A LESSER OF TWO EVILS?:

A CASE STUDY OF THE APPLICATION OF ALTERNATIVE MEASURES WITHIN A COMMUNITY JUSTICE COMMITTEE FRAMEWORK

BY

TRENT E. KANE

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DEDICATION

This Thesis is dedicated to the following persons

Monsignor R. M. Hickey, Major, MC (19?-1987)

For providing me a model in my youth of a kind, good and decent person that positively impacted those around him in a world that contains so much evil.

Father Vincent J. Jensen, s.j. (1916-1988)

For being my guide and my mentor during my undergraduate days at Saint Paul's College at the University of Manitoba. It is because of him that I even made it to graduate school. His last official act, hours before his death, was to submit my history grade so I could convocate with my B.A.

Herbert E. Kane (1938-1992) & Anne C. Kane

For supporting my academic endeavours especially when they had no idea what it was that I was doing.

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Chapter I

INTRODUCTION

From October 1986 until May 1992, I was a member of a community committee called the South Winnipeg Alternatives Committee (formerly the Fort Youth Justice Steering Committee). I served as Vice Chair of the Steering Committee from October 1986 until March 1987, Constitutional Chair from April 1987 to February 1988, Vice Chair from April 1988 to September 1989, and Chair from September 1989 to January 1992. I was heavily involved in the drawing up of the Constitution that included the aims and objectives of the group. As a member of the Committee I strove to have our deliberations, as a committee, adhere to the ideals that we set out for ourselves. I was very much a player in matters transpiring at the Committee.

In my time with the Committee I began to develop intuitive questions about the process that we were engaged in as well as the youth that we were dealing with. As time went on I refined my thoughts on these intuitive questions to the point that I decided to do my thesis on the Committee as part of the youth justice system in Manitoba. I had a sense that there were some things that did not seem to fit properly either with the operation of the Committee as well as how such Committees are situated within the framework of federal legislation. It appeared to me that the stated intent of the legislation and what was actually occurring were at odds with each other. Up to the point of starting this thesis there had been little work done on community justice committees under the .us Young Offenders Act

(hereinafter refereed to as the YOA) particularly in Manitoba. A Professor from the Faculty of Social Work at the University of Manitoba and a graduate student of his evaluated a federal / provincial project in Manitoba that was to set up these Community Justice Committees. Other than the that evaluation, and subsequent M.S.W. thesis, nothing else has been written about these Committees from an academic point of view.

From an academic perspective, it is my intention to present a case study of one such Committee that I was closely involved with, to raise questions for discussion and thought on how we deal with young persons who come into conflict with the law. It was not my intention to produce a definitive work that would show inalterable answers to the issues raised. Rather it is an attempt to question as well as suggest some issues that need to be examined more closely. From a personal perspective I also wanted to attempt to suggest some changes in the system that would bring the proclaimed intent of the legislation closer to the reality of implementation. In other words, I wanted to reconcile the theory with the practice in a way that would benefit all stakeholders, the state, the victim, the youth and the community.

In 1982 an new era in juvenile justice came to Canada with the passage and proclamation of the Young Offenders Act (hereinafter referred to as the YOA.).

The YOA was brought in to replace the Juvenile Delinquents Act (hereinafter referred to as the JDA) and was heralded to be the instrument of correcting some of the difficulties experienced under the previous legislation. Central to the movement away from the JDA was a fundamental re-orientation

of the purpose of dealing with young persons who become involved in the criminal justice system. These new philosophical principles in the YOA were to provide a solid foundation, from which the new legislation would move to deal, in a markedly different way, with youth offenders. These philosophies have been enacted as Section 3 of the YOA. At first glance these provisions may be appealing to anyone who was uncomfortable with the manner in which the juvenile justice system operated under the JDA.

The JDA had a number of different principles that provided it underpinnings. These principles were drawn up in an era where societal values and the approach of conflict resolution were different from today. Of great importance for the purposes of this thesis the JDA had as one of its principle tenets the doctrine of parens patriae. This Latin term literally means the "divine right of the parent".[1]

Parens patriae is a key concept in the JDA and one which caused a good deal of concern over the years because while the definition of parens patriae appears to be relatively straight forward the practical application of concept caused a certain degree of confusion as can be illustrated in Re: Gault:

> These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. the Latin phrase proved to a great help to those who sought to rationalise the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its

[1] (parent is meant as male parent, patriarchy is implicit through all discussion on parents in this paper). The term refers to the position of power (parent) versus the position of powerlessness (youth). The parent rules with an authority and a discretionary range that is entrenched, and generally unquestioned, within our society. Traditionally the parent disciplines the youth and said discipline is not open to outside review and criticism. The relative state of dependency that the youth is in (relative to the parent) is often cited as justification of such authority.

> historical credentials are of dubious relevance. The phrase was taken from the chancery practice, where, however, it was used to describe the power of the state to act in loco parentis[2] for the purposes of protecting the property interests and the person of the child. But there is no trace of the doctrine in criminal jurisprudence.[3]

Indeed, some say that the:

> doctrine of parens patriae is now believed to be unacceptable to exclusively define this relationship. It is assumed that the role of the state be defined in terms of the rights and responsibilities of both the state and the individual, rather than simply in terms of the state as surrogate parent.[4]

As Judge Archambault has noted, the time had come to reform the juvenile justice system and remove the doctrine of parens patriae from its position of pervasiveness throughout the system by the provisions contained in the JDA in order for the state to deal with young persons in conflict with the law in a manner that placed the youth in a position of other than total subservience.

It is my contention, however, that while the YOA removes the explicit reference to the doctrine of parens patriae from the juvenile court, some of the provisions in the YOA are written in such a manner as to create the possibility for the replication of the parens patriae doctrine by

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[2] "Loco parentis" exists when a person undertakes care and control of another in absence of such supervision by the latter natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption that is permanent. Griego v. Hogan, 71 N.M. 280, 377 P.2d 953, 955.

as cited in Nolan, Joseph R.; Nolan-Haley, Jacqueline M. Black's Law Dictionary (Sixth Edition). (St. Paul: West Publishing Company, 1990), page 787.

[3] In Re: Gault, 387 U.S. 1, 16 (1966) per Fortas J. as cited by Wilson, Lawrence Charles. Juvenile Justice in Canada: The End of an Experiment. (L.L.M. Thesis: University of Manitoba, 1976), page 8.

[4] Archambault, Judge Omer. "Young Offenders Act: Philosophy and Principles" in Silverman, Robert A.; Teevan, James J. Jr.; Crime in Canadian Society (Third Edition) (Toronto: Butterworths, 1986.) page 47.

legislative design through the utilization of a new diversion framework known in the Act as "Alternative Measures". This thesis will test that hypothesis (hereinafter referred to as the "hypothesis one") and a second hypothesis (hereinafter referred to as the "hypothesis two") relating to the application of the process of Alternative Measures by a community justice committee in he southern portion of Winnipeg. This first chapter will serve to outline the remainder of the thesis.

Chapter two sets out to examine, in detail, the provisions of the YOA in comparison to the relevant provisions under the JDA in an attempt to ascertain what similarities, and differences, exist between the two pieces of legislation. Particular attention will be focused on whether or not the provisions of the YOA allows for the replication of the doctrine of parens patriae which was pervasive under the JDA and was understood to have been removed under the YOA.

Section 3 of the YOA, the Declaration of Principle, are dissected to ascertain how it's provisions, which act as philosophical foundations, compare with similar underpinnings found in the JDA. Sections 38, 3(2), 17, and 37 of the JDA are used to compare the provisions in Section 3 of the YOA to discover what reforms the YOA appeared to have affected and those that have not.

The discussion in chapter two will then move to Section 4 (Alternative Measures) of the YOA. Section four will be examined clause by clause in an attempt to determine the difference and/or similarities between these provisions and any which existed under the JDA. A brief glimpse at the constitutional division of powers between the federal and provincial

governments is undertaken to better situate some of the considerations that may have gone into the designing of the provisions and some of the difficulties with its implementation.

Discussion focuses on some of the specific language used in the legislation that relates to the concepts of "guilt" and "non guilt" as well as the utilization of a new term ("responsibility") as a concept to replace the concept of guilt in order to continue parens patriae. Note is made of how the provisions contained in section 4 impact on the role of the components of the traditional legal system and the implications that said impact has on the protection of legal due process rights afforded the youth under the YOA.

Close study is made of the eligibility provisions for referral to Alternatives Measures under section 4 with comparisons being made to the some of the current practices and the difficulties that the current eligibility provisions present for the protection of due process rights. Comments of the Law Reform Commission are noted as part of the study.

Chapter two then turns to the topic of section 69 of the YOA. Section 69 formally establishes Youth Justice Committees, very broadly set out the appointment of members, as well as their role and status under the YOA. Section 69 is contrasted with section 27 of the JDA again to ascertain similarity or difference. Discussion turns to the direction in which section 69 appears to direct the administration of juvenile justice in Canada and how this relates to other trends that are occurring elsewhere in North America and the United Kingdom. Issues of accountability and consistency among jurisdictions are touched on at the conclusion of the

chapter. A conclusion on the hypothesis one is provided in the conclusion of chapter two. This conclusion will serve as first step in the chain of legislative potential to the current policy and practice relating to the continuation of parens patriae.

Chapter three moves the focus of the thesis from the wording and design of the legislation, with potential implications, to an inquiry regarding the implementation of section 4 and section 69 of the YOA in Manitoba. Background is provided on the vehicle that was utilized to facilitate the formal introduction of Alternative Measures to the Province of Manitoba. The mandate of the jointly funded Working Together Project is explored with a view towards attempting to establish if the groundwork has been laid for the operationalization of the potentiality for the continuation of the doctrine of parens patriae under the YOA. Thus the attention will be focused on the legislative potential for the replication of parens patriae through the provisions relating to Alternative Measures programming, and the beginning of transforming that potential into the concrete action.

Section four is compared with sections 27(2), 27(3), 27(4) and 28(1) of the JDA to determine the level of similarity, or dissimilarity between the aforementioned legislative components in order to ascertain if parens patriae replication is possible under these provisions of the YOA. This section of Chapter three culminates with a short discussion on the difficulties a volunteer committee may encounter as a result of the limitations of the YOA on the availability of financial resources.

The chapter continues with a section on the South Winnipeg Alternatives Committee. To explain the procedures the committees utilize to deal with a

young person, a scenario is constructed that is used not only to explicate the procedures that the Committees applies, but also to illustrate the process that occurs when a young person comes into contact with the criminal justice system. Mention is made of every relevant act and step in the process that follows a young person from the time of arrest to the successful completion of Alternative Measures and the dismissal of the charges under section 4 of the YOA.

Chapter IV continues with discussion hypothesis two of the thesis. Hypothesis two postulates that the utilization of community justice committees, constituted as per section 69 of the YOA, is best able to deal with a certain profile of youth, that is to say that community justice committee is only able to meaningful deal with certain types of criminogenic[5] factors. Following from this supposition, a hypothesis was constructed which sets out there are four different profiles of youth that were referred to the South Winnipeg Alternatives Committee. One of these profiles is referred to as a design profile and the remaining three are designated as non-design profiles. The design profile consists of those youths that the Committee is able to deal with in a meaningful manner with the resources and skills that they have at their disposal. The three non design profiles are comprised of youth who have criminogenic factors that are beyond the ability of the Committee to deal with or otherwise inappropriate referrals to the Committee keeping in mind the level of aggregate skills available to deal with the youth.

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[5] Criminogenic factors are those things that are connected to the commission of the offence. If an offender drinks every time they are ready to commit an offence then the use of alcohol would be a factor involved in the genesis of the offence or criminogenic factor.

Upon further examination of the data available it was determined that the level of qualitative data present was insufficient to adjacently assign each youth to one of the four categories under the original hypothesis. As a result hypothesis two was revised with the number of profiles being reduced from four to two. Four variables were used to assign each youth as either a design or non design case. The four screening variables are:

1. Category of Offence (summary conviction, or indictable offence),
2. number of charges laid against the youth
3. estimated amount of loss, damage or un-recovered goods; and,
4. whether or not the youth became re-involved with the criminal justice system while they were dealing with the Committee for Alternative Measures.

Each profile is fully outlined for;

1. the reason for variable selection,
2. the reason for the selection of the variable value to one profile or the other; and
3. some of the shortcomings with the selection of both the variable and the specific variable value for designation of cases as design and non design.

The chapter continues with a look at what profiles appear after the cases have been designated as design or non design. The design and non design profiles for each variable are scrutinized and contrasted with the profile of the overall sample population using the variables of gender and age. A summation section for the trends across each of the screening variables is presented at the end of the chapter.

Chapter V tackles the issue of reform related to the juvenile justice system in Canada. Of note is the argument that we need to change the wording in the YOA to reflect what is occurring in the implementation in the Act regarding the confusion about due process rights when a youth is diverted to Alternative Measures. A section is devoted to an examination of changes that could be made to facilitate a more honest handling of young persons under the YOA. Changes to the YOA that involve the Charter of Rights & Freedoms (hereinafter refereed to as the Charter) are outlined as well as those amendments to the YOA that are of a more procedural nature. These procedural changes could have the potential to eliminate some of the current practices utilized during diversion that are causes for concern.

With the changes to the structure of the criminal justice system suggested, attention will then turn to how the community can best take advantage of the changes to the YOA to help the youth in their community which in turn would also potentially double as a community development project whose goal would be to help turns our neighbourhoods back into places we live instead places where we hide. Consideration is given to the points of connection to the formalized systems that the Committee would have as well as the level of control that must exist for the exercise to be a meaningful one for the youth and the community.

Chapter II

REVEALING THE CONCEPT OF PARENS PATRIAE

An important delineating factor in this thesis is the supposition that the handling of young offenders under the YOA is vastly different from that of the JDA because of a shift in legislative philosophy. In other words, the YOA is touted as solving many problems that arose from the JDA. The YOA is written in such a manner as to set forward the appearance that youths being dealt with by ways of the Alternative measure's provisions will have their rights protected, including the preservation of certain basic due process elements. What appears to happen is that the handling of a youth, under Alternative Measures, is not much different from the manner in which the youth was dealt with in court under the JDA. Note will be made of how some feel that the language of the YOA is a compromise between two very distinct and strong lobby groups as well as the implications this type of legislation has from a "disengagement" perspective.

2.1 FIRST HYPOTHESIS

The first major hypothesis of the thesis will be examined in this chapter. As has been mentioned previous, the aim of this chapter is to ascertain whether or not the doctrine of parens patriae as found in the juvenile court and in the JDA is replicated in the provisions of the YOA despite the apparent shift in focus towards due process rights. The examination of this hypothesis will provide the foundation under which the hypothesis one will be examined

To accomplish this end, the writer will move in a logical progression first through the relevant sections of both the YOA and the JDA. These areas deal with Principle, Alternative Measures, and Youth Justice Committees.

The YOA defines Alternative Measures as;

> measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence.[6]

The theme of parens patriae characterized the tone of the JDA and was, in fact, written into the legislation as section 38,

> This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated not as criminal, but as a .us misdirected and misguided child, and one needing aid, encouragement and help and assistance.[7] (emphasis added)

The court was, legally, a substitute for the parent and thus the legislation is laced with a seemingly patronizing attitude that Havemann refers to as "child saving".[8] The passage of the YOA was touted as an important move away from parens patriae and the Federal Government hailed the Act as;

> one of the most significant pieces of social legislation to have been passed in recent years.[9]

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[6] Young Offenders Act. R.S.C. 1985 c.Y-1 s.2

[7] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.38

[8] Havemann, Paul. "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act 1908-1984" in Brickey, Stephen; Comack, Elizabeth. The Social Basis of Law: Critical Readings in the Sociology of Law. (Toronto: Garamond Press, 1986). page 225.

[9] The Young Offenders Act, 1982: Highlights. Ottawa: Minister of Supply and Services Canada, 1982.

These changes were purported to be on the leading edge of juvenile justice reforms, particularly those revolving around the elimination of parens patriae and its replacement with a system akin to the due process system model used in the adult court system.

The debate to make these changes in the JDA started during the 1950s and culminated with the proclamation of the YOA in the early 1980s. In the time period that preceded the passage of the YOA, a number of troublesome areas of the JDA were identified, these include;

1. Children do not have the same legal rights and safeguards as adults involved in criminal proceedings.

2. There does not exist any legislative authority for the practice of diversion nor any safeguards or protection for young persons who are dealt with by Alternative Measures instead of the formal court process.

3. There are inconsistent practices across the country including conflicting judicial pronouncements as to the legality of certain practices.[10]

When the YOA was drafted an attempt was made to remedy some of these problems and the result was, in part, expressed in section 3 of the YOA entitled "Declaration of Principle".

