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THE YOUNG OFFENDERS ACT A REPORT CARD 1984-1986

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The Latin ethical principle "premium non nocere" means first do no harm "which is a stronger moral imperative than to do good"[1] This is an appropriate theme for a critique of the first two years of the operation of the *Young Offenders Act* (hereinafter referred to as the *Y.O.A.*).

What follows is a short summary of the *Y.O.A.*, then a look at the legislation's impact in Saskatchewan after two years of operation. Next is a review of the case law to date in Canada, with some critical comment about whether the legislative objectives of the legislation are being met. Lastly, a solution to over-criminalization will be discussed.

PART I

THE YOUNG OFFENDERS ACT--A SHORT SUMMARY

The *Y.O.A.* replaced the *Juvenile Delinquents Act* (hereinafter referred to as the *J.D.A.*) on April 2, 1984. Sixteen and seventeen year olds were included under the Y.O.A. in Saskatchewan in April of 1985.[2] There has already been significant public reaction to the legislation.[3] Politicians have placed it high on the agenda as evidenced by pressure from attor-

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1 Somerville, Margaret, A., "Governing Professional Intervention in Family: Achieving and Maintaining a Delicate Balance" (1984), 44 R. du B. at 691, uses this maxim in relation to child apprehension proceedings but it is also very appropriate for a critique of the early operation of the *Young Offenders Act.*

2 *Y.O.A.*, s. 2(2)(a).

3 Smith, Andrew, Department of Solicitor General, Informal Address (Saskatoon, 30 April, 1986) [unpublished].

ney generals which has led to the introduction of a host of new amendments on April 30, 1986.[4]

Perhaps public, political, and academic comment is premature given the limited experience with the new legislation. In some provinces there is only one year of experience in the application of the legislation to sixteen and seventeen year olds and at most two years of experience in any event. Optimistically, some of the writer's concerns may be due to the fact that the legislation is new. Attitudes in the criminal justice system are slow to change[5] and therefore because of the major change, *the fact of change alone* may account for some of the judicial reluctance to embrace the full import of the legislation.

While the jury is still out on the *Y.O.A.*, the writer notes some disturbing trends both with the practical administration of the legislation and in the interpretation placed on the legislation by certain courts.

An examination of the principal tenets of the legislation is in order. The *Y.O.A.* stresses accountability, responsibility and protection of the public coupled with a notion that young persons "also have special needs and require guidance and assistance". [6] The declaration of principle is set out in its entirety as it is the cornerstone of the *Y.O.A.*

DECLARATION OF PRINCIPLE

POLICY FOR CANADA WITH RESPECT TO YOUNG OFFENDERS– Act to be liberally construed

3.(1) It is hereby recognized and declared that

(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who

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4 *An Act to Amend the Young Offenders Act*, April 30, 1986 [no bill number yet assigned as at April 30, 1986].

5 An example of reluctance to change may be the rather novel case of *R. v. W.W.W.*, 20 C.C.C. (3d) 214, where in spite of clear language in section 3(e) of the Y.O.A. commanding that young persons are to have rights and freedoms "in their own right", a majority of the Manitoba Court of Appeal held that young offenders should only instruct counsel through a guardian or next friend as the court interpreted that this has always been the appropriate procedure in Manitoba.

6 *Y.O.A.*, s.3(1)(c)

commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervison, discipline and control, but, because of their dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences

(e) young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or in the *Canadian Bill of Rights*, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

The thrust of the *Y.O.A.* is quite different than that of the *J.D.A.*, the *J.D.A.* having as its central principle a reliance on the Parens Patriae doctrine as embodied in section 38 of the *J.D.A.*:

> "the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may that which should be given by his parents, and that as far as practicable every juvenile shall be treated, not as a criminal, but as a misdirected and misguided child *and needing aid, encouragement, help and assistance.*" (Emphasis added)

Some further elements essential to this topic will now be discussed.

Jurisdiction

The *Y.O.A.* includes only offences created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance,[7] but excludes status offences and provincial offences.

Alternate Measures

The *Y.O.A.* allows for the formalization of police warning or cautioning,[8] pre-and post-charge diversion, mediation, etc. Unfortunately, the responsibility for funding, initiation, and delivery of such programming is with the provincial governments. There is no statutory obligation on the federal government to assure minimum national accessibility standards to alternative measures programming.

Detention Prior to Disposition

Young persons are to be kept separate from adults.[9] The *Y.O.A.* incorporates the interim release provisions of the Criminal Code with an additional pre-condition (or a parallel provision) allowing for custodial release to a "responsible person". This person must be "willing and able to take care of and exercise control over" a young person and "be responsible for the attendance of the young person in court". Amendments introduced April 30, 1986 modify this section to give more discretion regarding detention between arrest and first appearance. Included also is a new provision allowing an adult person who has agreed to care for a young person to be relieved of that duty on application.[10]

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7 *Y.O.A.*, s. 2 (offence).

8 See Wilson, J.W., *Children and the Law*, 2d ed., at 344.

9 *Y.O.A.*, s. 7(3). This provision is subject to some common sense exceptions which involve the young person being incarcerated with adults where the safety of the youth and safety of others would be in jeopardy, if they were not placed in an adult facility (s. 7(3)(a)), and where because of remoteness or other reasons no suitable separate place of detention is available (s. 7(3)(b)).

10 *Y.O.A.*, s. 7(4)(a) and (b).

Parents

Parents must be given notice.[11] Section 3(h) of the Declaration of Principle sees parents being responsible for their children. Young persons should only be removed from parental supervision if parental care is inappropriate.[12]

Right to Counsel

During consideration of the use of alternative measures,[13] upon arrest and detention,[14] and at every stage of the proceedings including "review"[15] the young person is given the right to retain and instruct counsel without delay. In certain cases and certainly after arrest counsel will be provided and paid for if the young person cannot afford counsel herself.[16] Parents or other suitable persons may also fulfil the role of counsel.[17] Stringent rules require counsel to be offered to a young person before her statements may be admissible in evidence against her pursuant to section 56.

Transfer to Ordinary Court

J.D.A. transfers were made to adult court where "*the good of the child* and the interest of the community demanded"[18] (emphasis added) Under the *Y.O.A.* transfer may be made if the court is of the opinion that "in

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11 *Y.O.A.*, s. 9.

12 This latter statement is rather confusing as "child" is defined in s. 2 as a person "under the age of 12 years" and therefore s. 3(h) conveys the message that parents are responsible for care and supervision of children, although children ae not included under the ambit of the legislation. Young persons who are the focus of the legislation *by negative implication* perhaps do not come under the responsibility for care and supervision of the parents as do children. Young persons are affected only where parental supervision is inappropriate, not where care has not been given. It is likely that this is an error in drafting. The literal reading of the section would lead one to conclude that there is a logical inconsistency.

13 *Y.O.A.*, s. 11(1).

14 *Y.O.A.*, s. 11(2).

15 *Y.O.A.*, s. 28.

16 *Y.O.A.*, s. 6(a)(i), (ii)(b) and s. 4(a) and (b).

17 *Y.O.A.*, s. 11(7).

