THE YOUNG OFFENDERS ACT: A REVOLUTION IN CANADIAN JUVENILE JUSTICE by Alan W. Leschied, Peter G. Jaffee and Wayne Willis (Toronto: University of Toronto Press, 1991)

> But the pupils — the young noblemen! How the last faint traces of hope, the remotest glimmering of any good to be derived from his efforts in this den, faded from the mind of Nicholas as he looked in dismay around! Pale and haggard faces, lank and bony figures, children with countenances of old men.... There were little faces which should have been handsome, darkened with the scowl of sullen, dogged suffering; there was childhood with the light of its eye quenched, its beauty gone, and its helplessness alone remaining; there were vicious-faced boys, brooding, with leaden eyes, like malefactors in a jail.... With every kindly sympathy and action blasted in its birth,with every young and healthy feeling flogged and starved down, with every revengeful passion that can fester in swollen hearts, eating its evil way to their core in silence, what an incipient Hell was breeding here![1]

Dickens was writing about the maltreatment and misraising of young people in the private schools of early 19th century England. He was not speaking of young criminals, about which he elsewhere wrote many another line with his typical linguistic sensitivity. He was writing about the manner in which young people could be ordinarily raised. It is plain that he felt that the English society and law which permitted this to go on was seriously off course. The societal approach taken to young people in this respect was fundamentally flawed. The society seems to have just not known what to do, or why.

In western societies like Canada of the late twentieth century, we seem to have come to realize — at least as a society, if, sadly, not always as individuals — that we ought not to deal with young people in the same fashion today as described by Dickens over a century ago. However, we still seem to have the greatest difficulty in figuring out what sort of laws we ought to have touching upon the situation of young people. As the writer has elsewhere written,[2] we have many laws, both statutory and judge-made, which deal with children, but the burden of many of those is to serve some purpose or benefit to adults either as individuals or in communities, or as part of society as a whole. Indeed, the guiding philosophy behind such laws seems often to view the role of young people as being symbols or utensils of those greater purposes. Depending on which politico-social perspective is dominant, such manipulative laws relative to young people can easily come into existence to follow the dominant perspective. Dramatic changes in the perspective having philosophic hegemony leads to dramatic changes in the laws.

I. CHANGES IN PHILOSOPHY AND PRACTISE

The situation of the law in Canada relative to how to deal with young persons who offend against our penal laws — particularly the criminal law — reflects, at least, the phenomenon of dramatic oscillation in the law, if not necessarily the manipulation of the law. Ironically, in both of the two major pieces of legislation relating to the subject — the *Juvenile Delinquents Act* and the *Young Offenders Act* — the language used has reflected

---

1. Charles Dickens, *Nicholas Nickelby* (New York: The Kelmscott Society Publishers, 1912) at 98-99.
2. Jack Watson, "How Laws Hurt Children" unpublished, October 1990, submitted for credit to LL.M. program, University of Alberta.

a relative air of assurance about the correctness of Canadian philosophy about the nature of young people and the proper ways for society to deal with them. Nonetheless, the philosophical and practical shift as between the pieces of Canadian legislation relating to the subject has, manifestly, involved jarring changes. The law was not tinkered with in 1984-1985 when the *Young Offenders Act* came into being. It was transformed wholesale. Have we made any progress? Despite any protest of confidence, do we know any better what to do with young people who break our penal laws? Do we in fact handle them any better?

II. THE ASPIRATIONS AND ACHIEVEMENTS OF THE BOOK

These questions seem, ultimately, to be the fundamental questions posed in each of the articles enclosed into the compendium book. In this collative work, a variety of capable and experienced authors try to wrestle with the questions. The answers and opinions expressed thereon have themselves varying degrees of either substantive support or persuasiveness. Indeed, most authors go beyond analysis to evaluation: they suggest in a confident way that Canada is, or is not, on the right track. Some writers seem to be boosters of the law; others seem to be skeptics; still others seem to be cynics about it. In none of the articles, however, is full or unequivocal satisfaction, with either the terminological or rational structure of the *Young Offenders Act* or with its effects, unambiguously expressed. Indeed, the editors' aim seems to be to propose that the *Young Offenders Act* is merely a good start, but that it has shifted the equilibrium too much towards legalism.