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[10] (Caplan, 1981. 1-3) as cited by Havemann, Paul. "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act 1908-1984", page 227-228 in Brickey, Stephen; Comack, Elizabeth. The Social Basis of Law: Critical Readings in the Sociology of Law. Toronto: Garamond Press, 1986.

2.2 YOA DECLARATION OF PRINCIPLE (SECTION 3)

Havemann feels that the language contained in section 3 shows the visible compromises between the two very strong lobby groups that have been referred to as the civil libertarians, and those who adhere to a just-desert crime control philosophy[11] Clearly these two groups are on opposing ends of the political justice spectrum and represent very different perspectives in their approach to the justice system based on their apparent orientation on the nature of human nature. One group, known as 'civil libertarians' would appear to be in favour of individual rights, the right for individuals to make choices, and the potential for change. Thus it would also appear that the civil libertarians would also have an orientation of human nature which falls somewhere between the tabula rasa view of the nature of human nature that scholars such as Berger & Luckmann[12] expound and the view that humans are born with some sort of in-born goodness as Marx appears to explicate when he predicts the destruction of capitalism and the appearance of a new Socialist utopia in which individuality flourishes and each person respects all other persons.[13]

The obverse side of the argument has its philosophy embodied in a lobby referred to as the 'law and order' lobby. The 'law and order' group would appear to view humans as corrupt individuals who can not be "saved" "repaired", or rehabilitated. Thus the only matter to be concerned with is

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[11] Havemann, Paul. op. cit. page 232.

[12] Berger, Peter L.; Luckmann, Thomas. The Social Construction of Reality: A Treatise in the Sociology of .us Knowledge. Garden City: Anchor Books, 1967.

[13] Tucker, Michael (ed.) The Marx-Engels Reader. (New York: W.W. Norton & Company, 1978) page 5.

order, protection of the person, and protection of private property with no attention being paid to helping, only punishing, that person who is defined as being deviant. Bala has hypothesized the aforementioned ideological and philosophical split is found throughout our society and is not limited to the verbal expression of the groups mentioned. Rather these two lobby groups have views representative of the societal ideological spectrum.[14]

What follows is an examination of the relevant subsections of section 3 of the YOA with discussion centred around whether the pertinent subsection reflects a genuine change from the JDA or is merely a restatement of the apparent shortcomings of the JDA (which the YOA was supposedly brought in to redress). The discussion will also note where Havemann feels the legislation has been directly compromised to appease the above noted lobby groups.

2.2.1 Section 3(1)(a)

Section 3(1)(a) of the YOA states;

> 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 commit offences should nevertheless bear responsibility for their contraventions[15]

The key components of the above are the words "accountable" and "responsible". This contrasts sharply with section 3(2) of the JDA which states;

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[14] Bala, Nicholas. "The YOA: A Legal Framework" in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. (Toronto: Wall & Thompson, 1988) pages 14-15.

[15] Young Offenders Act, R.S.C. 1985 c.Y-1 s.3

> Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.[16]

The youth is no longer in a "condition" but is held "accountable" for their actions. The movement of viewing delinquency from the medical model[17] to a retributive model is readily apparent in this section. Havemann illustrates that the provision that ends with "for their behaviour as adults" is redolent with a civil libertarian point of view while the add-on provision relating to the responsibility for their actions reflects a more law and order orientation.[18]

2.2.2 Section 3(1)(c)

Section 3(1)(c) of the YOA states;

> young persons who commit offences require supervision, discipline and control, but because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance[19]

This a direct restatement of what was found in the JDA under section 3(2). The words "guidance" and "supervision" are transposed from the JDA and exemplify the *parens patriae* mentality that characterized the JDA. The portion of this section that precedes the word "control" is reflective of the law and order perspective while the remainder of the section appears to

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[16] *Juvenile Delinquents Act* R.S.C. 1970 c.J-3 s.3(2)

[17] this phrase is seen most often when the terminology and philosophy of disease treatment to an organic bodily difficulty are transposed to another application that is meant to be an analogous illustration. Thus the appearance of terminology such as "condition", "illness", "cure", and "treatment" are indicative of a medical model perspective on youth crime.

[18] Havemann, Paul. *op. cit.*

[19] *Young Offenders Act* R.S.C. 1985 c.Y-1 s.3

mirror civil libertarian concerns. Particular note is taken of:

> [S]pecial needs warrants closer examination. Canada's juvenile-justice system is premised on a fundamental assumption that young persons have special needs because of their adolescence. These needs will vary, depending on a youth's level of biological, psychological, and social development. The term 'special needs' therefore encompasses the need of the youth to form positive peer relationships, to develop appropriate self- esteem, and to establish an independent identity; it also extends to their health, educational and spiritual needs.[20]

2.2.3 Section 3(1)(d)

Section 3(1)(d) of the YOA is an important statement of policy;

> where it is not inconsistent with 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[21]

This section suggests that as many cases as possible should be resolved outside the courtroom. The Liberal Federal Government of the day felt that the taking of measures other than judicial proceedings "were to be the means by which all but a small number of hard core young persons who broke the law were to be handled".[22]

This section is the key to the "Pandora's box" of difficulties that come about when dealing with young people who come into conflict with the law. This section encourages the use of proceedings other than court and indeed was intended to be a large fixture in the new youth system. The placement of the provisions for Alternative Measures as section 4 immediately

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[20] Bala, Nicholas; Kirvan, Mary-Anne. "The Statute: Its Principles and Provisions and their Interpretation by the Courts." in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. (Toronto: University of Toronto Press, 1992) page 77.

[21] Young Offenders Act R.S.C. 1985 c.Y-1 s.3

[22] Havemann, Paul. op. cit. pg 238.

following the Declaration of Principle accords additional prominence to section 3(1)(c).

2.2.4 Section 3(1)(e)

Section 3(1)(e) of the YOA states;

> 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.[23]

This section contrasts markedly with the provisions of the JDA which are not of a due process nature. This non due process model is exemplified in the JDA section 17(2);

> Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.[24]

2.2.5 Discussion

Section 3(1)(e) and (g)[25] both relate to the youth's rights under the YOA. The youth is now accorded the same rights that adults have under the Canadian Charter of Rights and Freedoms as well as being accorded supplemental rights such as a ban on publication of proceedings, and a ban on the publication of the identity of the youth that was carried over from section 12(3) of the JDA. Some of the these new rights which relate to due

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[23] Young Offenders Act R.S.C. 1985 c.Y-1 s.3

[24] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.17

[25] 3(1)(g) states that;

> young persons have the right, in every instances where they have rights and freedoms that may be effected by this Act, to be informed as to what those rights and freedoms are;

process, such as the right to appeal, were specifically prohibited under the JDA[26] unless the appeal was of an extraordinary nature. The Act also stated that the disregard for due process (because of informality) could not be used to reverse decisions.[27] The "due process" philosophical cornerstone, as found in section three of the YOA is significant in that the youth is presented with the principle that he/she will be treated in a manner which, in theory, is similar to the way that adults are to be dealt with. It would appear that the inclusion of due process rights speaks to the problem that Caplan stated earlier on safeguards and legal rights pursuant to criminal proceedings.

How these rights are exercised within Alternative Measures is indeed a unique phenomenon and its examination falls outside the boundaries of this paper, suffice it to say that a youth is advised of their rights as part of the process at the committee level but then the parens patriae mentality comes to the forefront and tends to dominate the proceedings from that point forward. Bala, one the other hand, maintains that;

> It is generally felt the Alternative Measures represent a socially useful experiment for dealing with first-time offenders in a humane, socially inexpensive fashion.[28]

With the examination of the provisions of section 3 now concluded, the focus of the discussion will now shift to section 4 of the YOA.

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[26] Juvenile Delinquents Act R.S.C 1970 c.J-3 s.37

[27] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.17

[28] Bala, Nicholas. op. cit. page 22.

2.3 YOA ALTERNATIVE MEASURES (SECTION 4)

The next relevant section of the YOA that will be dealt with is Section four that outlines a system of Alternative Measures. Section four stipulates that Alternative Measures programmes may be set up by the provinces but does not go so far as to make the implementation of these programmes a mandatory component of the criminal justice system. The reason behind this feature is readily apparent because if the Federal Government attempts to introduce a program that falls under provincial jurisdiction and makes it mandatory then it justifies the provinces demanding that the Federal Government share the cost of the programmes implementation and operation. Indeed such concerns about the cost of the administration of the act may yet come back to haunt the federal government as seen in a case which was taken to the Ontario Court of Appeal.[29] In this case the court ruled that the Ontario government's non- implementation of Alternative Measures under Section 15 of the Charter of Rights and Freedoms constituted a "denial of equal benefit and protection of law on the basis of residence".[30]

Again, it would appear that Caplan's concern regarding the lack of guidelines, as well as the need for due process protection for youths involved in diversion programmes has been met with the introduction of the YOA. However, upon closer examination, section 4 appears to indicate that Alternative Measures is a loose framework that is vague and ambiguous and appears to have little impact on Caplan's concerns about the inconsistencies of dispositions within diversion programmes. As the relevant sections are discussed, reference will be made to the sections

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[29] R. v. Sheldon S. (1986) (Ont.Prov.Ct.-Fam.Div)

[30] Bala, Nicholas. op. cit. page 22.

that appear to be vague.

2.3.1 Section 4(1)(a)

Section 4(1)(b) stipulates that the province is empowered, through the Lieutenant Governor in Council, with the designation of Alternative Measures programmes for that provinces. There is no provision that allows the Federal Government to establish and operate these programmes itself. The division of powers between the federal and provincial governments, as they relate to Alternative Measures, fetters the Alternative Measures process.

The Federal Government has exclusive jurisdiction of, and thus sole responsibility over;

> The Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters[31]

The Provincial Governments have exclusive jurisdiction and authority pertaining to;

> The establishment, maintenance, and management of public and reformatory prisons in and for the Province[32]

and

> The administration of justice in the Province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.[33]

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[31] Constitutional Act of 1867 s.91(27). R.S.C. 1985 Appendix II no.3

[32] Constitutional Act of 1867. s.92(6). R.S.C. 1985 Appendix II no.3

[33] Constitutional Act of 1867. s.92(14). R.S.C. 1985 Appendix II no.3

Thus the Federal Government has the power to pass the YOA but it is currently within the purview of the provinces to "administer", "maintain" and "organize" provincial courts. In Manitoba, the Youth Court is a branch of the Provincial Court and all justices who are Youth Court Judges are also judges who have been appointed to the bench of Provincial Court. The only area where the federal government was involved in funding items outside of its constitutional mandate is:

> [u]nder the JDA, federal transfer payments were made in respect of the vices associated with dispositions consisting of placements in the care of child welfare authorities or in industrial schools ; i.e. paragraphs' 20(1)(h) and (i) and where the appropriate order was made pursuant to section 21 or where the province had entered into a special agreement that paralleled the Canada Assistance Plan. Other dispositions, such as probation, were not eligible for federal support because they were considered as correctional services for the purpose of the Canada Assistance Plan. The only services eligible for cost sharing involved the removal of the juvenile delinquent from his or her home to a child welfare facility or programme of some nature. In other words these services involved some measure of institutionalization, the equivalent of custodial orders under the YOA.[34]

As can be seen in the aforementioned quotation, an argument can be mounted that by enacting the YOA, the federal government was also disengaging itself from an area it had provided funding for previously and transferred those costs to the provinces.

Section 4(1)(a) sets out what an Alternative Measures programme would, or should look like; there are no provisions what a programme may or may not be. There are no stipulations or guidelines that would provide for some measure of uniformity among the provinces in these programmes. The manner in which this section is written, and the resulting effects on the

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[34] Coflin, Jim. "The Federal Government's Role in Implementing the Young Offenders Act" in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A.; Justice and the Young Offender in Canada (Toronto: Wall & Thompson Inc., 1988) page 45.

remainder of section 4, allows each province to designate and operate as many, or as few, programmes as is sees fit. This section of the YOA has the potential, as written, to entrench the inconsistencies for which the JDA was criticized. The provisions relating to due process and Charter rights would appear to be circumvented in a system where each jurisdiction is permitted to conduct programmes under federal legislation without some common standards and/or requirements.

While each province should have the freedom to build a programme that fits their own requirements and circumstances there still must be some minimum standards established through the YOA that would address Caplan's concerns while not constraining the needs of the provinces.

2.3.2 Section 4(1)(b)

Section 4(1)(b) of the YOA states;

> 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[35]

This is relatively congruent to section 20(5) of the JDA which reads;

> The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.[36]

The only difference between here is that section 20(5) of the JDA refers to court proceedings while section 4(1)(b) of the YOA refers to diversion, even the order of; 1) the best interests of the child, and 2) the community is maintained . This is congruent with the writer's contention that Alternative Measures is the JDA court system with the overt institutional

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[35] Young Offenders Act R.S.C. 1985 c.Y-1 s.4(1)(b)

[36] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.20

trappings removed and replaced with the symbols of the "community". Section 4(1)(b) is considerably vague and left to the interpretation of the "person" what is "appropriate" in the particular circumstances with no checks on what the provincial government, or the federal government deem to be "appropriate".

2.3.3 Section 4(1)(c) & (d)

Section 4(1)(c) and 4(1)(d) contain several provisions relating to due process. These portions of section 4 mandate that the youth is to be informed what their rights are before participating in Alternative Measures as well as given the choice whether they wish to continue to have their case proceeded upon by way of Alternative Measures or opt to return to court.

This presentation of rights and choice is, in the view of the writer, inherently a fallacy. The system is constructed in such a manner as to give the youth the illusion of choice by stigmatizing the court as "undesirable", and presenting Alternative Measures as desirable. This point will be explicated later in this thesis.

2.3.4 Section 4(1)(e)

Section 4(1)(e) of the YOA reads;

> the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed.[37]

This section requires the youth to take "responsibility" for their actions. Further on in section 4(3) there are provisions such that any statement of responsibility made during participation in the Alternative Measures

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[37] Young Offenders Act R.S.C. 1985 c.Y-1 s.4

process is not admissible in subsequent criminal and civil proceedings, relative to the incident in question. Although it is interesting to note that during the writer's tenure with the South Winnipeg Alternatives Committee (hereinafter refereed to as the YOA in Manitoba the Manitoba Public Insurance Corporation, (referred to as Autopac). Autopac is a provincial crown corporation responsible for automobile insurance in the Manitoba. There was a common perception among probation officials and many of the parents that appeared before the Committee that Autopac appears to have a policy that requires parents to press the charge of "Taking Auto Without Owners Consent" (T.A.W.O.C.) in order for Autopac to covers damages arising from accidents their underage children may have had while driving without a license or without explicitly asking for the use of the vehicle. The youth may then go successfully through the Alternative Measures system and have the charges against them dropped. It would appear that Autopac uses the youth's participation as an indicator of guilt and has been reported as informing youths charged with T.A.W.O.C. that they will sue for recovery of the cost of the claim in civil court when the youth reaches the age of 18. There is nothing other than antidotal evidence to support this view, and while the examination of this issue falls outside the bounds of this thesis, the mere perception that this is a practice of a Crown corporation Should this in fact be the policy of M.P.I.C then the existence and application of that policy by a crown corporation would cast some doubts regarding the integrity of Section 4(3) of the YOA.

In addition to this practice noted above, it was the experience of the writer that in the event that the youth did not complete the measures that they had agreed to then the Committee was to fully document this so that it

would be useful when the matter was proceeded upon in court. If this information is being used in court against the youth then it raises some serious questions as to Section 4(3) of the YOA is being violated in spirit as well as in letter

2.3.5 Discussion

For Alternative Measures the concepts of "guilt" or "non- guilt" are not the primary issue. Thus the stigmatization that is associated with the polarity of guilt or non- guilt[38] is to be eliminated by the creation of this neutral legal category in section 4(1)(e) known as "responsibility". The term "responsibility" conjures up popular images that might well appeal to current public opinion. The tone of the term "responsibility" is one which casts the individual in the light of doing "what is proper"[39] but which subverts the due process model that sections 3(1)(d) & (f) & (g)[40] introduced.

In order to be admitted to Alternative Measures the youth, must, de facto, confess to the offence that the Crown alleges them to have committed. It is disguised with the coded term "responsibility" when it is in fact an admission of an act or omission. The Law Reform Commission of Canada in answering the question of "Should the Offender be required to admit "responsibility" in order to gain admission to a diversion programme" said:

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[38] Not to be confused with innocence.

[39] Of note here is that implicit in the term responsibility is the notion that the current system of law is inadequate and does not necessarily do what is proper, but rather does what is legal. The distinction is one that is not lost on many in our society.

[40] These sections contains all rights under the Charter of Rights and Freedoms, the right to be heard, to participate, and to be informed of their rights.