18 *J.D.A.*, s. 9(1).

the interest of society and having regard to the needs of the young person,"[19] (emphasis added) the young person should be proceeded against in ordinary court. Only those over fourteen[20] may be transferred under the *Y.O.A.* Particular criteria are set out which define what the youth court should take into account in deciding whether to transfer or not. The youth court is to consider: (1) the seriousness of the offence and the circumstances around its committal; (2) the age, maturity, character and background of the young person and any previous record; (3) the adequacy of the *Y.O.A.*, the Criminal Code, other Acts of Parliament, to meet the circumstances of the case; (4) the availability of treatment or correctional resources; and (5) other factors that are relevant.[21] As will be discussed later, there is a serious debate as to whether section 16 is merely a codification of section 9 or whether it has a significantly different intent and focus.

Dispositions

The *J.D.A.* had a limited array of dispositions while the *Y.O.A.* by contrast allows for a wide range of dispositions including a possible maximum three year committal to secure custody.[22]

Appeals

Formal appeal mechanisms similar to those granted to adults are included in the *Y.O.A.* where the *J.D.A.* contained a very limited right of appeal.[23]

Review of Dispositions

The *Y.O.A.* makes provision for a post conviction review[24] at certain prescribed intervals, or at the option of the accused, or the person in whose custody the accused may be. This review may be by a "board" or by the "youth court".[25]

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19 *Y.O.A.*, s. 16(1).

20 *Ibid.*

21 *Y.O.A.*, s. 16(2).

22 *Y.O.A.*, s. 20(k)(i) and (ii) and s. 24. Proposed amendments allow sentences beyond 3 years for certain multiple offences, *supra* note 3, s. 13(1).

23 *Y.O.A.*, s. 27.

24 *Y.O.A.*, s. 28.

25 *Y.O.A.*, s. 30(1).

Records and Privacy

Criminal records will now clearly attach to young persons who commit offences but must be automatically destroyed after fixed periods of two or five years from the completion of dispositions for summary and indictable offences respectively.[26]

Youth Justice Committees

The *Y.O.A.* suggests that youth committees be established by provincial ministries to assist in "any aspect of the administration" of the Act.[27]

PART II

REALITY: THE FIRST TWO YEARS

The preceding is only a cursory review of the *Y.O.A.* On paper the Declaration of Principle, special rights to counsel, and the rules regarding admissibility of statements are indeed significant. The drafters drew on a "free will" conceptual ideology viewing the young person as a responsible growing member of a community of relative equals. At the same time the drafters did not completely extricate themselves from the philosophy of the benevolence of a caring paternalistic justice system. The drafters were so imbued with the need to bring back due process and fairness to the administration of juvenile justice that they then went beyond some of the rights granted to adults.[28] However, the drafters did not embrace due process completely. Young people do not have the right to a preliminary hearing or a jury trial.[29]

We can and should applaud the progressive due process aspects of the *Young Offenders Act.* The remainder of this paper will not focus on the

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26 *Y.O.A.*, s. 45. New amendments proposed April 30, 1986 make a number of changes regarding disclosure of records, etc.

27 *Y.O.A., s. 60.*

28 The right to counsel goes beyond s.10 of the Charter to order counsel be supplied (s. 11 of the *Y.O.A.*). Statements must be more carefully taken by the police than in the adult situation (s. 56 of the *Y.O.A.*), although new amendments allow a waiver to be both verbal and in writing (see *supra,* note 4).

29 The [Toronto] Globe and Mail, (22 April 1986) 2. An Ontario Court of Appeal judgment delivered April 22 upheld the *Young Offender's Act* refusal to grant young people a jury trial.

due process advances of the *Y.O.A.* Bala and Lillies,[30] Wilson,[31] and others[32] have adequately described in some detail how the system should be different under the new legislation. The concern noted in this paper is that the new legal order is not meeting expectations.

Judge J. R. Omer Archambault, one of the principal drafters of the *Y.O.A.*, made the following comments to a conference in Ottawa in January of 1983.

> "I suggest that we have created a coherent and balanced process to deal with juvenile crime which will encourage respect for the law and promote the well-being of both the young offender and society"[33]

With these high ideals the proponents made predictions of a brave new world of even-handed but stern treatment of responsible young citizens who would be provided full due process rights.

A detailed statistical assesment of the first two years of operation of the *Y.O.A.* is not possible in Saskatchewan.[34] The provincial Departments of Justice and Social Services acknowledge they have not produced official statistics at this point. Their officials, however, have been helpful with some unofficial trends and impressions which when matched with impressions of others in the system make a strong circumstantial case indicative of certain patterns. While basing critical comment on such impressionistic data is always dangerous, in this circumstance the need for early critical comment, outweighs the danger of using less than perfect statistical data.

The start point of a practical criticism of the administration of the *Young Offenders Act* begins with the fact that the provinces claim they were taken by surprise by the proclamation of the Act. It is generally

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30 N. Bala and H. Lillies, *The Young Offenders Act*. annotated. (Solicitor General).

31 Wilson, *supra*, note 6 at 340-404.

32 Wardell, W. J., 47 Saskatchewan Law Review, 381.

33 Archambault went on to quote from a book by Brantingham where the *Young Offenders Act* was complimented as a major piece of social legislation. See the last page of his speech.

34 Federal government statistics are also not available as at April 30, 1986 according to officials at the Consultation Center, Solicitor General, Saskatoon.

admitted that April 2, 1984 came sooner than predicted by most provinces. On the other hand, the *Young Offenders Act* had been in a stage of advanced planning and discussion for many years. Provincial governments clearly played a dangerous negotiation game for more resources. They literally avoided preparing for an early implementation of the legislation. On April 2, 1984 the lack of resources created a comedy of errors. Transportation arrangements, custody arrangements, a lack of psychological and psychiatric reporting capacity and confused court administrators complaining about the record-keeping provisions were sources of tribulation.[35] Two years later the construction of facilities is still in the infancy stage. Young persons are being warehoused in most unsatisfactory accommodation. In short, advance planning proved to be almost nonexistent and young people suffered the main thrust of the lack of planning and facilities.[36]

Not only was the system not ready for the proclamation, almost everyone in the system was taken by surprise by the significant increase in the numbers of young persons who were being processed. From 1980 to 1984 the weekly juvenile court docket in Saskatchewan consisted of one morning a week where an average of ten alleged delinquents appeared at the Unified Family Court. This docket usually took no more than an hour. By April of 1986 administrators in charge of the youth prosecution branch were considering adding a fourth docket day per week with an average of 20-30 cases being dealt with per docket.[37]

A social worker from the Yorkton district actively involved in the young offenders unit in that community reported a tripling of the number of cases going to court and being handled by his unit. He attributes this to significantly increased charge rates by police. He. noted that police (R.C.M.P.) in his district came in contact with a large native population and he noted significant increases in native youth being brought to court. West (84:67) notes a study where charge rates for juveniles of Indian an-

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35 All of the above were discussed in detail at advisory meetings conducted under the chair of the Department of Social Services every second Friday afternoon in Saskatoon following the implementation of the Act on April 2, 1984. These sessions included police, social workers, Crown counsel and judges as well as defence counsel.

36 See Hopley, S., The Young Offenders Act and the Criminal Capability of Young Offenders (1985) [unpublished] at 14; and personal interview with a staff member at Kilburn Hall who wished to remain anonymous.