So does this book help Canadians as a whole to address these questions on either a philosophical or practical level? Certainly the book is not parsimonious about its intellectual offerings. Each of the contributing writers try hard to provide answers at both levels. Beyond this, the editors have also tried to marshall, into the single work, a balanced collection of written work on the *Young Offenders Act* from a wide variety of sources, considering its history, genesis, social context, operation, effect and implications. Evidently, one of the editors' aims was to make it possible for the reader to discern and appreciate the various normative and philosophical tensions that, ultimately, lie behind all laws dealing with young persons and are brought into acute conflict in relation to the laws dealing with young persons who offend against our penal laws. The book offers an excellent demonstration of the debate, as between those who find neither a coherent model of juvenile justice described or carried out, and those who take a more optimistic view. True, there seem to be considerably more *Act*-boosters than *Act*-cynics in the book, and more *Act*-skeptics than both of the other, but no wilful effort to skew the materials provided for the reader is inferred from this. In these two senses , that is from the point of view of the *efforts* and the *achievements* of both the writers and the editors, the book is to be commended.

A few examples can be noted. Susan Reid-MacNevin, author of Chapter 2 in Part I, seems to fall in the category of skeptic, noting that the *Act*, "...still does not provide clear guidance on the amelioration, treatment or control of youthful crime in Canada."[3]

Reid-MacNevin offers a studious analysis of the four possible models of juvenile justice which she calls the "Community Model" the "Welfare Model," the "Justice Model" and the "Crime Control Mode" and concludes that the *Act* lacks a clear priorization of goals, philosophy or approach. Her view, despite its critique, is, however, essentially optimistic and reformative.

By comparison, James Hackler, in Chapter 3 of Part I, seems to be more of a cynic, when he impactively observes:

> ...[T]he juvenile justice system in Canada works badly, despite valiant efforts on the part of many within the system.[4]

He later adds:

> Canada has permitted a clumsy and insensitive juvenile-justice system to evolve....[5]

Nonetheless, Hackler does not appear to consider the enactment an irremediable failure. He suggests some adjustments. Interestingly, he seems to propose something which is more along the *parens partiae* model of the predecessor *Act*, the *Juvenile Delinquents Act*.

By way of further comparison, Nicholas Bala and Mary Anne Kirvan (who may well have contributed significantly to the development of the *Act* in their respective positions as influential members of the legal community) are undeniably *Act*-boosters. Like Gordon West, whose historical piece commences Part I, they provide a recital of the historical legal developments that ultimately resulted in the *Act*. Unlike West, however, who seems to consider the *Act* disappointing, Bala and Kirvan seem reluctant even to concede that there are flaws in the *Act* at all, saying:

> While individual provisions of the YOA require scrutiny *and perhaps reform*, it is submitted that the *Act's* Declaration of Principle reflects a societal consensus concerning young offenders, though these principles may be difficult to apply in individual cases.[6]

Apart from demonstrating the philosophical contention reflected in this debate as to the *aims* or *philosophy* which should be expressed in any law dealing with crime by young persons, the book also sheds light on the *effect* or *impact* of the *Act*. Looking back on the years in which the *Act* has been in force, a significant divergence is seen in opinion as to its usefulness and efficacy in reaching whatever is thought to be its proper goals.

---

3. A.W. Leschied et al., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991) at 17.
4. *Ibid.* at 37.
5. *Ibid.* at 65.
6. *Ibid.* at 109.

Several authors offer what appear to be booster-like complimentaries about the enhanced role of Counsel and Judges under the *Act* and the decline of the *parens patriae* model: see the articles of John Pearson, Judge Lucien Beaulieu and Ira M. Schwartz.

However, Alan W. Leschied and Peter Jaffee, two of the editors, who seem to be boosters as to the aims of the *Act*, seem also to despair as to its effectiveness. Amongst other things, they say:

> In an effort to provide civil rights and due process for young offenders and save them from the unfettered paternalism of JDA judges, a worse consequence may have resulted. The increase in custodial sentences and decreased access to rehabilitative services may suggest more process but less meaningful outcomes for young offenders. One hopes that a new generation of child-savers and civil libertarians can become stronger allies in creating a balance n the Canadian juvenile justice system.[7]

Their disappointment with the way in which the *Act* works does not, however, reflect any zeal to discard it. On the contrary, they appear to think that with some adjustments and accommodations, the *Act* will work in a good way.

However, the Book then turns to Parts III and IV to discuss the wider issues of treatment, education, and rehabilitation of the young people who commit the crimes. The reader in perusing the first half of the Book hears from the legal communities, but by this stage comes to hear from the clinical, medical and educational constituencies. The conflicts in the message, however, are still there. Mental-health and educational professionals speak to a series of important questions focusing largely on the need to remember and deal with the young person as an individual who must be integrated into the greater society and not simply placed on the crime and punishment treadmill. Some of these authors attempt to be optimistic that the clinical and similar needs can be accommodated within the legalistic structures of the *Act* and resist the tendency to disaffection as between professional methodologies.