> Entry into a pre-trail settlement program should not be conditioned upon an admission of "guilt", but on an informal admission of the facts alleged against him. While seeking a guilty plea may be explained as a means of getting the accused to accept his responsibility in the matter and hence an element in his rehabilitation, the same end may be achieved by less dramatic means. All that is needed is an informal and out-of-court acknowledgement of partial or full responsibility for the harm complained about. In addition to require a pre-trial admission of "guilt" overlooks the fact that it .us is mediation and settlement, not adjudication that is needed in some cases and that is why they are considered for pre- trial settlement in the first place.[41]

The de facto admission of guilt would appear to violate a youth's right to a fair and impartial trial as part of due process. One might ask how could the youth have a fair trial when they are asked to admit their involvement in the act or omission for which they are charged even before it reaches court? This has been the position of the Province of Ontario which felt that;

> the use of Alternative Measures may jeopardize the protection of a youth's civil rights by having them take part in programs following a finding of "guilt" without due process.[42]

The evolution of the legal concept of responsibility serves to discourage active traditional court involvement by lawyers in the Alternative Measures process. Our common law legal system is an adversarial one by and hinges on concepts of the "guilt" or "non- guilt" of the accused. The role of the Crown Attorney is, in theory, to represent the interests of the Crown in the matter before the court while the role of the Defence Attorney is, in theory, to ensure that the defendant is afforded proper due process by protecting the rights of the defendant from the potential abuses by the

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[41] Diversion. Law Reform Commission of Canada (Working Paper #7) Ottawa: Information Canada, January 1975. page 17-18. (emphasis added)

[42] Leschied, Allan W.; Jaffe, Peter G. "Implementing The Young Offenders Act in Ontario: Critical Issues and Challenges for the Future" in Hudson, Joe; et. al. op. cit. page 70.

state.

If a youth has taken responsibility for an offence, then the issue of guilt or non-guilt is a moot point. However, from this admission forward the youth is purported, to work with the committee to agree to a measure that is appropriate. With no dichotomization of polarities, such as guilt or innocence, there is no place for lawyers because the "responsibility", as alluded to earlier, can be said to be predicated on a moral order that rises above the law (as well as those who practice it).

> I would, however, like to qualify the statement that the presence of lawyers in juvenile courts will provide better justice by adding a rider that these lawyers should be lawyers who understand what the juvenile court is trying to do, who are in harmony with the basic philosophy, who take a socio-legal, and not a strict legal, approach to the problems of children.
>
> When a Lawyer comes into a juvenile court, throws his briefcase down on the counsel table and announces to the court: 'I represent the accused. He is pleading guilty,' the presiding judge knows at once that the lawyer thinks that he is in criminal court for children, that he does not know what it is all about, that he never understood, if indeed he has read, section 3 of the Juvenile Delinquents Act.[43]

The above quote is the opinion of a juvenile court judge towards lawyers and their role under the JDA in relation to the doctrine of parens patriae. Judges viewed lawyers as 'helpful' to the juvenile justice process, but only if those lawyers presented an orientation that was unlike that for which they were trained and the rest of the legal system is based on. This attitude has been carried forward by legislative design into the provisions for Alternative Measures under sections of the YOA.

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[43] Stubbs, Roy St. George. "The Role of the Lawyer in the Juvenile Court" Manitoba Law Journal 6(1974):65.

The absence of lawyers in a system which leans heavily on their existence for the administration of due process would also seem to eliminate essential points in due process. This brings into question the nature and equality of Alternative Measures under an Act which holds itself out to be part of the due process model. In short, inherent in the concept of responsibility is the notion that lawyers get in the way of "the needs of the young person".[44] Which is precisely what section 20(5) of the JDA stipulates. What transpired is that while the government vowed to make a form of social change which includes the extension of due process rights to young offenders, they left a model of youth justice which is strikingly similar in pith and substance to the doctrine of parens patriae of the JDA as stated by Judge Beaulieu.

> Section 4 codifies the most unusual aspect of the old paternalism. Under the previous act, there arose in several centres throughout the Dominion juvenile-diversion programs. They appeared without statutory authority but operated with the blessing of one or more provincial government departments and sometimes with the tacit approval of the juvenile court. Their appearance coincided curiously with the adoption of due-process safeguards by the juvenile court, and it has been suggested by few writers that when due process begins to infect the juvenile-justice system, the old child- savers did not disappear but re-surfaced in another form, that of the juvenile-diversion committees. Section 4 of the Young Offenders Act is an apparent attempt to legitimate those alternatives to the judicial process.[45]

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[44] Section 4(1)(b) of the YOA

[45] Beaulieu, Judge Lucien A. "A Comparison of Judicial Roles under the YOA and the JDA" in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Juvenile Justice. (Toronto: University of Toronto Press, 1992). page 138.

2.3.6 Section 4(1)(f)

An important limiting factor on the Crown Attorney's office is found in section 4(1)(f) of the YOA which states;

> there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence[46]

This provision of the Act directs that diversion can only occur if the case in question could be preceded upon in court. This directs the Attorney General, or agent, (in the case of Manitoba the Youth Crown's Office) to make a determination as to the merits of the case on the basis of the information at hand, including that laid by the police. In essence the Youth Crown conducts the equivalent of a preliminary hearing to determine if there is sufficient evidence to hold over for trial. There are no requirements for this decision to be made in public or for the Attorney General, or agent, to include the youth in the process of determining whether sufficient evidence to proceed exists. There is no right of discovery, no cross examination, and no scrutiny of evidence. The absence of all these things would seem to run counter to the inclusion of the due process model that the YOA supposedly aspires to. Presumably this section was included to prevent the diversion of cases that are factually questionable to Alternative Measures. This section of the YOA, 4(1)(f), would also include those cases that may be referred because in the opinion of the Crown, the youth is in need of help regardless of the weak nature of their case and the "help" should come from Alternative Measures.

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[46] Young Offenders Act R.S.C. 1985 c.Y-1 s4

What appears to occur is that youth charged without much evidence are then diverted to Alternative Measures under the assumption that "it can't hurt them anyway". An example of a questionable referral under the Section 4(1)(f) is the youth arrested for Theft Under $ 1 000.00 for shoplifting at a multi-floor department store. The youth is observed to conceal some item on his/her person on the second floor, then proceeds to the third floor of the store where store security apprehends them. Since the youth is still on the premises of the establishment and has not exhausted opportunities to pay for the item in question, then the legality of apprehension within the store for an item that was moveable to begin with raises a question whether the provisions of the noted 4(1)(f) have been applied appropriately when the case was referred for Alternative Measures. To address the concern regarding sufficient information to proceed in court, the Law Reform Commission felt that:

> To the extent that conduct does remain within the reach of the criminal law, however, one way of ensuring that pre- trial diversion schemes do not needlessly bring individuals into the criminal justice system is to require that a charge be laid.[47]

Thus the Law Reform Commission recognized that the potential existed for cases to be diverted that might not normally stand scrutiny in court. The current practice in Manitoba is a mixture of referral before laying a charge and proceedings stayed by the Crown and then sent to Alternative Measures. Bala and Kirvan state that:

> The concept of "special needs"[48] should not be used to justify intervention under the YOA that is not commensurate with the offence.[49]

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[47] Law Reform Commission of Canada. Diversion. Working Paper #7. (Ottawa: Information Canada, January 1975) page 15.\

[48] as mentioned in Section 3(1)(c)

[49] Bala, Nicholas; Kirvan, Mary-Anne. "The Statute: Its Principles and Provisions and their Interpretation by the Courts" in Leschied, Alan W.;

This point will be conducted further below.

The decision on the eligibility, of a youth to be diverted to Alternatives Measures which includes criteria in addition to section 4(1)(f),[50] is an arbitrary one made by the Crown without the youth being present, represented, or consulted.[51] Once the youth has been deemed eligible by the Crown, they are then given the "choice" of whether of not to participate in Alternative Measures. As has been discussed earlier, this choice appears to be little more than an illusion with desirable and undesirable labels being placed upon the choices by the bias of the persons presenting them.

It has been my experience that the people who serve on these committees are generally not bent on coercing and controlling the youth as a matter of course, but rather they have an honest belief that coming before a committee is infinitely preferable to appearing in court. Thus committee members go to great lengths to emphasis this to the youth while still attempting to present the youth with a "choice".

Jaffe, Peter C.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. (Toronto: University of Toronto Press, 1992) page 78.

[50] 4(1)(f) contains evidence criteria

[51] RE T.W. and the Queen (1986), 25 C.C.C. (3d) 89 (Sask. Q.B.) backs this contention that the youth does not have a right to participate in this decision while R. v J.B. (1985), 20 C.C.C. (3d) 67 (B.C. Prov. Ct.) held that the youth is entitled to notice of this decision, is entitled to be present and to be represented by counsel.

2.3.7 Section 4(2)

Section 4(2) of the YOA states;

> Alternative Measures shall not be used to deal with a young person alleged to have committed an offence if the young person
>
> 1. denies his participation of involvement in the commission of the offence; or
>
> 2. expresses the wish to have any charge against him dealt with by the youth court.[52]

Of importance in this section is that in the neutral legal category or "responsibility", neutral in the sense that it may imply neither guilt nor non-guilt, is absent. In the place of "responsibility", the terms "participation" and "involvement" appear in the YOA. Both terms implicitly refer to a model of guilt or non-guilt rather than to a detached "neutral" category such as "responsibility".[53]

2.3.8 Section 4(4)

Section 4(4) outlines provisions by which the court may dismiss charges against the youth for successfully or partially successful, participation in Alternative Measures. This section is the proverbial "carrot" held out to the youth, the pot of gold at the end of the rainbow (as it were). Sections 4(1)-(4), tell youths that if they make the "appropriate" decisions and take "responsibility" for their actions then any statement they make (pertinent to the incident in question), can not, and will not,

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[52] Young Offenders Act R.S.C. 1985 c.Y-1 s.4

[53] The use of the word "denies" in this section leaves an image in the mind of the writer of a defensiveness on the part of the youth. This can also be interpreted as inferred by "denying" the youth has something to hide. Indeed, it could be construed that the youth in question may not of significant personal integrity to "own up" to whatever it is they stand accused of.

be used against them in a court of law (civil or criminal). If they comply with the measure assigned they may have their charges dropped by the court and not be left with a youth, or criminal, record.

2.3.9 Discussion

The process by which a youth passes through the system is coercive and funnels the youth who enter through section 3(1)(d),[54] then proceeds through sections 4(1)(d), 4(1)(c), 4(1)(e)[55] and finally emerges at the conclusion through 4(4)(a) or 4(4)(b).[56] This process will be examined further in the next section. elaborated more during the discussion which follows on section 69 of the Act.

2.4 YOUTH JUSTICE COMMITTEES

Section 69 of the YOA reads;

> The Attorney General of a province or such other Minister as the Lieutenant Governor in Council of the province may designate, or a delegate thereof, may establish one or more committees or citizens, to be known as youth justice committees, to assist without remuneration in any aspect of the administration of this Act or in any programs or services for young offenders and may specify the appointment of committee members and the functions of the committees.[57]

This section of the Act was hailed as something progressive and innovative; as a way for the community to become involved in the life of their community. It was held out to be new and dynamic, but it was anything but new. Rather is was recycled from section 27(1) of the JDA which states;

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[54] "taking measures other than Judicial proceedings"

[55] Been advised of their rights, accepts responsibility and consents to participate in Alternative Measures

[56] provisions for dropping of charges upon completion or partial completion of Alternative Measures

[57] Young Offenders Act R.S.C. 1985 c.Y-1 s.69

> There shall be in connection with the Juvenile Court a committee of citizens, serving without remuneration, to be know as the "juvenile court committee".[58]

2.4.1 Discussion

"Community" is probably one of the most misused phrases in the western industrialized world when used in reference to the disengagement, or transfer, of service delivery (and the accompanied costs) from a centralized government to sub- units and eventually to the people in neighbourhoods. What is a community? How does one define community? How can the concept of community be applied? The writer has no answers for the above questions, but rather raises them as an example of the ambiguous nature of many sections of the YOA.

This move towards disengagement (as mentioned earlier) in the YOA is generally reflective of change not only in Canada, but all over the western industrialized world. In Canada the airline industry has been deregulated; Air Canada has been sold and the trucking industry has been deregulated; in Manitoba, Flyer Bus Industries and Manfor are examples of disengagement; Saskatchewan, under Devine's Conservatives wished to sell off their potash company. In the United States there has also been major deregulation in many of its transportation industries; prison services and other parts of the criminal justice system have been "contracted out" in the United States[59] and, in the United Kingdom, British Petroleum and the publicly

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[58] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.27

[59] Contracting out refers to the practice that large institutions have turned to cut costs. Things such as cleaning, security, training and many other facets of operation are performed by an outside company under the provisions of a contract, thus freeing the company from the problems of doing all of this themselves and saving a good sum of money in labour costs, benefit packages and the like as the people who work for these companies that have contracted the work generally make a much lower wage

owned phone utility have been sold off. In Canada the Department of National Defence, as well as other government departments (federal and provincial), and crown corporations, such as Canada Post, have adopted contracting out of many parts of their operation that extends from the closing of small post offices in favour of expanded services in the local drugstore to the training of pilots in the Canadian Armed Forces.

The provinces do not seem to be any more accountable, by virtue of a system of checks and balances to the federal government for it's Alternative Measures programmes, than the Youth (or Community) Justice Committee is accountable to the community that they are purported to represent. Although it was not stipulated in the Act, the infamous "green book" contained a suggestion that method of membership selection could include election by the community.[60] This is an option which is extremely appealing in principle but troubling to those who feel that election by the masses of the community would be good only if everyone got involved. If the level of mass community involvement is low, then one interest group (such as a particular church) could take over the reins of the committee and proceed to deal with youths inappropriately. This is a danger no matter where, or how, democracy is exercised. Suffice it to say it would appear that election by universal suffrage to these committees is an idea which has been quietly discouraged. Thus the only means of accountability that a committee might have to the community is by means of an Annual General Meeting in which year end reports are presented by the Committee to the Community and open discussion can take place.

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than a unionized employee or a public servant.

[60] The Young Offenders Act, 1982: Highlights. Ottawa: Minister of Supply and Services, 1982.

The experience of the writer with these Annual General Meetings is that they are very poorly attended by people who could be characterized as members of the community. The event turns into little more than a "love-in" with no critical community input.

2.5 CONCLUSION

This chapter has examined hypothesis one of the thesis which related to the replication of the doctrine of parens patriae as found in juvenile court under the JDA to the provisions in the Declaration of Principle and the Alternative Measures sections of the YOA. Enough analysis and evidence has been presented to conclude the doctrine of parens patriae is indeed replicated by legislative design in the YOA despite the added emphasis on due process rights for young offenders before the courts.

With this chapter concluded, attention will now turn to whether this potentiality is actualized in the practices of a community justice committee in the City of Winnipeg.

Chapter III

RE-USING THE CONCEPT OF PARENS PATRIAE

This chapter will take the results of the previous chapter which showed that parens patriae as a concept was recycled from the JDA to the YOA and show how this concept is put into action. This will be accomplished through a examination of the Working Together Project in Manitoba and how this Project carried out the formation of a specific committee, the South Winnipeg Alternative Committee.

3.1 WORKING TOGETHER PROJECT

A joint pilot project sponsored by the Solicitor General of Canada and the Province of Manitoba called the "Working Together Project " was instituted in Manitoba in 1985. Community and Youth Correctional Services for the Province of Manitoba are divided into regions and, where warranted, sub-divided into units. Specified regional and unit offices were allocated "community facilitators" whose job it was to carry out the implementation of the project. The proposal for the project described the nature of the project as follows:

> Working Together is a province wide community mobilization program. Its intent is to promote effective implementation of community justice programming based on the principles of the Young Offenders Act. The Young Offenders Act presents a challenge for the creation of greater harmony between the efforts of the professionals and citizens. It seeks to enhance the perception that prevention and protection are not alien concepts; to foster the recognition that both victim and offender are part of the social fabric; and to promote a greater balance between responsibility of the state and the citizen[61] (emphasis added).

[61] Working Together Project Proposal. Executive Summary, page 1.

Of particular note is most of the project was geared toward community "involvement" instead of community "development". The latter concept revolves more around a process of community empowerment and investment in ownership over a community and each other as opposed to merely assisting with state control of the community. "In the Working Together project, a community development approach provides a rhetoric of justification for reassigning the task."[62] This topic will be more fully explicated in Chapter VI.

The sixth item in the terms of reference for the implementation of the Working Together Project read as follows:

> The parameters of the Working Together Project will fall in one or more of the following categories: Alternative Measures; judicial interim release; non-custodial disposition programs (sentencing alternatives); victim offender mediation; public education / crime prevention; youth justice committees; review boards, community service orders.[63]

It was the Community Facilitators who were charged with the responsibility for the implementation of this item in the region, or unit, to which they were assigned. The Province of Manitoba seconded senior management personnel to head up the project with each Community Facilitator reporting to the project co-ordinator. A second reporting relationship also existed between the facilitators and their regional or unit head.

