HARSH REALITY
OF THE
YOUNG OFFENDERS ACT

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EXECUTIVE SUMMARY

Recent statistical data from the youth and adult judicial and corrections systems do not support the widespread notion that the justice system treats young people in a more lenient manner than adults. On the contrary, youth cases are more likely than adult cases to result in conviction and a greater proportion of youth cases with at least one finding of guilt result in a custodial disposition. Additionally, adults are more likely than youths to have sentences of 1 month or less. Further, the rate of incarceration for young people is much higher than the adult rate and this disparity can be explained, in part, by the higher probability of youths to be sentenced to custody.

The use of custody for young offenders has risen considerably since the introduction of the Young Offenders Act (YOA) in 1984. This legislation replaced the Juvenile Delinquents Act (JDA) which took a treatment approach to juvenile justice. The YOA, on the other hand, takes a more punitive approach - young people are now required to bear more responsibility for their actions than ever before. Youths were often sentenced to custody under the JDA, and for longer periods of time, on average, but only for specific reasons. It was thought that delinquent and neglected youths could be given care and treatment in custody - the 'best interest' of these young people was made paramount. The YOA, unlike the JDA, does not have a clear statement of purpose and consequently, many considerations in the sentencing of youths have been given validity that did not exist prior to 1984, including deterrence and denunciation. These considerations have led to an increase in the use of custodial sentences for youths, particularly sentences that are short in length. Other considerations of the youth court under the YOA that have resulted in an increase in custody are the child welfare concerns of the young offender. Under the JDA, youths with problems at home could be committed to the Director of Child Welfare of the province; under the YOA, this option does not exist. Neglected and abused children are often given lengthier custodial sentences than their offences warrant because judges have no preferable alternative.

Bill C-68, the Youth Criminal Justice Act (YCJA), which passed a first reading in the House of Commons in March of 1999, has the potential to effect a dramatic reduction in the use of custody for young offenders. The Act, in its preamble, states that society must reserve the most serious form of intervention (incarceration) for the most serious of crimes, and must also reduce the over-reliance on custody that currently characterizes the youth justice system. The majority of young offenders could be diverted from the justice process, as few youths are violent or serious repeat offenders. The YCJA recognizes this, and provides for the expansion of diversion programs and policies. It is likely that the principles of deterrence and denunciation would only be factors in sentencing for the most serious of crimes, and this could further reduce the prevalence of custodial dispositions in the youth court. Currently, the youth justice system treats youths, in many respects, more punitively than adults. It is hoped that when the YCJA comes into force, this will be the case no longer.

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INTRODUCTION

It is rare that a day goes by without a story on violent youth crime appearing on the television news or in the printed media. Headlines often tell of school shootings, gang violence, home invasions and other serious crimes committed by youths. In recent months, the massacre at Columbine High School in Colorado, and the copycat crimes in Taber, Alberta, and Atlanta, Georgia, have been the focus of a great deal of media attention. Many Canadians, exposed to such coverage, would argue that the justice system needs to 'get tough' with young offenders in order to forestall a serious youth crime epidemic. The treatment of young offenders, according to this line of thinking, is not sufficiently punitive to deter young people from committing random and senseless acts of violence.

In contrast, many academics who have studied youth crime and the response of the youth justice system would counter that youth crime has not risen significantly and that youths are, in fact, held accountable for their criminal behaviour. The 'dramatic rise' in youth crime reported by the media is not reflective of an actual trend in youth crime. In fact, youth crime peaked in 1991, and has been slowly dropping since (Solicitor General of Canada, 1998). Furthermore, the available court and corrections data show that youths are treated as punitively as adults, if not more so. There is little proof that youths are given an 'easy ride' by the justice process.