Nonetheless, one still finds skepticism about the ability to effectively serve all aims together, as where George Awad, in Chapter 9, observes:

> ...[There is, in the *Act*] an unclinical and anti-clinical attitude. There seems to be an underlying tone suggestive of the need to protect offenders from clinicians.[8]

and as where P.G.R. Patterson says:

> Viewed from this perspective, the *Young Offenders Act* may well have been an important and necessary step in our evolution, refocusing our attention, as it does, on the issue of individual rights and freedoms and personal responsibility. However, as outlined above, the price has been high, and the baby has gone down the drain with the bathwater. We need now to move on and combine that which is good from both the *Juvenile Delinquency Act* [sic] and the *Young Offenders Act*.[9]

---

7. *Ibid.* at 168.
8. *Ibid.* at 184.
9. *Ibid.* at 195.

In their concluding article, the three editors "remain optimistic" and say:

> ...[T]he intense interest and vital debates have provided an opportunity for significant positive changes, leading to finer tuning and better balance in the future Canadian juvenile justice system. The next decade offers considerable challenges and opportunities for the development of a more coherent and effective Canadian juvenile justice system.[10]

Having regard to the need to be constructive an forward-looking with the law, and particularly having regard to the substantial material offered by this Book in support of these conclusory remarks, it is easy to state in this Review that the Book is, by and large, a good one, and a success in relation to it two main projects being (a) the assessment and evaluation of the *Young Offenders Act* as the modern Canadian law on offences by young people and (b) the final critique or vindication of the *Act* as good law.

III. THE SHORTFALL OF THE BOOK

Nonetheless, in this Reviewer's opinion, this book is not an unqualified success. It lacks one element which might complete its evident aim to reveal the full range of the debate on both the aspirations and effects of the *Young Offenders Act*. That element would be a more direct and blunt challenge to the unalloyed legalism which the *Young Offenders Act* represents. There are two aspects to this: the legalism of the Act itself, and the increasing legalism of the society which has created it. It would not have been wrong for this Book to include comments, if available, from someone who disagrees with both tendencies.

As to the legalism of the *Act*, some might argue that the *Young Offenders Act* is currently designed and formulated in a way that makes it impossible to achieve a successful merger of the various models of law which the authors of this Book so capably discuss.

While the multiple-track language of the *Act* allows — indeed, induces — most commentators about it to be able to be selective and thus to find room to comment constructively on possible improvements to various phrases or sections of the *Act*, it likewise makes the possibility of substantive amendment either by adding or shifting priorities a very difficult proposition. Any written work on this *Act* might be able to find reason for optimism as to the development of an overall coherency and consistency by simply choosing the parts and philosophy that the author of that written work thinks best and steering them to the position of first priority. It is at least possible to argue that in most real instances, such election and promotion of values would result in an effective exclusivity to the winning values, and the diminution of the lesser values to those which can be given lip service but little else.

In other words, it is at least arguable that it may be impossible, under this *Act* to actually logically reconcile the language of the *Act* to real situations on anything but a

---

10. *Ibid.* at 298.

case-by-case basis, unless the true purport of the *Act* is profoundly changed so as to permanently and universally re-order the priorities in values and objectives. It is easy to say, but not so easy to do, to have any enactment, particularly one with coercive features, recognize and take due account of 'everything.' In implementation of any such enactment in a real case, something out of the list of 'everything' is going to be decisive, or the most important thing to weigh. Accordingly, the enactment will, in that case, be potentially different for that case than any other case. Either all other cases will follow the arrangement of priority determined in that case, or they will not. The *Young Offenders Act*, with its long list of aims, can be carried out with overall coherency and consistency and, thus, effectively be transformed, or it can have flexibility and encourage lottery legalism.

As to the legalism of society, it is possible to argue that modern reasoning and social policy generally is so swollen with legalism that it seems, at times, that our social order cannot conceive of, let alone trust, a system which might not regard all social problems as disputes capable of juridical resolution and remedy. Indeed, the various contributing authors in this Book seem, to a greater or lesser extent, to accept the idea that juridical legalism will ultimately yield up the best societal response to the phenomenon of anti-social behaviour of young persons if it could only be twisted this way or that, ever so slightly.

For this reason, the Book, though informative, constructive and helpful, falls one step short of what might be an ideal overview retrospective on evolution and implementation of the *Young Offenders Act* of Canada. There is no need to assume that the traditional criminal justice system, with its forms of stigmata, its adversarial characteristics, and its insecurity about surrendering any unobserved power to clinicians, educators and the like, needs only to be amended somewhat to work properly. There is no reason to assume that legalism has exclusive legitimacy in addressing social problems. This Book could therefore have used an article which challenged the underpinnings of and addiction of Canadian society to legalism.