While the role of the Community Facilitators was largely that which is articulated in item six above, item four also set out an overriding concern which set an important parameter for the discharging of those duties:

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[62] Heinrich, Catherine. The Diffusion of Innovation in a Human Service Organization. (M.S.W. Thesis: University of Manitoba, 1989) page 54.

[63] Item 6, Terms of Reference for Implementation of Working Together Project (April '85 to April '87).

> All programs and activities undertaken during the duration of the Working Together Project will be developed with a view to ensuring continuity of service and program availability upon termination of the project.[64]

This could be perceived as a plan to address governmental centred priorities and issues rather than community development:

> Community development, in the Working Together project, is operationalized as task oriented to help the organization meet the demands of service in a period of fiscal restraint.[65]

As discussed in the preceding chapter Section 69 of the YOA loosely set out the manner in which Youth Justice Committees are to be formed and operated. The first half of section 69 (YOA) is the same as section 27(1)[66] of the JDA, while the second half of section 69 is a consolidation of sections 27(2),27(3),27(4)[67] and 28(1) of the JDA which reads;

> It is the duty of the juvenile court committee to meet as often may be necessary and consult with the probation officers with regards to juvenile delinquents, to offer, through the probation officers and otherwise, advice to the courts as to the best mode of dealing with such delinquents and, generally, to facilitate by every means in its power, the reformation of the juvenile delinquents.[68]

Section 69 collapses all of the above noted sections into one omnibus section that leaves the appointment of these committees and their members to the Attorney or designate. In Manitoba the Minister who is charged with the discharging of this responsibility is the Attorney General as Community

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[64] Item Four, Terms of Reference for Implementation of Working Together Project (April '85 to April '87)

[65] Heinrich, Catherine. The Diffusion of Innovation in a Human Service Organization. (M.S.W. Thesis: University of Manitoba, 1989) page 50.

[66] This section sets up the "Juvenile Court Committee"

[67] These sections deal with operation of the committees, methods of member selection etc.

[68] Juvenile Delinquents Act R.S.C. 1970 c.J-3 s.28

and Youth Correctional Services fall under that Ministerial portfolio.

In practice the committees are generally allowed to decide on the appointment of their own members and what the agenda for the committee will be. The only proviso that the department puts on committee membership is that prospective members must pass vetting procedures that the department has laid down for those individuals who will have access to protected information documents (a youth's file is classified as confidential). Individuals who pass this level of scrutiny are appointed as Honourary Probation Officers under Section 3(2) of the Manitoba Corrections Act.

The requirement that members serve without remuneration is meant, in theory, to give the committees relative autonomy from the government when the committee sets priorities and makes decisions. In reality this non-remuneration provision has been used as justification not to provide committees with the kind of resources, such as further training and administrative support that may be required for the proper administration of the programme. Resources are doled out with the same rational under which welfare has been historically viewed; "give them just enough to get by" while not providing enough tangible resources for a committee who may wish to expand into an education programme, victim offender meditation or even for committee members to be reimbursed for reasonable expenses such as gas or baby- sitting. This effectively restricts the committee from expanding its role further than the government department feels is absolutely necessary to process the case on a strictly utilitarian basis. This doling out of resources would appear to be a prima facie example of government disengagement in the criminal justice system.

3.2 SOUTH WINNIPEG ALTERNATIVES COMMITTEE

In October, 1986 the first meeting of a group of people who lived or worked in South Winnipeg took place and resulted in the formation of the "Fort Garry Youth Justice Steering Committee" under the guidance of a Community Facilitator from the Working Together Project based in the West Unit Probation Office which is part of Community and Youth Correctional Services then under the jurisdiction of the Minister of Community Services for the Province of Manitoba.[69] As mentioned earlier, the writer was part of the original committee.

3.2.1 Formation

The Committee met every Thursday evening for three and a half to four hours from early October 1986 to March 1987 to develop a constitution, training, resources, and the operational procedures . The Community Facilitator remained with the committee through all the process until the end of her contract with the department. Two probation officers from West Unit were designated as liaison officers between the Committee and the Unit Director. These probation officers provided advice on the training and operational procedures of the Committee and any other matter the Committee wished advice on. The Committee received no direct funding from the Working Together Project, the Province of Manitoba, or the Federal Government. Project funds were used on some occasions to by Probation Officers provide doughnuts and coffee for some of the meetings of the Committee. The Community facilitators and the Probation Officers also provided some clerical support for the such things as the photocopying of reports and the

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[69] Community and Youth Correctional Services was subsequently moved into the portfolio of the Attorney General and again to the Minister of Justice where it sits at the time of the writing of this thesis.

like.

By April, 1987 the Committee was ready to start seeing youth referred to them under section 4 of the YOA. The next section will outline what happens to a youth as they proceed through the process that included the Committee.

3.2.2 Procedures

The youth is arrested for an offence under the criminal code,[70] (for the purposes of this illustration the youth is charged with Theft under $ 1 000.00) and is either released into the custody of a parent or guardian with a summons to appear to answer the charge, or is held in custody at the appropriate facility in the City of Winnipeg.

The youth may or may not be fingerprinted and photographed by the arresting police department depending on the nature and severity of the charge and departmental policy. The police department fills out a report with information on the incident that is forwarded to the office of the Youth Crown Attorney who then makes a determination under sections 4(1)(b) & (f)[71] to refer the youth to Community and Youth Correctional Services offices, proceed with the charges in court, or drop the matter.[72] The Crown Attorney takes into consideration the following criteria set down by the Province for admission of youth to Alternative Measures programmes:

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[70] It should be noted that status offences which existed under the JDA are no longer offences under the YOA. The youth is typically charged with violation of the Criminal Code of Canada, or the Narcotic Control Act.

[71] provisions relating to suitability of the offender for Alternative Measures and those regarding the presence of sufficient evidence that information could be proceeded on in court.

[72] All these steps are assumed to be final decisions that are made after all requested information has been made available to the Crown.

> Consistent with the branch's principle of least restrictive interference in offender's lives, all young person are eligible to be dealt with by means of Alternative Measures unless they are excluded for the following reasons:
>
> 1. serious driving offences such as refusing a breathalyzer, criminal negligence, dangerous or impaired driving are ineligible,
>
> 2. offences involving violence, threat of violence, personal injury, weapons, or potentially dangerous circumstances (i.e. bomb threats), totally unrecovered loss or damage, as estimated by the police exceeds $1,000.
>
> 3. they have been convicted of Criminal Code offences during the 6 months preceding the occurrence of the alleged offences, and
>
> 4. Alternative Measures have already been used on 3 occasions to deal with the young person.[73]

If the Crown Attorney feels that the youth meets the legislative and regulatory requirements, the case is referred to Community and Youth Correctional Services. The Unit receiving the referral makes an assessment on what action should be taken on the case. The Unit could assign the case to a single volunteer working out of the Unit office, deal with the youth by means of a parent action letter,[74] or refer the youth to a Community Justice Committee. Should the Unit opt for the latter form of action, the youth is typically referred to the Committee who's geographically area includes the residence of the youth regardless of where the alleged offence occurred.

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[73] Alternative Measures Handbook. (Winnipeg: Community and Youth Correctional Services, November 21, 1989) page 7-8.

[74] parent action letters are letters sent from the Unit to the parent(s), or guardian(s), of the youth requesting that the parents take corrective action to address the behaviour of the youth under their charge. This method of dealing with youths is typically used when the minor first offence. Whether these letters are used is at the discretion of the individual Unit Director.

The Probation Officer who is the liaison for the Committee would bring the new case to the Committee for review. The Committee would review the case using such criteria as, type of offence, number of charges, was violence involved?, does the Committee possess resources that might logically be used to deal with the offence should the case be accepted? If the Committee felt comfortable with accepting the case they would send a letter to the parent(s) or guardian(s) of the youth advising them that an appointment had been scheduled for them and their son/daughter to deal with the alleged offence. A copy of a pamphlet entitled "Alternative Measures" was also enclosed with the letter to the Parent.

Typically the Committee did not accept any cases;

1. where the information indicated that the youth used a weapon in the offence. Examples of using a weapon would include threatening with a knife, shooting a BB or pellet gun, or physical violence in which one person is clearly a victim (as opposed to minor fighting between relatively equally matched and consenting youths).
2. If the charge is sexual assault
3. the nature of the charge is such that the Committee feels that it does not have the resources to deal with the youth in what they consider to be a meaningful fashion. Examples of the type of cases that might not be accepted under this group include a youth charged with multiple charges involving a series of events, such as a bike theft ring.
4. charges involving what appears to be determined and planned offence (as opposed to crime of opportunity). An example of this kind of case would be a youth that repeatedly attempts to gain access to a building over a series of days or evenings.

The Committee insists that the youth attending be accompanied with a parent or guardian.

Once the youth arrives for the appointment he/she, and accompanying parent or guardian, is interviewed before the full committee consisting of between five and fifteen persons and the liaison Probation Officer. The Chair of the Committee provides a brief introduction about the nature of the Committee including that all members are volunteers that live and/or work in the geographical area. The youth is informed of his/her rights under the Charter of Rights and Freedoms, including their right to retain and instruct counsel without delay, their right to terminate his/her involvement in Alternative Measures and return to court, as well as his/her right to decline to answer any questions. Both the youth and the parent(s)/guardian(s) are encouraged to seek clarification or ask questions at any point in the process to facilitate understanding.

The Chair then asks for confirmation from the youth that they understand their rights and ascertain whether he/she wishes to retain counsel. Assuming the youth does not wish to retain counsel then, the information laid on the alleged offence is outlined. At the conclusion of the recitation of the information the youth is asked the following question: "Do you accept responsibility for your involvement in this incident?" The youth is prompted to respond with a verbal yes or no. Should the youth disagree with any of all the information laid, the Committee will attempt to gain an understanding of the youths version of their involvement in the alleged offence. If the youth denies participation in the incident in question, the Committee is not empowered to proceed with the Alternative Measures process. The Committee then requests the liaison Probation Officer to refer the youth back to the Crown Attorney.

If the youth accepts responsibility the Committee proceeds with the Alternative Measures process. The acceptance of responsibility by the youth serves as consent by the youth to participate in the Alternative Measures process with the Committee. The Chair informs the youth and the parent(s)/guardian(s) that the process will begin with the questions from the members of the Committee to both the youth and anyone accompanying them. The first group of questions are directed to the youth and address the instant offence. Once the Committee is satisfied that it understands the youth's version of the incident the questions then focus on background and other factors such as school, home, friends, extra-curricula activities, hobbies, interests and any other relevant factors. Parent(s)/guardian(s) are asked how they feel about the youth's involvement in criminal activity and what actions, they took. Other questions such as differences in youth's behaviour before and since the offence, how they feel about the youth's friends and what they see as being a meaningful measure to address the offence are also posed to the parent(s)/guardian(s). Once all Committee members have asked the questions they feel need to be asked, the youth and parent(s)/guardian(s) are excused to an adjacent room where they are joined by the liaison Probation Officer who often will talk with the youth to make sure no pertinent information was left unmentioned when they met with the Committee. The Probation Officer often 'double-checks' his/her own sense of the dynamics the youth was displaying with the Committee. At the same time the Committee is meeting in closed session to decide on what measure would be appropriate to ask the youth to perform as a redress for their involvement in the offence. After the appropriate measure has been decided, one member of the Committee is assigned to be the Worker for the youth. This person then becomes the contact between the youth and the Committee and makes sure the youth completes the measure.

A generic example of what kind of measure a committee might assign is the following: Tom breaks Ms. Jones's window. As a consequence, Tom apologies to Mrs. Jones, pays to have the window fixed, and either shovel Ms. Jones' walk or cuts her grass for a time.

Once the Committee has agreed on what they feel is a suitable measure(s) to suggest to the youth, the Probation Officer brings the youth et. al. back into the room with the Committee. At this time the Chair hands the youth an agreement between himself/herself and the Committee which outlines that the youth was interviewed by the Committee about their involvement in a offence and agrees to perform the measures, specified by the time specified. The chair ascertains that the youth understands the agreement and its terms. One specific portion of the agreement is highlighted: should the youth not comply with the terms of the agreement, then their case will be sent back to the Crown Attorney who may elect to bring the case to trial. The youth is encouraged to share the agreement with their parent(s)/ guardian present and receive advice from them. The youth is instructed to sign were indicated if there is a consensus on the terms of the agreement. The agreement will also note significant sanctions taken by parent(s)/guardian(s) The agreement is also signed by the parent(s)/guardian(s) present, the Chair of the Committee and the Worker. para The Committee has a wide potential number of measures that the Minister of Justice for the Province of Manitoba has authorized for Alternative Measures. These consist of:

1. Compensation by the young person to the victim, by cash, in kind or by way of personal service.

2. Mediation or conciliation between the young person and victim.
3. An interview or interviews with the young person and the parents or guardian to examine the circumstances of the offence, any action taken by the young person to make amends and any action taken by the parents as a consequence.
4. An oral or written reprimand.
5. A curfew.
6. Attendance at a crime-prevention class at which participants examine the reasons people commit offences and the consequences of offences for offenders and society, and learn ways to improve conduct.
7. Completion of a crime-prevention project such as an essay or poster.
8. Performance of community service, that is, unpaid work for the benefit of the community.
9. Referral to a social, educational, or health service, or any combination of these services, with appropriate follow-up.
10. Any combination of the preceding measures.[75]

The Committee attempts to tailor the measures to the case taking into account the individual circumstances of the youth with regards to time availability, financial resources etc. The danger of this approach is illustrated as follows:

> Any court, by tradition, must reflect and act as the conscience of the community in dealing with children who come before it. Here is the irony; the basic philosophy of the Juvenile Court is to bring the child under its protection and jurisdiction, for the child's best interests, but instead we may be subjecting him to traditional inequalities rather than granting him individualized justice.[76]

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[75] Authorization of Manitoba Alternative Measures Program. Proclamation signed by Hon. James McRae, Minister of Justice for Manitoba. May 26, 1986.

[76] Litsky, H. "The Cult of the Juvenile Court, 'Justice with Mercy'" (1972)

An slightly different view is exemplified by the following:

> the juvenile justice system has come full circle. The juvenile court once the formal mechanism of diversion from the stigmatizing and punitive processes of criminal justice, is now the legalistic tribunal from which children are to be diverted. The informal practices of parens patriae justice are being abandoned in juvenile courts only to be recreated in innovative diversion programs. Reformers in the field of juvenile justice do not seem to have learned much from history. They do not yet recognize the basic incompatibility of informality and justice, nor do they recognize that benign intentions are inadequate safeguards of individual liberties.[77]

Committee members unwittingly contribute to the replication of the parens patriae doctrine by the subtle kinds of pressure that are applied to gain the consent of the youth to participate in the process.

Yet is must be noted that Committee members are not intent on subverting the rights of the youth or dealing with the youth in anything less than a straight forward manner. It appeared to the writer that members of the South Winnipeg Alternatives Committee share an honest belief that youth benefit much more from participation in the Alternative Measures process with the Committee than by appearance before the courts. There is a intangible qualitative sense on the part of the Committee members that some good comes of their involvement and contact with young offenders;

> Committee members seem pleased to be involved in youth justice. There is a sense of a return to earlier, less complicated times when communities, not governments, solved local problems. Members report that they are convinced that their volunteer activities help young people.[78]

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20 Chitty's L.J. 152, 153-154.

[77] Burlington, B. et. al. "A Critique of Diversionary Juvenile Justice" Crime and Delinquency (24):59-71. in O'Brien, Daniel. "Juvenile Diversion: An Issues Perspectives from the Atlantic Provinces. Canadian Journal of Criminology. Vol. 26(1984):219.

[78] Ryant, Joseph C.; Heinrich, Catherine. " Youth Court Committees in Manitoba" in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. Justice and the Young Offender in Canada

> Committee members see themselves as a more appropriate response to minor offences than the court system that may give them a complete discharge. They believe they hold children more accountable for their actions in a manner that resembles a firm, loving parent. The needs of victims are frequently taken into consideration and apologies to victims are present in a majority of dispositions. A re integrative function is served by forcing youth offenders to face up to their victims and apologize.[79] (emphasis added)

While there is some feeling on the part of committee members that Alternative Measures administered by a community justice committee is a useful and meaningful process, there has been no research published that would indicate whether the youths felt the same way about the process. This would to be an area that would benefit from further research work.

