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Youth Justice in Canada

ABSTRACT
Starting in 1908 with a law based on welfare principles and finishing in 2003 with a law based on criminal law principles and proportionality, successive changes in Canada's youth justice legislation have provided additional structure in governing the key decisions involving youths. While criminal law in Canada, including youth justice laws, is a federal responsibility, the provinces administer the law. Interestingly, there are very large differences in the manner in which the provinces administer the single (federal) criminal law. Although most Canadians believe that the youth justice system is too lenient, the data show that many of the cases being processed through Canada's youth courts and many of the cases resulting in imprisonment for youth involve very minor offenses. Federal government concerns about the provincial overuse of the youth justice system and about the high rates of custodial sentences for minor offenses were important determinants of the shape of the most recent youth justice legislation—the Youth Criminal Justice Act (YCJA), which came into effect in 2003. For political reasons, these concerns were "balanced" with symbolically tough, but practically inconsequential, measures. It remains to be seen what the effects of the new law will be.

In the past century, Canada has had three quite different laws governing the manner in which young offenders are handled. The shift, over time, has been from a law based on welfare principles toward legislation that focuses more on criminal law principles and proportionality. In addition, successive changes in legislation have provided more structure in governing the key decisions that are made in the youth justice system. Finally, the legislation has, over time, shifted away from the assumption that the reduction of offending by youths can best be accomplished within the formal youth justice system.

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In the past twenty years, youth justice issues in Canada have been important politically for various reasons. People believe that youth crime has been increasing, though the evidence, especially in the past ten years, does not support this conclusion. The public assumes that the youth justice system controls the level of youth crime in our communities, and people believe that the youth justice response has been too lenient. At the same time, there is evidence that many of the cases being processed through Canada’s youth courts and many of the cases resulting in imprisonment for youth involve very minor offenses.

Canada is a federal state. Criminal law, including youth justice laws, is a federal responsibility, though the administration of justice is a provincial responsibility. The result of this split in responsibility is that there are very large differences in the manner in which the single (federal) criminal law is administered. Federal government concerns about provincial overuse of the youth justice system and about high rates of custodial sentences for minor offenses were important determinants of the shape taken by the most recent youth justice legislation—the Youth Criminal Justice Act (YCJA) passed in 2002. Politically, however, these concerns were “balanced” with symbolically tough measures. Based on Canada’s experience with similar “tough” sounding changes, it appears likely that these tough changes will have no impact in practice. It remains to be seen whether the new law will result in fewer cases going to court and fewer youths going to prison.

The history of youth justice in Canada is the story of two parallel, but separate, youth justice systems: the political youth justice system (the system as it is seen and discussed in the political realm) and the operational youth justice system (the system as it operates on a daily basis). The political youth justice system itself is not coherent. There are substantial pressures to “get tough” on young people who have offended. At the same time, there are political concerns about too many youths who have apparently committed minor offenses being brought into the formal system and too many youths being incarcerated.

This essay explores the manner in which these conflicting tendencies have played out in the past 100 years on questions such as the age of youths under the jurisdiction of the youth court, decisions on whether a case should be brought to court, “transferring” youths to adult court, and principles of sentencing, including the use of “custodial” sentences. These policy issues can be seen as ways of understanding Canada’s youth criminal justice system.
Canada’s youth justice system, since 1908, has changed in at least three ways. In the first place, there has been a very clear move from a “child welfare” approach to youthful offending toward a “criminal law,” or accountability-proportionality, response to youthful offending. Whereas Canada’s first youth justice law, the 1908 Juvenile Delinquents Act (JDA; R.S.C. 1970, chap. J-3), saw all offenses as symptoms of an underlying “delinquent” state, Canada’s newest step on this path, the 2002 YCJA, sees offenses as something that the state has an obligation to respond to in a measured, proportional manner.

The second major shift that has occurred over the past century is a move toward more structure in the laws. The JDA said, in effect, that almost any bad behavior on the part of a youth made that youth subject to being defined as delinquent. And this 1908 legislation allowed almost any disposition or sentence to be imposed to address the problem. The most recent legislation provides not only principles (e.g., in terms of what goes to court and how sentences are handed down) but also “hurdles” that must be overcome (e.g., in determining that a youth should be held in pretrial detention or in sentencing the youth to custody).

Finally, the law has shifted away from the optimistic view that crime can be addressed effectively with youth justice interventions. The 1908 legislation required the judge to act like a sensible parent. The legislation passed by Parliament in 2002 requires the judge to hand down the most rehabilitative and reintegrative sentence within the requirement that the sentence be proportional to the seriousness of the offense. These shifts have taken place within a context of contradictory political pressures both to be tough with young offenders and to use the youth justice system parsimoniously.

We argue that many of the problems that Canada faced in the operation of its youth justice system during the latter part of the twentieth century come from an inability or unwillingness to make difficult decisions about what the goals are of the youth justice system. This led to an apparent ambivalence about what the youth justice system should look like. At the same time, structural concerns arise as a result of an unusual constitutional division of responsibilities for youth justice matters: criminal law, including young offender legislation, is a federal responsibility, but Canada’s ten provinces and three territories are responsible for the administration of justice. The result is that the provinces and territories, with different political climates, ideologies,
and administrative practices, administer the same youth justice legislation in quite different ways (Doob and Sprott 1996).

Recent legislative changes by the Canadian federal government appear to be addressing some of the fundamental problems of youth justice. Whether many of the explicit and progressive goals of the legislation are accomplished will be determined by administrative policies that are largely the responsibility of provincial governments whose focus is largely on the "political youth justice system" rather than the "operational youth justice system."

Section I outlines the constitutional context for youth justice legislation in Canada. We then describe the first two pieces of federal youth justice legislation—the 1908 JDA, which had a clear "child welfare orientation," and the 1984 Young Offenders Act (YOA; R.S.C. 1985, c. Y-1), which moved Canadian youth justice legislation a large step closer toward criminal law principles. Both reflected values and approaches that were consistent with approaches and concerns elsewhere in North America. Section II describes the pressures, which started almost immediately after the YOA was passed, to change this law. This pressure is discussed in the context of concern about crime and the justice system as well as the pressure to look "tough." Section III describes the problem faced by the Liberal government after its return to power in 1993 in looking and sounding as if it were "tough on crime" while still remaining liberal. Section IV focuses on the four-year period beginning in 1998 in which the third of Canada's youth justice laws developed. The conflicting concerns and political realities during this period are described. Finally, the legislation and the political process of selling it are discussed in Section V. In Section VI, we speculate about the possible impact of the new legislation.

I. History of Canadian Youth Justice from 1908 to 1984

Canada is a federal country, consisting of ten provinces and three territories. The division of responsibility between these two levels of government is important in many areas, including youth justice. In order to understand the nature and problems of youth justice in Canada, it is first important to look at the constitutional arrangements in the country. We briefly describe the first of three sets of legislation that have operated during the past century. The history is important because today's issues reflect the problems and models of youth justice that Canada has experienced over the past century.
A. Constitutional Arrangements

Under the Canadian constitution, the responsibility for the criminal justice system is what is typically referred to as a “shared responsibility” between the federal and provincial governments. The federal government has responsibility for legislation on criminal law, whereas the provinces have responsibility for the administration of the criminal law. However, welfare legislation, including child welfare legislation (and its administration), is a provincial responsibility. Thus there are different child welfare laws in each province. These laws cover children who are neglected, abused, or otherwise in need of state protection. In addition, youths who are seen as being in need of apprehension for offending but who are under twelve years old (the current age of criminal responsibility) can usually be apprehended under child welfare legislation.

Canadian youth justice laws have always allowed, or encouraged, discretion in responses by police and others to offending. Canadian provinces vary dramatically across time and space in the political orientation of their governments. These governments also vary in the way in which they apparently view youths generally and young offenders in particular. The result is that there is considerable variation in the manner in which the system deals with youths (Doob 1992; Carrington and Moyer 1994; Doob and Sprott 1996), as we discuss in more detail in Section IV.

Canada, since 1982, has had a “Charter of Rights and Freedoms” (pt. I of the Constitution Act, 1982; enacted by the Canada Act 1982, [U.K.] c. 11), which, not surprisingly, governs youth justice matters along with all other laws. For the most part, Charter issues do not have much impact on youth justice legislation. The exception is a requirement that any person facing a penalty lasting five years or more must have the option of a trial by jury. This leads to the otherwise inexplicable maximum sentence of five years less a day for youths tried for homicide offenses between 1992 and 1995. In addition, a complex set of

1 Canada has ten provinces and three territories (in which the federal government assumes some of the powers that otherwise would go to the provinces). The three territories combined constitute 40 percent of the landmass of Canada but have a combined population of only 99,200, which is roughly 0.3 percent of the total population (Statistics Canada 1996). For ease of presentation, when we refer to “the provinces,” we will mean the provinces and territories unless we state otherwise.

2 An issue that we do not discuss further is the constitutional anomaly that Newfoundland, which joined Canada in 1949, did not operate under Canada’s youth justice laws until 1984, when the 1908 JDA was replaced with the YOA.
notice and "election" provisions (choice of mode of trial) became necessary as penalties for youths tried in youth court broke through the five-year barrier in 1995. The requirement of a uniform age of youth court jurisdiction also flows from concerns raised by Canada’s Charter of Rights and Freedoms.

B. An Overview of the Move toward Criminal Law Principles

Until 1908, there were no separate criminal laws dealing with young offenders. Youths over age seven could be charged criminally and dealt with under the same laws as adults. They were often, however, imprisoned separately from adults.

In 1908, after a good deal of debate (See Leon [1977] for a discussion of the development of Canada’s first juvenile offending law), the Parliament of Canada enacted, under its criminal law powers, the JDA, an act that would remain, essentially unchanged, until 1984, when it was replaced with the YOA. The JDA had jurisdiction over youths who offended who were at least seven years old. The maximum age varied from sixteen to eighteen across provinces. In one province, Alberta, the maximum age was, for most of this period, sixteen for boys and eighteen for girls. Although the JDA was a criminal law—creating a single offense of delinquency—it was consistent with the child-saving period in which it was enacted (Leon 1977; Platt 1977). Three sets of provisions support this assertion.

First of all, the scope of the JDA was broad. A youth who committed any criminal offense, breached any provincial law or municipal bylaw, was liable to be placed in a provincial training school or reformatory for any reason, or was engaged in “sexual immorality or any similar form of vice” (JDA, sec. 2[1]) was guilty of a single offense: that of delinquency. All “offenses” were symptoms of a single underlying problem: delinquency.

Second, the principles of the JDA emphasized “welfare” principles. The direction to those working in the system was that the juvenile delinquent “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” (JDA, sec. 3[2]). Furthermore, “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 a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help, and assistance” (JDA, sec. 38). Although it was criminal
law, one of the choices available to the judge was to commit the youth to the child welfare system (JDA, sec. 20{1}[h]).

Third, sentences under the JDA were indeterminate. In fact, the court could order the youth back to court for a review of the sentence at any time up until the youth had turned twenty-one. An important complication, however, created tension between the parts of the system. The act contemplated two different types of custodial dispositions: commitment of the youth to the local Children's Aid Society or commitment of the youth "to an industrial school." Industrial schools were defined as including a "juvenile reformatory or other reformatory institution or refuge for children" (JDA, sec. 2[1]). These came to be known as "training schools" in most parts of Canada and were, for the most part, secure institutions. Once a youth was committed to an industrial school or a children's aid society, however, "the child may thereafter be dealt with under the laws of the province in the same manner in all respects as if an order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province; and from and after the date of issuing of such order except for new offenses, the child shall not be further dealt with by the court under this Act" (JDA, sec. 21[1]).

In effect then, and in reality as soon as a youth had been committed to training school, the juvenile court lost all control. The youth could be released whenever the (provincial) training school authorities deemed it to be appropriate under provincial laws. As the federal government pointed out during the process of changing the laws in the early 1980s, "In keeping with the [JDA]'s treatment oriented approach, the dispositions which a juvenile court judge may give are frequently open-ended, on the grounds that when the juvenile is sufficiently 'treated' the authorities will terminate the disposition" (Canada 1981, p. 2). In addition, "Under the [JDA] once a juvenile court has pronounced a custodial sentence, jurisdiction of the case is usually transferred to the provincial authorities. In theory the provincial authorities can then unilaterally alter the juvenile court's decision in any direction which might offer, in their opinion, more 'aid encouragement, help and assistance'—even if it means the premature release of a juvenile whom the court has sentenced to custody" (Canada 1981, p. 11).