37 Interview with Fred Dehm, Provincial Department of Justice, Prosecutor, March 1986. The writer acted as duty counsel with 3rd year law students in docket court 1980-1984.

cestry were found to be more than twice that of non-Indians, prior to the *Y.O.A.* The social worker from Yorkton also noted the incredible additional cost of transportation, paperwork and administration as a result of the new caseload and the new procedures for recordkeeping, etc., in the *Y.O.A.*[38]

In Saskatoon, Kilburn Hall has traditionally been the custodial and treatment facility for juveniles. Its main function was as a temporary stabilization unit for apprehended children under the *Family Services Act*. Occasionally, it was used for persons committed to the Minister under the *Juvenile Delinquents Act* or remanded under that legislation. Persons sentenced under the Young Offenders Act monopolized the facility making it no longer accessible as a stabilization unit for *Family Services Act* children. Inside of a month or two of the coming into force of the Act, Kilburn Hall was full to capacity.

The custodial unit or holding unit is designed for twelve persons but regularly holds eighteen to nineteen people.[39] The upstairs open living unit at Kilburn Hall is designed for 16 and on occasion has had as many as 34 inmates registered. However, up to 5 were sent home on questionable temporary absences under section 35 of the *Y.O.A.* for medical, compassionate or humanitarian reasons.[40] Facetiously, the writer notes, help for the overcrowded conditions is on the way. The following institutional beds and their cost are of interest:

Secure Custody Beds[41]

1. Sask. Hospital, Battleford	40 beds	$ 4 million
2. Kilburn Hall, Saskatoon	14 beds	2.1 million
3. Paul Dojack Centre, Regina	62 beds	7 million
	116 beds	$13.1 million

This major construction of new facilities is being undertaken at the same time that the Neilsen Task Force report suggests that "marked growth in

38 A personal interview with a social worker from the Yorkton district who wished to remain anonymous.

39 This information was gleaned from a personal interview with a worker at Kilburn Hall who wished not to have his name released. This interview was conducted in March 1986.

40 *Ibid.*

41 Saskatchewan Department of Social Services, Press Release, (April 1985).

prison populations follows periods of intensive building".[42] The same report notes that

> "too often, judges are left with an unpalatable choice between probation and prison, with no programs in between for dealing with crime-related problems such as drug and alcohol dependency, lack of job finding skills and family violence".[43]

Unofficial but credible sources in legal aid, the police department, and social services in Saskatoon indicate a significantly increased charge rate for young persons in Saskatoon after the implementation of the *Y.O.A.*[44] This increased charge rate is attributed in part to the administrative cutbacks imposed on the youth unit of the Saskatoon City Police. This unit no longer has responsibility for the charging decisions for young offenders. The unit now only deals with a small portion of the young offenders while patrol officers exercise the discretion to warn, divert or charge without the expertise of the youth unit. Members of this unit had gained an intimate knowledge of the family and community structures in which of the young offenders lived.[45]

Sentences also appear to be longer for the 16 and 17 year olds under the *Y.O.A.* than under the Criminal Code. Ontario reports average sentences up to twice as long.[46] Impressionistic views of the Department of Social Services in Saskatoon suggest that in certain regions of the province the Ontario experience is perhaps being duplicated here.[47]In Saskatchewan, as of March 1, there were 140 twelve to fifteen year olds in custody and a similar number of sixteen and seventeen year olds in custody as well. Under the old regime where sixteen and seventeen year olds were punished under the Criminal Code there were only a maximum of 120 sixteen and seventeen year olds in custody at any one time in the recent past.[48]

The above is little more than circumstantial evidence as reliable statistics are not officially available at this time. However, this circumstan-

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42 The [Toronto] Globe and Mail (3 March 1986) 1.

43 *Ibid.*

44 Interview with David Macknack, Department of Social Services, March 1986.

45 *Supra,* note 35.

46 *Supra,* note 36.

47 Hopley, *supra* note 30 at p. 14.

48 Macknack, *supra* note 44.

tial evidence does represent a foreboding pattern of increased charging, longer sentences and more expensive custodial sentencing of young people.

From these trends it would *appear* that youth crime is on the increase. This gives cannon fodder to persons in the community concerned about increased crime who advocated for more resources for detection and apprehension, for more crime watch programs and for more custodial institutions. The creation of more custodial institutions and the increased detection and processing leads to more statistics which leads to more community pressure for more control mechanisms and so the escalation continues.

Criminality Rates Among Young Persons

Obtaining an accurate reading of crime levels by youth in any community is difficult, Many crimes remained unsolved. West (1985: p. 86-92) discusses the difficulties with official statistics as an indicator of youth crime. He notes that self-report studies, while having some flaws, give us helpful information about actual crime levels. West argues that since World War II "self-report research has not generally shown steady rises in delinquency". *Official statistics* indicate "a ten per cent increase in crime being processed" while other studies show a *decline of two per cent.*[49] West goes on to conclude:

> "Figures for juvenile delinquency, specifically over the last two decades, indicate very little change, with the exception of drug and alcohol abuse (both victimless)."

Self-report research also questions whether delinquency is primarily a lower social economic group phenomena. West summarized a number of studies concluding that social class is not a predominant predictor of delinquency.[50] He also notes numerous studies which indicate little difference between rural and urban youth crime and no correlation between delinquency and single parent homes. School failure and peer group relations have a more significant influence. He notes that:

> "self-report studies do present one other undeniable difference

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49 West cities an American victim survey of households from 1975 (May 1984 Justice Assistance News): West, W. Gordon, *Young Offenders And the State* (Toronto: Butterworths, 1984) at 87.

50 *Ibid.*, at 89.

> from analysis of offical statistics. The sheer volume of reported delinquencies is high."[51]

However, many of the delinquencies are minor in nature and what we have termed status offences in the past.

If West and the various statistical surveys he cites are correct there is clearly no new juvenile crime wave in Canada or the United States. What appears to be happening is that recent events in Canadian and American society have caused increased detection and formal processing of more young offenders.

Great Britain has also expericnced a move from the liberalism of the 1970s to a restoration of :

> "law and order to the streets, prisons and schools, and to 'rediscovery of the moral virtues of individualism and responsibility'".[52]

PART III
JUDICIAL INTERPRETATION OF THE *YOUNG OFFENDERS ACT*

From the sparse data available, it is likely that:

> (1) Society's definition of what its citizens need protection from has widened. Actual offences are not apparently increasing nearly as fast as the rate of increased detection and formal processing thus creating the appearance rather than the reality of increased youth criminality.
>
> (2) More young persons appear to be receiving longer sentences.

The *Young Offenders Act* with its emphasis on protection of the public, accountability, and individual responsibility appears to be resulting in more young persons being committed to state institutions than the *Juvenile Delinquents Act* which incorporated a *parens patriae* philosophy.

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51 *Ibid.*, at 87 and 90.

52 Collison, M.G., "Youth In Custody, Punishing Juveniles In England", in Maclean, Brian D., ed., *The Political Economy of Crime: Readings In Critical Criminology*, (Toronto: Prentice-Hall, 1986), at 248.