3.3 CONCLUSION

As has been shown in this chapter, the Working Together Project was the catalyst for the operationalization of the replication of parens patriae from the JDA to the YOA in Manitoba. The project was geared more to community involvement than to community development; the programs it was to establish were supposed to be started with an eye to continuation upon the termination of the project. Costing cutting was an implicit part of the mandate, as was the role that the project played in selling the involvement of volunteers in areas which were viewed as the domain of the professional probation officer.

The study of the procedures the Committees use shows how parens patriae operates at the Committee level in much the same manner as it did in the old juvenile court under the JDA.

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[79] Heinrich, Catherine. The Diffusion of Innovation in a Human Service Organization: A Case Study. (M.S.W. Thesis. University of Manitoba, 1989):53.

Chapter two demonstrated that the doctrine of parens patriae found in the JDA was replicated in the Alternative Measures provisions of the YOA. This chapter has shown that the replication and continuation of the doctrine and practices of parens patriae is operationalized by the Working Together Project. Parens patriae is actualized by the procedures and operations of the South Winnipeg Alternative Committee.

Chapter IV

RECYCLING THE CONCEPT OF PARENS PATRIAE

Attention in the this chapter turns to the examination of hypothesis two which examines the data which was collected for the thesis relating the profiles of youths that have been referred to the Committee by Community and Youth Correctional Services.

4.1 'DESIGN

(Original)' The hypothesis that relates to the quantitative data stipulates that there were four different profiles of youth whose cases are being referred to Alternative Measures and the South Winnipeg Alternatives Committee. These four profiles are loosely categorized into "design" and "non- design" cases.

Under the provisions of the YOA an argument can be made that the administration of Alternative Measures within a community justice committee framework is best meant to deal with a certain profile of youth that the writer has entitled the "design" case. Alternative Measures is designed to deal only with cases that were not of a serious nature that fit the criteria set out in sections three and four of the YOA as well as any standards that are set by the provincial jurisdiction for the administration of Alternative Measures programmes. As noted in the previous chapter, the model in Manitoba has been to use section 69 of the YOA to designate Youth Justice Committees to assist the province in the

administration of Alternative Measures programmes in the province. Probation Services also uses volunteers in its offices who are designated as Honourary Probation Officers (HPOs)[80] to assist in Alternative Measures programmes. People who are interested in volunteering in provincial corrections apply for HPO status. All applicants are put through a screening process that includes a criminal records check before being recommended to the Minister of Justice for appointment. HPOs also assist with the supervision of clients on probation as well as Alternative Measures. In Manitoba, Alternative Measures are administered both by individuals (HPOs working in the unit offices) and by community justice committees designated under section 69 of the YOA.

Thus the majority of Alternative Measures work is done by volunteers. The provisions of section 69 clearly state that members of youth justice committee serve "without remuneration".[81] The model of community justice committees in Manitoba sees most committees meet between once and twice a month for the period September to June of each year. A Probation Officer is designated as the resource and liaison officer for the Committee. This typically involves bringing the files from Probation Services to the meetings of the committee and providing advice to the committee on specific cases as well as being a conduit with the Probation Services Unit which the committee is organizationally attached to. Probation liaisons also assist in the screening process for new members to the committees and training for these new members.

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[80] Honourary Probation Officers are given power to act and are appointed under section 3(2) of the Manitoba Corrections Act.

[81] Young Offenders Act, R.S.C. 1985 c.Y-1 s.69

Even with this valuable assistance the operation of a community justice committee is still essentially a volunteer endeavour. In using volunteers in a group setting, meeting once or twice a month, there comes a threshold in complexity that a case can reach beyond which it is unreasonable to expect that a committee can meaningfully deal with it. It can be assumed that volunteers as a group will have little, if any, of the professional skills necessary to deal meaningfully with a complex case.

Many volunteers may be university students studying criminology, teachers, nurses, social workers, university professors, or peace officers. This type of volunteer may be able to bring skills to the operation of the committee and the processing of cases from the other parts of their lives that assist the committee greatly in the exercising of its mandate. Should a committee be composed of these types of individuals then all the better, but this can not always be assumed as the case. It may be just as likely to have a committee composed of individuals who do not bring skills from the criminal justice systems or the delivery of social services, indeed a case can be made that a community justice committee should have a membership that is more representative of the community and less representative of the workers in the social services and criminal justice systems. The ability to deal with increasingly sensitive and complex cases relates directly to a reasonable assumption about the average aggregate professional skill level any particular volunteer committee may possess. These next two quotations illustrate the difficulties this can pose and while the reference in both quotations is to the youth court the terms "youth court" and "community justice committee" are inter-changeable:

> In short, the value advanced is not primarily that of the welfare of the child adjudicated a delinquent. This is due not so much to the court's lack of commitment to the rehabilitative ideal as to

> the incapacity of the court and its instrumentality's to deal effectively with the conditions giving rise to delinquent behaviour.[82]

> If the worthy purpose of social rescue of children is not always realized, the failure is due, in no small measure, to the lack of machinery to handle the problem efficiently. The court is charged with the responsibility of acting in the best interests of the children but it does not always have at its command the resources to make dispositions which could best further these interests.[83]

In the writers work as a member of the South Winnipeg Alternatives Committee there emerged a qualitative sense that there were a number of profiles of young offenders that would appear to be dealt with more meaningfully in a setting that was more professionally based rather than volunteer based.

The writer was not engaged in participate-observer research at the committee and thus the emergence of the original hypothesis, relating to design and non-design cases, was grounded more in a cumulative intuitive sense than being the product of a scientific and methodological approach. By the time the writer had decided to write a thesis on the Committee, the opportunity to engage in meaningful participant-observer research has passed. This is truly an opportunity lost.

The original hypothesis, which was later modified due to problems with data availability, held that there was four basic kinds of cases which came before the Committee; one design and three non-design profiles. As

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[82] Allen, Francis A. The Borderland of Criminal Justice. Chicago: University of Chicago Press, 1964. as cited in Alumna, Madeline G.; Wright, Kevin N. "The Fairness Paradigm: The Evaluation of Change i Juvenile Justice". Canadian Journal of Criminology Vol 24(1982):19.

[83] Stubbs, Roy St. George. "The Young Offender" Manitoba Law Journal Vol 19(1972):24 as cited in Wilson, Lawrence Charles. Juvenile Justice in Canada: The End of an Experiment. (L.L.M. Thesis, University of Manitoba, April 1976) page 17.

mentioned earlier the design profile case has as a dimension the sense that once a case reaches a certain level of complexity it can not be processed in a meaningful fashion by a community justice committee operating as the South Winnipeg Alternatives Committee does. The design case is the that is sent to Alternative Measures in compliance to both the wording and the spirit of the YOA. The YOA appears to be written so that youth with low needs is sent through diversion. That is to say that if a youth offends and their offence appears to be inconsistent with their previous behaviour they may be dealt with by a group of volunteers whose aggregate skill level is sufficient to meaningfully deal with the issues the youth brings to the table connected with their alleged offence. Thus Alternative Measures under the YOA is designed for this kind of youth.

A non design case would be one which is sent to Alternative Measures with issues connected to criminal behaviour that may exceed the reasonable expectations of the Committee to deal with meaningfully. The issues this youth may bring to the table my extend into many dimensions. At its most basic level, the YOA is not designed to process a youth with needs that exceed that ability of the Committee to deal with. If an aircraft mechanic was to repair and aircraft by using bailing twine and wire instead of the specified hardware, the aircraft may get off the ground but the likelihood of a serious malfunction increases in magnitude. To continue to send non design cases through the Alternative Measures system would an unreasonable risk. The same can be said of sending a youth through a process that is not designed to meet the level of need of the youth.

The other characteristics of the design case category will be explicated once the three non-design case profiles have been enumerated.

It is important to note that the underlying reason for the design & non design hypothesis is to attempt to see how many cases were coming before the Committee that perhaps ought not to have been sent there. The objective was to provide an idea of which of the cases are potentially of a problematic nature. This picture can help provide some grounding for future examinations. The intention of this hypothesis is not to see whether the non design cases comprise 18 or 20 percent of the sample population, but whether the non design cases make 25, 50, or 33 per cent of the population. This type of finding would affirm our disprove some very basic ideas and lend a direction to much more in- depth study.

4.1.1 First Profile (Non Design)

The first non-design case profile is comprised of those youth who are charged with offences that by definition would fall outside the ability of a group of volunteers to deal meaningfully[84] with. It is difficult to say where the dividing line is concerning the seriousness of the offence. For the purposes of this thesis an arbitrary decision was made which establishes the boundary between design and non design cases at the level of indictable or summary conviction offence. Any youth charged with an indictable offence, or a hybrid offence that would be elected to go indictable, is deemed to be beyond the ability of community justice committee to deal with. This profile would also include those youth that were charged with multiple counts of indictable offences as well as multiple counts of summary conviction offences. Any youth that has multiple charges of Possess Goods Obtained by Crime, Theft under $ 1000.00 (when the total value of the goods is close to the breaking point and is not a

[84] meaningful as defined by the volunteers and the youth. It presupposes some positive impact on the youth and community.

shoplifting related charge) would not be a good candidate for the Alternative Measures process. There are grey areas in this category about what types of cases are design and non-design. The crux of the cases in this non-design category is that the severity of the offence itself is a limiting and identifying factor.

4.1.2 Second Profile (Non-Design)

The second non-design case profile is comprised of those cases where the referral of the youth to Alternative Measures under section 4(1)(f)[85] may be problematic. That is to say that the case against the youth may not be sufficient solidity to proceed with in court. As mentioned in a previous chapter, there were two general examples of kinds of cases that were sent to the committee that related to the second profile; first cases were being sent to Alternative Measures when the Constables that made the arrest and laid the information told the parents and/or the youth that they felt nothing would happen and, second, those cases that appeared to be very weak evidentiary nature even to a person who did not have a legal background. One of the most common scenarios was the youth that was charged with Theft Under $ 1 000.00 (shoplifting) that hid an item somewhere on their person and then moved to another area of the store (usually other floors of a multi- floor department store) where they were approached by store security, detained, turned over to the Police and a charge was laid. A simple reading of the criminal code would raise serious questions whether this occurrence would be classified as theft or would be dismissed in court. Previous practice has seen store security required to wait until

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[85] there is, in the opinion of the Attorney-General or his agent, sufficient evidence to proceed with prosecution of the offence.

youths were physically outside the premises of the store and thus had not stopped at any cashiers to pay for the merchandize they had concealed. There was a perception at the Committee that some cases were sent to the Committee on the "it can not hurt them" philosophy. Regardless of whether or not this is accurate is immaterial, rather the mere perception of cases being referred under the aforementioned philosophy is incongruent with section 4(1)(f) of the YOA is problematic. Any youth which fit under this profile would be most properly dealt with through the courts.

4.1.3 Third Profile (Non-Design)

The third non-design case profile is composed of those cases in which the youth is encountering significant other difficulties in their lives that do not appear to be addressed by other parts of the system. In some cases there is a sense that the other difficulties the youth is facing are related to the charges that have been laid against them. Many times it is apparent from the youth's file (or the interview with the youth, and the parents) that there are difficulties ranging from alcohol and other drug use by the youth, to sexual abuse, to the use of alcohol and other drugs within the family unit, or other serious behavioural difficulties. Many of these youths appear to have little or no motivation to be an active participant in the process and thus have not been self co-opted into the "this is a break and for my own good" philosophy which appears to underlie Alternative Measures programming. This category of youth may or may not be charged with an indictable offence and these may not overlap with the first profile. Some of these youths are also wards of the court or of child and family services. In many of these cases the youth was not receiving assistance from any other part of the system, or were in long lines for

assistance from Child and Family Service Agencies. In many instances parents who accompanied the youth would verbally indicate that they had abdicated their parental responsibilities for the behaviour of their child and it was the job of the Committee to "set things right".

This profile of youths is the one which benefits the least from referral to Alternative Measures. By sending this type of youth to Alternative Measures, the 'official' criminal justice system is not forced to acknowledge that there is a difficulty that professional resources must be brought to bear on. Thus the system gives the appearance of dealing with these youths on a strict utilitarian basis. The youth is diverted to a group of volunteers who have no funding and no direct referral access to be able to deal meaningfully with a youth experiencing serious life difficulties.

4.1.4 Fourth Profile (Design Cases)

Any youth that did not meet any of the criteria set out for the first three profiles were classified as design cases for the purpose of the original hypothesis. That is to say that any youth that was charged with a summary conviction offence, and had two or fewer charges against them, and had strong evidence against them, and did not seem to be experiencing other serious life difficulties were designated as design cases. These cases, by definition would stand a greater degree of probability of being dealt with in a meaningful fashion by being diverted to Alternatives Measures as administered by a community justice committee.

4.2 'DESIGN

(Modified)' After the initial investigation as to the data availability to assist the examination of this hypothesis was completed, changes were made to reduce the number of profiles to two; that of design cases and non-design cases. Access to the necessary qualitative data from the files of each of the sample population would be crucial into order to properly assign each of the cases into one of the four original categories. It was learned that after a fixed time the qualitative information on a young offenders file is reviewed with much of it then being destroyed or archived. This made practical access to the necessary qualitative data to evaluate the original hypothesis very problematic. The data that was available was statistical data that was collected by Probation Services on a standardized form as each case proceeded through the system. The details of the offence, the report of the arresting Constables, and other pertinent contextual qualitative data are not recorded on the statistical form.

What follows is a brief outline, then a more in-depth look at the selection, and finally the arguments both for the selection of the variable and the dividing lines between the variable values that separated the population into design and non-design cases. This pattern will be followed for each of the variables that were selected for division of the sample population. With this completed, discussion will turn to some of the shortcomings of the data for each of the variables. These shortcomings should be taken into account when looking at the generalizability of any results. The overlap of cases between some of the non-design categories will be discussed later in this chapter. It is important to note that the variables used to assist in the division of the population into design and non-design cases are aggregated into a single non-design category.

From the data that was available, a number of variables were selected as being the main determinants for the purpose of the classification of each case in the population as either design or non-design. The selection of the variable values for division into design and non- design cases was not done on the basis of a current instrument or theory, rather the choice was an arbitrary one based on the hypothesis which had as a component the reasonable level of complexity that a structure such as the South Winnipeg Alternatives Committee can reasonably handle in a meaningful manner.

4.2.1 Category of Offence

Any youth charged with an indictable offence was classified as a non-design case. As mentioned previously, a portion of the design hypothesis is based on the supposition that a group of volunteers meeting once or twice a month for three hours at a sitting will only be able to deal meaningfully with a reasonably low level of complexity in the cases before them. Combine this supposition with some of the previously articulated arguments concerning the reasonable expectations of the aggregate level of skill present in a group of volunteers, and a case can be made that any youth charged with an indictable offence (a more serious offence by definition) would not be a design case that would benefit from the purpose of Alternative Measures which is not to label, but to have consequences that have relevance to both the offence and the importance of healing with the community. Thus any youth charged with an indictable offence would be classified as a non design case with those charged with summary conviction offences being counted as design cases.

There are difficulties with a strict interpretation of the designation of all youths charged with indictable offences as non-design cases. It would appear that most young offenders that commit Break, Enter & Theft do not do so as solitary actors. More often than enough a group of youths will come together and commit the offence. Within this group of youths there is usually present at least one youth who is perceived as the leader and the motivator for the rest of the group; there are also members of the groups (not always the entire remainder) who are tagging along and reacting to peer pressure, who realize their behaviour is not acceptable to society but who also wish to receive approval from peers to be accepted as an equal among them. Often the desire to be accepted wins over thoughts of withdrawing participation and risking alienation from what the youth thinks is his/her peer group. Since Break, Enter and Theft are an indictable offence, this youth would be classified as a non design case. .para It would appear, however, that the youths that fit into the latter group mentioned are the individuals that might potentially benefit most from the integrative, or restorative, purpose of Alternative Measures that can be best achieved through the self-realization by the youth that their behaviour is inappropriate. There are other situations and offences where a referral to Alternative Measures may be of benefit to the youth. All the information that would lend to a mitigation of offence with other factors is not present in the data thus the crude and broad selection by strict category of offence was felt to the best approximation available. The element to emphasis about this variable value selection is that there is still the potential to identify cases which have a higher probability of being non-design.

It should be noted in the discussion of this variable that the statistical information that was collected by Probation Services was actually on only the most serious offence that the youth was charged with. The statistical form did not indicate what other charges, if any, the youth is charged with. The total number of charges against the youth may reflect all charges but was not known whether the multiple charges a youth may have listed are all for Break, Enter & Theft or if some are Possess Goods Obtained by Crime or some other charge(s). It should also be noted that while this information is not derivable from the statistical report, the individual that coded the information about the most serious offence and the total number of charges was able to ascertain the total number of charges of all offences for the particular incident the youth is before the Committee for.