Juvenile courts could be held "in the private office of the judge or in some other private room in the courthouse or municipal building" (JDA, sec. 12[2]) and, therefore, could be closed to the public. The
separation from the adult system was meant to be complete. If the trial were held in a regular courtroom, half an hour "shall be allowed to elapse between the close of the trial . . . of any adult and the beginning of the trial of a child" (JDA, sec. 12[2]). More important was the provision that the identity of the young person be kept private, and no identifying characteristics be published (JDA, sec. 12[3]).

The JDA survived essentially without changes until 1984. However, in 1961, the federal Department of Justice started a process of examining the need for change by setting up a committee to examine the youth justice system. It is important to recall that it was during the 1960s that "rights-oriented" issues (culminating in such cases as In re Gault, 387 U.S. 1 [1967]) were having their influence on youth justice in the United States. The principles contained in those cases were part of the debate in Canada throughout this reform period (1961–84). During this period of discussion, there was a government committee report in 1965 (Department of Justice Committee on Juvenile Delinquency 1965), a bill introduced in Parliament in 1970 (the Young Offenders Bill [C-192]) that was not enacted before the Parliamentary session ended in 1972, another federal government committee report with draft legislation in 1975 (Solicitor General Canada 1975), a set of "highlights" of proposed legislation from the (Liberal) federal minister responsible for youth justice law in 1977 (Canada 1981), another set of "legislative proposals" in 1979 (Solicitor General Canada 1979; from the Conservative government that was in power for seven months beginning in mid-1979), and, finally, a bill introduced into Parliament in 1981 by the Liberal government that became law in 1984 (the YOA, R.S.C. 1985, c. Y-1).

These various reports and pieces of draft legislation created a process that, at least for the final fifteen years (1969–84), kept "youth justice" on the policy agenda. In addition, however, these various documents created a forum for debate and discussion that forced those interested in youth justice policy to consider carefully what they thought legislation should look like. The 1975 report, for example, proposed an elaborate structure to screen cases out of the court and back into the community (Solicitor General Canada 1975). It also recommended a minimum age of criminal responsibility of fourteen and jurisdiction until a youth turned eighteen. Finally, it recommended that youths should not be transferred to adult court until they turned sixteen.

In 1977 when the Liberal government released its set of "highlights"
of youth justice legislation (Solicitor General Canada 1977), the proposed minimum age of criminal responsibility was twelve. Two years later, in the midst of a seven-month Conservative reign, the government’s proposed minimum age was also twelve. As that report stated, “It was universally agreed that under the current Juvenile Delinquents Act the age of seven years was too young for criminal proceedings” (Solicitor General Canada 1979). The maximum age was another matter. The Liberal government in 1977 had indicated that it would prefer a uniform age of eighteen across the country but had not achieved a consensus with the provinces and, therefore, would maintain provincial choice. The Conservatives, two years later, indicated their law would have a uniform maximum age. Their preferred maximum age was sixteen, but they were flexible if the provinces agreed, instead, on allowing a uniform maximum age of seventeen or eighteen.

For the most part, the 1979 Conservative legislative proposals were the same as the 1977 Liberal proposals. The legislation (as the proposed YOA) that was introduced into Parliament in 1981 by the Liberal government after it regained power in 1980 would have allowed provinces to choose the maximum age (sixteen, seventeen, or eighteen). However, only slightly more than a year later and two years before the bill became law, Canada acquired a Charter of Rights and Freedoms, which, among other things, guaranteed “equal protection and equal benefit of the law” (Charter of Rights and Freedoms, sec. 15[1]). The bill was amended during the legislative process such that a uniform maximum age of eighteen was set for the whole country.

That age range—the twelfth to the eighteenth birthday—still stands. It was set as a result of a combination of political necessity (the perception or assumption of a newly established constitutional requirement) and political compromise. There is, however, still pressure to lower both ages.

C. The Young Offenders Act: A Shift of Principles and a Set of Compromises

The 1984 YOA moved a good distance away from “welfare” principles toward criminal law principles. Due process rights (e.g., the right to a lawyer, rights of appeal, definite sentences, and a hint of proportional sentencing) were all part of the act. In addition, however, the

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3 The law came into effect in 1984, but the implementation of the uniform maximum age of eighteen did not come into effect until 1985.
YOA had a definite treatment orientation. The principles placed in the act in the legislative process in the early 1980s illustrate the tension between a welfare and a criminal law orientation. For example, the YOA states that:

3 (1) It is hereby recognized and declared that

(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

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

(c) young persons who commit offences require 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.

The YOA is, however, unambiguously, criminal law. Though carefully referred to throughout the act as “dispositions,” sentences under the YOA are definite sentences. Clearly this was an important change and a change that the government described in part in terms of public safety: “The new Act recognizes that the youth court is the authority that should decide the extent to which custody and other dispositions are used to ensure the safety of Canada’s communities and people. It would therefore be inconsistent if such decisions could be unilaterally altered by provincial authorities without reference back to the court” (Canada 1981, p. 11).

Proportionality entered the new act but was not part of the language. The maximum length of a custodial sentence was normally two years, but for the most serious offenses (those that would put an adult in jeopardy of a life sentence), the maximum sentence for a youth was three years. The use of “secure” custody (as contrasted with “open” custody) originally had offense-based restrictions. As Trépanier concluded five years after the act was implemented, “The Young Offenders Act and the interpretation given it by the courts have introduced proportionality as one of the considerations that must guide the judge in his choice of a measure” (1989, p. 33).

Criminal law principles, however, do not necessarily imply harsh
One of the most broadly recognized failures of the YOA was the tendency to bring large numbers of cases into the court system. This failure, however, was not the result of criminal law principles within the act. For example, the declaration of principle made it clear that young offenders need not be brought to court: “Where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offenses” (YOA, sec. 3[1][d]).

Keeping youth out of the court system had become a priority in Canada during the 1970s. During this period, concern about the labeling of young persons as offenders was part of youth justice culture. Not surprisingly, the 1975 federal committee report (Solicitor General Canada 1975) recommending new youth justice legislation referred to youth who had offended as “young persons in conflict with the law” presumably to avoid labeling them as “juvenile delinquents” (the term in use at that time) or “young offenders,” the term that would come into effect in 1984. This set of proposals included a mechanism to screen cases prior to court action over and above the present informal exercise of discretion. This mechanism would provide the opportunity to screen cases on a uniform basis to determine if a more appropriate alternative to formal court proceedings is available. This reflects an ever-growing body of opinion that holds that an appearance in court often may be unnecessary and perhaps even harmful to some young persons. Therefore, if intervention in the life of a young person is justified on the basis of the alleged commission of an offence, then the option should be available to deal with a young person without the necessity of resorting to the court process. . . . [The] primary function [of the screening mechanism] would be to consider the feasibility and possibility of diverting the young person from the court process to other resources that are better able to deal with him having regard to all the circumstances at hand. (Solicitor General Canada 1975, p. 10)

This issue—the failure of the youth justice system to screen out cases that were seen as inappropriate for the youth court—is an issue that has not yet been solved. Part of the problem then—in the 1970s—and now is that there appears to be substantial provincial (and municipal) variation in the proportion of those youths who come to the atten-
tion of the police who are taken to court. In one study (Conly 1978), the “charge rate” (proportion of youths taken to court in relation to those who were apprehended by the police for an apparent offense) varied across twelve metropolitan areas in Canada from 17 percent to 96 percent. The variation was not simply provincial. Cities within some provinces showed dramatic differences as well.

This issue was clearly salient to the drafters of the 1984 YOA. The official book of “highlights” from the act released by the office of the federal minister responsible for the act noted that “one of the underlying principles of the new Act is that, for less serious offenses, alternative measures to the formal court process might be used. It has been recognized for some time that many young people are brought to court unnecessarily, when other effective means to deal with them already exist in some provinces. These programs, called diversion programs, may entail community service, involvement in special education programs, counseling or restitution agreements; their common characteristic is that they are all voluntary” (Canada 1981, p. 6).

In other words, the minister responsible for the act made it clear that it is not in the public interest to invoke the criminal law for all young people who commit criminal offenses. Our point is not that such an approach is unusual. It is not. But the fact that Canada’s law is “criminal” does not mean that it is meant to be invoked in a harsh manner.

Symbolically, one of the important changes that were brought about by the proclamation of the YOA was the end of the ability of the court to turn a criminal matter into a child welfare matter. As we have pointed out, under the earlier legislation (the 1908 JDA) the court, after finding a young person to be a delinquent, could “commit the child to the charge of any children’s aid society” (JDA, sec. 20[1][h]). This was no longer possible after the 1984 YOA became law. At least in theory, there were two separate approaches: the provincial child welfare laws or the federal (criminal) young offender laws. The YOA made no reference to the provincial child welfare laws. Presumably it was left to those administering the law to determine into which stream a child should be thrown.

Quebec addressed this decision quite explicitly in its 1977 Youth Protection Act (YPA; Quebec: Loi sur la Protection de la Jeunesse, Chapitre P-34 [1977, c. 20, a146]). A case involving a young person who apparently committed an offense would go to a provincial administrative official who would decide whether the case should go to youth
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court or be dealt with outside of the youth (criminal) court structure. Although some serious due process concerns were raised about the particular approach used in the late 1970s and early 1980s to screen youths out of the youth court system in Quebec (see, e.g., Trépanier 1983), the more generally applauded tradition of Quebec's keeping youth out of the formal youth (criminal) court system has been maintained to the present day, as is described in Section IV below.

The shift to definite sentences was an important change from the previous legislation. Most offenses were punishable by a term in custody of no more than two years. For the most serious cases (including murder up until 1992), the maximum legal (aggregate) length of any sentence was three years. Although some suggested that three years was too little, the argument was that if three years was not sufficient to accomplish whatever it was that the youth justice system was supposed to accomplish, the youth (if he or she was at least fourteen years old) could be transferred to adult court. Once a youth was committed to custody, the expectation was that he or she would spend that full sentence in custody, though temporary absences could be granted administratively. Transfer was always seen as a type of "safety valve" for those cases where the youth justice system did not appear to be adequate. The theory was that the maximum sentence length in the youth court could be kept relatively low because the transfer provisions allowed exceptional cases to escape these limits.

One symbolically important acknowledgment of rehabilitation principles in the YOA is the provision that allow reviews of sentences—including custodial sentences—by a youth court judge. The application for a review can come from provincial officials or from the youth. Thus a young person with a relatively long sentence (over six months) can apply for a review of the sentence. The judge can leave the sentence as it was or can reduce its harshness (e.g., move the youth from a secure to an open custody facility, or from a custodial facility into the community, or shorten the length of time in custody). Probation conditions can also be altered, but the length of the sentence cannot be extended. Judges appear to see reviews as being an important part of individualized justice. Most judges (80 percent in a recent survey) believe that the original sentencing judge should carry out the review presumably because they believe that the sentencing judge has a unique ability to assess the changed circumstances (Doob 2001). Unfortunately, little is known about the frequency of reviews or their impact on custodial (or other) sentences. It would appear from survey data of
judges (the only data currently available) that the proportion of sentences receiving reviews varies considerably across the country (analysis by the authors of data reported in Doob [2001]).

**D. Transfers of Youths into the Adult Criminal Justice System**

Throughout Canada's youth court history (i.e., 1908 to the present), youths age fourteen and older have been in jeopardy of being "transferred" out of the youth justice system into the adult system. The transfer takes place in the youth court after the first appearance in that court. A youth can be transferred for all but the most trivial of offenses. From 1908 to 1984, the test for transfer was fairly simple sounding: if the court is of the opinion "that the good of the child and the interest of the community demand it," that youth could be transferred to adult court (JDA, sec. 9[1]). Courts obviously "sharpened" this test somewhat. It remained clear, however, that transfers were meant to be rare.

The consequences of being transferred in Canada are serious. First of all, for most criminal law purposes, the fourteen-year-old who is transferred to adult court is deemed to be a full adult. This means that they have the rights of an adult (e.g., a choice of a jury trial) but could also be sentenced as an adult. In the case of murder, for example, this meant, after 1977 (and until 1992), that a youth over age fourteen could, if transferred and subsequently found guilty of murder, be sentenced to imprisonment for life without parole eligibility for twenty-five years. For more mundane cases, the consequences are also important: when a case is transferred to the adult court, the youth can be named publicly by the mass media as soon as the transfer is "complete" (i.e., all appeals have been disposed of). Normally, youths are not in jeopardy of being identified in the mass media at any stage of youth court proceedings or after conviction.