While the above trends are not categorically discernible in interpreting recent judicial decisions (because of the sparsity of reported cases) some tendencies are beginning to appear. What follows is an analysis of some of the more important judicial comments grouped into areas of sentencing, transfer applications, and alternative measures.

Alternate Measures

The point at which the police exercise a charging discretion is likely the most critical point in the criminal justice process.

> "What the police do about juvenile crime on the streets and in the station is perhaps more important than what social workers in the courts do"[53]

The statutory references regarding alternative measures bear repeating as they are new and unique in a Canadian criminal statute:

> 4(1) alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings...
>
> 3(d) Where it is not inconsistent with the protection of society taking *no measures or taking measures other than judicial proceedings* under this Act should be considered.
>
> 3(f) ... the rights of young persons include a right of the *least possible interference with freedom* that is consistent with the protection of society, having regard to the needs of young persons and the interests of their family.
>
> 11(1) a young person has the right to retain and instruct counsel without delay at any stage of proceedings against him and *prior to and during* any consideration... [emphasis added]

These provisions are the furthest a Canadian criminal stutute has gone in placing its stamp of approval on alternate measures although a recent amendment to the Criminal Code removed a roadblock to mediation diversion programs for adults.[54]

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53 *Ibid.*, at 253-254.

54 The following clause has been added to s. 129 of the C.C.C., which is compounding an indictable offence:
(2) No offence is committed under subsection (1) where valuable consideration

The drafters of the *Y.O.A.* spoke of its great potential to encourage respect for the law, protect the public, and provide due process rights for young people. *Minimum legislative standards* were put in place to ensure the right to counsel and the availability of counsel as well as a right of the state to incarcerate youth for up to three years. However, in speaking about alternative measures Judge Archambault indicated there would be no minimum standards but a strong dependence on the community to provide the resources for alternative measures programming.

> "The principle that in seeking solutions to juvenile crime, measures other than judicial proceedings should be considered is dependent upon community-base alternatives. Such programs and services have the potential to be adapted to the specific circumstances and requirements of any community be it rural, native or otherwise and, further, provide the scope for the involvement of communities and volunteer organizations. An additional benefit to effective programming, in this area, is that it prevents the overuse of custodial and other types of institutionalized treatment and programming."[55]

The Neilsen Task Force[56] reports a similar attitude noting that prison costs were ten to fifteen times as much as community programming. The Neilson Report indicates it is imperative to incarcerate fewer people and rely more on community programming.

Perhaps alternative measures were never a high priority with the drafters of the *Y.O.A.* even though the concept did embrace a radical non-intervention philosophy when it used the phrase "take no measures" in section 3(1)(d). In simple terms government seems to embrace community programming mostly because it is cheap, not because of any philosophical view that alternative measures or community programming are in the long run better than formal court processing or incarceration.

Persons administering alternative measures programs must be assured that the program would be appropriate "having regard to the needs of the young person and the interests of society".

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is received or obtained or is to be received or obtained under an agreement for compensation or restitution or personal service that is

(a) entered into with the consent of the Attorney General;

(b) made as a part of a program, approved by the Attorney General, to direct persons charged with indictable offences from criminal proceedings.

55 *Supra*, note 33.

56 The [Toronto] Globe and Mail, (3 March 1986) 1.

In practice police charge young offenders and refer to the Crown Prosecutor for a decision whether alternative measures might be appropriate to determine that "there is sufficient evidence to proceed with the prosecution of the offence". However, as a matter of organization in Saskatchewan the Crown decides what will be approved for alternate measures as opposed to the police or a community agency. The Crown consults with the police when the spirit moves them or they require their view supported and confirmed.

Four recent case scenarios in Saskatoon show some of the difficulties with unfettered Crown discretion in this area.

Case 1: Deanna.	Charge -theft under $5 (chocolate bars). Record -prior warning April 1985. Disposition -discharged absolutely.
Case 2: Geoff.	Charge -theft under (a shirt) Record -prior warning December 1985. Disposition -order for ten hours community service.
Case 3: Shaun.	Charge -two thefts under (drunk -taking things out of parked cars). Record -no prior warnings. Disposition -diverted.
Case 4: Nancy.	Charge -theft under (two chapsticks). Record -prior warning but Crown didn't have information on file Disposition -diverted[57]

Why did Geoff get ten hours community service when others were diverted or discharged? Should not the discretion given to Crown counsel be tempered to assure a philosophical commitment to the section 4 alternative? Formal research needs to be undertaken in this area, the research question being whether there is less than even-handed administration of the overwhelming discretionary power granted to the Crown in this situation. In the author's view the decision to use alternate measures, subject to ordinary criminal safeguards for the accused, should be in the hands of some administrative official who is subject to principles of natural justice.

In British Columbia a provincial court judge held that the decision to use alternative measures "precludes a purely administrative procedure". In

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57 Hornung, Sandra, "Case Analysis Presentation", (Clinical Law Class, College of Law, University of Saskatchewan, 1 April 1986).

this B.C. case a fifteen year old was charged with assault and mischief arising out of an incident in a cafe. After arrest he was charged rather than granted alternative measures. Counsel for the young person made an application to re-activate consideration of alternate measures pursuant to s. 4 of the *Y.O.A.* A probation officer in a routine "Report to Crown Counsel" dismissed alternate measures because J.B. was"skipping school and had been in a fight". Crown counsel appeared to rubber-stamp the reccomendation,

> "without the young person or his counsel having any say in the consideration of the decision whether to divert. Neither of them were notified or consulted."[58]

The court held that:

> "It (section 11(1) of the *Y.O.A.*) says that he has the right to consult counsel before and during the consideration of whether to divert... that clearly implies that the young person be given notice of the 'consideration'-- if he does not have notice, how can he get his lawyer there? It also implies that he, the young person, has the right to be present during the consideration-- if he is not, how can he 'instruct' his lawyer? It also implies a right to be heard-- what other point is there in having the young person and the lawyer there?[59]
>
> The right of a young person to be notified, present, represented, and heard at a 'consideration' of whether he should be diverted turns that 'consideration' into a quasi-judicial hearing. The 'person considering' can certainly still be Crown counsel."[60]

The Court of Appeal for Saskatchewan took a much different view of the same issue in *R.* v. *T.W.C.*[61] Counsel for T.W.C. argued that s. 4 of the *Y.O.A.* confers

> "a right, and particularly, the right to be dealt with in cer-

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58 *R.* v. *J.B.*, 20 C.C.C. (3d) 67 at 71.

59 *Ibid.* at 68.

60 *Ibid.* at 69.

61 *T.W.C.* v. *R.*, (7 April 1986), Saskatchewan #2312 and 2318 (C.A.), (Chief Justice Bayda, Cameron and Sherstobitoff JJ.).

> tain instances and given certain prerequisites, by the use of alternative measures... instead of by judicial proceedings."[62]

The appeal went on to hold that:

> "Section 4 of the *Y.O.A.* does not confer a right [upon the young person] but that it confers a power upon the Crown... The Crown may or may not choose to rely upon that power. A power, unlike a right, does not impose a corresponding duty."[63]

The court also rejected a s. 7 Charter argument:

> "that the failure by the Crown to use its power under s. 4 of the Act will result in the appellants being dealt with by judicial proceedings, a process which can hardly be described as not in accordance with the principles of fundamental justice."[64]

The court also found that as the Crown was under a duty and not a power under s. 4, no "liberty interest" was interfered with.