4.2.2 Number of Charges

If the number of charges laid against a youth exceeds two then the youth was classified as a non-design case. The reasoning behind the designation of three charges as the cutting point between design and non-design cases is the result of cumulative unrecorded observations which postulates that youths who are charged with many offences have, according to the police information, been involved in more than previous to the instant offence. For example, if a youth enters a department store and conceals five different items on his/her person and then exits the store premises without paying for said items and is apprehended. That youth may be charged with one count of Theft Under $ 1 000.00 instead of five while a youth stealing one item from five different stores in the same mall will be charged with five counts of Theft Under $ 1 000.00 (assuming the total value of the goods in question does not exceed said amount) because there are five different complainants.

The ability of Alternative Measures to counteract an entrenched counter value system is limited. Alternative Measures appears to have the most meaning for those youths that deviate from implicit codified societal values, who then retrospectively define their behaviour as deviate and wish to find a path by which amends can be made and return to the codified value system is possible.[86] The shortcomings of the use of this variable as a screening mechanism for the division of the sample into design and non-design cases is twofold in nature. The first shortcoming lies in the assumptions about the potential usefulness of Alternative Measures as a process that can have a positive impact on a youth who may be easily convinced that a form of repentance for the behaviour in question is needed and appropriate. These assumptions are inherently paternalistic, and to a certain extent may also be viewed as patronizing. However, the youth that temporary deviates from the value system codified in the Criminal Code has a higher probability of being positively impacted by a group of volunteers from their community than the youth that may have committed numerous offences that may not be in the same situational context (lapse of judgement), then the utilization of this variable to discriminate between design and non-design cases are appropriate.

The second shortcoming of the use of this variable as a screening instrument lies in its inability to identify those youth that may become involved in a series of incidents and subsequently decides that their behaviour was not what they wanted others to consider to be representative of themselves as individuals. Again the use of this variable has the potential to exclude those youths who, upon examination of contextual

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[86] The youth spoken of here is not the youth that uses Alternative Measures as a means of potential easy escape from the criminal justice system.

qualitative data, might benefit from Alternative Measures. This potential is balanced by the probability that the utilization of this screening variable may assist in the identification of cases that perhaps are not best suited for the Alternative Measures process.

4.2.3 Estimated Loss, Damage or Unrecovered

A third variable which was utilized to assign the population into design and non design categories is that of total dollar amount of unrecovered or damaged property in the incident for which the youth has had information laid against them. If the police estimate of loss / damage in an incident exceeded $ 500.00 then the case was classified as a non-design case.

The dollar value attached to the incident may also be an indicator of the seriousness of the offence that the previous two variable were not able to discern. A youth may be charged with two counts of Theft Under $1 000.00 but the items stolen were not the typical cosmetics, music, clothing taken in shoplifting incidents.

The shortcoming of the use of this variable lies in the fact that the dollar amount that is assigned to the loss or damage is the estimated value designated by the peace officer on the scene of the incident. Many times the peace officer could do little more than guess at the estimated damage to a vehicle or any other object. The result being that many times the estimate is inaccurate and thus the use of this variable to discriminate the population may result in the identification of cases that have the amount of damage over-estimated and the non-identification of cases where the amount of damage or loss is under-estimated by the peace officer filling out the report. Thus, again, the hope is that the use of this

variable as a discriminating one would assist in the identification of youths which stood a higher probability of being designated as non design cases.

4.2.4 Re involvement

Any youth that was found has been arrested for another offence during the period the youth was at the committee for Alternative Measures would have their cases designated as a non-design case. The statistical reports compiled by Probation Services kept track of those youths that had previous court convictions but did not keep track of the number of times the youth that had been to Alternative Measures previously. The utilization of the variable of re- involvement during the period of Alternative Measures as a determinant of the design and non-design cases was intended to be a very rough substitute for the unavailable data on previous arrest and referral to the Alternative Measures system. The use of this variable would be extremely problematic if used in isolation as a prime determinate. The use of this variable in concert with the other mentioned variables complements the task of dividing the population into design and non- design cases.

4.2.5 Missing Cases

In the discussions on the results of the examination of the data there is one group of cases that is of consequence to the hypothesis that there are no statistics for. As was described in the previous chapter, when the case is brought to the Committee by Probation Services, it is reviewed and the Committee votes on whether to accept the case. There was approximately 15-20 cases (maybe more), during the period which the data is derived, that the Committee choose not to accept and referred back to Probation Services.

These cases involved one or more of the following elements; weapons, sexual assault, violence, or multiple incidents each of moderate (or more) seriousness. Many of the cases that fit in the latter category where the types of cases where a youth appears to be involved in a ring of stolen goods collectively worth a large amount of money that appeared to have been occurring for an extended time. If the statistics from this group of cases were available as part of the population then the number of cases designated as non-design would have been higher even using the modified hypothesis.

4.2.6 Policy Change

There has been an important change in policy at Probation Services that has affected the nature of the cases that have been referred to the Committee. As has been noted, the majority of the cases handled by the Committee were youths charged with Theft Under $ 1 000.00 (shoplifting). As of January 1992 many of these cases are now being handled in the Unit office using what is referred to as a "parent action letter". A parent action letter is a letter sent to the parents requesting that they take action with the youth under their care and to inform Probation Services of such action. As a result there has been a greater number of the cases being referred from January to May 1992 that would be classified into the non-design category as used in the modified hypothesis. The majority of the cases would fall into the non-design category on the basis of being charged with an indictable offence, or for more than two charges against them. Again this is an intuitive impression gained from sitting through the cases during the January to May 1992 period rather than being the product of participant-observer research using the appropriate methodology for that mode of social research.

4.3 SAMPLE CHARACTERISTICS

The data for this thesis was supplied by Community and Youth Correctional Services in the Department of Justice for the Province of Manitoba. The population is the entire case load of the South Winnipeg Alternatives Committee from the inception of the Committee in March 1987 to the end of December, 1991. Thus the sample is equal to the population with n=286. The database was exported from dBase and imported to SAS on the mainframe at the University of Manitoba.

4.3.1 Gender

The population consisted of 202 youths (70.6%) that were male as opposed to 84 youth (29.4) that were female.

4.3.2 Age

As can be seen in Table 1, 24 youths (8.5%) were between ages 12 and 13, 36 (12.7%) youths were between the ages of 13 and 14, 56 youths (19.8%) were between the ages of 14 and 15, 57 youths (20.1%) were between the ages of 15 and 16, 66 youths (23.3%) were between the ages of 16 and 17 with 41 youths (14.5%) were between the 17 and 18 years of age. Three cases did not have the age recorded and three cases had ages recorded that were incalculable. The previous six cases were listed as missing data. It should be noted that the ages were derived on a formulaic basis using SAS to determine the ages on the base of birth dates.

TABLE 1

Age of Population

AGE	Frequency	Cumulative Percent	Cumulative Frequency	Percent
12	24	8.5	24	8.5
13	36	12.7	60	21.2
14	56	19.8	116	41.0
15	57	20.1	173	61.1
16	66	23.3	239	84.5
17	41	14.5	280	98.9
18	3	1.1	283	100.0

Frequency Missing = 3

4.3.3 Category and Type of Offence

As can be seen in Table 2, that of 286 youths, 243 (81.8%) had information laid against for charges which were listed as summary conviction offences under various pieces of federal legislation which contained provisions for criminal sanction for violation. 52 youths (18.2%) had information laid against them for indictable offences under the aforementioned pieces of

TABLE 2

Category of Offence

OFFENCE	Frequency	Cumulative Percent	Cumulative Frequency	Percent
Summary	234	81.8	234	81.8
Indictable	52	18.2	286	100.0

federal legislation. While the above noted table may provide a broad picture on the generally severity of the charges 3 serves to illustrate the broad range of offences that the youths in the sample have committed. By far the largest number of youth (65.0%) were charges with Theft Under $ 1000.00. The majority of these offences were for shoplifting from local stores. Break,. Enter & Theft was the single offence which appeared most often after Theft Under. It should be noted that this table reflects only

TABLE 3

Most Serious Offence Charged With

STATSEC	Frequency	Cumulative Percent	Cumulative Frequency	Percent
Bodily Harm (I)	5	1.7	5	1.7
Assault	2	0.7	7	2.4
Theft Over (I)	8	2.8	15	5.2
Theft Under	186	65.0	201	70.3
T.A.W.O.C.	5	1.7	206	72.0
Theft(Cred Card)	4	1.4	210	73.4
Break & Enter(I)	29	10.1	239	83.6
Poss H.B.I. (I)	1	0.3	240	83.9
P.G.O.B.C.	15	5.2	255	89.2
False Pretences	2	0.7	257	89.9
Forgery (I)	1	0.3	258	90.2
Harrass Phone	1	0.3	259	90.6
Fraud	5	1.7	264	92.3
Fraud (I)	1	0.3	265	92.7
Mischief	16	5.6	281	98.3
Arson (I)	1	0.3	282	98.6
Immigration Act	1	0.3	283	99.0
Possession	3	1.0	286	100.0

Legend:
(I) = Indictable Offence
T.A.W.O.C. = Take Auto Without Owners Consent
Poss H.B.I. = Possess House Breaking Instruments
P.G.O.B.C. = Possess Goods Obtained By Crime

the most serious offence that the youth was charged with.

4.3.4 Loss and Number of Charges

As shown in Table 4, of 286 cases there was a grand total of $ 18 693.86 of estimated damage, or unrecovered loss, as a result of all the offences committed. This averages out to $ 65.36 per youth. However, if the youths that had no estimated damage or unrecovered losses associated with their instant offences are removed from the population then the remaining 62

TABLE 4

Loss, Unrecovered or Damaged

LOSS	Frequency	Percent	Cumulative Frequency	Cumulative Percent
No Loss	224	78.3	224	78.3
< 100	26	9.1	250	87.4
100-499	23	8.0	273	95.5
500-999	10	3.5	283	99.0
1000 >	3	1.0	286	100.0

youths averaged $ 301.51 of damage individually.

As noted in Table 5, for the 286 cases there was a grand total of 425 charges that had information laid on them. This averages out to 1.48 charges per youth. However when all youths with only one charge laid against them are removed from the population only 59 youths are left with the average number of charges per youth moving up to 4.05.

TABLE 5

Number of Charges Laid

NCHARGES	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	227	79.4	227	79.4
2	29	10.1	256	89.6
3	13	4.5	269	94.1
4	10	3.5	279	97.6
5	1	0.3	280	97.9
6	2	0.7	282	98.6
7	2	0.7	284	99.3
15	2	0.7	286	100.0

4.4 ANALYSIS & RESULTS

The population was examined using the four screening criteria and divided into design and non-design categories. There was a total of 197 (68.9%) cases that did not match any of the criteria previously enumerated and thus were assigned to the design category; while 89 cases (31.1%) of the population matched at least one of the criteria and were assigned to the non-design category.

The criminal justice system is large and complex and with an organization that large it would not be unusual to find some cases that had been inappropriately refereed to Alternative Measures. If this occurred between one and five percent of the time it would probably be the result of randomness. However the data shows that 31.1% of all cases which the Committee accepted fell into the non design category. 31.1% non design cases in the sample would appear to be more of a systematic issue than one of randomness. This 31.1% percentage is exclusive of the approximately 20

- 25 that they Committee declined to accept because it was felt that these cases were beyond their ability to deal with.

With the data showing 31.1% of the cases as non design cases in nature there was one other secondary question about the general nature of the cases that were brought to the attention of the writer. One might wonder what the overall profile of the non design case would be. One colleague wondered if the data showed that the non design cases (being more serious by definition) were predominately those of older males. With this question in mind the data was re- examined to answer that question.

4.4.1 Discussion

This section will contain some discussion on what trends emerge, or do not emerge when all profiles are compared across age and gender.

In Table 6, is the compilation of the results from all screening variables for age. Note is made of which part of the sample, design or non-design, is dominate within each of the four screening variables at each age level. The focus was to determine whether each age group was more prevalent among the design or the non-design cases for each screening variable.

As can be seen above, the non design profile has a greater percentage of youth in the lower ages (12-13, 13-14) for offence, a greater percentage of youth in the middle ages (14-15, 15-16) for number of charges, re-involvement and loss as well as a greater percentage of in the upper ranges (16-17, 17-18) for re-involvement and (17-18) for loss. What may be drawn from these results is that the non design portion of the population are not pre-dominantly the youth that are older as one might suspect. In

TABLE 6

Domination by Age and Screening Variable

Age	Offence	NCharges	Reinvolve	Loss
12	Non Design	Design	Design	Design
13	Non Design	Design	Design	Design
14	Equal	Non Design	Non Design	Non Design
15	Design	Non Design	Equal	Non Design
16	Design	Design	Non Design	Design
17	Design	Design	Non Design	Non Design

some cases the reverse is the phenomenon especially when looking at the crucial variable of type of offence. It is in the 12 and 13 year old offenders where the non- design cases are pre- dominate

As seen in Table 7 following the compilation of the results from all screening variables for gender indicates that as was seen with age, the non

TABLE 7

Domination by Gender & Screening Variable

Gender	Offence	NCharges	Reinvolve	Loss
Female	Design	Non Design	Equal	Design
Male	Non Design	Design	Equal	Non Design

design cases are pre- dominate across the range of the screening variables.

As can be seen by the results below, females are in higher percentages for non design profiles in only the number of charges variable. Again the caution about the low number of cases in some of the non design profiles is low and thus does not lend to overall generalizability. While the male offenders do pre-dominate in two of the four screening variables, they are equal to the females in one, and less pre-dominate in the other variable. Thus the male offenders do not necessarily appear to eclipse the female offenders across all screening variables.

4.5 CONCLUSION

What is found in the data that was analyzed for the examination of hypothesis two is the while the hypothesis is not proven in absolute terms, there is enough data present which would indicate that a serious examination must be conducted as to the manner in which young offenders are being referred to Alternative Measures in Manitoba. The presence of so many cases that might be designated as non- design, and thus inappropriate referrals, should warrant a closer examination of the rationale by which the youth are sent to the Alternative Measures and for what purposes. Greater attention must be paid to the needs of the youth and the ability of volunteer based committees to respond meaningfully to youth who have criminogenic factors that are too complex for non professionals to deal with.

Chapter V

INTEGRATING RIGHTS, FRAMEWORKS, & COMMUNITY

As has been demonstrated throughout this thesis, the JDA operated under the doctrine of parens patriae, or divine right of the parent, an approach that was thought appropriate to deal with young persons who had committed offences because of their impressionable nature. Thus an adherence to dealing with the youth within their status of "specialness" rationalized an approach in which due process had little or no role. The inherent weakness in this type of system is that it assumes a homogeneity of a value system that could be applied across the board fairly with a hearty helping of benevolent paternalism. As the years went on, more and more concern began to focus on the civil rights that all persons had. The civil rights movement in the United States lead to a re- examination of how civil rights where being accorded to young person coming into contact with the law in Canada. Many observers saw the juvenile court in Canada as a venue in which equitable and legally fair treatment was in jeopardy by the very nature of the court. If one accepts that a criminal justice system should be predicated on a procedural fairness formula which serves to protect the innocent from the powers of the state, then the observation that the juvenile court system under the JDA was open to a form of fundamental unfairness found good degree of resonance. These concerns culminated with the passage of the YOA which appeared to have as a basic tenet the introduction of a more true due process schema to replace the parens patriae doctrine in the administration of juvenile justice. The YOA did

remove the application of the doctrine of parens patriae from the court itself through the provisions of the Declaration of Principle found in Section 3, only to re- surface in the provisions relating to Alternative Measures as found in section 4 and, by implication, section 69.

Section 4 sets out the due process provisions that must be observed in the administration of an informal[87] diversion programme. What this thesis has shown is that the YOA is designed to divert young offenders away from the court to a system of informal measures, utilizing the doctrine of parens patriae under the guise of due process and the Canadian Charter of Rights and Freedoms. One of the main concerns of the writer throughout the thesis has been the appearance of affording due process that is incongruent for the use of a system predicated on informalism. By legislative design, including the invention of new legal terminology such as "responsibility", young offenders are being channelled through parens patriae in a community setting with the institutional trappings of the court removed and those of the "community" inserted. The most concerning aspect of this legislative design is the manner in which it is packaged; the Alternative Measures system is sold as a diversion programme with due process procedural protection when it is, in fact, the replication of the parens patriae model of juvenile justice practice that the YOA was supposed to have eradicated when it eclipsed the JDA. In other words, the YOA says one thing and does another. This thesis has served to illustrate this point over and over again. Many youths have lost faith in the criminal justice system, and by extension wider society, because of the level of double speaks that YOA offers to the youth of our nation. The next logical question that one might

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[87] informal in the sense that the procedures are occurring outside a court and only loosely following the formalism of the court.

pose after coming to this position would be "so what do we do now"? A simple straight forward question that may have an equally simple and straight forward response; "change it". The next question would be what is this change and how is it to be accomplished? The remainder of this chapter will attempt to answer those questions by presenting a strategy that could have a spin off effect that may affect other parts of how we live in our communities and the level of control that we have over what happens in our communities.

