more serious offenders, yet only two of this "concentrated" group were sentenced to custodial dispositions.

It is not suggested that the implementation of diversionary programs such as cautioning or family conferencing will be effective in isolation. The experience in England/Wales, however, where the numbers of those cautioned as a percentage of those cautioned and sentenced increased from 35% in 1981 to 59% in 1988, indicates that it was an important factor which operated together with other factors to achieve a substantial reduction in cases coming to court and in custodial dispositions. These other factors included: the creation of intermediate sanctions such as community supervision orders and attendance centre programs and convincing judges to use them; specific legislative criteria in the Criminal Justice Act 1982 limiting the use of custody by judges; early Court of Appeal decisions[27] which reduced the harsher sentences imposed by magistrates, giving effect to the intent of the legislation to limit the use of custodial dispositions for youth (Allen, 1991); and a general disillusionment with custody by judges and others in the system. The conditions leading to this disillusionment appear strikingly similar to those which afflict the Canadian youth justice system.

> Firstly, the government's evaluation of the tougher regimes in detention centres found no difference in re-offending rates between the "tougher" and "ordinary" regimes and exposed the fact that trainees were made up of a "disproportionate number of temperamentally difficult and unhappy individuals", one in ten of whom were illiterate and over one half of whom had been in care.
>
> (Allen, 1991, 38)

The involvement of judges in any initiative to reduce the use of custodial dispositions is extremely important. As judges work on a case by case basis, they will seldom be aware of the cumulative impact of their decisions. Most Canadian youth court judges would be surprised by the high rates of youth custody in their jurisdictions, in the country as a whole, and how these figures compare with incarceration rates from other countries. They seldom, if ever, get any feedback on the impact of their sentence on the young person. They are usually not privy to the planning and implementation of new programs with the result that few judges would be aware of all the dispositional alternatives available in their own community.

In the Federal Republic of Germany between 1983 and 1988, the number of juveniles in custody decreased by 39%. Judicial attitudes towards the use of custody changed, as a result of the following four factors (Graham, 1993, 161):

- consultation with the judiciary on proposals for change;
- involvement of the judiciary in the establishment of diversionary projects;
- provision of statistical information to judges on sentencing practises; and
- appointment of more female judges which led to a greater willingness to adopt alternative approaches.

Similarly, the success of the intermediate sanctions programs in England and Wales is partly attributable to the participation of magistrates on supervisory management committees for these programs.[28] The initial reluctance of the magistrates to participate for fear of compromising their independence was overcome by a directive from the Lord Chancellor giving them the go ahead to get involved. Similarly, judges in Canada should not hold out "judicial independence" as the reason for not becoming informed about sentencing statistics or the availability and effectiveness of various youth programs, and for not consulting on the implementation of new sentencing alternatives.

It is evident that merely legislating new intermediate sanctions or establishing legislative criteria limiting the use of custodial sentences is unlikely to have much impact without an organised effort to involve and educate the judiciary. Previous legislative attempts to restrain judges from using custodial dispositions did not have the desired effect because no attempt was made to change judicial attitudes.[29] Without the involvement and education of the judiciary, current proposals which set out detailed guidelines for the use of custodial dispositions are unlikely to reduce youth custody rates.[30] On the other hand, experience in New Zealand, Australia, and England/Wales has shown that the most effective programs for reducing youth custody rates are those that divert young people away from the courts altogether.

IMPLICATIONS FOR CANADA

Compared to other jurisdictions like New Zealand, Australia and England/Wales, Canada has embraced unnecessarily formal and heavy handed responses to youth offending. It also appears that the implementation of the *Young Offenders Act* has fallen far short of international principles, standards and expectations. In particular, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (hereinafter called the Beijing Rules)[31] and the *United Nations Convention on the Rights of The Child* (hereinafter called the UN Convention)[32] should be considered as guidelines for Canadian

parliamentarians. While Canada fares well on many of the due process directives set out in these international documents, its performance is poor in relation to the following fundamental principles.

- Custody shall only be used as a measure of last resort and for the shortest period of time;[33] the same applies to any restriction of liberty.[34]
- Deprivation of liberty shall not be imposed unless the juvenile is found guilty of a serious act of violence or is persistently committing other serious offences — there is no other appropriate response.[35]
- Positive measures to encourage involvement of family, volunteers, community groups, etc. shall be given sufficient attention with a view to reducing the need for legal intervention[36] and to permit the rehabilitation of the juvenile within the community and so far as possible within the family.[37]
- Consideration shall be given, wherever appropriate, to dealing with juvenile offenders outside the legal system (diversion).[38]

While Canada has often played a leadership role in asserting human rights abroad, these efforts must be matched by vigilance over its own policies and domestic legislation to ensure that minimum standards are effectively maintained at home. Unfortunately, the practice under the *Young Offenders Act* falls short of the international standards noted above. This failure should not be excused by blaming the provinces for not implementing diversionary programs or for failing to provide for effective alternatives to custodial dispositions. It is open to the federal government to alleviate the current situation by amending the legislation so as to provide clearer goals and aims for the youth justice system, by imposing national standards for programs including diversion, and by using its funding policies more creatively in order to ensure that these international objectives are met.