As one might expect, with the shift toward a more legal orientation, the initial "test" for transfer was also more explicit under the YOA than it had been previously. It was still possible to transfer almost any youth over age fourteen who was charged with almost anything other than the most trivial of offenses. In deciding whether a case should stay in the youth court or be transferred to the adult court, a judge had to consider the seriousness of the offense, and the age, maturity, and criminal record of the youth. Then the judge had to consider which system—the youth system or the adult system (including the correctional facilities of the two systems)—"in the interest of society and having regard to the needs of the young person" (YOA, sec. 16[1])
could best “meet the circumstances of the case” (YOA, sec. 16[2][c]). Judges found this a challenging task, in part, of course, because they were making decisions about which of two systems could best deal with a case before any of the facts of the case had been established. The notion that the judges were to “balance” the interests of society and those of the young person was consistent with the rest of the act. When judges were confronted with a fork in the road to justice, the YOA instructed them to take it.

E. Conclusion: A New Youth Justice Law, 1984–85

In summary then, the changes that took place in Canada’s youth justice laws in 1984 tended to focus on “criminal law” principles. These changes took place as a result of a process that began in 1961 and ended in April 1985 when a uniform maximum age of eighteen was implemented across Canada. This overall “criminal law” or “due process” orientation of the law included the following elements: an explicit acknowledgment of due process rights (rights of appeal, special restrictions on the use of statements by accused youth, and rights to counsel); a restriction of the jurisdiction of the act to federal (criminal) acts; a change in the age of jurisdiction (from a minimum age of seven to twelve, and to a uniform maximum age of the eighteenth birthday); definite sentences with relatively short maximum sentences; a hesitant first start at acknowledging the importance of proportionality (e.g., in maximum sentence length, in the availability of secure custody as a sentence option, and in the criteria for transfer to adult court); and the enshrining of the principle that “the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families” (YOA, sec. 3[1][f]). These changes created a system in Canada where youths were (and still are) being dealt with in a separate system from adults, but in a system where the justification for them being there and the principles that govern the manner in which they are treated are clearly “criminal law” principles.

It is worth noting, in this context, that according to survey evidence (Doob 2001) most judges in Canada who hear youth court matters also hear (adult) criminal court matters. The vast majority of youth court judges (84 percent across in all provinces) who responded to this survey indicated that they also hear adult criminal cases as part of their regular work. For 37 percent of the respondents to this survey, youth
court matters are mixed in with adult criminal cases in the normal daily docket.

**F. The Other Youth Justice System: The Child Welfare System**

As we have pointed out, the full legislative and administrative responsibility for the child welfare system lies with the provinces. The importance of provincial laws increased in 1984 for two reasons. First, the scope of behavior falling under the YOA included only those behaviors that were violations of federal law. Provincial and municipal laws were no longer included, and there was no longer a “catchall” category of behavior like “sexual immorality or similar form of vice.” Second, what otherwise would be offenses by those eleven years old and younger were no longer under criminal law control.

Generally speaking, the provincial legislation focuses on traditional child welfare issues—children suffering or at risk of physical or sexual harm, neglect, and so on. The Ontario law—the Children and Family Services Act (R.S.O. 1990 c. C. 11) that came into effect in 1984—covers all children in the province under the age of sixteen. In part because of the void left in the criminal law for youths under age twelve who might commit offenses, a “youth in need of protection” typically includes a broad definition of harms from which provinces wish to protect children. Thus, in Ontario the child can be found in need of protection if

the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person’s property, [and] services or treatment are necessary to prevent a recurrence and the child’s parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment; or the child is less than twelve years old and has on more than one occasion injured another person or caused loss or damage to another person’s property, with the encouragement of the person having charge of the child or because of that person’s failure or inability to supervise the child adequately. (Children and Family Services Act, Ontario, secs. 37[2][j] and [2][k])

The Ontario child welfare law is not dramatically different from other provincial laws. And, like the federal (criminal) legislation, it has an explicit, but not very strong, statement endorsing the principle of
minimal interference. Under “purposes” it states that “so long as they are consistent with the best interests, protection, and well being of children,” there is the necessity “to recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered” (Children and Family Services Act, Ontario, sec. 1[2][2]). “Considering” a course of action does not, obviously, require that it be chosen.

If a youth is found to be in need of protection, there is, again, a presumption in favor of the least disruptive intervention or a community placement (e.g., with a relative, neighbor, etc.; Children and Family Services Act, Ontario, sec. 57). Nevertheless, the fact remains that, on the balance of probabilities, youths can be placed into the care of the state if they have committed offenses and the parents appear to a court to be unable to supervise them adequately. Hence, although Canada’s criminal law does not address the offending of youths under age twelve, the state can and does apprehend and hold in secure settings youths under age twelve who commit offenses.

The separation of the “welfare” system from the “youth [criminal] justice system” became clearer with the YOA than it had been under the JDA. As the youth justice system became more clearly focused on criminal behavior, the pressures to move toward a harsher system became more focused.

II. Pressure for Change
When it received its final vote in Canada’s (federal) House of Commons, the YOA received all parties’ support. It is unusual for all major political parties in Canada to agree on anything. Agreeing on youth justice legislation would not, therefore, be expected. Perhaps the more than twenty years of discussion was responsible for this.

Soon after the YOA came into force (in April 1984), however, controversy returned. There were a number of technical problems that occurred almost immediately (e.g., in a few of the provisions having to do with records of youth justice matters). But there were also substantive concerns. A new offense—failure to comply with a disposition (largely a breach of a probation order)—was introduced into the YOA in 1986. Fourteen years later, this single offense would be responsible for 23 percent of the custodial sentences handed down in the country. For the first two years of the act’s operation, if a young person breached a condition of a probation order, the breach could result in a resentencing of the youth for the original offense. The amendments that came
into force in 1986 were the first of three sets of amendments that attempted to "look tough" on youth crime (R.S.C. 1985, c. 24 [2d Supp.]). In 1992 and again in 1995, the maximum sentences for murder were increased, and the rules for transfer to adult court were changed. These are described in Section II.B.

A. Crime Trends and Public Perceptions

Youth justice laws in Canada have been shaped since 1984 by an intensely political process. Although it could be argued that the change from the welfare-oriented JDA to the more "legally" oriented YOA developed as a result of principled debate, it would be hard to argue that the debate during the latter part of the 1980s and the 1990s was as principled.

Canadians have, for years, reported to pollsters that they believe that sentences for adults are too lenient. A Province of Ontario poll found that 77 percent of residents thought that adult sentences were too lenient. The corresponding figure, from the same survey for youth court sentences was 86 percent (Doob et al. 1998). The difficulty is that part of the belief that sentences are too lenient is based on the incorrect assumption that harsher sentences will lead to a safer community (Doob et al. 1998).

To understand what happened to youth justice legislation during this period, we need to look at what was happening to measures of crime at this time. As shown in figure 1, "crime" as measured by incidents reported to the police increased quite regularly from 1962 until the early 1980s. During the 1980s, however, overall crime incidents
reported to the police did not go up dramatically, and certainly there was no sustained increase during the 1990s. Violence, as a proportion of all incidents, was never very large.

A more careful look at the curve for violence, however, is important. Clearly the rate of violent incidents reported to and by the police increased between 1962 and the early 1990s. But the increase in “crime” was not driven, in large part, by the increase in the number of reported violent incidents.

The only measure that exists at a national level of official responses to youth crime comes from police reports of the number of “youths charged” from aggregate (Uniform Crime Reports) data. Because these are aggregate data (reported centrally only in terms of the number of “youths,” not their ages), it is impossible to compare data from before April 1985 with data after this date. On April 1, 1985, the provinces adopted a uniform maximum age of eighteen. Prior to that, as we have pointed out, whether a sixteen- or seventeen-year-old was a youth or adult depended on the province (and to a lesser extent, on gender). There are serious concerns, as well, with the accuracy of the data on “youths not charged” such that the Canadian Centre for Justice Statistics, Statistics Canada, no longer routinely reports these data.

The result is that “youths charged” from 1986 onward constitutes the best available data on what was happening in youth justice in the early years of the YOA (1986–91). More important, for our purposes here, “youths charged” is often cited, incorrectly, as a good measure of “youth crime.”

These data show a rather dramatic increase in youths charged for any violent offense. These are often cited by the police and others as an indication that “the youth violence problem” is getting worse. This increase, however, is disproportionally driven by increases in the low-end violent cases. As an illustration, we have included, in figure 2, the relevant rates for the three levels of assault in Canadian law. Level-1 assault (“common assault”) accounts for dramatically more of the increase than does either level 2 (“assault causing bodily harm or assault with a weapon”) or level 3 (aggravated assault). It was not until the mid-1990s that evidence could be found to suggest that “violent youth crime” had leveled off.

Youth court data show similar patterns—suggesting that it is largely minor violence that accounts for the increase. By the mid-1990s, when the numbers of violent cases going to court leveled off, the suggestion was often heard that although the number of violent cases was not in-
increasing, the "quality" of youth violence was changing—toward more serious, brutal incidents. The available data do not support this assertion (see Doob and Sprott [1998]; for an opposing view, see Gabor [1999]; then see Doob and Sprott [1999]).

Carrington (1995, 1998, 1999) suggests that much of the apparent increase in youth crime or youth violence during the 1980s was illusory. His analysis suggests that the police, under the new act, tended to charge youths whom previously they would have cautioned or dealt with informally. Thus, increased youth crime—as measured by changes in the number of youths charged by police—appeared to have had less to do with changes in the behavior of youths than with changes in police decision making. The "youth crime wave" was, then, probably police induced. Nevertheless, the public’s most accessible proxy for serious youth crime—the youths charged with violent offenses—went up every year from 1986 to about 1993 before leveling off in the mid-1990s.5

Even though Canada has relatively few youths accused of homicide

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4 This interpretation is not universally accepted; see, e.g., Corrado and Markwart (1994); Markwart and Corrado (1995).

5 Unfortunately, Canada does not have very useful measures of youthful offending that are independent of the justice system. One longitudinal study (Statistics Canada's National Longitudinal Survey of Children and Youth) of a representative sample of Canadian children is currently being conducted, but to date there are only two waves (collected in 1994 and 1996) of data publicly available, and self-report data at these two points in time are available only for ten- to eleven-year-olds. Nevertheless, ten- to eleven-year-olds at these two points in time did not differ appreciably in their level of self-reported offending. For details of the survey and of the results of this analysis, see Sprott, Doob, and Jenkins (2001).
offenses each year and, as shown in figure 3, there is no evidence of a consistent trend, most Canadians probably believe that homicides involving youths are increasing. Seventy-nine percent of adult residents of the Province of Ontario thought, in 1997, that youth homicides were increasing, a proportion that is significantly higher than the 66 percent who believed, incorrectly, that the overall Canadian homicide rate was increasing (Doob et al. 1998).

Between 1984 and 1995, the YOA was amended three times. As we have seen, these were times when, except for homicides, there was a good deal of public evidence supporting the belief that crime generally and violent youth crime in particular were increasing. With these data as the background, it would not be surprising if Canadians perceived increasing crime to be a problem. And it would not be surprising if the governments in power felt pressure to do something. The governments, however, appeared to have listened somewhat selectively to the public. Getting tough on crime is not seen by a majority of Canadians as the best way to address crime generally or youth crime in particular (Doob and Roberts 1988; Doob et al. 1998). And many respondents, when faced with specific cases, were not as punitive as their general attitudes might suggest (Sprott 1998).

B. The Changes Begin in Earnest: Sentences for Murder and Transfers to Adult Court

Canada has not been immune to the practice of assuming that crime levels in a society are a direct function of criminal justice policies. A
spectacular case helped tie up the loose strings in the package of beliefs suggesting that the YOA was too lenient. A youth charged with the murder of three people in Toronto was found guilty in youth court and sentenced to the maximum custodial sentence of three years. No attempt to transfer the youth had been made, apparently because there had been an agreement between the Crown and defense that the youth would be found not guilty by reason of insanity. However, the youth court judge, after hearing the submissions from both sides, determined that although there was sufficient evidence to find the youth guilty of murder, there was insufficient evidence to find him not guilty by reason of insanity. When, in the late 1980s, the youth was released from custody, the tabloid press in Toronto saw this case as evidence of the leniency of the YOA. The fact that the prosecutor had not applied to transfer the youth and that the “consensual insanity defense” was procedurally flawed did not enter into the debate.