The primary objective will be to propose changes to the legal system that will provide a framework that the individual communities can use to build on. This framework would provide some degree of equity across the country for entrance into the system, yet still allow communities to decide what types of cases are appropriate for them to deal with based on the concerns of the community. These changes should help to reconcile the discontinuity between the formalism of the YOA and the informalism of the Committee; between the due process of the YOA and the parens patriae in the community. It is a task that must be attempted if we are to endeavour to deal with young persons in conflict with the law in a manner that tied to the formal system but also adheres to the principles of restorative justice. To reconcile properly the voiced intent of the YOA with the practice in the Community is of great importance to the any process of empowerment with our communities.

In a sense this is an attempt to address questions which have been raised in the literature on private justice. The literature on private justice looks at the way that conflict is resolved outside of the legal system and the courts. As our society continues and grow and public resources begin

to shrink, the amount of policing and law enforcement which now is carried out by private interests is on the rise. Security guards patrol private property as well as commercial establishments that used to be looked after by the Police. Of more particular importance is the literature surrounding the resolution of conflict within a community by the community. Stuart Henry has looked the growth of private justice in the United States and how this development has served to displace the traditional models of court conflict resolution. This growth of informal or private justice raises many issues that are complex and beyond the scope of this thesis. However, it is important to note that work has been done how the informalism of private justice conflicts with the current legal system. In large measure this chapter is geared towards making structural changes in the legal system that would allow the development of this kind of private justice (Alternative Measures) in a manner that will conflict with the overall legal system the least while still addressing the fundamental needs of the youth and the community. The suggestions that are made here are exactly that, suggestions. Because it is only through dialogue that we can reach the goal that we seek.

It should be noted that later that what is proposed in this chapter is only for the reformation of the formal-rational portion of the system. Discussion that takes place later in the chapter focused around what other changes need to be made outside of the legal system in order to give the reforms suggested the opportunity to work. Research needs to be done on how these external variables should be approached. The purpose of including these areas into the thesis to raise awareness of some of the other issues which need to be addressed. The inclusion of the discussion

on these other areas is not based on the findings from the data in this thesis and this statements made in this area are not grounded in the primary examination fields of the thesis.

Certain assumptions are made in this chapter about the kind of change that can occur as well as how it may occur:

> Proponents of this approach (the approach of saying youth is an economic under class) would dispel any attempts to 'correct' the offender, arguing that, unless there is an overall change within society, little can be accomplished through the reforms aimed at changing individual offenders (Chambliss 1974, 1975; Quinney 1977; Krisberg 1977). While radical criminologists adhering to this ideology position would argue for the use of political activism in bringing about a complete restructuring of the capitalist system (Turk 1969), Mill (1973:144) sees the potential of taking short-term measures that can ameliorate the situations without a major social revolution. He argues that increased local control in the community through a decentralization of power and more citizen involvement are steps that would assist in decreasing the abuses of power of the ruling class.[88]

One of the crux's of classical Marxism is that it is not possible to effect change in the economic base, or mode of production, be changing the superstructure because the forces of production drive the superstructure not vice versa. As the above noted quotation indicates, there are some who feel that short term change can be effected by meaningful power dissemination in the communities in which people live. The writer is taking the position, as an assumption for this chapter, that social change is possible without a revolution or change in the mode of production or the restructuring of society on a massive scale such that all the inequities of the capitalist mode of production are obliterated in very short order. Thus the majority of this chapter will focus on some of the things that can be done to facilitate social change through the enhancement of our communities

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[88] Reid-MacNevin, Susan. A Theoretical Understanding of Current Juvenile-Justice Policy" in The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). (Toronto: University of Toronto Press, 1992) page 22.

in the day to day decisions that impact on how we live as individuals and as groups. The changes suggested in this chapter may seem overly optimistic as a blueprint for change but more articulation must occur to assist in the mobilization of those who currently reside next to each other to transform them into people who live together.

5.1 SAY WHAT WE MEAN

As the title of this section note, the first thing that needs to be done if for we, as a society, to mean what we say. There is no better place to begin this process for meaning what we say with young offenders then with the YOA itself.

Currently the YOA has a built in process which claims that due process is important, if not paramount, then proceeds to use new coded language like "responsibility" to replace "guilty" or "not guilty", coerces the youth to admit to the offence in order to participate in a diversion process which de facto is juvenile court with the institutional trappings of the judiciary traded for those of the community. This whole manner of dealing with youths is not straight forward and honest and does not reflect a "say what we mean" philosophy in dealing with their involvement with illicit behaviour.

5.2 THE CHARTER OF RIGHTS AND FREEDOMS

What the YOA currently asserts is that a youth must plead guilty to the offence in question before being eligible to participate in the Alternative Measures process. We should move to amend the YOA to clearly state that a plea of guilty must be entered by the youth so they may be able to

participate in diversion programming. An observer might ask if this proposed practice violates the youths right to due process as set out in the Canadian Charter of Rights and Freedoms? The answer to that question is probably, yes, it does violate the rights of the youth to participate in Alternative Measures only upon the entrance of a guilty plea. But if one examines the Canadian Charter of Rights and Freedoms in detail, they would notice that there are two ways in which this limitation on the rights of young persons involved with the law can be limited to participate in the process of Alternative Measures.

5.2.1 Section 33 - Notwithstanding

Section 33 of the Charter of Rights and Freedoms (the infamous Notwithstanding clause) read as follows:

> 1. Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to fifteen of this Charter.
>
> 2. An Act or provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> 3. A declaration made under subsection (1) shall cease to have effect five years after coming into force or on such earlier date as my be specified in the declaration.
>
> 4. Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> 5. Subsection (3) applies in respect of a re-enactment made under subsection (4).[89]

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[89] Canadian Charter of Rights and Freedoms s.33.

As noted in the quotation above, it is possible for Parliament to pass the YOA and invoke section 33 as it applies to section 4 of the YOA. This invocation of section 33 of the Charter must be renewed within a fixed time. This would allow for the continued use of section 33 to override the rights of a youth to parts of due process to participate in diversion programming as an alternative to going through the complete court process. This procedure has many potential political pitfalls inherent in its use, but may be well worth it to achieve the end of "saying what we mean".

5.2.2 Section One - The Qualifying Clause

The second way that the Charter might allow for an amended YOA to authorize the use of Alternative Measures that impinges on a young person's rights would be to do so citing the language contained in section 1 of the Charter:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[90]

While the protection of the rights of individual citizens must be pursued by a democracy, there are limits. It is the writer's contention that the surrendering of certain rights by the youth as part of informed consent[91] in exchange for participation in Alternative Measures is a reasonable limitation of rights consistent with Section One of the Charter of Rights and Freedoms.

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[90] Canadian Charter of Rights and Freedoms s.1.

[91] Informed consent occurs when a decision is made by an individual having access to all pertinent information and most importantly understanding the decision that they are making.

5.2.3 Discussion

What is of paramount importance here is that the legislation be clearly re-written to say exactly what will happen and be up front with the youth and the public. It is crucial to clearly communicate to the youth that we as a society recognize the process of Alternative Measures violate some of the rights that are normally accorded all Canadians, but we as a society feel that the abrogation of these rights to participate in Alternative Measures are a reasonable limitation on those rights given the option of having the matter dealt with in court and the resulting difficulties.

5.3 CHANGES TO THE YOA

This newly amended YOA which has been passed invoking section 33, or section 1 of the Charter should also contain a number of fundamental amendments relating to the Alternative Measures process;

1. A charge shall be laid against the youth,
2. a review of facts shall be held,
3. the youth must plead guilty as a pre-condition to entry into the diversion process,
4. proceedings against the youth shall be adjourned once the youth enters the diversion process,
5. successful completion of the diversion process will result in a recommendation to grant an absolute discharge to the youth by the court that has stayed proceedings against him/her.

5.3.1 Laying of a Charge

As mentioned earlier in this thesis, the Law Reform Commission of Canada has recommended that a charge should be laid against a youth in order for the youth to be considered for per-trial diversion so that such programmes is utilized only for individuals whose behaviour warrants such consideration because of their alleged violation of the Criminal Code or some other piece of federal legislation such as the Food and Drug Act. Thus it is imperative that any youth must have a charge laid against them in court in order for them to be eligible for the Alternative Measures process. This requirement would also eliminate the confusion whether a youth has a charge laid before being diverted. The importance of knowing that whether a charge has been laid before the youth was sent to Alternative Measures is important because it will determine how long Alternative Measures process can take before the court losses jurisdiction over the youth for that particular offence. This is important to know if a youth is not complying with the measures they agreed to perform so the case can be referred back to the Crown Attorney for action to be taken in court. Requiring that a charge be laid may result in a little more time for the court than is normally used, but that would be time well spend to insure that all youths are treated in the same manner.

To alleviate the concern of the utilization of court time, an individual from the community can appoint as a Justice of the Peace with a restricted jurisdiction relation to specific provisions of the YOA. The paperwork would go from the YOA Justice of the Peace to the court this mitigating the impact on the court docket.

5.3.2 Review of Facts

After the charge has been laid, the youth should have to appear for a review of facts on their case. The purpose of the review of facts would be to establish whether there is sufficient evidence to proceed to trail on the charge that has been laid. Should the court find that the case against the youth is of sufficient merit to warrant trial then it would also have qualified under section 4(2) of the YOA that make explicit the need to proceed to Alternative Measures with only those cases that are solid enough to be able to proceed to court. This would eliminate the confusion what provisions are acceptable for the decision to offer diversion to the youth and the factors that may go into that decision. Having the process conducted in open court should help with the appearances of both the inequalities of access between provinces as well as ensuring that the cases that become eligible for Alternative Measures are ones that truly meet section 4(2) of the YOA as demonstrated in open court. If the presiding judge finds that there is enough evidence to hold over for trial then the youth would be offered the choice of trial or diversion to Alternative measures.[92]

Once a youth has had a charge laid against them and has participated in a review of facts, and the judge has decided that there is sufficient evidence to proceed on the information before the court, then the court informs the youth that they have two options at this point in the proceedings;

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[92] Implicit in this discussion is the assumption that the youth meets other eligibility criteria laid down by the federal and/or provincial regulations for admission to Alternative Measures programmes. Mention of the appropriate parameters on this matter will be dealt with later in this chapter.

1. They can plead guilty as a pre-condition to entry to Alternative measures programmes; or
2. they can elect for trial in the court on the charge(s) brought before them.

5.3.3 Entering a Guilty Plea

The importance of entering a guilty plea in open court is crucial to the success of the "say what we mean" philosophy in an amended YOA. The current provisions that speak of the youth taking "responsibility" for their action should be amended to indicate that they shall demonstrate their willingness to take responsibility by entering a guilty plea in a court of law before being considered for Alternative Measures programming.

5.3.4 Adjournment of Proceedings

Once the youth has pleads guilty and has opted for Alternative Measures, the Court would stay the proceedings against the youth for a fixed time in order for the youth to proceed through the Alternative Measures process. The court would ensure that the youth has given informed consent to participate in Alternative Measures as well as the understanding that should he/she not successfully complete the Alternative Measures process they will end up back in court. The staying of proceedings after a guilty plea has been entered should convey the message to the youth that there is a consequence to non compliance with the provisions of the Alternative Measures process. Having this procedure clearly outlined in section four would ensure that it applies to all provinces and be conducted in an open manner that may be scrutinized by the community. .subsection 'Absolute Discharge' Finally, once the youth has successfully completed the

Alternative Measures process, a recommendation shall be made to the court to resume proceedings, accept the guilty plea from the youth and grant said youth an absolute discharge for those matters that have been dealt with through Alternative Measures. The granting of an absolute discharge would bring a formal close the proceedings against the youth. Thus the process began with a charge being laid, an appearance in court for a review of facts, a guilty plea, adjournment of proceedings, participation in Alternative Measures programming (preferably in their community) and finally arrival back in court for the closure to the process and an absolute discharge. Amendment should also be made to the section 749 of the Criminal Code to the provisions pertaining to pardons. This section should be amended by adding to it that young persons who are given absolute discharges as part of the process of involvement in Alternative Measures should be permitted to apply for free pardons at age eighteen or one year from the time of the offence which he/she was given absolute discharge for, whichever is greater.[93]

These changes to the YOA would allow for a more public and straight forward process and would lessen the chance for abuse by youths, Crown Attorney's or persons delivering Alternative Measures programs. Having the youth in court for the beginning and end of the process gives a sense of closure for the youth in their contact with the criminal justice system while still allowing them to perform their Alternative Measures in and with their community and derive the potential restorative benefits from that end of the process.

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[93] It may be more appropriate to amend the regulations governing pardons than to amend the Criminal Code, but the amending the Criminal Code would give a much more tangible and visible indicates that the conviction that results from participation in Alternative Measures is removable within a shorter time than for any adult.

The above noted changes to the YOA would provide a consistent and stable framework through which Alternative Measures can operate out of. These changes to the legislation would allow for uniformity across the country as well as for the certainty of knowing that the youth has been exposed to the same court process regardless of whether they are charged in British Columbia, Manitoba or Newfoundland. Section 69 would also have to be amended. The change to this section will be discussed later on in this chapter.

5.3.5 Eligibility Regulations

Provincial regulations surrounding the secondary eligibility criteria need to be reviewed with an eye to more precisely defining what cases may be referred to Alternative Measures and what cases may not be referred to Alternative Measures. As a minimum, all cases that fall into the one or more of the following categories should not be deemed acceptable to the Alternative Measures process unless there are exceptional circumstances:

1. any youth charged with an offence involving violence, weapons, or the threat of the use of same,
2. any youth charged with sexual assault or other related offence which is sexual in nature,
3. any youth charged with an offence in which the estimated loss, damage or unrecovered goods which totals more than $ 1 000.00,
4. any youth who is charged and is determined to be a ward of the court or of any social service agency,
5. any youth who has been to Alternative Measures on two previous occasions or who has been to Alternative Measures within the previous six months of the involvement in the instant offence.

It should be noted that this list is a suggested one that would address some minimum stand or acceptability consistent with the responsibility of the Government to protect the interests of society. Each community would, in turn, be asked to address what their own criteria for admission to Alternative Measures would be. The Committee would also be able to design their own model for operation that would then be plugged into the formal system.

The combination of the above noted changes to eligibility regulations coupled with the suggested changes to the Alternative Measures provisions of the YOA should provide a solid base from which a community development framework can move to address youth crime within their communities by tapping into the current criminal justice system infra- structure. The next sections will raise issues that must be examined in order to provide communities with a reasonable chance of successfully implementing the reforms that have been discussed in this chapter.

5.4 AN EXPANDED ROLE FOR JUSTICE COMMITTEES

Community, or Youth, Justice Committees, should look to re- orient themselves as community based organizations not merely consisting of persons who reside in a particular geographical district. These committees should become agents for community development not merely community involvement.

> A different role for the community may, however, be suggested. The community, or more likely some organization with a commitment to community action and perhaps change, may take an active role in working with juveniles around the problems of delinquency. Working at "diverting" delinquents from the street life contributory to delinquency as well as from their involvement with the juvenile justice system, the more activist, community based group do not become dependent on the formal system for its main purpose. While not an inevitability, it may be able to

> avoid the trap of becoming simply part of the existing social control system. Such a community- based group may be involved with delinquents already formally a part of the juvenile justice system, yet still on the street. Alternatively, or at the same time, it could work with other not necessarily officially labelled delinquent or enmeshed in the juvenile justice process, yet who are considered by some to be at serious risk.[94]

If one is to take a community development perspective on community justice committee and working with young persons in the community, it becomes apparent rather quickly that the effects of the Committee should extend beyond its direct contact with youths who have been referred to them under section 4 of the YOA.

The key to any group being able to work both within the scope of a community justice committee and as true arm of the community, lie in what control it has over its operations and the manner in which it interfaces with the rest of the criminal justice and social services systems. Autonomy is the key.

> Diversion programs will not solve the problems that lead some people to crime; it will only make it possible to see those problems more clearly and come to grips with them at the community level. Diversion makes it possible for our responses to crime to be more rational, informed, open and selective. Yet it all depends on governments supporting the community and its agencies to make that intelligent response in a timely way.[95]

For the purposes of the current discussion the last line of the above quote is most crucial. Section 69 of the YOA outlines the use of community justice committee and specifically mentions that the members must serve without remuneration. This provision appears to be have been intended to give the committee some degree of autonomy over its operation because it did not have to deal with any government agency directly for the allocation

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[94] Fuchs, Don; Bracken, Denis C. "Self-Help Network and Community-Based Diversion". Canadian Journal of Criminology Vol 26(1984:344.