The experiences with cautioning and family conferencing described in this paper demonstrate that there are other viable responses to youthful offending that do not demand court processing and traditional punishment in every instance. The comparative data also underscore a need for a change in Canada's youth justice system: a significant change in the form, purpose and consequences of interventions for youthful offending. Such change will recognise that occasional deviance by adolescents is a normal part of maturation, and that most young offenders are not "dangerous" and will stop offending without formal

court intervention. New Zealand, Australia and to a limited extent, England/Wales, jurisdictions with similar social and legal systems to Canada, have shown that these strategies can be implemented and that they work. By "work" what is meant is that they have been shown to be less costly, that police, families, victims and offenders all report much higher satisfaction levels than with the traditional court based system, and that recidivism rates and youth crime have not increased as a result. Initial indications also suggest that they have not resulted in "net widening".

Police cautioning, including family conferencing as in the Wagga model, provides an effective model for reducing the size of the court intake and is consistent with Canadian law enforcement commitments towards community policing. Because cautioning occurs at the very first intervention by the justice system, the resulting cost savings can be maximised. Reducing the court intake will give the court more time to deal with those serious offenders and offences which do require formal intervention. Alone, or preferably in combination with other initiatives, a reduction in court intake will also decrease the number of custodial dispositions made by youth court judges.

The family group conference engages victims, reinforces family responsibility for offending youth, and holds young persons accountable to their victims in a way which the courts cannot do. One would expect politicians and the public to embrace this strategy because it is less costly, reinforces the importance of family and increases the satisfaction of victims. The main barrier to adopting such changes will be our apparent preoccupation, as a society, with the punishment of young people.

Those engaged in the review of the *Young Offenders Act* must be sufficiently pragmatic to recognise that there will be little new money made available for the youth justice system in the near future. Precisely because Canada's youth justice system is so formal, comprehensive and punitive, modest changes in the direction of cautioning and family conferencing can result in significant and almost immediate cost savings, as demonstrated in New Zealand. These savings will, in turn, permit the implementation of the recommendations of the Horner Report (Horner, 1993) to increase expenditures on preventative programs. And as most preventative programs focus on social, economic and developmental issues, their potential benefits extend beyond savings on actual justice expenditures, to education, health and social services.

There is no space to review the injustices perpetrated by our justice system on the First Nations Peoples of Canada, and in any event it has been done elsewhere (Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, 1991; Law Reform Commission of Canada, 1991; Alberta, Task Force On the Criminal Justice System and Its Impact On the Indian and Metis People of Alberta, 1991). Suffice it to say that the family group conference accommodates aboriginal concepts of extended family, collective decision making, reparation and victim participation in the process. It has the potential to provide the much needed "bridge" between our two cultures which would lessen the need to establish a separate justice system for First Nations Peoples. And in our multicultural society, this model is sufficiently flexible to respond to the needs of new Canadians from other cultures.

Some critics will argue that our justice system can not accommodate changes of the magnitude contemplated by the New Zealand model of family conferencing. But it is precisely because these changes have been implemented in New Zealand and in Australia that one can predict with a high degree of confidence that family conferencing can also be accommodated within the Canadian youth justice system.

Others will argue that cautioning and family conferencing merely represent examples of pre-trial diversion of the kind that was tried extensively during the 1980s, and which were subsequently abandoned. More recent diversion programs differ substantially from the early first generation ones in that they focus more on the victim than the offender. For example, they are designed to provide reparation and restitution to the victim, rather than merely to divert the offender. Victims are not pressured to participate. They involve more consultation with all the parties including the victim and family members of the offender. Such programs share many of the characteristics of family conferencing and have been evaluated favourably (Dignan, 1992).

In our system of government, the judiciary is independent and will always have a wide discretion in choosing an appropriate disposition for any offender. As the experience in England/Wales and Germany has shown, the judiciary must be involved and consulted in any program which has as its goal sentencing reform. In addition to the diversionary models described earlier in this paper, it will be necessary to develop non-custodial measures which are viewed by judges as practical alternatives. That can best be done by involving them in the process of developing intermediate sanctions such as intensive probation, attendance centres and wilderness camps and in providing policy advice with respect to their management. For in the final analysis, it is the

individual youth court judge who makes the disposition sending the young person into custody.