A comparison of the treatment of youths and adults by the justice system is, at best, difficult. One difficulty is that the youth system, unlike the adult system, does not have parole; youths, in most cases, must spend the entire length of their sentence in jail. We can only speculate at the actual time-served of adults and youths. We can, however, compare the average custodial sentence length applied to both adults and youths, keeping in mind that young people spend a greater portion of their sentence in custody. Another difficulty with such a comparison lies in the different types of custody available for adults and youths. Adults are incarcerated in facilities with various levels of security. Minimum security institutions allow for much more freedom of movement than do maximum security facilities. Youths are placed in either open or closed custodial facilities which do not have specific security level designations. There is no consensus as to what constitutes an open facility. In some provinces, they are like group homes, in others, they are in the same building as secure facilities. Similarly, the definition of secure custody varies from province to province. As a consequence, a comparison of the treatment of adult and young offenders while incarcerated - in terms of freedom of movement, programming, privileges, etc. - is complicated and beyond the scope of our analysis.

In this paper, we will compare data from the adult and youth courts and correctional systems in an attempt to answer the question, "Are youths treated more leniently than adults by the justice system?" Specifically, we will compare the proportion of youths and adults found guilty and sentenced to custody, the average length of custody and average rates of incarceration of adults and youths. We will also consider the impact of the YOA on the rise in use of custodial dispositions for youths. The roles of deterrence, denunciation and child-welfare concerns in judicial decision making will also be examined in this regard. Finally, we will assess the potential impact of the new Youth Criminal Justice Act on the use of incarceration for young offenders.

A COMPARISON OF RECENT ADULT AND YOUTH COURT AND CORRECTIONS DATA

The argument that youth courts are not 'soft' on young offenders is well supported by statistical data provided by the Youth Court Survey (YCS) and the Adult Criminal Court Survey (ACCS). These surveys were created to provide statistical information concerning the number of cases, court appearances, criminal charges and case outcomes for youths and adults charged with a Criminal Code or other federal offence (CCJS, 1998d, 1997e). These data are useful in the analysis of general trends in the imposition of custody for adults and young offenders and the types of offences for which adults and juveniles are charged. However, because of coverage limitations and the exclusion of case information from Superior Courts to which serious cases may be transferred (CCJS, 1998a; Roberts & Birkenmayer, 1997), comparisons of adult and youth court data are not always possible, particularly with respect to the length of sentences handed down in the most serious of cases - homicide and aggravated sexual assault, for example. Because these cases are few in number, and we are concerned with general, nationwide trends in rates of incarceration and custodial sentences for all offences, our analysis is not affected by the limitations inherent in the survey data.

The Frequency of Custodial Sanctions in the Youth and Adult Courts

While the youth justice system is separate from the adult system, youths enjoy the same legal rights as adults. Procedures followed in youth court are, in general, similar to those of the adult court. Both adult and youth court cases are conducted in an adversarial manner with defence counsel arguing for the accused and the Crown prosecutor arguing for the people of Canada. The youth justice system is separate from that of adults, however, because Parliament has declared that young people, given their dependence and relative immaturity, should not be treated as adults. One would expect, then, that youths would be less likely than adults to be incarcerated. In fact, the opposite is the case. The YCS and ACCS data reveal that, in each of the latest three fiscal years in which the survey data is available (1997/98, 1996/97 and 1996/95), youths were more likely than adults to be convicted of at least one charge per case. In all three fiscal years, young offenders were also more likely to receive custodial sentences. Youths were also sentenced to custody for minor offences at a higher rate than adults. Additionally, because of the absence of remission in the youth system, youths spend a greater proportion of their sentence in custody. These findings are contrary to the widespread belief that Canadian youth courts fail to hold young people accountable for their criminal actions.

For the fiscal year 1997/98, 121,000 youths (aged 12 to 17) were charged with a Criminal Code or other federal offence, and of those charges that proceeded to youth court, 67% resulted in a finding of guilt. Thirty-four percent of youth cases with a conviction had a custodial disposition as the most serious sentence (CCJS, 1999a). Of all the cases included in the Youth Court Survey for 1997/98 (with or without a finding of guilt), 23% resulted in a custodial sentence. In contrast, the Adult Criminal Court Survey found that in 1997/1998, 61% of adult cases resulted in conviction and of these, 33% resulted in a prison sentence (CCJS, 1999a). Twenty percent of adult cases processed by the criminal court included a prison sentence. From these data, we can conclude that youths are

slightly more likely than adults to end up in custody if their charges are dealt with by the court. The available data for the fiscal years 1996/97 and 1995/96 are also indicative of a relatively higher rate of incarceration among young people. These data, along with the data from the two subsequent fiscal years are presented in Table 1 below.