[95] Law Reform Commission of Canada. Diversion (Working Paper # 7). Ottawa: Information Canada, January 1975. page 14.

of funds for its operations. At the same time it would be very difficult for this type of committee to have any success without having some assistance from the system as it now stands. Thus there are three main areas which are pivotal to enhancing the operation of a community based youth diversion committee;

1. the points of interface with the governmental structures, and control thereof,
2. the ability to independently refer to another agency for attention (social service, child and family services etc.) as well as control over its own resources.
3. the extent to which they are willing and able to broaden their involvement to include activities that has a more direct purpose of community development.

5.4.1 Connection to Government

The issue of the point of connection, and the control over that point, with the referral body is an important one to address if the reformed system is to be at all responsive to the community. As has been mentioned previously, the Province of Manitoba, has chosen to use the Community and Youth Correctional Services Branch of the Manitoba Department of Justice as the referral agent to the Community Justice Committees. Probation Officers act in a liaison/resource capacity , but they are act de facto as the referral agent. One must keep in mind that it is the Crown Attorney's Office that reviews the cases that have been submitted by Police and make a determination as to the suitability for Alternative Measures. Should the youth be deemed suitable, they are sent to Probation Services who make a

further determination whether the youth should be dealt with by a single volunteer working out of the Unit office, by a community justice committee or by another method such as the parent action letters that were discussed earlier. As a direct consequence, the Committee does not have direct access to all the potential cases from the geographical area that they serve. Thus the Committee falls into the organizational chart of Community and Youth Correctional Services and act as a resource arm for them instead of an arm if the community. Bringing the operation of the committee and the point of referral closer together, in an organizational sense, to achieve an end of greater committee autonomy through less encumbered access to youths eligible for Alternative Measures would better serve the realization of the positive potential of community participation in the youth justice system.

Assuming the changes to the YOA, as articulated earlier in this chapter, have been implemented then it would appear the appropriate point at which a referral linkage should occur is at court itself. If a charge is laid against the youth and the youth must appear in court for a review of facts and enter a plea of guilty preparatory to participation in Alternative Measures then the referral should occur at that point. If the court was to refer all cases to the youth justice committees directly then the independence of the committee is not threatened by other organizational agenda items that may exist within the Crown Attorney's office or Community and Youth Correctional Services Branch. It would be hoped that leaning on the independence of the judiciary would be an appropriate relationship between the community and justice system. Catherine Heinrich noted one of the primary differences between what was said by the Working Together Project and what was done in the community development project as thus:

> Most activities (of Working Together) fall into a coproduction categorization, where citizens take over services previously undertaken by the organization. In most cases, the organization determines how 'citizen participation' is defined and operationalized; the implementation strategy is more organization-based and recruits helpful volunteers than community-based and responsive to local citizens.[96]

The mechanics of the system should not be that difficult to accomplish. Each court has a support staff that runs the court. Each judicial referral to Alternative Measures would be noted in some sort of referral listing system that a committee volunteer could obtain on a regular basis to bring to the committee for review. All cases referred for Alternative Measures would be referred to the committee whose geographical area includes the residence of the youth charged with the offence. The Committee would still have to review the cases for suitability to their process and resource availability, but they would have access to all cases that have come before the court that have been automatically referred to them by an independent judiciary.

The process may appear to have a lock-step rigid structure to it, and to a certain extent it does, but it also gives some guarantee to the youth that their case will proceed in a manner that is virtually identical to other cases up to the point of referral. The process would still be subjected to the practices of the police and the crown in terms of whether information will be laid, whether a charge will be laid or dropped, but will be a higher degree of confidence in the appropriateness of the case that has been referred, and the perception of the same by the public, to the committee. The Committee, or government, will still have to develop

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[96] Heinrich, Catherine. The Diffusion of Innovation in a Human Service Organization: A Case Study. (M.S.W. Thesis, University of Manitoba, 1989):102

guidelines for what types of cases are and are not appropriate for handling by the Committee as well as develop the rational for the choices that have been made on the broad categories of appropriate and inappropriate cases.

5.4.2 Connection to Professional Resources

Once the case had been referred to the Committee the next important issue that requires attention is that of control and access to resources to assist the youth and the committee in the process that lies ahead. Currently youth justice committees in Manitoba have no direct government funding to depend on. That practice should continue as a matter of course. What would have to be given up in the areas of autonomy and community distinctiveness in return for funding has the potential to relegate the role of committee back to just part of a response mechanism to governmental organizational needs rather than a true community based group. Having said that, there is a way in which the role of the committee can be significantly enhanced through its access to resources. The level of complexity and sensitivity of a case and the ability of the committee to deal with it in a meaningful is directly proportional to the level of available of crucial helping resources that the committee can directly access. Each community committee must have access and referral authority for youth who appear to have criminogenic factors that need to be addressed through specialized and/or specialist needs provision. The need for direct referral authority for chemical dependency issues, child abuse, behaviour problems etc. is crucial to a meaningful process for the youth and the community. It is important to note that any criminogenic factors that the committee feels the youth need to address should be directly related to the instant offence with a goal of providing the youth with opportunities to

deal with difficulties that have brought them to the attention of the criminal justice system. Whether the youth should be required to do more than attend to the referral agency for assessment to fulfil the terms of the agreement they have entered into with the committee is not clear. This is an issue that would require a thorough exploration, but the idea of having as a minimum the authority to directly refer youths to social service agencies for assessment of how, and if, to address the appearance of criminogenic factors in the instant offence would provide the committee with the type of access to resources that could contribute significantly to a community development role.

The utilization of the court as the direct referral agency would also have the potential of allowing the committee to pursue other items of community development interest. It is at this point in the development of a committee that is pivotal in determining the real impact that the committee may have on the life of the community.

5.4.3 Broadening the Role

Committees need to plug-in to the other community organizations that are present in the area. A Community Justice Committee can not do all the work themselves and be expected to succeed, only through community group networking and co-ordination can wider ranging improvement for our community its youth occur. Professor Rod Kueneman produced a position paper on the integration of community development with community justice committees. He felt that there were four main goals that need to be reached in order for these committees to have a meaningful role in the life of a community:

1. Contact with all youthful offenders, both judicial and non- judicial.

2. the opportunity to have informal follow-up with juveniles after the court legal matters have been completed.

3. Community education both about the committee and a stronger community orientation towards problems solving. Ultimately a desire to see urban community neighbourhood to approach the intimacy and integration found in smaller towns.

4. A commitment to the victim. We want the tear in our social life that has be caused by crime to be repaired. As such we are interested in restoring an emphasis on the harm being experienced by the community primarily and then only secondarily against the State. With this emphasis, we wish to successfully restore the community bond between offender and victim. To this end we want neighbourhoods to have the organization necessary to respond to its own problems in the first instance and to rely on the formal process only in more serious or contentious matters.[97]

The need for wider action for community development is both needed and required. The writer was employed by Campus Police at the University of Manitoba during the 1991-1992 academic year and encountered a situation that illustrated the need that exists in some of our communities. One late Saturday night we responded to a call that someone was in the one of the Universities gymnasiums. We arrived and gained entry to the gym to find a group of ten to twelve youths playing basketball. They were all students at local high schools and were simply enjoying themselves. Once the Constable arrived on the scene, the youths were asked for identification and told that they could be charged for Break and Enter and trespassing. The youths were warned that if they were found using the gym again they would be charged. The Constable was acting properly on behalf of the University, but it was sad to see youths who just wanted to play basketball on Saturday night instead of getting involved with other activities being turned away

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[97] Kueneman, Rod. "Position Paper - Towards the Development of Intensive Community Involvement with Young Offenders".

from unused facilitates. Our communities must return to an orientation that show people taking responsibility for themselves and others in their community. We can no longer continue to think of things in terms of "us" and "them" we must see ourselves on the same ship in which we all pitch in to keep if afloat lest we all drown together.

The key to the success of any community justice committee in being involved in community development is to attempt to work in community crime prevention. Keeping in mind the examples that have be cited above the following example of a self help network is suggested as a potential model for examination:

> It (Rossbrook House) operates on the principles of self-help and self- referral.... the program and program objectives reflect a commitment to these principles, as well as a commitment to access and availability. The building is open from 9:00 a.m. to 1:00 a.m. during weekdays and on a 24 hour basis on weekends and during times when school is not in session. The suggestion here is that to operate truly as an alternative to both street life and the juvenile justice system, such alternatives must be available during times of greatest need - after school and on weekends. .para The objectives of the program of Rossbrook House are quite simple: stabilization, socialization, personal development and crisis intervention when necessary.[98]

What is described by Fuchs and Bracken is a form of a drop- in centre that would be available for youths when they needed it. Physical space dedicated to the youth in the community that they feel some sense of safety and ownership over where they can come to hang out, play basketball, play cards, or just talk to someone about the things in their lives. In short, integrative and restorative community institution that youth view as relevant to them must be reconstructed with a view towards bringing the community to the youth and the youth to the community. Most community centres in the City of Winnipeg do not have their indoor facilities open

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[98] Fuchs, Don; Bracken, Denis C.; "Self-Help Network and Community-Based Diversion" in Canadian Journal of Criminology Vol. 26(1984):346.

past nine or ten o'clock in the evening although some of the outdoor facilities, such as hockey rinks are left lit overnight. Regardless, these facilitate are seen more as belonging to their parents or the cities' then ones to those who are primarily designed for our children.

5.5 CONCLUSION

It will only be through a concerted effort at providing a more meaningful environment to grow up in that have the type of impact that we will hope it to have. To address criminogenic factors before they become criminogenic factors and to make our communities comprise of homes in which we live together instead of buildings that we die in. Communities need to be devices of solidarity not instruments of destruction and isolation.

BIBLIOGRAPHY

Abel, Richard L. The Politics of Informal Justice: Volume 1 The American Experience. Toronto: Academic Press, 1982. Archambault, Judge Omer. "Young Offenders Act: Philosophy and Principles." in Silverman, Robert A.; Teevan, James J. Jr. (eds.). Crime in Canadian Society (3rd ed.). Toronto: Butterworths, 1986.

Aultman, Madeline G.; Wright Kevin N. "The Fairness Paradigm: An Evaluation of Change in Juvenile Justice." Canadian Journal of Criminology. Vol 24 13:24, 1982.

Bala, Nicholas; Kirvan, Mary-Anne. "The Statute: Its Principles and Provisions and Their Interpretation by the Courts". in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Bala, Nicholas. "The Young Offenders Act: A Legal Framework". in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. Toronto: Wall & Thompson, 1988.

Beaulieu, Judge Lucien. "A Comparison of Judicial Roles under the JDA and the YOA". in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Burrows, Barbara R., Hudson, Joe; Hornick, Joseph P. "Chapter 1: Introduction" in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. Toronto: Wall & Thompson, 1988.

Coflin, Jim. "The Federal Government's Role in Implementing the Young Offenders Act." in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. Toronto: Wall & Thompson, 1988.

Community Involvement in Criminal Justice: Report of the Task Force on the Role of the Private Sector in Criminal Justice. Ottawa: Minister of Supply and Services, 1977.

Constitutional Act of 1867. R.S.C. 1985 Appendix II no.3

Diversion: Law Reform Commission of Canada Working Paper #7. Ottawa: Information Canada, January 1975.

Dobb, Anthony N. "Turning Decisions into Non-Decisions." in Corrado, Raymond R.; LeBlanc, Trepanier (eds.) Current Issues in Juvenile Justice. Toronto: Butterworths, 1983.

Ekstedt, John W.; Griffiths, Curt T. Corrections in Canada: Policy and Practice (2nd ed.). Toronto: Butterworths, 1988.

Fuchs, Don; Bracken, Denis C. "Self-Help Network and Community-Based Diversion." Canadian Journal of Criminology. Vol 26 343:354, 1984

Glaser, Barney G.; Strauss, Anselm L. The Discovery of Grounded Theory: Strategies for Qualitative Research. New York: Aldine De Gruyter, 1967.

Griffiths, Curt T; Klein, John F.; Verdun-Jones, Simon N. Criminal Justice in Canada: An Introductory Text. Toronto: Butterworth & Co., 1980.

Griffiths, Curt T.; Verdun-Jones, Simon N. Canadian Criminal Justice. Toronto: Butterworths, 1989

Hackler, James C. The Prevention of Youthful Crime: The Great Stumble Forward. Toronto: Methuen, 1978.

Hackler, Jim. "In My Opinion... The Impact of the Young Offenders Act. Canadian Journal of Criminology. Vol 29 205:209, 1987.

Hackler, Jim. "Good People, Dirty System: The Young Offenders Act and Failure". in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Hatt, Ken. "Probation and Community Corrections in a NeoCorrectional Era. Canadian Journal of Criminology. Vol 27 299:316, 1985.

Havemann, Paul. "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act." in Brickey, Steven; Comack, Elizabeth (eds.). The Social Basis of Law: Critical Readings in the Sociology of Law. Toronto: Garamond Press, 1986.

Heinrich, Catherine. The Diffusion of Innovation in a Human Service Organization: A Case Study. M.S.W. Thesis. University of Manitoba, 1989.

Jaffe, Peter G.; Leschied, Alan W.; Willis, Wayne. "Regaining Equilibrium in the Canadian Juvenile Justice System" in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Juvenile Delinquents Act R.S.C. 1970 c.J-3.

Juvenile Delinquency in Canada. The Report of the Department of Justice Committee on Juvenile Delinquency. Ottawa: Queen's Printer, 1965.

Juvenile Justice Committee: Special Report: Department of the Attorney-General of Manitoba. Winnipeg: Attorney-General Department, August 1979.

Kennedy, Leslie W. On the Borders of Crime: Conflict Management and Criminology. New York: Longman, 1990.

Kueneman, Rod; Linden, Rick. "Factors Affecting Dispositions in the Winnipeg Juvenile Court." in Corrado, Raymond R.; LeBlanc, Trepanier (eds.) Current Issues in Juvenile Justice. Toronto: Butterworths, 1983.

Leschied, Alan; Gendreau, Paul. "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the Young Offenders Act." Canadian Journal of Criminology. Vol 28 315:323, 1986.

Leschied, Alan; Jaffe, Peter G. "Dispositions as Indicators of Conflicting Social Purposes under the JDA and YOA." in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

McGrath, W.T. "The Juvenile and Family Courts" in McGrath, W.T. (ed.). Crime and its Treatment in Canada. Toronto: Macmillian of Canada, 1965.

O'Brien, Daniel. "Juvenile Diversion: An Issues Perspective from the Atlantic Provinces." Canadian Journal of Criminology. Vol 26 217:230, 1984.

Pearson, John C. "Legal Representation under the Young Offenders Act". in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Rappaport, Julian. "Public Policy and the Dilemma of Diversion." in Corrado, Raymond R.; LeBlanc, Trepanier (eds.) Current Issues in Juvenile Justice. Toronto: Butterworths, 1983.

Ryant, Joseph C.; Heinrich, Catherine. " Youth Court Committees in Manitoba." in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. Toronto: Wall & Thompson, 1988.

Representing Young Offenders. Winnipeg: Manitoba Law Society, 1990.

Reid-MacNevin. "A Theoretical Understanding of Current Canadian Juvenile-Justice Policy." in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Reitsma-Street, Marge. "Differential Treatment of Young Offenders: A Review of the Conceptual Level Matching Model." Canadian Journal of Criminology Vol 26 199:215, 1984.

Towards Unity: Criminal Justice and Corrections. Report of the Canadian Committee on Corrections. Ottawa: Queen's Printer, March 1969.

Schwartz, Ira W. "The Death of the parens patriae Model" in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

Scott, Susan Price. The Young Offenders Act: Ideological Models of Dispositions. Ph.D. Dissertation, York University, October 1989.

Taylor, Kenneth Wayne. Social Science Research: Theory and Practice. Scarborough: Nelson Canada, 1990.

West, Gordon "Towards a More Socially Informed Understanding of Canadian Delinquency Legislation" in Leschied, Alan W.; Jaffe, Peter G.; Willis, Wayne (eds.). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press, 1991.

West, W. Gordon. Young Offenders and the State: A Canadian Perspective on Delinquency. Toronto: Butterworths, 1984.

Weiler, Richard; Ward, Brian. "The Voluntary Sector Response to the Young Offenders Act." in Hudson, Joe; Hornick, Joseph P.; Burrows, Barbara A. (eds.). Justice and the Young Offender in Canada. Toronto: Wall & Thompson, 1988.

Wilson, Lawrence Charles. Juvenile Justice in Canada: The end of the Experiment L.L.M. Thesis. University of Manitoba, April 1976.

Young Offenders Act. R.S.C. 1985 c. Y-1.