Politically, this and other cases, as well as the apparent increase in violent youth crime, set the scene for something to be done. A government focused on a quick solution to a youth crime problem can look to youth crime legislation as a solution to its political problems. In 1992, the YOA was amended again. This time the move toward tough-sounding dispositions focused largely on serious violent cases, and in particular, not surprisingly, on homicide. Clearly there was no evidence that homicides involving accused youths were a particular problem. And there was no evidence that there were any special problems involving cases that “should” have resulted in a transfer to adult court but that had such a transfer denied by a judge.

The Progressive Conservative government that was in power from 1984 to 1993 did not invariably take a hard-line view about crime. In 1993, for example, a Conservative-dominated Parliamentary committee looking into crime prevention focused almost exclusively on the social causes of crime and on noncriminal justice approaches to reducing crime (Standing Committee on Justice and the Solicitor General 1993). It noted that “the United States affords a glaring example of the limited impact that criminal justice responses may have on crime” and that “evidence from the U.S. is that costly repressive measures alone fail to deter crime” (Standing Committee on Justice and the Solicitor General 1993, p. 2). Nevertheless, the apparent problem of relatively short sentences for murderers was not examined within this context. A three-year sentence for a multiple murdering youth was a political problem and, perhaps, a problem of proportionality, notwithstanding
the fact that almost all youths charged with homicide offenses in Canada are eligible for transfer to adult court. For example, thirty-five of thirty-nine youths in 1998–99 and sixty-three of the sixty-seven youths in 1999–2000 facing a murder or manslaughter charge were in jeopardy of being transferred since they were over age fourteen at the time of the offense. Nevertheless, only seven youths (out of a possible thirty-five) in 1998–99 and twelve youths (out of a possible sixty-three) in 1999–2000 who were over fourteen at the time of the homicide incident were transferred to adult court. In the fiscal year 1991–92, the first year in which complete national data were available on the operation of the YOA, forty-nine of the fifty-one youths in court for homicide offenses were in jeopardy of being transferred. Only eight youths were, in fact, transferred (Canadian Centre for Justice Statistics, Statistics Canada 1992). Nevertheless, the law was changed in 1992 to increase the maximum sentences available in youth court for murder.

As shown in table 1, the maximum sentences in youth court increased considerably. Receiving less publicity was the fact that if a youth were to be transferred into the adult system and found guilty of murder, the minimum time of parole ineligibility was reduced considerably.

Thus, moving more toward a proportionality model of sentencing, there were, after 1992, three bands of offenses: those offenses with maximum sentences of two years, three years, and (for murder) five years less a day. The lowering of the parole ineligibility period for murder for those cases where the youth was transferred to adult court obviously reduced the discontinuity between the two systems. For a youth in jeopardy of a conviction for murder, the choice until 1992 had been a three-year sentence (in the youth system) or a life sentence with no possibility of parole for ten to twenty-five years.

The changes in the transfer provisions were also important from a political perspective. Originally, as we have noted, the court was required to balance the protection of society and the needs of the young person. After years of perceived increases in youth crime and statements linking levels of youth crime to youth justice policies, the “test” for transferring a youth to adult court changed in such a way that priority was given to “protection” of society: “The youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is
<table>
<thead>
<tr>
<th>Period</th>
<th>Maximum Sentence in Youth Court</th>
<th>Mandatory Sentence in Adult Court, Ages Fourteen to Fifteen at Time of the Offense</th>
<th>Mandatory Sentence in Adult Court, Ages Sixteen to Seventeen at Time of the Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984–92</td>
<td>Maximum of three years</td>
<td>Mandatory life, no parole for twenty-five years (first degree), ten to twenty-five years (second degree)</td>
<td></td>
</tr>
<tr>
<td>1992–96</td>
<td>Maximum of three years custody, plus two-years-less-a-day of “conditional supervision in the community”</td>
<td>Mandatory life, no parole eligibility for five to ten years</td>
<td>Mandatory life, no parole eligibility for five to ten years</td>
</tr>
<tr>
<td>1996–2003</td>
<td>Maximum of six years custody plus four years conditional supervision in the community (first degree) and four plus three years (second-degree murder)</td>
<td>Mandatory life, no parole eligibility for five to seven years</td>
<td>Mandatory life, no parole eligibility for ten years (first degree) or seven years (second degree)</td>
</tr>
<tr>
<td>2003 onward (YCJA)</td>
<td>Maximum of six years custody plus four years conditional supervision in the community (first degree) and four plus three years (second-degree murder)</td>
<td>Mandatory life, no parole eligibility for five to seven years (&quot;adult sentence&quot;)</td>
<td>Mandatory life, no parole eligibility for ten years (first degree) or seven years (second degree; &quot;adult sentence&quot;)</td>
</tr>
</tbody>
</table>
of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be [transferred to adult court]" (YOA, sec. 16[1.1]).

Clearly the goal was either to make it easier—or to make it be perceived to be easier—to transfer youths suspected of offending to adult court. However, when examining trends in the use of transfers over the years, there appears to be no evidence of an increase. Figure 4 shows the total number of transfers in Canada each year since 1991 when national data were first available. The data show that there are fluctuations each year in the number of cases transferred to adult court, but there appears to be no meaningful increase. This suggests that although legislation was enacted in 1992 (and again in 1995 as described in Sec. III) with the apparent intent of making it easier to transfer youths to adult court, there was no overall increase in the number of children transferred to the adult system. This figure also reminds us of another fact: very few cases have ever been transferred into the adult system.

Looking at the overall number of cases transferred obscures some interesting provincial variations. Figure 5 shows the rate of transferring cases in the four largest provinces in Canada over the past decade. The denominator in these figures is the population of youths in the province. Because provinces bring cases into court at very different rates, we decided that "cases in court that are eligible for transfer" in a province was a less useful denominator.\(^6\) Clearly the rate of transfer-

\(^6\) We have expressed these "transfers to adult court" rate figures in terms of rates per 100,000 youths in the province rather than per 1,000 cases to court. The reason for this is simple: if some provinces, such as Quebec, bring few cases to court, it would make sense that they would transfer a higher portion of these cases to adult court than a prov-
Fig. 5.—Rate (per 100,000 twelve- to seventeen-year-olds) of transferring cases, four largest provinces. Source: Canadian Centre for Justice Statistics, Statistics Canada 1991–2000.

ring youths to adult court varies across provinces and over time. There is considerable volatility in the rates of transfers. However, transfers, until recently, appeared to be more likely to occur in some provinces (e.g., Quebec and Alberta) than in others (e.g., Ontario and British Columbia; see fig. 5).

Although national data exist on the number of youths who are actually transferred to adult court, no data exist on the number of times transfer applications are brought to the court. Provincial court judges in early 2001 were asked how many transfer hearings they had heard in the previous five years (51 percent of the judges had heard no transfer hearings) and how many were successful. From these very rough estimates, it appeared that about 60 percent of the transfer applications were successful. Hence, even if every application were successful, there would be few youths transferred to adult court.

III. Balancing Youth Justice

A Liberal government was elected in the 1993 federal elections on a platform that included “toughening up” the YOA. Interestingly, the Liberal platform document (Liberal Party of Canada 1993) included ince like Alberta or Ontario, which have large numbers of very minor cases coming to court. Expressing “transfers” as a function of the number of youths in the province, then, is a measure of how eager or reluctant a province is to exclude its most difficult youths from childhood.
errors about the YOA that made the actual law look more lenient than it was.\textsuperscript{7} The stage was set for additional changes that were not necessarily "needed" from anything but a political perspective. The 1995 amendments (R.S.C. 1985, C. Y-1, amended 1995, chap. 19) were a combination of changes, most of which appeared to be part of a "balanced approach" to youth justice. Tough approaches were paired with "lenient" approaches. The changes on the "liberal" side of the ledger tended to be rather weak, and therefore ineffectual, in their wording. Those on the tough side tended to be weak, and therefore irrelevant, in their impact.

The "liberalizing" 1995 amendments included a statement in the declaration of principle that "the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour" (YOA, sec. 3[1][c.1]). The amendments also added some admonitions designed to limit the use of custodial sentences for youths: "An order of custody shall not be used as a substitute for appropriate child protection, health and other social measures. . . . A young person who commits an offence that does not involve serious personal injury shall be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and . . . custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered" (YOA, sec. 24[1.1]).

There are two points that need to be made about these changes. First, there was not much debate about them. Second, they are weak.

\textsuperscript{7} The Liberal platform stated that they would address the current law on criminal records, which they described as follows: "Currently an eighteen-year-old could land in adult court with no criminal record despite a number of prior convictions in youth court. Regardless of the severity of the offense charged, or the number of previous youth court convictions, he or she is treated as a first-time offender in adult court" (Liberal Party of Canada 1993). In fact, the law in Canada has never been that youth court records are automatically "cleared" as an eighteenth birthday gift to the youth. A youth court record cannot be disclosed if five years without a finding of guilt has elapsed since the end of a sentence (YOA, secs. 45[1][f]–[g]). In other words, the record could only disappear on the eighteenth birthday if the offending took place when the youth was twelve years old and the sentences (including any time on probation) were completed on the youth's thirteenth birthday. It seems rather implausible that a twelve-year-old could acquire a serious record of violent offending and complete all sentences before she or he turned thirteen. Even if this were to happen, it is a different kind of case from that conjured up by the Liberal Party election rhetoric.
Note that phrases like “where possible,” “where appropriate,” and “reasonable in the circumstances” are used rather than strong admonitions.

The prohibition on using custody for child welfare purposes is, obviously, the strongest of the provisions we have mentioned. These provisions came into effect in 1996. Five years later when youth court judges were surveyed, 37 percent of the judges indicated that in half or more of the cases, “the youth’s home (and/or parents) or living conditions were such that there was a need to get him or her into a more stable environment,” and this was a relevant factor in the decision to impose custody (Doob 2001). Only 27 percent of respondents indicated that this was a factor in none or almost none of the cases in which they imposed custody (Doob 2001). It seems unlikely that the other provisions designed to reduce the use of custody would have had much impact, since the one provision that was a clear prohibition was ignored by substantial numbers of judges.

The main tough-on-crime amendments in 1995 had to do with transfers and the maximum sentences for homicide offenses. Clearly, the “need” to change these aspects of the law was political, not substantive. The government had absolutely no evidence that there were any problems in these two parts of the law that might not have already been “fixed” by the amendments that went into effect in 1992.

As summarized in table 1, the government in 1995 increased (from five years less a day to seven to ten years) the maximum length of sentences for murder. And, interestingly, they reduced somewhat the parole ineligibility period for those fourteen- and fifteen-year-olds transferred to adult court for murder. These amendments create procedural complexities for the youth courts since Canada’s constitution requires that the accused have an option of a jury trial if he or she is in jeopardy of imprisonment for five years or more (Charter of Rights and Freedoms, sec. 11[f]). Until 1995, jury trials had not existed in youth courts. If a youth were transferred to the adult system, he or she would have the same access to jury trials as adults. But “youth court” jury trials were new. In any case, however, these changes came before there had been any possibility of evaluating the impact of the 1992 amendments. A need to “look tough” was, apparently, the dominant motivation for change.

Perceptions were also the basis of another 1995 innovation. Sixteen- and seventeen-year-old youths charged with any of four very serious violent offenses (murder, manslaughter, attempted murder, and aggra-
vated sexual assault)\(^8\) would be “presumptively” transferred to adult court unless they successfully argued that the transfer should not take place. Interestingly, however, the “test” as to whether a transfer should take place was the same as it had been. Not surprisingly, there seems to be no evidence that the change in law had any impact. Data for sixteen- and seventeen-year-olds alone (without including the twelve- to fifteen-year-olds) are not easily available. However, looking at all of the cases coming to court for one of these four presumptive offenses during the 1990s, it is clear that the number transferred seems to have been unaffected by the change in the law. It seems that during the 1990s, Canada transferred at most 10–19 percent of the sixty-five to ninety-four serious violent cases involving sixteen- and seventeen-year-old accused youths that came to court each year. The data in table 2 do not appear to support the notion that creating “presumptive” transfers to adult court (fully in effect from 1997–98 onward) had any impact.