Table 1: Relative frequency of custodial sentences in Canadian adult and youth courts

	YOUTH COURT			ADULT COURT		
	% of cases resulting in a conviction	cases with a conviction resulting in custody (%)	% of total cases resulting in custody	% of cases resulting in a conviction	cases with a conviction resulting in custody (%)	% of total cases resulting in custody
1997/98	67	34	23	61	33	20
1996/97	68	34	23	64	30	19
1995/96	66	33	22	64	30	19

Sources: Youth Court Survey, CCJS (cited in CCJS, 1999b, 1998e, 1997 b) and the Adult Criminal Court Survey, CCJS (cited in CCJS, 1998a, 1998d, 1997e).

One could argue that more youths than adults are convicted because adults are more likely to be tried for crimes that they have not committed. This argument can not be supported by any empirical data, however, because there is no measure of 'innocence' in the criminal justice system ('not guilty' and 'innocent' are conceptually distinct - if one is innocent of a crime, the offence was not committed; if one is found not guilty, sufficient proof was not presented by the court to warrant a conviction for an offence). The fact that youths were found guilty more often than were adults in 1997/98 does not, in itself, logically entail that a greater proportion of adults were innocent of the crimes for which they were charged. A smaller proportion of adult cases ended in conviction simply because guilt could not be established beyond a reasonable doubt in 39% of adult cases, versus 33% of youth cases. It is fair to assume that innocent people are found in equal proportions in the adult and youth courts, but perhaps because youth cases are processed within a short period of time and the sanctions available for youths are considered less severe, youths are convicted at a higher rate than adults.

The Use of Custodial Dispositions for Minor Offences

Not only are youths more likely than adults to be sentenced to custody, they are also more likely than adults to be given custodial sentences for minor offences. Adults are routinely sentenced to prison more often than youths for violent and property crimes, while in each year included in our analysis, youth cases for which the most serious charge was neither a property offence nor a violent offence, were more likely to result in a custodial disposition than comparable adult cases. These offences include Criminal Code violations neither classified as violent nor property offences, such as breach

of recognizance, failure to appear, impaired driving, Narcotics Control Act violations and violations of other federal statutes including the Young Offenders Act.

Adults and young people do not always commit the same types of offences at all or in similar proportions (for example, adults cannot violate the YOA and youths are seldom charged for impaired driving which is the most common adult offence). Therefore, we have chosen to group all offences other than property or violent crimes in one large category to minimize the effects of these offence rate differentials. In 1997/98, 42% of youth cases classified as 'other' resulted in custody, while only 30% of such cases heard in the adult court resulted in a prison sentence. Data from 1996/97 and 1995/96 were similar - youths were, in those years, more likely to end up in custody once their cases proceeded to court (see Table 2. Below).

Table 2. Youth and adult court cases with convictions resulting in custodial sentences

		YOUTH COURT			ADULT COURT		
	type of offence	cases with convictions	cases resulting in custody	cases with convictions resulting in custody (%)	cases with convictions	cases resulting in prison	cases with convictions resulting in prison (%)
1997/98	violent	14,472	4,485	31	42,105	15,847	38
	property	33,831	10,266	30	65,643	24,670	38
	other	26,225	10,919	42	142,325	42,151	30
	total	74,528	25,670	34	250,07	82,668	33
1996/97	violent	14,241	4,308	30	41,383	15,125	37
	property	35,519	10,478	29	71,870	24,275	34
	other	25,037	10,492	42	148,391	38,068	26
	total	74,797	25,278	34	261,644	77,468	30
1995/96	violent	13,736	4,226	31	42,567	15,670	37
	property	34,734	10,081	29	72,885	24,867	34
	other	24,475	10,005	41	154,711	39,824	26
	total	72,945	24,312	33	270,163	80,361	30

Sources: Youth Court Survey, CCJS (cited in CCJS, 1999b, 1998e, 1997b) and the Adult Criminal Court Survey, CCJS (cited in CCJS, 1998a, 1998d, 1997e).