IV. THE PROBLEM WITH THE ACT

Parts of this Book acknowledge the first problem, as to the *Act* itself. It is argued by a number of the contributors to this book, though not the majority, that the *Act* tries to be too many things and to serve too many conflicting goals at the same time. Indeed, one finds obfuscatory language in it. In particular, in s. 3 of the Act can be found a series of word strings to which one can tie almost any currently palatable proposition about the handling of young persons who behave — or who are accused of behaving — as offenders, or, indeed, criminals. It might be hoped that the introduction into enactments of such complex philosophical clauses and sections does not become some sort of legislative fad. Cumbersome explanatory matter which tries to show that all constituencies were heard from in the enactment process is not inevitably helpful. If we need laws at all, one can paraphrase what Gertrude said to Polonius, and assert that our laws could use more matter and less art. Indeed, we have a substantially enhanced written Constitution now. The language is brief and pithy. It embraces ideas and values which are fundamental and the time — and circumstance — transcendent. It leaves to both executive and juristic

application the translation of those values to current situations. It does not try to yoke such fundamental values to those of the contingent and transitory vogue.

This is not to prefer the *Juvenile Delinquents Act* to the *Young Offenders Act*. The *Juvenile Delinquents Act* also had philosophical statements in it – just different ones. It is arguable that both enactments were and are flawed, and that despite the sea changes reflected in the newer law, we still do not know what we want to do or should do about dealing with young persons who violate our penal laws.

Is the *Young Offenders Act* supposed to be a *Criminal Code* for young people? Does its demonstrable fixation on procedural proprieties and its aggressive assertion of the adversary system in preference to the inquisitorial processes of its predecessor mean that it is intended to provide a doll's house of criminal court processes? It is also influenced by the brooding omnipresence of the sort of adult legal rights and procedures as to which the executive branch of the state and the individual is within the state are set off and ineluctably in conflict?

Is the *Young Offenders Act*, on the contrary, some sort of young people protection legislation? Is paramountcy not to be given to public protection from crime, but instead given to assertion of procedural consistency with bureaucratized judicialism? Beyond this, do the primary aims of the *Act* intend to address medical, psychological or economic origins of the criminal behaviour of young persons, or do they merely seek to avoid excessive harm to young persons in the course of trying to protect the rest of Canada from them? Does the magnitude of the moral values that actuate the criminal law prohibitions in the first place enter to the evaluation of what to do about the young people who breach them?

In the *Juvenile Delinquents Act*, which was in the statute books for generations, our view was that Courts should assume, in effect, a *parens patriae* jurisdiction and act towards the young offenders. Courts would be the stern but sympathetic parents that the wayward youth presumably did not have, or did not understand. That *Act*, by its terms, pronounced that the Courts should treat juvenile delinquents as neglected children, needing guidance etc. The philosophy of the law, at least by its terms, was thus, at least apparently, focused: the theory of the law was primarily inclined in the single direction of curing and rehabilitating young offenders.

Accordingly, it fell to the imagination of the Courts, correctional services, police officers and the like, to manufacture, (in ways which might be beyond the specific terms of the Act) the panoply of curative, rehabilitative, educative, punitive, segregative or deterrent responses to crimes committed by the people whom the law did not consider to be adults. An escape valve of "waiver" of young persons to adult courts was also created so as to remove young persons that the law could not consider to be children, but it was to be used sparingly. In at least one sense, the handling of cases of young persons who had come into conflict with the criminal law, was personalized and, even, "privatized." Much of the judgment and discretion which the system accepted to be necessary, was extra-curial, in the sense that the traditional notions and concepts of the adversary system and the fuller court processes were considered inapt and unhelpful. The effect of all this

was that the system came to be centred upon individuality, and the legal framework in that sense was one of extremes: either the offender was a wayward child, against whom little of the traditional compulsive power of the state would be applicable, or the offender was a person who had to be "waived" to adult court.

By comparison, the *Young Offenders Act* embraces a variety of different perspectives on how state power should influence the situation. No longer, apparently, do we feel that the *Act* should be inclined, by its terms, in a single direction, leaving much of the efforts (a) to restrain crime, (b) to help wayward children, (c) to protect the public, (d) to compensate and rehabilitate victims, and (e) to reconcile offenders to society and its values, to some forms of privatized ingenuity involving measures outside the suzerainty of the same adversarial processes we grant to adults. Under the new *Act*, state institutions would be engaged to deal with young persons' cases in an enhanced curial splendour. Evaluation of the cases would be as crime trials usually are. Elucidation and application of the state response to the actions of an individual would be performed in minute detail by courts, albeit guided by state-sponsored and state declared lists of values and objectives.