The changes appear to have been designed to placate public opinion by being able to point to tough measures that had been taken against young offenders. The minister, however, had another problem. He had promised a full review of the YOA. In fact, two parallel reviews took place after the government had legislated these changes. These two reviews—one by a “federal-provincial-territorial task force” (Federal-Provincial-Territorial Task Force on Youth Justice 1996) and the other by the Standing Committee on Justice and Legal Affairs of the House of Commons (Standing Committee on Justice and Legal Affairs 1997)—carried out their responsibilities, reporting in 1996 and 1997, respectively. The necessity for the federal-provincial-territorial review derived from the fact that the provinces and territories administer the law and would have been left out of the review by the House of Commons committee.

Soon after these bodies reported, a federal election took place (1997), and a new minister of justice was appointed. Again, the government had promised to respond to the House of Commons committee reports and to change the YOA. As the government’s response, the minister, in May 1998, released a “white paper” entitled “A Strategy for the Renewal of Youth Justice,” which contained broadly written outlines for proposals that responded to two things: the political im-

\(^8\) The most serious of three levels of sexual assault in the Canada’s Criminal Code (R.S.C., 1985, chap. C-46).
TABLE 2

Total Number of Cases in Youth Court, Number of “Presumptive” (Serious Violent) Cases in Youth Court, and the Number of “Presumptive” Cases That Are Transferred to Adult Court (Canada)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of Cases in Youth Court</th>
<th>Number of Presumptive Cases to Youth Court (Sixteen- and Seventeen-Year-Olds Only)*</th>
<th>Number of Presumptive Cases Transferred to Adult Court (All Ages)t</th>
<th>Percent of Presumptive Cases Transferred to Adult Court (All Ages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991-92</td>
<td>116,397</td>
<td>65</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>1992-93</td>
<td>115,187</td>
<td>83</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>1993-94</td>
<td>115,949</td>
<td>74</td>
<td>14</td>
<td>19</td>
</tr>
<tr>
<td>1994-95</td>
<td>109,743</td>
<td>91</td>
<td>14</td>
<td>15</td>
</tr>
<tr>
<td>1995-96</td>
<td>111,027</td>
<td>87</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>1996-97</td>
<td>110,065</td>
<td>80</td>
<td>12</td>
<td>15</td>
</tr>
<tr>
<td>1997-98</td>
<td>110,883</td>
<td>89</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>1998-99</td>
<td>106,665</td>
<td>69</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>1999-2000</td>
<td>102,061</td>
<td>94</td>
<td>13</td>
<td>14</td>
</tr>
</tbody>
</table>


* Presumptive offenses include murder, manslaughter, attempted murder, and aggravated sexual assault.

† The number of sixteen- and seventeen-year-olds actually transferred is not available. The figures reported here of actual transfers includes all those transferred, regardless of their ages. Overall, those under sixteen and, therefore, not presumptively transferred account for only 14 percent of all cases transferred. These figures and, therefore, the proportion transferred (in the final column of this table) are likely to be slightly inflated.

The political imperative is simple to describe. As various commentators (e.g., Cullen, Wright, and Chamlin 1999; Tonry 1999; Doob 2000) have pointed out, it is easier to be “tough on crime” than to be smart about crime. Hence, there were the necessary tough elements. Among them was the proposal that the category of “presumptive offenses” would be broadened in two ways: by lowering the age at which a youth would be presumptively treated as an adult from age sixteen to age fourteen and by creating a new category of “presumptive adults”: those youths who had established a pattern of violent offending.

In addition, a symbolic thorn in the side of some police officers was
removed. The YOA had special restrictions on the admissibility of statements from accused youths. These were not easy to follow, but competent police forces had developed protocols for taking statements from youths that apparently overcame the procedural hurdles while respecting the requirements of the act. Nevertheless, the admissibility of confessions by accused youths was made easier as a way of signaling that the government was on the side of the police, not accused youths.

On the other side, there were acknowledgments of a number of serious problems with the operation of the YOA. The most important of these had to do with the overreliance on youth court and imprisonment as solutions to youth crime. As discussed earlier, the overreliance on youth court had been identified as a problem twenty-five years earlier. It has never been successfully addressed. In addition, by the end of the 1990s, notwithstanding political pressure to be tough, there seemed to be some consensus that custody as a sentence for youths was being overused. The House of Commons committee, on the basis of unpublished data, suggested that Canada uses custody at a higher rate than it is used in the United States. A study published subsequently (Sprott and Snyder 1999) confirmed this estimate for certain classes of offenses. More generally, however, there was the feeling that the YOA was not operating properly.

IV. The End of the Young Offenders Act

When the government of Canada released its “strategy” white paper in the spring of 1998, it noted that Canada used the youth justice system and youth custody for many very minor offenses (Department of Justice, Canada 1998). This is quite easily documented.

A. The Use of Court and Custody

Using the most recent data available, it appears that the minister of justice’s concern was well founded. Table 3 shows the types of cases that come into Canada’s youth courts as well as the cases that end up with youths being sentenced to custody.9 Theft of goods valued at less than $5,000 accounts for roughly 14 percent of all cases going to youth court. Adding in three other relatively minor offenses—possession of stolen property, failure to appear in youth court, and failure to comply with a disposition—one finds that these four offenses account for

9 A “case” consists of one or more charges against a single young person that all have their first appearance in the same court on the same day. Cases going to court are described by the single most serious charge that the youth is facing.
TABLE 3

Cases (Principal Charge) in Youth Court and Sentenced to Custody (Canada, 1999–2000)

<table>
<thead>
<tr>
<th>Cases in Court</th>
<th>Cases Sentenced to Custody</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Number of Cases</td>
</tr>
<tr>
<td>Theft under $5,000</td>
<td>14,514</td>
</tr>
<tr>
<td>Possession of stolen property</td>
<td>4,738</td>
</tr>
<tr>
<td>Failure to appear</td>
<td>11,078</td>
</tr>
<tr>
<td>Failure to comply with a disposition</td>
<td>13,517</td>
</tr>
<tr>
<td>Subtotal of minor offenses</td>
<td>43,847</td>
</tr>
<tr>
<td>Other thefts</td>
<td>4,536</td>
</tr>
<tr>
<td>Mischief/damage</td>
<td>5,103</td>
</tr>
<tr>
<td>Breaking and entering</td>
<td>10,285</td>
</tr>
<tr>
<td>Minor assault</td>
<td>10,235</td>
</tr>
<tr>
<td>Subtotal: sum of eight less serious offenses</td>
<td>74,006</td>
</tr>
<tr>
<td>All other violence</td>
<td>12,702</td>
</tr>
<tr>
<td>Drug possession</td>
<td>3,779</td>
</tr>
<tr>
<td>All other drug offenses</td>
<td>1,615</td>
</tr>
<tr>
<td>All other offenses</td>
<td>9,959</td>
</tr>
<tr>
<td>All cases</td>
<td>102,061</td>
</tr>
</tbody>
</table>


roughly 43 percent of all cases going to youth court. This proportion varies a bit from province to province and from year to year. But it is safe to suggest that somewhere between one-third and one-half of the cases going to youth court from any province in any year have as their most serious charge one of these four offenses.

When one adds in other thefts, mischief or damage to property, breaking and entering, and minor assaults, we find that these eight sets of offenses account for close to three-quarters of all cases in youth court. Given that court is cumbersome, slow, expensive, and probably counterproductive, it is not surprising that the Canadian government questioned the utility of bringing these cases to court. Those same eight offenses also account for the majority (75 percent) of cases sentenced to custody in Canada.

Other cases—including all other violence and drug cases—consti-
a small portion of the court workload and, interestingly enough, a small portion of the cases where the youth is sentenced to custody. Drug offenses, for example, are the most significant charge in only about 2.6 percent of the custodial sentences.

Canada tends to rely on custody for relatively minor offenses. Compared with other countries, Canada appears to have a relatively high rate of youth incarceration. For example, Canada has a similar or slightly higher rate than the United States in its use of custody for violence and property offenses (Sprott and Snyder 1999). However, the majority of custodial sentences in Canada are relatively short. In 1999–2000, for example, 34 percent of custodial sentences in Canada were for less than one month, and another 43 percent of custodial sentences were for from one to three months. Thus, 77 percent of custodial sentences in Canada are for three months or less.

These short sentences are seen by judges as accomplishing a variety of different things. In a recent survey of judicial attitudes across Canada (Doob 2001), judges were asked to indicate the importance of each of nine different factors in the decision to hand down a short period of time in custody. The most important factor was the need—because of the seriousness of the offense—to place the youth in custody. Hence, the offense “required” custody, but the period of time it required was not very long. One wonders why noncustodial sentences could not have been found as substitutes for these short periods of custody. The second and third most important factors were both “future” oriented: the judges indicated their belief in the rehabilitative impact of sentences by giving relatively high ratings to the reason “the youth had been given non-custodial sentences in the past and did not stop offending,” and by also endorsing the importance of “short sharp shocks” (Doob 2001).

As would be expected, their offense records affect the likelihood that youths will be sentenced to a period in custody. Table 4 shows the effect of criminal record on two offenses (minor assault and assault causing bodily harm) for the four largest Canadian provinces. There is, not surprisingly, considerable variation in the proportion of cases from each offense-record combination that receives custody in the four provinces. For example, 3.3 percent of minor assaults with no previous convictions are sentenced to custody in Alberta, while 11.8 percent of minor assaults with no previous convictions are sentenced to custody in Ontario. In general, however, the more previous convictions the youth has, the more likely it is the youth will be sent to custody. In
TABLE 4
Percent Receiving Custody as a Function of the Number of Previous Findings of Guilt (Selected Offenses, Four Largest Provinces, 1996–97)

<table>
<thead>
<tr>
<th>Number of Previous Findings of Guilt</th>
<th>None</th>
<th>One</th>
<th>Two</th>
<th>Three or More</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Province</strong></td>
<td>52.8</td>
<td>62.0</td>
<td>70.6</td>
<td>75.0</td>
</tr>
<tr>
<td><strong>Minor assault:</strong></td>
<td>57.9</td>
<td>75.9</td>
<td>82.5</td>
<td>67.9</td>
</tr>
<tr>
<td>Quebec</td>
<td>7.9</td>
<td>20.7</td>
<td>52.8</td>
<td>78.6</td>
</tr>
<tr>
<td>Ontario</td>
<td>11.8</td>
<td>38.7</td>
<td>62.0</td>
<td>70.6</td>
</tr>
<tr>
<td>Alberta</td>
<td>3.3</td>
<td>13.7</td>
<td>26.5</td>
<td>38.6</td>
</tr>
<tr>
<td>British Columbia</td>
<td>6.3</td>
<td>23.1</td>
<td>44.6</td>
<td>75.0</td>
</tr>
<tr>
<td><strong>Assault with a weapon or causing bodily harm:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>13.3</td>
<td>28.3</td>
<td>57.9</td>
<td>64.7</td>
</tr>
<tr>
<td>Ontario</td>
<td>26.0</td>
<td>51.9</td>
<td>75.9</td>
<td>82.5</td>
</tr>
<tr>
<td>Alberta</td>
<td>14.1</td>
<td>37.2</td>
<td>42.1</td>
<td>67.9</td>
</tr>
<tr>
<td>British Columbia</td>
<td>15.6</td>
<td>46.7</td>
<td>75.0</td>
<td>81.3</td>
</tr>
</tbody>
</table>

Source.—Data provided to the authors by Canadian Centre for Justice Statistics, Statistics Canada.

Note.—Numbers in parentheses indicate the number of cases on which each percent is based.

In this respect it is interesting to note the lack of differentiation of offense seriousness. Thus, a youth with a criminal record who is found guilty of a minor offense often has a considerably higher likelihood of receiving a custodial sentence than does a youth without a record who is found guilty of a more serious offense. In Ontario, for example, 38.7 percent of minor assaults with one previous conviction receive a custodial disposition, while 26 percent of assaults causing bodily harm with no previous convictions receive a custodial disposition.

B. Provincial Variation

Another concern about the use of youth court is the variability, across provinces, in the use of court and custody. Given that it is the provinces that administer the YOA, it is not surprising that there are some differences in the ways that it is administered. However, the variability that does exist is dramatic, especially when it seems that levels of offending by youths across provinces are fairly similar (Sprott,
Doob, and Jenkins 2001). As shown in table 5 (for the four largest provinces and two of the smaller provinces), the rates of bringing cases into court and of the use of custody differ dramatically across provinces (see also Doob and Sprott [1996] for a more detailed analysis). What we see, then, are large provincial differences in the rate of taking youths to court; some variability in the rate at which youths are placed in custody once found guilty; and, when these are combined, substantial interprovincial differences in the number of youths, per 1,000 in the population, who are placed in custody each year.