Custodial Sentence Length Comparisons for Adults and Youths

A comparison of custodial sentence lengths handed down by youth and adult courts is problematic. First, as mentioned above, the most serious offences committed by adults are frequently heard by Superior Courts, which are not surveyed by the ACCS. Even though these cases are few in number, the fact that they are not counted in the survey, coupled with the differences in maximum sentences available to the youth and adult courts (10 years for first degree murder in the youth system and life imprisonment in the adult system), we must be aware that sentence length data are limited. Of greater concern is the absence of remission, or early release, in the youth system. This is particularly significant in comparisons of custodial sentences for which adults are subject to penalties of 2 years or less. For example, both an adult and a youth found guilty of theft under $5, 000 could receive up to 2 years in prison. Rarely does this type of crime warrant such a lengthy term of incarceration, but if a youth and an adult were each given the maximum disposition of 2 years, the adult could be paroled after one third of the sentence and would be eligible for day parole after one sixth. In contrast, the youth could receive a judicial review of his sentence after 1 year. At that time, the sentence could be reduced, otherwise the full sentence must be served as ordered. For many minor offences, youths serve as much or more time than adults in custody (CCJS, 1998b).

Youth Court Survey data show that in the fiscal year, 1997/98, almost one third (31%) of youth cases included a custodial sentence of less than one month for the most serious offence (CCJS, 1999c). According to the Adult Criminal Court Survey data for the same fiscal year, 50% of prison sentences given to adults were for less than one month for the most serious charge in each case (CCJS, 1998a). In the two previous fiscal years, the percentages were similar. Overall, adults are more likely to be given short prison sentences of less than one month. Youths, on the other hand, are twice as likely to be given intermediate custodial sentences of a duration between one and six months.

Table 3. Percentage of cases in adult and youth court resulting in custodial sentences, by length of sentence

	YOUTH COURT			ADULT COURT		
	Less than 1 month	1 to 6 months	more than 6 months	Less than 1 month	1 to 6 months	more than 6 months
1997/98	31	62	7	50	38	11
1996/97	29	63	8	50	38	12
1995/96	28	64	8	49	37	12

Sources: Youth Court Survey, CCJS (cited in CCJS, 1999c, 1998b, and 1997c) and the Adult Criminal Court Survey, CCJS (cited in CCJS, 1998a, 1997a, and 1997e).

Note: due to rounding, numbers may not add up to 100%.

Rates of Incarceration

Corrections data also provide evidence to suggest that youths are at a much higher risk for being incarcerated. In the fiscal year 1996/97 for adults, the average annual rate of incarceration per 10,000 adults for most provinces is under 10, while for young offenders in the same year, the average annual rate of incarceration per 10,000 youths is much higher - only Quebec has a rate of 10 or less.

Table 5. Average Annual Rates of Incarceration of adults and youths in the fiscal year 1996/97

Province	Adult rate/ 10,000 adults	Youth rate/ 10,000 youths
British Columbia	8	13
Alberta	11	22
Manitoba	12	33
Nova Scotia	6	23
Newfoundland	7	28
New Brunswick	7	31
Québec	6	10
Saskatchewan	15	37
Ontario	9	26
P. E. I.	8	42
N. W. T.	83	94
Yukon	36	55

Source: Corrections Key Indicator Report for Adults and Young Offenders, CCJS, 1997d.

Canada incarcerates its youth at a rate much higher than adults, and at a rate much higher than other Western nations. It must be noted, however, that youths are disproportionately involved in criminal activity and this is a significant factor in the differences between incarceration rates of youths and adults. But we must also consider that youth cases are more likely to result in conviction than adult cases, and of the cases with convictions, those in youth court are much more likely to result in custody for lesser offences. The incarceration rate for youths would not be so much higher than that of adults if the youth court was 'soft' on young offenders.