With the new *Act*, we decided, evidently, to incline the *Act* in many directions at once. Young persons might be children, might be thugs, might be mentally ill. The law had to be flexible in its assessments and in its responses. It is difficult to find any rational basis to undermine this point of view. However, it would be the *Act* which would deal with everything. There would not be a perspective or option overlooked. Little, if anything, would be left to chance or imagination. There would be something in the words of the law to enlighten everybody. There would be little, however, to encourage the development of state tolerated institutions along the lines of *Nicholas Nickleby*, thank goodness. The law would treat allegations of criminal behaviour by young persons as being disputes to be resolved in the traditional juridical fashion by courts, following which, if the allegations were prove according to legal standards even more strict than those for adults, the courts would also direct and superintend the societal responses, enforcing, in the course of so doing, special restraints on the responses to reflect the youth of the subjects.

V. THE PROBLEM WITH CANADA'S APPROACH TO LAW

Saying this returns one to the second and larger issue of societal legalism much reflected in laws of recent vintage. The attempt to 'do something' about criminal conduct by young people has been with human society probably since there was human society to define what criminal conduct is. Using the public law and our court systems to do that something probably had begun to arrive as an idea when human society decided to use laws to distinguish between, and address, (a) those interests which were thought to be purely individual and "private" and (b) those interests which were thought to have a component of "state" or "public" interest, wherefore the state and its institutions and officers should take the matter in hand. Arguably, with the *Young Offenders Act*, public law and the courts have taken over.

Ironically, as the laws to promote equality and to raise minimum standards of conduct, concern and respect between people have been increasing, the authority and influence of the state has been increasing, with the corresponding risks to individual rights and freedoms. We have adopted, as fundamental values intrinsic to our society, national values and interests which might have been left, at one time, to the private sphere. We increasingly paint more details into our portrait of what constitutes the well-being that our society should guarantee for its members. We thus effectively place the coercive power of the state behind an increasing thick mix of values, and increasingly limit the scope of personal liberty by impressed versions of accommodation and conformity. Against this, we have created Constitutional prescriptions to declare those individual rights and freedoms while at the same time declaring the aims of equality, mutuality and community.

The Courts are given to be the ultimate guardian of all of this. Our entire philosophy as to the roles of our three branches of government has dramatically changed and we are awash in legalism. It is probably not surprising, therefore, that an enactment dealing with as important an issue as handling of young persons in conflict with penal laws should also promote legalism as the means of trying to balance off values that may be irreconcilable. One might wonder if the tendency to legalism is not irreversible.

Amongst other things, the articles in this book note this trend to legalism, and the problems that it creates. However, they do not, ultimately, much challenge either the inevitability or the desirability of such a trend to legalism. There is a broad spectrum of thoughtful and enlightening information and opinion in this book, as the authors seek to propose many justifications for either preserving or changing provisions of the *Young Offenders Act*, either technically or substantively. Beyond increasing our understanding of the meaning and the workings of the *Act*, various authors (boosters, skeptics and cynics included) advance a number of suggestions which could help Parliament and the Courts fine tune the *Young Offenders Act* so as to achieve an improved modicum by which the law could deal with young persons in trouble with the law.

VI. CONCLUSION

In the end, therefore, the book falls slightly short of success by not offering at least one direct analytical challenge to the very fundaments of the view, widely held amongst the authoritative in our society (mostly lawyers, of course) that all social problems must be treated in a legalistic way which at least purports to take cognizance of all relevant factors and theories. It may be that it was impossible for the editors and writers to find a coherently reasoned and plausibly expressed piece that might do this and thus add some seasoning to this otherwise well mixed salad. One, therefore, hesitates to seriously criticize this book on such an absence. Indeed, while there are probably many talented writers who, ultimately, seem to be mesmerized by legalism and its many manifestations, and who could write thoughtful pieces favouring particular reformative ideas, there are probably very few radical critics and their familiars who could compose incisive work free of the prolix and pedantic rhetorical flourishes and the platitudinous bombast which tends to disguise the underlying intellectual poverty of their work.

This book is a useful one for libraries and for practitioners in the field of the law dealing with young persons. It is justifiably sympathetic to those many sincere people who are trying quite earnestly to make the *Young Offenders Act* work and to do justice. Even to the extent that it might be mildly criticized as it has been here, it is a handy reference work.

Jack Watson
Appellate Counsel
for the Attorney General,
Alberta