This judgement is unfortunate. It does not comment at all on the carefully reasoned judgment of *R.* v. *J.B.* [65] discussed above. Nor did the court appear to pay any atention to the Supreme Court of Canada's judgment in the *Reference Re s. 94(2)* case.[66]

In the latter case the Supreme Court attempted to give some guidance around the use of s. 7 of the Charter. Two views are evident.

> "Principles of fundamental justice" is not a right in itself but a qualifier of the right not to be deprived of life, liberty and security of the person. Its function is to set out the parameters of the right."[67]

Madam Justice Wilson took a slightly different view.

> "I do not view the latter part of the section (principles of fundamental justice) as a qualification of right to life, liberty

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62 *Ibid.* at 1.

63 *Ibid.* at. 2.

64 *Ibid.* at 3.

65 *Supra,* note 58.

66 *Reference Re Section. 94(2) of Motor Vehicles Act,* 23 C.C.C. (3d) 289 (S.C.C.).

67 *Ibid.* at 300.

> and security of the person in the sense that it limits or modifies that right or defines its parameters.
>
> There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether the impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society."[68]

On either of these analyses it is submitted that the Court of Appeal for Saskatchewan failed to comprehend the purpose of s. 4 of the *Young Offenders Act*, a major tenet of the legislation as enumerated in s. 3(d) of the Declaration of Principle. The following careful statutory scrutiny is necessary to show:

> 1. Alternative measures are a fundamental *first* and *separate* process and a major separate tenet of the *Y.O.A.*
>
> 2. "Liberty" and "security of the person" rights are at stake when alternate measures are being considered.
>
> 3. "Fundamental justice" or elementary "natural justice" must be accorded young persons as a result of clear legislative direction.

The *T.W.C.* case strikes at a fundamental aspect of the legislation. The purpose of s. 4 within the framework of the *Y.O.A.* is to make sure that young persons are formally charged only where society must be protected.

Section 3(1)(a) stresses the "accountability" and "responsibility" of youth for their actions but concedes that not in all instances should youth be held accountable in the same manner or suffer the same consequences as adults. The fact that the legislation clearly outlines that youth should not "suffer the same consequences" is fundamental. A major aspect of this is that youth should not be processed formally through the courts and undergo labelling, etc.[69] There is significant support for the proposition

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68 *Ibid.* at 300.

69 West, W. Gordon, *Young Offenders and the State*, (Butterworths, 1984) 12, 131-32, and 139-40. Alvi, in an unpublished paper,"Youth, Crime and Alternate Measures" (April 1985), notes labelling may be an outdated theory. He gives a

that formal court processing accomplishes little in a positive sense for an offender not accused of serious crimes. Alternative measures are a "consequence" which is less formal, and manifestly a more appropriate solution than the court process.

Section 3(1)(c) acknowledges that young persons "because of their state of dependence and level of development and maturity,... have special needs and require *guidance* and *assistance*." (emphasis added). Alternate measures include mediation programs which have educational components, which work with victims, and which provide individual counseling. These programs are more attentive to the needs of young persons to receive *guidance* and *assistance* than are docket courts, sentence hearings, or passing contact with probation officers.[70]

Section 3(d) is clear and unequivocal:

> "Where it is not inconsistent with the protection of society, *taking no measures* or *taking measures other than judicial proceedings* under this Act should be considered for dealing with young persons who have committed offences;"(emphasis added)

Parliament has commanded that no measures be taken, or that measures other than judicial proceedings be taken. While the *Y.O.A. is* more clearly criminal legislation than the *J.D.A.*[71] it is also clear Parliament intended courts only to be used as a last resort for youth. Parliament supported this contention by saying in s. 3(f) that young persons had a right to the "least possible interference with freedom that is consistent with the protection of society".

This supports the view which is widely held that most young people offend only once or twice as a part of growing up. Society should be more tolerant of the adolescent stage of development and the tension when youth attempt to move away from parental domination, rules, and orders.

"left-realism" approach which "locates the problem or crime as it should be–as a phenomena which blatantly demonstrates the anti-social nature of our unequitable society (p. 11). Mr. Alvi is associated with the Department of Sociology, University of Saskatchewan. See also, Schur, E., *Radical Non-Intervention* (Prentice-Hall, 1973).

70 Alvi, *supra*, note 69, at 26, where the author argues diversion reduces demarginalization of youth, thereby preventing crime.

71 *A. G. of B.C.* v. *Smith*, (1969) 1 C.C.C. 244 (S.C.C.).

Section 3(4) declares that young persons should have

> "rights and freedoms in their own right and in *particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them,* and young persons should have special guarantees of their rights and freedoms."(emphasis added)

Section 3(2) notes that the *Y.O.A.* "shall be liberally construed to the end that young persons will be dealt with in accordance with the principles" set out in the Declaration of Principle.

Section 4(1) states "alternative measures may be used to deal with young persons alleged to have committed an offence instead of judicial proceedings". "May" indicates discretion. Certainly Parliament could not hamstring officials by delineating all the kinds of cases and fact situations where alternate measures should or should not be used. It left this decision to the careful judgment of police, prosecutors and community agencies trusting that administrative fairness would be used and that these agencies would carefully consider the direction in s. 3 that wherever possible alternate measures should be used.

Section 4(1)(b) requires that "the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society". This subsection requires the police, the prosecutor or the community agency, to be satisfied that alternative measures would benefit the young person. This entails a decision whether the young person would benefit from meeting with the victim, from counseling, from the educational programs, or the work assignments which would be the result of the alternative measures program of diversion or mediation.

Section 4 goes on to make sure young persons accept responsibility for the alleged act, that the young person has before consenting to the process clear knowledge of the right to instruct counsel, and has been given a reasonable opportunity and assistance in obtaining counsel.

The role of the prosecutor is specific. She must be of the opinion that there is "sufficient evidence to proceed with the prosecution of the offence".[72]

Section 11(1) further declares "a young person has the right to retain and instruct counsel without delay at any stage of proceedings against him

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72 *Y.O.A.*, s. 4(1)(f).

and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against him under this Act, to use alternative measures to deal with him".(emphasis added)

These numerous provisions are aimed at *assuring young persons a voice in the decisions that are made about them.* They affirm the widely held view that court proceedings should be avoided wherever possible. The provisions ensure that young persons should have an advocate at hand to assist in assuring that the rule of law is administered correctly.

Alternate measures *are a first and separate stage in a legal process legislatively unique to the administration of youth justice* which includes such other extra special processes as additional rights to counsel at every stage, additional bail provisions, separate custody, different sentencing rules, a special post sentence review process and many more. The steps are akin to a ladder approach with the justice system escalating the level of formal involvement *only if society clearly needs protection.*

To suggest that the first and critical stage, the decision to grant or not to grant alternate measures, does not affect "the security of the person" or the possible "liberty" of the young person does not reflect an understanding of the whole scheme of juvenile justice outlined in the Young Offenders Act.