THE RISE IN USE OF CUSTODIAL SANCTIONS SINCE 1984

A common belief held by many Canadians is that the YOA gives young offenders an 'easy ride' through the criminal justice process. A considerable amount of evidence shows, however, that the contrary is the case: since the enactment of the YOA, the youth court has become more punitive - the sentencing options available to the youth court are now similar to those available to adults under the Criminal Code and the use of custodial dispositions has increased dramatically (Markwart, 1992). The evidence shows that we have left behind the treatment oriented approach of the JDA and have developed an approach to juvenile justice that is similar to that of the adult justice system, focussed more on punishment above all else.

An analysis of Youth Court Survey (YCS) data by Alan Markwart for the fiscal years 1984-85 through 1989-90 shows that seven provinces had substantial increases in the proportion of cases resulting in custody. Markwart's analysis controlled for the effects of the change in the Uniform Maximum Age (UMA), implemented in 1985, by considering only those offenders under the previous maximum age for each province. Controlling for UMA was essential to the comparison of proportion of cases resulting in incarceration for various years, as it ruled out the change in the UMA as an explanation for the rise in custody for young offenders since the implementation of the YOA. Data from Ontario and Prince Edward Island are not presented because Ontario did not report to the Youth Court Survey at that time, and the data from P. E. I. would skew the analysis because the number of committals to custody were few (Markwart, 1992). British Columbia shows a large increase (109%) in the proportion of youths who are sent to custody (see Table 6, below).

Table 6. Percentage of cases with findings of guilt committed to custody and percent change in use of custody in eight provinces for the fiscal years 1984/85 and 1989/90, controlling for UMA.

Province	1984/85	1989-90	% change
British Columbia	11.2	23.4	+ 109
Alberta	10.3	18.9	+ 83
Manitoba	13.9	25.2	+ 81
Nova Scotia	12.7	22.7	+ 79
Newfoundland	14.4	24.1	+ 67
New Brunswick	20.8	31.3	+ 50
Québec	28.9	32.1	+ 11
Saskatchewan	25.2	25.7	+ 2

Source: Youth Court Survey, 1984/85 and 1989/90, CCJS, adapted by Markwart, 1992.

In the most recent fiscal year for which statistics are available, the proportion of youths found guilty by the youth court is even higher. Canada -wide (including the two Territories as well as Ontario and P. E. I.), 34% of youth cases where there was a finding of guilt resulted in custody. In Newfoundland, 37% of youth cases with at least one conviction ended in a custodial disposition and in Alberta, 28% ended in a sentence to either secure or open custody. Data for the fiscal year 1997/98 are presented in Table 7; however, these data include offenders over the previous maximum age under the JDA as well as provinces excluded by Markwart, so a direct comparison with Markwart's data is not possible. These data are significant in that they reveal the variation in use of custody dispositions across Canada. Youths convicted of an offence who reside in Ontario, the Yukon, the Northwest Territories and Prince Edward Island are more likely than those in other regions to serve time in custody. Of note, also, is the number of youth cases resulting in custody in Ontario (10,990) compared to those in Quebec (2,561). More youth cases in Ontario resulted in custody than the total number of youth cases with convictions in Quebec (8,861). This is somewhat surprising, given that the populations of the two provinces are similar.

Table 7. Youth custody cases by province, 1997/98

Province	Total convicted	Total custody	% custody
British Columbia	9,082	3,007	33
Alberta	11,594	3,236	28
Manitoba	4,173	1,277	31
Nova Scotia	2,523	796	30
Newfoundland	1,755	657	37
New Brunswick	2,005	602	30
Québec	8,861	2,561	29
Saskatchewan	6,415	2,084	32
Ontario	27,033	10,990	41
P. E. I.	328	177	54
N. W. T.	462	172	37
Yukon	297	138	46

Source: Youth Court Survey, 1997/98 (cited by CCJS, 1999c).