In the current environment, a significant reduction in the use of custody by our youth justice system will initially be subject to criticism by those who still believe that youth crime is increasing out of control and that our youth courts are too lenient. This misinformation must be corrected before any further significant changes are made to the *Young Offenders Act*. Politicians must stop using crime, and youth crime in particular, as an election ploy — by deliberately exaggerating the scope and nature of the problem (thus frightening the voters), and then promising to be tougher than the other political parties in dealing with the misperception so created. There is an urgent need for a broad based public discussion of youth justice policy, and a program of public information and education which underscores the need for public participation in and ownership of the justice system. The public must understand that hiring more police, building more courts and jails means fewer hospitals, cutbacks in social programs and fewer teachers.

The obvious vehicle for achieving these multiple objectives is a Royal Commission on Youthful Offending. Justification for a Royal Commission can be found in youth incarceration rates which are equal to and even exceed those visited on our First Nations peoples. The urgency is underscored by the rapidly escalating costs of the current justice system, which saw a 34% increase in the five year period ending in 1993 to $9.6 billion per year.

Canada appears to be at a crossroad, at the same decision point where the United States was in the early 1980s. Will it take the same path, by passing more punitive laws, building more jails, and by enlarging the existing criminal justice industry, with comensurate cuts in social programs? Or will Canada take the other path, the one modelled by New Zealand and Australia? We have the distinct advantage of seeing where both roads lead.

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NOTES

1 Bill 37, An Act to amend the Young Offenders Act and the Criminal Code, 1st Session, 35th Parliament, 42–43 Elizabeth II, 1994; First Reading 2 June 1994.

2 Data for 1992–93 indicates that of all court dispositions, categorised by most severe disposition, 17% were for open custody and 14% for closed custody (Statistics Canada, 1994).

3 Data from Ontario shows that of those sentenced to prison in 1990, 62% had been in prison before (Onatrio, Justice Review Project, 1992).

4 This is an estimate, since data for Ontario were not available prior to 1991–92. It was calculated on the assumption that the custody rates in Ontario increased at about the same rate as in the rest of Canada during the period, namely by 40%, and that the proportion of youth aged 14–16 years sentenced to custody in 1992–93, namely 34%, remained relatively constant between 1987–88 and 1992–93. The statistical data for this period shows that there has been little change in custody as a proportion of all dispositions ordered by youth courts (Statistics Canada, 1994).

5 It is worth noting that in 1994 the English Court of Queen's Bench attempted to abolish the *Doli Incapax* rule, which would have had the effect of increasing the exposure of children under the age of 14 to the criminal law. Whether this judicial decision was influenced by the Bulger death and intense media publicity surrounding this tragic incident will remain a matter of speculation. In any event, the move was unsuccessful, the decision being reversed on appeal by the House of Lords: *C. v. DPP* [1995] 2 All ER 43.

6 Again it is important to urge caution when making comparisons with other jurisdictions: note that the definition of young person in New Zealand includes only 14, 15 and 16 year old youth.

7 For example, consider the comparative homicide rates for 1992 (per 100,000 population): England/Wales 0.5; Australia 1.9; Canada 2.1; New Zealand 2.2; and USA 9.1. (World Health Organisation, 1992).

8 See the New Zealand *Children, Young Persons and Their Families Act* 1989.

9 The government has proposed to amend the Declaration by introducing Bill C–37 which would add two additional principles, one which articulates crime prevention, and the other rehabilitation. Together they add weight to the social welfare approach to youth justice, but by increasing the number of conflicting principles to 10, they do little to eliminate the lack of focus in the current Declaration of Principle. Merely adding a few more principles to the existing mix of principles, without rethinking and reworking the entire section is unlikely to produce any substantive changes in how the Act is applied.

10 That section provides: "Conditions for custody. (1) The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person."

11 *R. v. J.J.M.* (1993), 20 C.R. (4th) 295 (S.C.C.)

12 Interestingly, there is research evidence that fear of crime by members of the public does not result in greater demands for punitive punishment. On the other hand, the judiciary's perception that the public has an increased fear of crime has resulted in harsher sentences by judges (Ouimet and Coyle, 1991).

13 The legislation actually uses the Maori words, whanau, hapu and iwi, to emphasise that the procedures are to be culturally sensitive.