Alternate measures are *intended for guilty young pesons who freely admit that guilt.*[73] They do not want the formal "fundamental justice" accorded to them in an adversarial trial or sentencing hearing as wrongly inferred by the Saskatchewan Court of Appeal in *Re T.W.C.* These young persons are in accord with Parliament's choice of options that they be dealt with via mediation or diversion. They also know that they will *not be given any criminal record* as a result of the alternative measures process.[74]

The issue of the criminal record is by no means the whole or major rationale for alternative measures but it is important. If a young person (who admits his guilt) can avoid a criminal record as a result of alternative measures as opposed to formal court processing, that decision affects the young person's "security of the person". Professional accreditation, bonding, or the possibility of even being considered for an interview for a job in a very competitive market place may be fundamentally affected by a criminal record. If a young person may answer definitively and unequi-

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73 *Y.O.A.*, s. 4(1)(e) and 4(2)(a) and (b).

74 *Y.O.A.*, s. 4.

vocally "NO" to the question "Do you have a criminal record?", she will obviously be much more secure in her person to pursue such goals.

Then why not provide elementary justice to the young person? Why not allow her to make representations, to be present and to be represented by counsel before those officials, be it the prosecutor, the youth detail officer or community agency, who might be making the decision to use alternate measures? The discretion in s. 4 is not like other discretions in the Criminal Code such as the discretion to proceed by summary conviction or indictment. The Code does not give direction in anything like a Declaration of Principle to guide the prosecutor's discretion. The *Y.O.A.* acknowledges in s. 3 a totally different approach to the administration of criminal justice for young people, one that has a fundamental tenet "take no measures" or use alternate measures.

Judicial Attitudes Evident in Sentencing Trends

As noted before there appears to be a leaning to longer sentences under the *Y.O.A.* at the trial level. Appeal court rulings have alleviated this trend to an extent.

In *R.* v. *R.I.* and five other appeals,[75] the Ontario Court of Appeal reduced the sentences of five youth who were given two years custody each for break and enter and other offences. The Court of Appeal reduced the sentences to a range of between 6 months and 18 months. The court resisted giving one of the accused the maximum sentence possible under the *Y.O.A.* as the trial judge had done.

> "The fact that this young offender may require some long term form of social or institutionalized care or guidance if there is to be any real prospect for his rehabilitation does not mean that the vehicle of the Young Offenders Act can be employed for that purpose.... The punishment should fit the crime but it should not be stretched so that it exceeds, even where that might be thought desirable by some in the interests of providing some extra protection of the public"[76]

However, the court also noted the need for flexibility in applying the "relativity" principle:

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75 (1985),17 C.C.C. (3d) 523.

76 *Ibid.* at 533.

> "where the task of arriving at the 'right' disposition may be a considerably more difficult and a complex one, given the special needs of the young person and the kind of guidance and assistance they may require."[77]

In further case, *R.* v. *J.F.*[78] the same Ontario Court of Appeal reduced a sentence of 8 months secure custody to time served in the case of a fifteen year old. The Court noted that the trial judge said:

> "'I think the whole purpose of the *Young Offenders Act* is to finally give some degree of paramountcy to the protection of society and the rights of the people that make it up; and they come first.'

He went on to say that there was a 'glaring need' for a general deterrent to deter others from this sort of thing in the community where the offences were committed'."[79]

The Court of Appeal disagreed:

> "While undoubtedly the protection of society is a central principle of the Act (see, e.g., ss. 3(1)(b), (d) and (f), 16(1), 24(5), and 29(1)). It is one that has to be reconciled with other considerations, such as the needs of the young persons and, in any event, it is not a principle which must inevitably be reflected in a severe disposition. In many cases, unless the degree of seriousness of the offence and the circumstances in which it was committed militate otherwise, it is best given effect to by a disposition which gives emphasis to the factors of individual deterrents and rehabilitation. We do not agree that it puts the matter correctly to say the whole purpose of the Act is to give a degree of paramountcy to the protection of society—with the implication that this is to overbear the needs and interests of the young person and must result in a severe disposition."[80]

The attitude of the Saskatchewan Court of Appeal[81] by contrast is comparatively quite different.

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77 *Ibid.* at 530.

78 22 C.C.C. (3d) 555.

79 *Ibid.* at 557.

80 *Ibid.* at 558.

81 *R.* v. *M.J.C.* 22 C.C.C. (3d) 95.

A seventeen year old took part in an armed robbery of a taxi cab driver. The young offender was accompanied by a 20 year old man. The young offender caused minor wounds with a knife to the taxi cab driver when the taxi cab driver attempted to escape. The young offender had a record indicating alcohol abuse and unstable emotional conditions.

The trial judge placed the young offender in secure custody for four months. The Court of Appeal raised the sentence to one year in closed custody.

The Court of Appeal stated:

> "In cases where there is robbery with violence, particularly where the victim is a taxi driver and where a weapon is involved, this court has made it clear that offenders--regardless of age-- can expect such conduct to be visited with a substantial custodial sentence.
>
> Furthermore, we think that a longer period of secure custody is warranted in order to ensure supervised treatment and training for this offender--with the expressed hope that he will respond and come to grips with his personal problems."[82]

In contrast the Alberta Court of Appeal in *R. v. G.K.*[83] considered a case where an offender three months short of his sixteenth birthday committed armed robbery of a convenience store. A sentence of 2 years probation plus 100 hours of community service was granted by the trial level and the Crown appealed. The court held:

> "A custodial sentence is not the disposition of first choice for a young offender even in cases where it would appear to be the proper sentence for an adult--deterrence to others does not, in my view, have any place in sentencing of young offenders--it is not in section 3 and 24(5) prohibits commital unless necessary for the protection of society."[84]

There is obviously some judicial disharmony at the Court of Appeal levels regarding the sentencing principles enumerated in the *Y.O.A.*

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82 *Ibid.* at 98.

83 21 C.C.C. (3d) 558.

84 *Ibid.* at 500.

Judicial Attitudes in Transfer Applications

Courts in British Columbia and Manitoba tend to agree on a more conservative interpretation of section 16 while the courts in Quebec and Ontario take a more liberal view. In *R.* v. *W.*[85] the British Columbia Supreme Court approved a transfer of a 16 year old to adult court who was charged with murder. The Court compared section 9 of the *J.D.A.* and s. 16 of the *Y.O.A.* and concluded:

> "The interests of society are now given at least equal weight with that of the child, and in fact other things being equal the welfare of society is stated to be paramount."[86]

In *R.* v. *G.S.K.*[87] the Manitoba Court of Appeal upheld a transfer of a 14 year old boy charged with the murder of his father's girl-friend. A majority of the Court of Appeal agreed with the less optimistic view of the psychiatric evidence which was taken by the trial judge and concluded that the trial judge properly exercised discretion in deciding that "I am not satisfied that the juvenile will be able to be treated in the 1 to 3 year period put forth by Dr. Ellis".[88] The minority opinion, however, stated:

> "It may be that rehabilitation cannot be completed within 3 years. Dr. Ellis, himself, acknowledged the possibility that longer treatment might be required and there can be no absolute guarantees of success no matter what the treatment program or for what duration. There is, however, some hope for the accused. If counseling is required beyond the time of his custody under the Young Offenders Act, it may well be that the accused will continue that program on a voluntary basis after incarceration has ended.....
>
> Both experts including the Crown psychiatrist agreed 'that a lengthy sentence in an adult prison would be calamitous as to the accused'."[89]

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85 22 C.C.C. (3d) 269 (B.C.S.C.).