The implementation of the Young Offenders Act clearly led to an increase in the use of custody as dispositions in the youth court, but the length of custodial dispositions has decreased since 1984 (Doob & Meen, 1993; Doob, 1992; Corrado & Markwart, 1994; Markwart, 1992). In Alberta, for example, the median length of secure custody sentences decreased by two-thirds from 1984/85 to 1989/90 (Markwart, 1992). Under the JDA, judges did not determine a definite length for custodial sentences, so it is not surprising that youths spent longer periods of time in custody. Youths were sentenced to custody and released when they were cured of delinquency or when they turned 21, whichever came first. The YOA required judges to attach a specific length to youth sentences - up to 2 years for most offences and 3 years for any offence for which an adult could receive life imprisonment. Under the YOA, youths could no longer be incarcerated for years on end (possibly until they reached 21), and consequently sentence length decreased. But why did the use of custody increase so dramatically since the enactment of the YOA?

EXPLAINING THE INCREASE IN USE OF CUSTODY FOR YOUNG OFFENDERS

Various principles of sentencing have contributed to the rise in custodial dispositions for young offenders since the enactment of the YOA; most notably, rehabilitation and child welfare concerns, deterrence and denunciation. Under the JDA, the welfare of the youth was paramount, and thus, treatment was emphasized by the court. The YOA, based on a hybrid model combining elements of the child - welfare and justice models, offers no clear sentencing guidelines (Anand, 1998a) and does not provide a consistent statement of the Act's intent in its Declaration of Principle. Consequently, youth court judges have had more freedom since the introduction of the YOA to sentence youths based on a multitude of conflicting principles.

When the Young Offenders Act came into force in 1984, the youth justice and child welfare systems became separate entities, and a dilemma arose for youth court judges: neglected and abused children without home lives could no longer be committed to the Director of Child Welfare, but it was imperative that these children be removed from their homes or 'saved' from the streets. The solution to this dilemma increasingly became open custody, which was (and still is) considered to be a rehabilitative disposition - in custody, according to this line of thinking, a child can get the help that he needs to become a productive citizen. In a study of the Alberta youth court during the first year of the YOA by Gabor, Greene, and McCormick (1986), family and youth division judges were asked if they equated open custody dispositions with committals to the Director of Child Welfare. Many of the judges surveyed responded that they saw a similarity between the dispositions, pointing to the rehabilitative nature of an open custodial disposition. In the past, youths from troubled homes could be placed in foster care and removed from the formal justice process. Today, neglected and abused youth are often put in custody 'for their own good.'

Several youth cases underscore the acceptance of a judicial concern for a young offender's welfare as a legitimate reason for imposing a custodial disposition. In a case documented in Leschied and Jaffe's paper, a young girl of 13 was given a secure custody disposition for breaching a condition of probation. Such a punitive disposition is intended to be reserved for serious and/or violent offenders.

The court, in this case, sentenced the girl to secure custody "out of concern for the fact that the girl had been involved in street prostitution and her history included many serious risk factors for subsequent disturbance, such as sexual abuse" (Leschied & Jaffe, 1995, p. 428). The very young and clearly troubled girl was put in a secure facility not because she was a danger to society, but because of concerns the court had for her lifestyle.

Another relevant case is *R. v. S.(N.L.)*, in which a female youth, aged 17, was convicted of 2 counts of robbery, to which she pled guilty. She had no prior convictions and the robberies were muggings that took place on the same day. N.L .S. was sentenced to 6 months in open custody, to be followed by 18 months of probation. In sentencing the teenager, the judge explained his reasons for imposing such a lengthy disposition for a first-time offender.

> I recognize that you have no prior record, but in light of the very sad history which you have which I am not blaming you for..., I can see no viable option at this point in time other than putting you into an ongoing, structured environment and that frankly for me to release you to the community at this time...I think would be a dereliction of my responsibility to you (*R. v. S.(N.L.)*, cited in Anand, 1998b, p. 496).

Because her home was not a 'structured environment,' and because the judge felt that her chances for successful rehabilitation without custody were poor, she was given a sentence 2 years in duration - 6 months in custody and 18 months probation. If, while on probation, she breached any of the conditions imposed upon her (such as a curfew or a prohibition on the use of alcohol), she would return to custody. This was certainly an onerous offence for a first-time young offender since she would receive no remission for good behaviour. It is extremely unlikely that a first-time adult offender would receive as harsh a penalty, but even if an adult were given such a sentence, he or she would only spend 2 to 4 months in custody due to early release provisions.