The decision to bring cases to court may relate in some cases to explicit policies at the provincial level. Quebec, as we have pointed out, has a policy (and a law to implement that policy) of keeping youths out of the youth justice system. Ontario, by contrast, appears to have a policy to require youth court for many youths who commit minor offenses. In 1994, the provincial left-of-center New Democratic Party developed a “Violence Free School Policy” (Ministry of Education and Training, Province of Ontario, Canada 1994) that directed school officials to call the police whenever there was anything more serious than the most minor school violence.

Many judges believe that there are many cases that come before them that could have been dealt with outside of the court. Twenty-seven percent of Quebec judges responding to a survey thought that half or more of the cases they were seeing could have been dealt with adequately outside of the court; the comparable figure for Ontario was
55 percent (Doob 2001). Generally speaking, large numbers of judges, particularly outside of Quebec, thought that many of the cases they were seeing in court could have been dealt with outside of court. The variability between the views of Quebec judges and those in the rest of Canada appears to result from perceived differences in the adequacy of community programs for dealing with youths who offend (Sprott and Doob 2002).

C. The Case of Quebec

As shown in table 5, Quebec has the lowest use of youth court and custody when compared with all the other provinces. Quebec has a unique history that sets it apart from other provinces in terms of the treatment of juvenile offenders. This difference in the rate of bringing youths into youth court is not surprising given that Quebec implemented a form of formal diversion of young people from the youth justice system long before the YOA was made law (Trépanier 1983). As mentioned earlier, in the 1970s Quebec passed legislation—the Youth Protection Act—to divert children from the youth justice system. Therefore, even though a young person may be brought to the attention of the police because of an offense, such a youth would be diverted from the criminal justice stream if it was felt that, in essence, the case could best be handled other than in youth court. In contrast, Ontario fought the necessity of having “alternative measures” programs for youths up to the Supreme Court of Canada (R. v. S. [S] [1990] Supreme Court Reports 254). Hence, given the legislated provincial policy that youths who offend should not necessarily be brought to court, it is not particularly surprising to find variation between Quebec and the rest of Canada in youth court caseloads.

The lower rate of taking youths to court appears to be the largest difference between Quebec and the rest of Canada. When one looks at indicators of what actually happens in court, the data tell a somewhat different story. Tables 4 and 5 suggest that Quebec judges are not sentencing dramatically differently from judges elsewhere in Canada. And when one looks at transfers to adult court (fig. 5), it would appear that in some recent years Quebec prosecutors and judges have been transferring more youths into the adult system than have prosecutors and judges in some other provinces. The more noticeable effect, however, is that since the mid-1990s, as far as transfers to adult court go, the “Quebec system” did not appear to be more “child centered” than the “systems” in place in Ontario and British Columbia.
Residents of Quebec are more likely to be content with the level of severity of youth sentences than are other Canadians. In 1999, a Department of Justice, Canada, survey reported that 66 percent of Quebec residents thought that youth court sentences were not harsh enough. Over 80 percent of the respondents in each of the other nine provinces held this view. In addition, in a recent national survey, residents of Quebec were less likely than were residents of other regions of Canada to recommend imprisonment for four different types of cases involving young offenders.

From a political perspective, then, it appears that Quebec residents are less punitive toward young offenders. Their justice system brings fewer youths into this system. The result is that fewer Quebec youths end up in youth custody facilities than elsewhere in Canada. It is not surprising, therefore, that in a thorough analysis of the administration of the YOA in Quebec (Task Force Established to Study the Administration of the Young Offenders Act in Quebec 1995), the conclusion was largely that the problems with the YOA have to do with its administration rather than with the law itself.

D. Aboriginal Overrepresentation

It is well known that aboriginal people in Canada are overrepresented in the justice system generally and in prisons specifically (Federal-Provincial-Territorial Task Force on Youth Justice 1996). While there are no national data regarding aboriginal youths in custody or under community supervision, several jurisdictions in Canada have collected data on this issue. For example, the Federal-Provincial-Territorial Task Force on Youth Justice (1996) notes that a judicial inquiry in the Province of Manitoba found that while 17 percent of the youth population in the province was of aboriginal descent, aboriginal people accounted for 64 percent of the residents in the Manitoba Youth Centre (Federal-Provincial-Territorial Task Force on Youth Justice 1996, p. 609). In Alberta, 9 percent of the youths were identified as aboriginal, but 35 percent of admissions to custody were aboriginal. In Saskatchewan and British Columbia, these same patterns have also been found. For example, while 16 percent of the youth population in Saskatchewan are aboriginal, 45 percent of all youths receiving a disposi-

10 Analysis by the authors of the 1999 Department of Justice, Canada, survey reported on, in part, in Sprott and Doob (2000).
11 Analysis by the authors of the 1999 (Statistics Canada) General Social Survey (Statistics Canada 2000).
tion under the YOA were of aboriginal background. Finally, in British Columbia, 19 percent of the sentenced admissions were aboriginal youths—a rate that was roughly three times the proportion of aboriginal people in the population (Federal-Provincial-Territorial Task Force on Youth Justice 1996, p. 610).

Although the overrepresentation of aboriginal people, including young people, in prisons is well established and is politically acknowledged (Standing Committee on Justice and Legal Affairs 1997, p. 53; Department of Justice, Canada 1998, p. 16), the explanations for it are not. It is almost certainly wrong to suggest that the overrepresentation of aboriginal people in prisons is solely a function of discrimination at sentencing. LaPrairie (1990) has noted that the view that this phenomenon is a result of differential sentencing is not established by the data that are available. Rates of offending coming to the attention of the police appear to be a major contributor. Nevertheless, for adults there is a provision in the Canadian Criminal Code stating that, when sentencing, “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders” (Criminal Code, sec. 718.2[e]). Not surprisingly, this section has been a source of both litigation (R. v. Gladue [1999] 1 Supreme Court Reports 688) and academic controversy (e.g., Anand 2000; Roach and Rudin 2000; Stenning and Roberts 2001).

When the YCJA was first introduced into Parliament in March 1999, a similar provision that focused on aboriginal people was not included. The only reference that might be seen as incorporating the principle that there should be something special related to aboriginal offenders was in the statement of principle that stated: “Within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should . . . (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of young persons with special requirements” (YCJA, sec. 3[1][c]).

The lack of a reference to aboriginal people was, for some, conspicuous by its absence. The version of the bill reintroduced into Parliament in February 2001 (and the version that finally did pass the House of Commons) added the words “of aboriginal young persons and” after “needs” in this subsection. In December 2001, the overrepresentation of aboriginal people in youth custody facilities would create additional problems for the government. The Senate of Canada, a group of
largely elderly people who are appointed for life to act as the “upper” legislative body, sent the YCJA back to the House of Commons. This was accomplished by adding an amendment to the sentencing principles that essentially incorporated the adult sentencing provision quoted above. Hence, this section created a legislative snag between the two houses of the Parliament of Canada. In the end, the House of Commons accepted the Senate amendment. The requirement that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons” (YCJA, sec. 38[2][d]) is now part of the law.

It is, however, almost certainly more important for aboriginal youths, and for others who might be in jeopardy of being sentenced to custody, that there are stronger prohibitions against the indiscriminate use of custody for youths contained in the YCJA than in the YOA or in the (adult) criminal code. These provisions are described in Section V.

E. Conclusion: The End of an Era

The YOA had few friends when the minister of justice announced, in May 1998, that she would soon bring in a new youth justice law. It gathered some friends shortly thereafter, however, when the Quebec government used its apparent support for the YOA as a demonstration of Quebec’s distinctiveness within the Canadian federation. The YOA, therefore, became a tool for separatists in Quebec to argue that the Canadian federation does not serve Quebec’s interests. The argument was simple: Canada was forcing the YCJA onto an unwilling Quebec. Quebec would prefer to maintain its distinct youth justice system under the YOA. But generally, the YOA did not have much public or political support. The minister’s justification for having a new law, rather than amendments to the old law, was that it would “send a clear signal to Canadians of all ages that a new legal framework is in place” (Department of Justice, Canada 1998, p. i).

She attempted, in her white paper outlining her plans (Department of Justice, Canada 1998), to differentiate changes in the youth justice laws from other policies aimed at the problem of youthful offending.

12 Part of Quebec’s opposition to the bill may have derived from the way it was described by the minister’s office in the initial press release (Department of Justice, Canada 1999) (see Sec. V.A. in this essay). By describing the bill largely in terms of its tough-sounding provisions, the minister’s office gave the impression that the bill would automatically lead to tough outcomes in all provinces.
Her strategy, she argued, had three complementary parts: first, “prevention”—this was largely the focus of activity outside the formal justice system (crime prevention programs, a “National Children’s Agenda” focusing on such strategies as support for low income families); second, “meaningful consequences for youth crime”—proportional responses were emphasized (“The consequences for the crimes will depend on the seriousness of the offense and on the particular circumstances of the offender” [p. 13])—it was noted, however, that “community-based penalties are often more effective than custody and will be encouraged for lower-risk, non-violent offenders” (p. 13). And, third, “rehabilitation and reintegration”—the document suggested that rehabilitation and reintegration are “particularly important for serious, violent offenders, including those youth receiving adult sentences” (p. 14).

The document, like many before it, stated that it was not necessary or desirable, often, to bring youth to court for offenses (Department of Justice, Canada 1998, p. 5). It noted that youths were incarcerated more often than adults tended to be under certain circumstances. And it cited the 1997 Parliamentary committee report (Standing Committee on Justice and Legal Affairs 1997) for the assertion that “the rate of youth incarceration in Canada is much higher than that of many Western countries, including the United States, Australia, and New Zealand” (Department of Justice, Canada 1998, p. 7). Many of the provisions that, eventually, would be contained in the law were mentioned, in general terms.

The bill introducing the new law was first presented to Parliament in March 1999. A new session of Parliament, followed by a federal election in the fall of 2000, meant that the bill had to be reintroduced two more times before it finally passed the House of Commons in the spring of 2001. The Senate, an appointed body analogous to the British House of Lords, typically, after debate, passes government bills. In this case, as described in Section IV.D., the Senate instead amended the bill forcing it back to the House of Commons for another vote. The bill passed was again approved by the House of Commons in February 2002 and received royal assent shortly after. It was proclaimed into force in April 2003. The new law is, in fact, very different from the YOA.

V. The Youth Criminal Justice Act
As we have pointed out, there are two substantial problems with the YOA on which almost all policy and academic observers agreed: the
youth justice system is being overused for minor offenses, and too many youths are going to custody, especially for relatively minor offenses. We have noted that the YOA has "admonitions" not to use custody when other sanctions are plausible and that it allows police and others to keep youths out of the formal court system. The biggest single change that came into force with the YCJA is that the degree of directness of the "guidance" has increased considerably. What are admonitions under the YOA have turned into formal "tests," or hurdles, that need to be overcome in the YCJA. It is not that these hurdles—or guidelines, to use a more common word—cannot be surmounted or avoided. In many cases, however, it will be clear what decision was contemplated by the new act. It would appear that the government of Canada has decided that if it has legal responsibility for young offenders, it should make policy on how young offenders should be handled.

The law was, however, created in an intensely political climate. The government could appear to be responding to public concern about crime by bringing in a harsh law. Hence, the government attempted to do the impossible: be sensible but seem tough. It is not clear that they succeeded, at least with their political goals. Although there was pressure to lower the minimum and maximum ages that define who is a "youth," the government did not appear interested in the suggestion. There existed at the time data suggesting that such changes were not a political necessity since the public could easily be persuaded to be content with other approaches to dealing with youths under age twelve who offended (see Sprott and Doob 2000).

Furthermore, the liberalizing impact of the separatist Quebec provincial government cannot be ignored. Youth justice laws provided the government of Quebec with an ideal political tool. Quebec has traditionally been more child centered in its orientation to youth justice laws. If the federal government were to force Quebec to do something that it could not avoid through administrative procedures (e.g., deeming sixteen- or seventeen-year-olds to be adults for all criminal law purposes), it would be a perfect—and accurate—example of how Quebec was different and, within Canada, was being forced to do something regressive that it would not have done on its own.