86 *Ibid.* at 500.

87 22 C.C.C. (3d) 99.

88 *Ibid.* at 111.

89 *Ibid.* at 105.

Mr. Justice Husband would have set aside the trial judge's transfer order:

> "Stefanson, Prov. Ct. J. chose the alternative which was certain to be neither good for the accused nor in the interests of the community. While the other alternative may have its uncertainties, there can be no doubt that it is a better alternative."[90]

In *R. v. F.*,[91] Mr. Justice Bowlby of the Ontario High Court set aside a transfer order finding that the trial court had failed to consider the issue of the availability of adult treatment resources. However, in the course of his judgment he did find that, "it is clear that one of the predominant principles at work in s. 16 is the protection of society."[92] He went on to quote from Bala and Lillies:

> "In limited circumstances, it is felt that the broader interests of criminal as distinct from juvenile justice must take precedence, that the interests of society must be the governing factor. This procedure provides a safety valve for dealing with difficult cases, particularly where public protection is at issue".[93]

The Quebec Court of Appeal, on the other hand, in *R. v. N.B.*[94] considered a difficult case where a 17 year old girl with absolutely no criminal background deliberately stabbed a friend. The court held that the mere fact that the accused was nearly an adult or that the charge was first degree murder were not sufficient reasons to transfer.

> "It is true that at the level of principle, parliament has moved slightly to the right. Young persons must now bear responsibility for their contraventions. However, I do not believe that the replacement of s. 9 of the *J.D.A.* by s. 16(1) of the Act is significant to the point that it can be said that the new Act favors transfers more than the former Act did. To decide whether to transfer a young person on the basis of interests of society having regard to the needs of the young person is

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90 *Ibid.* at 106.

91 20 C.C.C. 334 (Ont. H.C.J.).

92 *Ibid.* at 356.

93 *Ibid.* at 356.

94 21 C.C.C. (3d) 374 (Que. C.A.).

> not very different from deciding on the basis of the good of the youth and the interests of the community."[95]

Again there appears to be a real divergence of opinion by courts of appeal over significant issues of principle and interpretation of the transfer provisions of the *Young Offenders Act*.

PART IV

GLOOMY TRENDS - ARE THERE ANY SOLUTIONS?

The above rather pessimistic collection of statistics and case analysis of court attitudes leaves the author questioning why we are where we are at this point, where we should be and how might we get there. The author is not qualified to make sweeping suggestions for major change but there is a narrow area of change which cries out for consideration.

It begins, perhaps, with the basic question of why we jettisoned the parens patriae model for the "responsibility" and "accountability" model? The author's off the cuff reaction is "god only knows?". There is not a lot of hard evidence that the parens patriae model of the *Juvenile Delinquents Act* was working intolerable hardship on youth. With the coming of the *Charter of Rights and Freedoms* many of the due process concerns would have been met by the legal rights provisions and section 7 of the Charter could have been used to clear up some of the administrative accusations of paternalism around social work practice.

However, when dealing with a subject like juvenile crime we must recognize that society seems to need to "stumble forward".[96] We must do something to stop young people from committing crimes, we say. In spite of Judge Archambeault's optimism noted earlier it is submitted that the individualistic focus of the *Y.O.A.* on responsibility and accountability is a smoke screen to hide society's unwillingness to redistribute resources and to admit major responsibility for youth. Haveman argues that the social welfare approach is preferable to the "free will model". A free will model of the young person accountable as a mini-adult (i.e., the criminal law perspective) is a step back to Victorian criminology according to Haveman. He argues further that the rejection of the social welfare approach is akin to "blaming the victim".[97]

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95 *Ibid.* at 269.

96 Hackler, James C., *The Great Stumble Forward* (Methuen, 1978).

97 Haveman, Paul. "Is Juvenile Delinquency Rooted in the Family or a Con-

The reality is that the *Y.O.A.* is here to stay and perhaps in an even more individualistic or regressive form based on the amendments introduced into the House on April 30, 1986.

However, the author wishes to propose a more concrete and practical change for future administration of the *Y.O.A.* which may offset some of the concerns noted above. The author submits that major source for reform lies in the interpretation of s. 3(d) of the Declaration of Principle. To quote 3(d) again: "where it is not inconsistent with the protection of society, *taking no measures or taking measures other than judicial proceedings* under this Act should be considered for dealing with young persons who have committed offences". (emphasis added).

It will not be urged that alternate measures or diversion programs are able to solve the problems of overcrowding in the courts and custodial institutions. It is also recognized that alternate measures, diversion programs and mediation programs can be a part of the widening of the net of the justice system.[98] This happens when police exercise a discretion to charge, cynically believing the system administrators above the police, including the prosecutor, will take a "soft" approach and divert or mediate the situation. Present unofficial information from the Saskatoon John Howard Society office indicates that many people who were not formally charged before are now being charged and diverted.[99]

It is not difficult to conclude why more people are being charged in Saskatoon. After the implementation of the *Y.O.A.*, city police administration as a cost-cutting device cut back the youth detail. The charging discretion was primarily placed with regular duty officers.[100]

The author challenges police administrators and justice administrators as well as courts to focus on s. 3(d) and the words "*taking no measures.*" Historically, we all know that all offences reported or investigated by police do not result in charges. Dr. Doob testifying in *Re Southam Inc.* v. *R.* [101] was of the opinion that

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struct of the Criminal Law" (paper presentd at 3rd Annual Conference on Juvenile Justice, Calgary, Alberta, 8, 9, 10, Oct. 1980).

98 Alvi, *supra*, note 62 at 25.

99 Interviews with Carol Riekman, Anne Marie Dewhurst, and Irene Hannah, John Howard Society, Saskatoon.

100 *Supra*, note 35.

101 (1984), 16 C.C.C. (3d) 262.

> "publishing the name of young people brought before the court would be capricious since almost every juvenile engages in some form of conduct technically criminal, but only a small percentage of those engaged in criminal behaviour are apprehended, *and not all of those are charged.* It is his evidence that whether a young offender is charged depends upon the extent to which the involved police exercise discretion, reasonable local policies and law enforcement practices and the availability of authorized programs for alternate measures for non-judicial disposition."[102]

Youth court judges, Saskatoon city police and the Department of Social Services in Saskatoon agree that during the days of the *J.D.A.* the majority of offenders were taken home or reported to the Department of Social Services as children in need of protection.[103] As noted earlier the juvenile docket for years managed only 10 to 12 people a week. This was because formal charging mechanisms were saved for the most persistent and serious cases and almost never used for first offenders.

England and in particular the Metropolitan Police Force of London examined the use of cautioning very thoroughly beginning in the mid-50s. Based on a study that those first offenders (who were taken to court for their first offence) re-offended more readily than those who were dealt with in other ways, the Metropolitan Police introduced a formal cautioning policy. This preceded and was in preparation for the *Children and Young Persons Act* of 1969 which removed almost all of those under 14 from the criminal justice system.

