirer J. concurring.

[108] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 157 (S.C.C.), *per* Wagner C.J.C.

[109] The British Columbia Civil Liberties Association made this point succinctly in their factum.

For a young person not granted leave to appeal, the Crown is effectively suggesting it is better to risk that they may be wrongfully convicted than for their case to be decided in a longer time frame. For those young people who are granted leave to appeal, the Crown is also

to young people suggests a deeper and persistent sense that the youth and adult systems are incomparable and therefore not the proper subjects of an equality analysis. If, in theory, courts act as guardians of due process rights in criminal trials where the state "battles" with the adult accused, the Court in *P. (C.)* appeared far more willing to see Parliament as the proper "parental" body to balance and protect youth interests. In this respect, the Court's thinking about youth punishment and rehabilitation is remarkably reminiscent of the JDA.

V. CONCLUSION

As I have argued throughout this paper, *P. (C.)* is a curious decision because the stakes were relatively low in terms of appellate practice. The expansive trajectory of youth appellate rights over the course of the 20th century reveals section 37(10) of the YCJA to be a historical artifact of a time when Parliament expressly traded off procedural rights for a promise of beneficent treatment. Today, that trade-off strikes many as unjust and unfair.

It is worth remembering, of course, that the contemporary criminal system is also premised on trade-offs between expediency and due process rights. These trade-offs do not occur through the formal deprivation of rights which characterized the juvenile system. Instead, they work more subtly through policies and practices that incentivize defendants to resolve cases through guilty pleas rather than proceed to trial where they could potentially avail of more legal rights and defences.[110] As Robert E. Scott and William J. Stuntz famously wrote three decades ago of the American system, plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."[111] Casting the practice in a positive light, the Supreme Court of Canada has affirmed that "plea resolutions help to resolve the vast majority of criminal cases."[112]

In this sense, while P. (C.)'s appellate trajectory mirrors that of most youth cases that law students and commentators learn and write about, it speaks to a miniscule number of youth criminal matters overall. *P. (C.)* involved a trial, an appeal to a provincial court of appeal, and ultimately an appeal to the Supreme Court of Canada. Procedurally, it represents a sliver of a tip of an iceberg. Appeals to the Supreme Court of Canada, as of right or with leave, offer the possibility of detecting

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endorsing an appeal process that will take longer and be more costly than that available to adults.

R. v. P. (C.), [2021] S.C.J. No. 19, 2021 SCC 19 (S.C.C.) (Factum of the British Columbia Civil Liberties Association at para. 25).

[110] For a discussion of the ethical obligations of prosecutors within this incentive structure of plea bargaining, see Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2017) 63:1 McGill L.J. 45.

[111] Robert E. Scott & William J. Stuntz, "Plea Bargaining as Contract" (1992) 101:8 Yale L.J. 1909 at 1912.

[112] *R. v. Nixon*, [2011] S.C.J. No. 34, [2011] 2 S.C.R. 566 at para. 47 (S.C.C.).

and overturning wrongful findings of guilt in an infinitesimally small number of cases.

Since the passage of the YCJA, the total number of youth cases that go to court has fallen precipitously. In the early 2000s, around 75,000 youth matters went before the courts; after 2004, that number fell by almost 10,000 and has continued to drop ever since.[113] In 2016, for the first time in recent history, fewer than 30,000 youth cases went to court. In 2019-2020, that number had dropped to 22,071.[114] For those youth matters that do proceed to court, nearly half end with the charges being stayed or withdrawn.[115] These numbers all form part of the crucially important story of youth decarceration in Canada in recent decades.[116]

Still, over the past five years, over 50,000 young people have been found guilty of criminal offences.[117] Because Canada does not produce national statistics distinguishing guilty pleas from judicial findings of guilt, it is difficult to estimate how many young people plead guilty to criminal charges each year.[118] If one extrapolates from estimates about the adult system, however, it is likely that around 9,000 to 14,000 youths have pled guilty to criminal offences each year since 2015.[119]

Combatting some of the well-known causes of false guilty pleas among young

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[113] Statistics Canada, "Youth courts, number of cases and charges by type of decision" Table 35-10-0038-01 (Ottawa: Statistics Canada, 2021).

[114] Statistics Canada, "Youth courts, number of cases and charges by type of decision" Table 35-10-0038-01 (Ottawa: Statistics Canada, 2021).

[115] Statistics Canada, "Youth courts, number of cases and charges by type of decision" Table 35-10-0038-01 (Ottawa: Statistics Canada, 2021) (in 2019-2020, charges were withdrawn or stayed in 10,809 out of 22,017 total youth cases; in 2018-2019, charges were withdrawn or stayed in 11,887 out of 24,656 total youth cases; in 2017-2018, charges were withdrawn or stayed in 13,103 out of 27,919 total youth cases).

[116] See Cheryl Marie Webster, Jane B. Sprott & Anthony N. Doob, "The Will to Change: Lessons from Canada's Successful Decarceration of Youth" (2019) 53 Law & Soc. Rev. 1092.

[117] Statistics Canada, "Youth courts, number of cases and charges by type of decision" Table 35-10-0038-01 (Ottawa: Statistics Canada, 2021).

[118] See Department of Justice Canada, Research and Statistics Division, Angela Bressan & Kyle Coady, *Guilty Pleas Among Indigenous People in Canada*, Catalogue No. J4-62/2018E-PDF (Ottawa: Department of Justice Canada, 2017) at 6. See also Debra Parkes & Emma Cunliffe, "Women and Wrongful Convictions: Concepts and Challenges" (2015) 11:3 Int. J. of Law in Context 219 at fn 47 ("It is surprisingly difficult to find Canadian statistics that differentiate between findings of guilt and guilty pleas.").

[119] See "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada," Final Report of the Standing Committee on Legal and Constitutional Affairs (2017) at 44 (estimating that 90% of guilty verdicts in the adult system are the product of guilty pleas).

people remains an urgent task, especially because they most often burden marginalized youth. This is particularly true for Indigenous young people who are at greater risk of false confessions due to a confluence of factors including inadequate defence representation, mistrust of the state system, traumatic life experiences, and living in state care.[120] The harshest penalties of the youth system continue to be doled out against poor, Indigenous, and racialized youth.[121]

Just as the ideology of beneficent and "familial" care that guided the juvenile system was never realized in practice, the due process "battle" vision of criminal law is also increasingly a figment of ideology that influences how people imagine the carceral system contrary to its reality. Administrative efficiency, caseload management, employment opportunities, and a persistent will to punish and "save" reveal a more fragmented but also more realist view of what continues to make the system run.

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[120] See Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3-4 Crim. L.Q. 415; Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" (2020) 67 Crim. L.Q. 477.

[121] See Statistics Canada, "Adult and youth correctional statistics, 2020/2021" (2022), online: https://www150.statcan.gc.ca/n1/en/daily-quotidien/220420/dq220420c-eng.pdf?st=9hzQcB2t.