14 Ontario is a case in point. Until the Court of Appeal decision in *R. v. Sheldon S.* (1988), 63 C.R. (3d) 64, Ontario refused to implement alternative measures programs, and when it did it limited eligibility to summary offences and a few dual procedure offences where the maximum punishment prescribed in the Code is two years imprisonment. The *Sheldon* case was subsequently overruled by the Supreme Court of Canada [1990] 2 S.C.R. 254, on the basis that

each individual province was free to decide whether and what kinds of diversion programs to implement, yet Ontario retained the limited programs which had been set up in response to the Court of Appeal decision.

15 If one looks around a typical courtroom, one will see a judge, a Crown Attorney, an informant (police officer) who prior to court will have spent time investigating and preparing the paperwork for the case, defence counsel, one or more clerks, a victim-witness coordinator, a court recorder/reporter and possibly a security person. They are all being paid for being there. One does not see the large number of staff behind the scenes which processes paper and electronic data both before and after every court appearance and adds to the cost of every court case. And of course, courtrooms have to be cleaned, heated and refurbished.

16 The impact of generous police overtime payments for officers who attend court outside their normal shifts may also be a factor which operates to decrease the exercise of police discretion. The economic interest of the officer may be better served by charging and not by diverting the youth away from court.

17 South Australia became the first State to adopt a statutory system of family conferencing with the proclamation of the *Young Offenders Act 1993* on 1 January 1994. Prior to that time, approximately 60% of offending youth were screened out of the formal justice system by Aid Panels, a form of diversion committee.

18 In New South Wales, the youth crime rate is currently decreasing. See "State's top researcher refutes 'crime wave' claims", *The Weekend Australian*, 9 July 1994, 5: "While both sides of Parliament have concentrated on juvenile crime, Dr. Weatherburn said there had been substantial decreases in offences by children and juveniles".

19 Section 209, *Children, Young Persons and Their Families Act 1989*.

20 Section 280, *Children, Young Persons and Their Families Act 1989*.

21 Such amendments to the *Young Offenders Act* (Canada) were passed by the conservative government in 1992; S.C. 1992, c.11, ss. 2 and 3.

22 The United States imposes capital punishment and jails proportionately more of its citizens than any other country, yet its prison population rose 168% in the '80s and has had no impact on the crime rate: "Lock 'em Up, Throw Away the Key", *The New Statesman*, 1 April 1994, 20. Between 1982 and 1993, California experienced a "prison rush", spending $14 billion on prison construction, the prison population increased by 500% and crime rate increased by 75%: Real Answer to Stopping Crime, *Guardian Weekly*, 10 April 1994.

23 "Criminality, Poor Prenatal Care Linked", *The Globe and Mail*, 13 August 1994 reports the results of a major study from the University of California which suggests that better prenatal care could reduce violent crime by up to 18%. See also the report of a recent Australian study based in Brisbane which indicates a similar link between health care of infants and subsequent behaviour: "Bad behaviour linked to health as baby", *The Australian*, 1 February 1995. Both reports suggest that ameliorating the disadvantages experienced by infants in their early years can have a positive impact on future behaviour.

24 The FGC can also be held for children aged 10 to 13 years of age where there has been relatively serious and repeat offending, even though children in this age group cannot be charged in court.

25 Section 211, *Children, Young Persons and Their Families Act 1989*. The formal police caution is a more elaborate version of the "warning" described earlier, is administered by a senior police officer at the station, in the presence of the parents or adult person nominated by the young person. A written notice that the caution has been administered is given to the young person and to his parents.

26 Contrast this speedy resolution with the lengthy delays which are common in the court process. See *R. v. Askov* (1990), 74 D.L.R. (4th) 355 (S.C.C.).

27 See for example *R.v. Bates* (1985) 7 Cr. App. R. 105.

28 For a description of a successful project which involved the judiciary as advisers, see Brownlee and Joanes (1993).

29 See the discussion of the effect of the amendment to s.24 (1) of the Act at note 7 *supra*.

30 Bill 37 would require the youth court judge, prior to imposing a custodial disposition, to consider: that custody should not be used as a substitute for child protection; where the offence does not involve serious personal injury, non-custodial dispositions should be used whenever appropriate; and custody is to be used only when other reasonable available alternatives have been considered. Reasons will have to be given as to why a non-custodial disposition was not adequate.

31 Adopted by General Assembly resolution 40/33 of 29 November 1985.

32 Adopted by the General Assembly of the United Nations on 20 November 1989. Canada became a party on 13 December 1991.

33 UN Convention Article 37 and Beijing Rule 19.1.

34 Beijing Rule 17.1(b).

35 Beijing Rule 17.1(c).

36 Beijing Rule 1.3 and UN Convention Article 4.

37 Beijing Rule 25.1.

38 Beijing Rule 11 and UN Convention Article 40(3)(b).

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