The cautioning scheme directed

> "that only persons alleged to have committed serious offences were charged, the rest were cautioned unless:
>
> (1) young persons did not admit responsibility;
>
> (2) parents would not agree to consent;
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> (3) no *prima facie* case was made out against the young offender;
>
> (4) the victim did not consent to the cautioning scheme."

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102 *Ibid.* at 269.

103 *Supra,* note 33.

There existed a complicated system of checks and balances put into place to direct the constables and to assure that the cautioning scheme was not manipulated.[104] Saskatoon had an equivalent cautioning scheme with the exception that the formal checks and balances were not so carefully built into the scheme. However, with the funding cuts to the youth detail after the implementation of the *Y.O.A.*, the scheme all but vanished.[105]

Cautioning is just one example of what s. 3(d) may be referring to when it suggests it is appropriate to "*take no measures* ". Further support for such a policy may be found in s. 3(f) of the Statement of Principle. This section indicates a "right to the least interference with freedom that is consistent with the protection of society". Taking no measures or what some have called radical non-intervention is certainly consistent with "least interference" with personal freedom.

The policy of non-intervention would recognize the youth or adolescent is in a natural state of rebellion against parents and adults. It is submitted Parliament recognized this state of adolescence and was urging courts and policy-makers to loosen the reins of what is objectionable conduct by *statutorially emphasizing a traditional prerogative* not to charge for many minor crimes.

What of the words "protection of society "? It is suggested that we in the '80s have come to take a far too narrow and individualistic approach to what it is society must be protected from. If we view criminal activity by youth along a spectrum there are rough demarcations as set out in Appendix 1 attached. It is forecastable that the *Y.O.A.* has and will be moving more offenders on to the spectrum as a result of the widening of the net of overcharging by police, even though the jurisdiction of the his narrow because of the exclusion of status and provincial offences.

Other offences have been moved along the spectrum and labelled more serious and punitive by the actions of police, the Crown and some of the courts. This appears to be with the support of a new right wing political and societal view which is in vogue. Some authors have referred to this new right wing movement as Thatcherism and Reaganism. For a time in Saskatchewan, one might have used the term "Lanism" as Mr. Gary Lane, the former Minister of Justice was an outspoken advocate for the need for reform to the *Young Offenders Act* by publishing the names of ac-

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104 Oliver, Ian, *The Metropolitan Police, Approach to the Prosecution of Juvenile Offenders* (Peel Press) 79.

105 *Supra*, note 35.

cused offenders and by assuring more control of young people so that society might be protected.[106]

At the more serious end of the charge spectrum, more young people are being bumped off the spectrum into adult court by virtue of new interpretations placed on section 16.

The system must begin to recognize that in criminalizing more young people and in escalating the number and length of sentences, and by increasing the number of those raised to adult court, we are not in the long term "protecting the public". The escalation of society's definition of what is criminal is not only costly in dollar terms, it is counter-productive in a time when the gap between young peoples's opportunities and society's expectations are widening. Through extensive advertising appeal to youth, society is nurturing a capitalistic individualism. An example is the very slick advertising campaigns for clothes, liquor, etc. At the same time more young people cannot find meaningful employment.

The legal community has narrowly focussed its expertise on the technical due process issues and is missing an important opportunity to emphasize the de-escalation potential of the criminal justice system by making more effort to emphasize "taking no measures" or taking alternate measures.

These comments in no way should be taken to be critical of the movement toward due process in the *Young Offenders Act*. Both the *J.D.A.* and our present *Family Services Act* [107] have been seriously deficient in that area. However, it is argued that it is not necessary to throw out the "welfare" Parens Patriae approach completedly to accommodate due process. The new proposed *Child and Family Services Act* [108] in Saskatchewan is an example of tempering a previously paternalistic system with at least minimum due process requirements.

We need not move back to the positivist model of significant paternalistic intervention. Nor should the focus be on the "free will" responsibility model. We must consider what society wants to see as criminal and what should be dealt with by informal measures such as police warning, cau-

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106 *Star Phoenix* (9 June 1986), noting previous press statements by M. Lane, and Collison, M.G., *supra*, note 52 at 248, and Hopley, S., *supra*, note 36 at 1, regarding Thatcherism and Reaganism.

107 *The Family Services Act*, S.S., c. F-7.

108 The Child and Family Services Act, Legislative Proposals, January, 1985, Saskatchewan Social Services.

tioning or non-intervention. There should be a clear recognition that only the most serious crimes should be formally dealt with. Examples of these crimes would involve bodily injury or violence. In other matters family services should be available at the macro level by increasing social services support in both monetary and other terms to low income families, and to employ and educate youth.[109] At the micro level we must provide the myriad of counseling, psychiatric and psychological skills which are potentially available to young people provided these service institutions are appropriately supported.

Mid-range property offences involving loss to the public could be dealt with by the civil courts using state compensation schemes similar to the criminal injuries compensation plans. Offenders should be given an opportunity to satisfy civil damage judgments by working for the victim or through state supported non-profit or government agencies to repay the wrongful damage. The state's enforcement mechanism could be akin to the new reciprocal enforcement procedures which exist in Saskatchewan and other provinces.

In these ventures the state may come to appreciate the importance in the social contract to provide young persons with meaningful employment opportunities. Youth must be given the opportunity to see in their work an intrinsic social value so that young people may come to have a stake in society rather than being rejected by it.

Conclusion

The *Young Offenders Act* appears to be becoming a mini-criminal[110] system. It is submitted it was not intended to be so. If it was so intended then radical change is necessary in the best interests of youth.

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109 Alvi, *supra*, note 69 at 27.

110 This was predicted by Havemann, *supra*, note 97 at 1.

APPENDIX ONE
FORMAL CHARGING SPECTRUM

J.D.A.

50% Warned Cautioned etc[1]	Repeat Minor Offenders, Break & Enter, etc.	Serious Property or Violence, Robbery, etc.	Murder, Manslaughter Rape	-Transfer to Adult Court -No Hope of Rehabilitation (s.9)
	Probation	Only Occasional Custodial Implications Plans	Custodial Sentences Based On Rehabilitation	

Y.O.A.

Greatly Reduced Warning Or Cautioning In Favor of More Formal Charging[2]	First Time Minor Property Mischief, Shoplifting	Break & Enter, Theft Over, Escape Lawful Custody, Possession	Serious Property Damage, Theft, Mid-Range Assault Robbery, etc.	-Transfered to Adult Court -Most Murder, Manslaughter -Some Rape, Robbery, etc. (s.16)
	Diversion, Mediation, Probation, Community Service	Custodial Sentences	Heavy Custodial Sentence Up To Maximum In Some Cases	

1 Empey, 1978 cited by West 1984: 65, p. 212. One study of police in Frontenac indicated some police used to warn 3/4 of juveniles. Note also, Hogarth, Toronto, cited West, 1985: 65.

2 Impressionistic and factual data supplied unofficially from Department of Social Services, Saskatoon, Yorkton, The John Howard Society Mediation Diversion Program; See also, Alvi, *Youth, Crime & Alternative Measures*, (April 1986)[unpublished], a study of a sample of 180 youths, pp. 17-21.