These age limits, therefore, remained. The acts that could bring a youth in contact with the youth justice system—violations of criminal and other federal laws—also did not change. What changed is what happens to a youth when apprehended.
The preamble to the bill noted, among other things, that “Canadian society should have a justice system . . . that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons” (Bill C-7, House of Commons, First Session, Thirty-Seventh Parliament, 49–50 Elizabeth II, 2001 [as passed by the House of Commons May 29, 2001]). It also acknowledges that Canada is a party to the United Nations Convention on the Rights of the Child. But “saving the most serious intervention for the most serious crimes” is a principle that would appear in a number of places in the new act.

An important change in orientation in the act is that the “protection of the public” is not to be interpreted as meaning either deterrence or incapacitation. The YCJA states that the youth justice system does various things—addressing the circumstances underlying offending, rehabilitating and reintegrating offenders, and ensuring meaningful consequences—“in order to promote the long-term protection of the public” (sec. 3[1]). Thus, the words “protection of the public” appear. The underlying theory, however, appears to be that ensuring meaningful consequences along with rehabilitation and reintegration are means to accomplish long-term protection. The focus on long-term protection rather than the short-term protection afforded by short sentences is also important.

Along with these general statements are the principles designed to address the need to screen cases out of the court system. Measures outside of the formal court system (“extrajudicial” measures) such as warnings, referrals to community programs, and so on, are “presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has previously not been found guilty of an offence” (YCJA, sec. 4[d]). The Canadian youth justice system has tended to focus on the youth’s background of offending at least as much as the offense. Thus it is important that the new law states that noncourt alternatives can be used even if they have been used before, and even if the youth has been found guilty on a previous occasion (YCJA, sec. 4[d]). If the offense is minor and noncourt approaches “are adequate” to hold the youth accountable, then they should be used.

Police are told that they “shall” in all cases consider noncourt approaches in all cases before starting judicial proceedings (YCJA, sec. 6[1]). However, perhaps because of the provincial, rather than federal, responsibility for the administration of justice, the failure of a police
officer to consider noncourt approaches does not invalidate any charge that is laid against the youth (YCJA, sec. 6[2]).

Canada does not have complete data on the number of youths detained before trial. This number is, however, seen as being higher than it need be. Generally speaking, there are two main legal justifications in Canada for detaining a person before trial: that the accused will not show up for trial and that the accused is likely to commit an offense or interfere with the administration of justice. In an attempt to limit the use of pretrial detention under this second justification, the YCJA states that “in considering whether the detention of a young person is necessary [because there is thought to be a substantial likelihood that the youth will commit an offense or interfere with the administration of justice while on release] a youth justice court . . . shall presume that detention is not necessary . . . if the young person, could not, on being found guilty, be committed to custody [under the sentencing provisions of this Act]” (YCJA, sec. 29[2]).

In other words, a youth who would not be sentenced to custody for the offense should not be detained in custody while awaiting trial for that same offense. Many judges under the YOA (30 percent in a survey of youth court judges; Doob 2001) indicated that at least half of the youths whom they detained awaiting trial were detained only because of welfare considerations. The YCJA explicitly forbids this practice (sec. 29[1]).

When a youth has been found guilty, judges are told that “the purpose of sentencing . . . is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of society” (YCJA, sec. 38[1]). More specifically, “the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence” (YCJA, sec. 38[2]). Furthermore, subject to the proportionality requirement, “the sentence must be the least restrictive sentence that is capable of [holding the youth accountable]” and must be “the one that is most likely to rehabilitate the young person and reintegrate him or her into society” (YCJA, sec. 38[2]).

While the proportionality principle sets the rules by which the relative severity of sentences are determined, the actual sentence (within the limits set by proportionality) must be the most likely sentence to rehabilitate or reintegrate. As various commentators (e.g., von Hirsch
1976) have pointed out, a proportionality principle on its own defines the relative severity of punishments. It does not, however, define on its own the level of punishments that should be given. Perfect proportionality, therefore, could be achieved by giving all young persons custodial sentences as long as their length was proportional to the seriousness of the offense. Thus, it is necessary to set at least some standards within the proportionality framework. The YCJA chose to focus on the decision of whether a youth receives a custodial sentence.

Custodial sentences can only be imposed if one or more of four conditions are met: it is a violent offense; the youth has previously failed to comply with noncustodial sentences (i.e., more than one sentence); the youth has been found guilty of a moderately serious offense and has a history of findings (i.e., more than one) of guilt; or, "in exceptional cases where the young person has committed an . . . offence, such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles [of sentencing]" (YCJA, sec. 39[1]).

Furthermore, in cases where custody is imposed, the judge is specifically required in section 39(9) "to state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose [of sentencing] including, if applicable, the reasons why the case is an exceptional case" (i.e., those cases where the youth was sentenced to custody on the basis of the "exceptional case" criterion in sec. 39[1]). The point of these, and other similar requirements, is clear: judges are forced to think about whether custody is really necessary.

In 1996, the traditional purposes of sentencing (individual and general deterrence, incapacitation, rehabilitation, and denunciation) were added as explicit "objectives" of the sentencing laws for adults (Criminal Code of Canada, sec. 718). The judge, when sentencing an adult, is supposed to impose "just sanctions that have one or more of [these] objectives" but is to do so within the principle that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (Criminal Code of Canada, sec. 718.1). Generally speaking, these sections have been criticized as being too vague and contradictory (Roberts and von Hirsch 1999). There is no evidence that we are aware of that codifying these sections had any impact on sentencing above and beyond what had been common practice before these changes (Roberts and von Hirsch 1999, p. 53; Doob 2000, pp. 326–27).

There are two notable differences between the YCJA sentencing
provisions and the adult criminal code provisions. First, the YCJA provisions are clear in their intent. They are designed to limit the use of custody. The mechanism to limit the use of custody is that one or more of four explicit criteria must be met before a youth can be placed in custody. Explanations for the decision must be given.

Second, the YCJA contains no references to general or specific deterrence or to incapacitation in the context of sentencing. Canadian judges have tended to interpret the “protection of society” as being accomplished in part through deterrence and incapacitation. In the YCJA, however, sentencing contributes to the long-term protection of the public by “hold[ing] a youth accountable for an offence through the imposition of just sanctions that have meaningful consequences and that promote his or her rehabilitation and reintegration into society” (YCJA, sec. 38[1]). Although there is no section that specifically says that deterrence and incapacitation have no place in the sentencing of youths, there is a section that indicates that the adult sentencing provisions do not apply (YCJA, sec. 50[1]) except when an adult sentence is being imposed on a youth (YCJA, sec. 74[1]).

When determining the severity of the sentence, proportionality principles are obviously meant to dominate. However, in the choice of the exact sanction that is to be imposed, the judge is required to choose the sentence that is the least restrictive possible, that is most likely to rehabilitate and reintegrate, and that promotes a sense of responsibility and acknowledgment of the harm done (YCJA, sec. 38[2]). But if a custodial order is imposed, there are additional changes. In order to accomplish “reintegration,” a “custody” sentence has been transformed into a “custody and supervision” order whereby a fixed portion (one-third) of the sentence is normally served in the community after the custodial portion. Reviews of dispositions by the court are also still possible.

One difficulty for the federal government is that it has little direct power to force provincial governments to provide noncustodial sanctions. Many judges (29 percent), particularly those judges outside of Quebec and in smaller communities, indicate that they do not have an adequate range of sanctions available to them at sentencing (Doob 2001). The YCJA provides possibilities for additional noncustodial sanctions, but provinces make their own decisions on whether to provide an adequate range of noncustodial choices to judges.

These two parts of the new law—strengthened principles to attempt to reduce the use of youth court, and more explicit sentencing princi-
ples—are undoubtedly the most important potential changes in youth justice law. The intent of both parts of the law is clear. The issue, of course, is whether the intent of the law will be followed. When one looks at the cases that are coming to court or are ending up in custody (see table 3), it is clear that thousands of cases presently ending up in custody should not be there under the YCJA. First-time shoplifters, for example, will be exceedingly difficult to place in custody. Whether the law will be successful in accomplishing its stated goals (e.g., reducing the use of youth court and of custody) is, of course, not certain.

A. Political Reality Steps In: Selling the New Law

The YCJA was first introduced into Parliament and to the Canadian public in March 1999. In the week before the bill was introduced, stories appeared in some of the larger Canadian newspapers under headlines like, “Youth-Crime Bill Aims to Aid Prosecutors” (Anderssen 1999); “New Act Would Jail Parents for Children’s Crimes: New Youth Criminal Justice Act to Be Introduced” (Ovenden 1999); “Youth Crime Laws Get Tough: Young Offenders’ Criminal Records No Longer Secret” (Tibbetts 1999); and “New Law to Get Tough on Youth: Harsher Penalties for Violence, Age of Adult Trials Drops to 14, New Repeat Offender Category” (MacCharles 1999).

It appears that these stories were the result of motivated “leaks” from the government. Whether these stories were, in effect, planted by the government, it is clear that the government was successful in priming the public to expect a tough bill. The news coverage after the release of the bill was slightly more “balanced,” but, nevertheless, the tough parts of the bill dominated discussion. This was not surprising when one looks at the description of the bill released by the minister’s office to the press on March 11, 1999, the day that the bill was released. The first four bullet points in the press release (Department of Justice, Canada 1999) indicated that the YCJA would include provisions that “allow an adult sentence for any youth 14 years old or more . . . ; expand the offenses for which a young person convicted of an offense would be presumed to receive an adult sentence . . . ; lower the age for youth who are presumed to receive an adult sentence . . . ; permit the publication of names of all youth who receive an adult sentence. Publication of the names of [serious violent offenders over age fourteen] will also be permitted” (pp. 1–2).

To the uninitiated, these provisions could be seen as indications that the new law was going to be tough on youth crime. The first of the
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points listed by the minister's office is noteworthy because it is a statement of the law as it has always been in Canada. It is about as meaningful as a statement that murder, under the YCJA, will be an offense. The last two of the thirteen points describing the new legislation was that the YCJA would "allow for and encourage the use of a full range of community-based sentences and effective alternatives to the justice system for youth who commit non-violent offenses; and recognize the principles of the United Nations Convention on the Rights of the Child" (Department of Justice, Canada 1999, p. 2).

It is not surprising, therefore, that the bill was labeled as being largely tough. The first eleven points in the press release all sound tough. The bill itself is long and complex. For reporters who have deadlines and who know nothing about what might be buried in complex legal language, the press release may be both the starting point and the end point of their knowledge of the bill. Only those who had access to data on Canada's youth justice system would be able to know that these tough provisions were numerically unimportant. Few, if any, cases would be affected by them.

The most extreme of the irrelevant points is the one listed as number ten. It states that the new law would "permit tougher penalties for adults who willfully fail to comply with an undertaking made to the court to properly supervise youth who have been denied bail and placed in their care" (Department of Justice, Canada 1999, p. 2). Although clearly this change was incorporated into the law, relatively few people would know that it is possible that no adult has ever gone to prison for this offense. Published statistics for 1999–2000 suggest that no person even went to court for this offense.13 Raising the hypothetical maximum sentence from six months in prison to two years in prison is hardly newsworthy, since almost nobody even gets charged for this offense, let alone goes to prison for it. It is a bit like claiming to be tough on crime by threatening the death penalty for whistling under water. Nevertheless, this provision got higher billing than the changes

13 The statistics are not absolutely clear on this. There were three "cases" (a basket of one or more charges against a single accused appearing together for the first time in court on the same day) involving accused people age eighteen or older for "failure to comply with an undertaking." Most such accused are, of course, the youths themselves who fail to comply with undertakings they have made. Turning to the data on persons (all of the charges a person faced during the twelve-month period), there were no persons age eighteen or over who had this charge as their most serious charge in youth court (where such a charge would appear, no matter what the age of the accused). It seems likely, therefore, that no adult was charged with this offense in 1999–2000.
that could result in thousands of youths not going to court or to custody. Clearly the intended message was that the YCJA is tough legislation.

B. Other Changes to Canada’s Youth Justice Legislation

As we have already pointed out, Canada transfers very few youths to adult court. The procedure by which youths are transferred has been a source of criticism for some time (Beaulieu 1994; Standing Committee on Justice and Legal Affairs 1997). The YCJA, instead of having “transfers” to adult court, would have a procedure where the youth would stay in youth court and be dealt with as a youth. However, for serious offenses (where proper notice had been given), the prosecutor could ask, at the sentencing hearing, for an adult sentence. The test as to whether an adult sentence should be given is fairly simple: if a youth sentence “imposed in accordance with the purpose and principles [of sentencing in the YCJA] would have sufficient length to hold the young person accountable for his or her offending behaviour,” the youth shall be sentenced as a youth (YCJA, sec. 72[1][a]). If not, the youth shall be sentenced as an adult. In other words, the test is whether a proportionate sentence can be given in the youth system within the maximum sentences laid out in the act (two or three years of custody and supervision for all offenses other than murder). If a youth is sentenced as an adult, the judge then decides whether it is appropriate for the youth to start serving the sentence in a youth or an adult facility. The name of the youth who is sentenced as an adult can be published. Normally, the identity of accused (or convicted) youths cannot be published.14

It is impossible to know for certain whether many adult sentences will be imposed on youths. In 1999–2000, however, there were only eighteen custodial sentences handed down in youth court that exceeded twenty-four months out of 23,215 custodial sentences imposed. Even if all of these were, instead, given adult sentences and all of those transferred received adult sentences, one would expect only about 70 or so adult sentences to have been awarded that year.

Another tough-sounding measure contained in the new act is the

14 One exception is in the case of a youth charged with a very serious violent offense (one of the “presumptive offenses”) but given a youth sentence rather than an adult sentence; a judge may allow the identity of the convicted youth to be published “if the court considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest” (YCJA, sec. 75[3]).
provision that anyone over the age of fourteen who was found guilty of one of the four presumptive offenses (murder, manslaughter, attempted murder, or aggravated sexual assault) or who had a history of serious violent convictions would be “presumptively” sentenced as an adult. Two factors make it unlikely that this will be very important. First, as we discussed earlier, the 1996 “presumptive transfer” provisions had no apparent impact on transfer rates. Second, the test of whether a person should be sentenced as a youth or as an adult is the same: can a youth sentence be crafted that meets the “proportionality” test?

In order to emphasize the distinction between criminal and child welfare law and to facilitate child welfare intervention where it is appropriate, the YCJA allows judges at any stage of the proceedings to refer a case to a child welfare agency “to determine whether the young person is in need of child welfare services” (sec. 35). In a tentative acknowledgment of developments in many parts of Canada and as an encouragement for the expansion of such activities, “a youth justice court judge, the provincial director [of youth services, or, if delegated, a probation officer], a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act” (YCJA, sec. 19[1]). In addition, courts are reminded of this ability to refer matters to conferences “for recommendation to the court on an appropriate youth sentence” (YCJA, sec. 41). Conferences are essentially undefined (“conference means a group of persons who are convened to give advice in accordance with Section 19”; YCJA, sec. 2[1]). Effectively this means that various forms of less formal community forums can be deemed to be conferences. In sentencing and in other judicial functions, they would provide advice rather than make decisions. By contrast, if the decision was being made outside of the judicial setting (e.g., on how to hold a youth accountable for an action that was not going to court), the conference could, it would appear, have authority.

C. The Legislative Process

As described earlier, the Canadian Senate has a tradition of criticizing government legislation but, in the end, passing it. In the case of the YCJA, the Senate raised issues that had not received much attention. One of these was that there was no provision requiring that the YCJA be interpreted in light of the United Nations Convention on the Rights of the Child. Canada, like all countries other than the United
States and Somalia, is a signatory to this convention. The concern that was expressed by government officials about the convention is that Article 40 defines proportionality in a way that is quite different from the way in which the term is used in the section 38 of the YCJA. The YCJA indicates that sentences must be “proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence” (YCJA, sec. 38). The UN Convention, by contrast, states that “a variety of dispositions . . . shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offense” (United Nations Convention on the Rights of the Child, 1989, Article 40[4]). According to senior government officials, two problems were seen with this formulation. First, there is obvious concern that “appropriate to their well-being” is set as an equal requirement to proportionality. Hence, one could argue that this would allow youths to be imprisoned “for their own good” even if the offense were minor. Second, it is not clear what it means to be “proportionate” to two different factors. For example, what would it mean to be “proportionate” to a youth’s circumstances if the youth were without resources or support and had committed either a very serious or a very minor offense. Thus there was concern that this could be interpreted as undermining the basic proportionality model since “who” the youth was and “what” the youth had done were to determine jointly the severity of the intervention. Youths who commit minor offenses, under the UN Convention, could be placed in custody for social welfare reasons because this could be seen as being “proportionate” to their circumstances.

Canada has never endorsed the requirement in Article 37(c) of the UN Convention on the Rights of the Child that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.” Under the YOA, for example, a young person can be detained prior to trial in a place that is not separate and apart from adults if it is necessary “for the safety of others,” or there is no other place of detention available within a reasonable distance (YOA, sec. 7[2]). This latter problem is not trivial in some remote parts of Canada where there are seldom separate detention facilities. A more “principled” situation involving youths in adult facilities occurs in those cases where young people are transferred to the adult system for trial and then found guilty. In these cases, the youth can be ordered by the court to serve the sentence in a youth facility or an adult facility (YOA, sec. 16.2). In the YCJA, the placement of the
youth who receives an adult sentence is still a judicial decision. However, if the youth, at the time of sentencing, is under age eighteen, the youth is presumptively sentenced to serve the sentence in a youth facility (YCJA, sec. 76[2]). Hence, the YCJA does not bring Canada into strict compliance with Article 37(c) of the UN Convention but is closer than is the YOA.

As has been pointed out elsewhere in this essay, the desire to lock up youths for therapeutic reasons is quite popular in Canada. In a brief to the Senate of Canada, one Quebec organization that represents youth correctional facilities noted with dismay that with the YCJA, “what we see is an automatic escalation of measures based on the nature of the offence and the degree of the young person’s involvement in the commission of that offence. For example, it will become almost impossible for a youth court judge to commit a young person to custody for property crimes even if, in the opinion of experts, that young person is engaged in a trajectory of delinquency, being a member of a criminal gang for example” (Association des Centres Jeunesse du Quebec 2001).

The Senate committee that held hearings on the YCJA recommended a number of amendments to the YCJA, including the proposal that the act should be interpreted in such a way as “best assures” compliance with the UN Convention. It is difficult to know whether such an amendment would have made any difference, since the UN Convention is certainly much less definite than the YCJA about most things, including the meaning of proportionality.

In the end, as described in Section IV.D., the Senate focused more on local aboriginal people than on UN conventions. It expressed its concern about the bill on one dimension only: the failure of the YCJA to focus explicitly on the need to consider punishments other than custody for aboriginal youths in particular.

D. Summary

The YCJA has been criticized from both the criminal justice “right” and the criminal justice “left” for being too complicated. The ideological critics have also criticized it for being too tough on youths (the

15 Clearly there are many other changes in the law, and many of the provisions are, undoubtedly, complex. The YCJA is 157 sections long, compared with 70 sections for the YOA and 45 sections for the JDA. Much—but probably not all—of the escalation in size relates to the decision to be much more explicit about the manner with which cases are dealt.
view of many academics and members of helping professions, and the Province of Quebec) and for being too soft on offending youths (the view of most politically conservative provincial governments and some conservative writers). These are not, however, the most important aspects of the legislation.

What is most noteworthy about this piece of legislation is its attempt, for the first time in Canadian history, to draft criminal legislation that explicitly and implicitly describes what it is trying to accomplish and that lays out a policy for the manner in which it should be administered. In the area of criminal law, it contains provisions that are as close as Canada is likely to get for quite some time to a form of sentencing guidelines.

Judges and others are told what to expect (e.g., proportionality) and are told what not to expect (minor cases ending up in custody or very serious cases ending up with what would appear to be a light sentence because of the needs of the child). At the same time, enormous power is left with those who administer the law. The tough-sounding provisions—adult sentences for youths being the most obvious—clearly do not need to be imposed if a province wishes otherwise. There are procedural disincentives for a province that wishes to impose an adult sentence since, among other complexities, a youth in jeopardy of receiving an adult sentence would have the right to a jury trial. A province such as Quebec that has principled objections to these provisions can, therefore, choose not to ask for adult sentences. But achieving the intent of the law requires an educated and alert defense bar and judiciary. In some provinces, such as Ontario, youths are often represented by counsel whose main activities involve other areas of law. To the extent that they assume that there are few substantive differences between the YCJA and the criminal code, the intent of the new law will not be fulfilled. In other parts of Canada, where most young offenders’ cases are handled by specialized legal aid lawyers, there is more reason to believe that change will occur. Judges, as well, vary in terms of how focused they are on “youth” matters. The judge who hears only the occasional young offender matter paired with a lawyer who is not knowledgeable about the YCJA does not sound like a winning combination.

VI. Conclusions

If the political process by which the YCJA became law is predictive of the process by which it will be administered by the provinces, there is reason for concern. The process of passing the bill began with a prom-
ise by the minister of justice in 1994 to do a major overhaul of youth justice legislation. Parliamentary and federal-provincial-territorial examinations of the system then followed. A policy paper describing the government’s intentions was released in May 1998. The bill itself was introduced into the House of Commons in three different legislative sessions before it received final House of Commons approval in May 2001. Then Canada’s Senate, in a very rare move, defied the elected chamber of Parliament and amended the bill with a controversial, and almost certainly ineffectual, provision. By amending the bill, the Senate required the House of Commons to review and approve, yet again, a bill that it had been considering, in one form or another, for almost three years. The bill’s final legislative approval on February 4, 2002, marked, then, the end of a prolonged gestation period and a very difficult birth.

There are some data that suggest that difficult prenatal periods and difficult childbirths combined with lack of resources and social disadvantages during the period of early development are likely to lead to life-course persistent antisocial behavior in boys (Tibbetts and Piquero 1999). One can hope that the analogous difficult early experiences of this legislation will not also lead to life-course persistent difficulties.

There are signs that attempts are being made to get beyond the problems that the new law faced during the legislative process. For example, as discussed in Section V of this essay, police officers are told that they are required to consider noncourt approaches to holding youths accountable for their offenses. A number of police forces in Canada, most notably the Toronto Police Service, Canada’s largest municipal police force, have, in anticipation of the implementation of the new act, started programs within their forces to encourage police officers to use the court more sparingly. The federally funded National Judicial Institute is organizing a large training program for judges. Much of this program focuses on the need for judges to sentence differently under the YCJA than they have been doing under the YOA. If either or both of these (and other similar) programs are effective, the types of cases coming into the youth justice system under the YOA and going into custody (described in table 3) could change dramatically. The federal government department responsible for youth justice matters has initiated a research program designed to monitor various aspects of the operation of the youth justice system in a sample of communities in order to be able to identify problems of implementation.
At the same time, some aspects of the new legislation, designed largely to placate the provinces, will be interesting to monitor. For example, the general principle limiting disparity in sentencing was modified during the legislative process to require that “the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances” (YCJA, sec. 38[2][b]). Quebec, in particular, argued that it did not want its judges to be required to sentence in the same way as judges in other regions. Under the YOA, the level of custody—“secure” or “open”—is determined by the youth court judge. Under the YCJA, the legislation presumes that the decision on the “level of custody” will be left to the provincial correctional authorities, but provinces can opt to have it decided by the youth court judge as a sentencing decision. Provinces can also decide whether the “presumptive adult sentence” provisions, described in Section V, apply at age fourteen, fifteen, or sixteen. These changes—clearly designed to suggest to provinces that the federal government would not interfere with the administration of justice—are unlikely to increase the already large amount of provincial variation. They deal with issues where there is already considerable variability, or they deal with issues that are likely to occur only rarely in any province. Nevertheless, they do signal a small amount of deference to provincial sensibilities.

One unfortunate aspect of the untidiness of the legislative process between 1998 and 2002 is that one of the original purposes of bringing a completely new youth justice act—to rehabilitate public confidence in youth justice legislation—seems to have been compromised by the legislative process. As we pointed out in Section V.A., the minister of justice, in introducing the first version of her legislation, contributed to the public’s confusion about the legislation. With politicians—including the minister of justice who introduced the legislation and her successor, who was named just as the legislative process was ending—being unwilling to appear enthusiastic about the new legislation, one might expect that public support for the legislation will not come quickly or easily.

What will change, however, is that decisions—and aggregate data such as sentencing patterns—will be able to be evaluated against the

16 The term “region” is an interesting one in this context since some provinces (Quebec, Ontario, and British Columbia) are regions, whereas the other seven provinces are divided into two regions (the Prairies, and the Atlantic Provinces). The territories are not normally considered to be part of any region.
provisions of the legislation. The YOA appears to have been designed to support Yogi Berra’s observation that “if you don’t know where you are going, you may not get there.” The YCJA, on the other hand, may not get Canada’s youth to the place that the legislation proposes, but at least we will know that they are not there.

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