The case *R. v. M.(J.J.)* is also indicative of the role that child welfare concerns play in the sentencing of youths. This case, in which a 14-year-old Aboriginal boy from northern Manitoba was sentenced to 2 years in open custody, resulted in an appeal to the Supreme Court of Canada. This was the Supreme Court's first sentencing decision under the Young Offenders Act (Corrado & Markwart, 1994). The boy had been found guilty of breaching probation and 3 counts of breaking and entering, and had prior convictions for 2 counts of breaking and entering and 2 counts of taking a vehicle without the permission of the owner. J. J. M.'s family situation was of great concern to the court as there was domestic and child abuse taking place within the home. The children had been apprehended by Child Welfare authorities previously, but were 'uncontrollable,' and were soon returned to their troubled and abusive parents (Anand, 1998a). J. J. M. was sentenced to a period of custody that could only be justified by child welfare concerns, and not the serious nature of his offence. The Supreme Court upheld the lower court's decision, giving validity to the use of child welfare concerns in sentencing young people. Even though a bad family is no defence for a criminal act, *R. v. M.(J.J.)* has indicated that a bad family can be justification for a more severe sentence than warranted by the offence (Corrado & Markwart, 1994).

Often, custody is imposed when a judge believes that it could serve as a deterrent to the young offender, also known as specific deterrence, or to other young people (general deterrence), so that they will be less likely to commit the same act in the future. Under the JDA, deterrence was not a consideration of the youth court (Markwart, 1992) as the 'best interest' of the delinquent was paramount. The YOA provided no single, primary goal for sentencing, and in the years after its enactment in 1984, many sentencing principles were introduced to the youth court, including deterrence. In the case of *R. v. M. (J.J.)*, general deterrence was given validity as a sentencing principle. In the court's decision, it was stated that:

> There is reason to believe that Young Offenders Act dispositions can have an effective deterrent effect. The crimes committed by the young tend to be group activity...If the activity of the group is criminal then the disposition imposed on an individual member of the group should be such that it deters other members of the group. (*R. v. M. (J.J.)*, cited in Doob, Marinos, & Varma, 1995, p. 60)

The judges, in their decision, cite sociological evidence of the prevalence of groups, or gangs, in youth crime and argue that sending one member of the group to custody will decrease likelihood that his friends will commit a similar act.

The problem with the Supreme Court's logic in *R. v. M. (J.J.)* is that having knowledge of a sentence handed down to a friend or gang member is necessary, but not sufficient, for general deterrence to occur. In other words, to be deterred by a sentence imposed on a fellow young person, a youth must have knowledge of the disposition, but that does not mean that he or she will believe that the same penalty could be applied to him or her. As Doob, Marinos, and Varma (1995) point out, there is social-scientific evidence to show that as involvement in delinquency increases, perceptions of risk decrease. This finding suggests that general deterrence is less likely to be achieved with young people heavily involved in criminal activity. This may seem counter-intuitive at first glance. However, if we first consider that delinquents may engage in criminal acts daily and are arrested for those acts rarely, and second, that they are convicted and sent to custody at a lesser rate, we can see how a custodial sanction would not be an effective deterrent for many young offenders. The finding that involvement in delinquency is associated with a diminished sense of risk also implies that specific deterrence may not be accomplished by custodial sanctions. The youth who is sent to custody for a single offence, and who has committed numerous offences without being caught, will likely not believe that he is at risk for returning to custody if he commits a subsequent offence.

Not only is deterrence not effectively achieved by the youth court when imposing custody, the use of general deterrence, in particular, in youth sentencing is "antithetical to the due process origins and orientation of the YOA" (Anand, 1998a, p.339). This is because a more onerous sentence than is warranted by the crime itself could be imposed if a judge aimed to deter other youths from committing similar acts. Section 3.(1)(f) states that youths have a right to the least possible interference with their freedom, and the use of general deterrence in sentencing has the potential to violate this principle of the YOA. Youths are now incarcerated at a higher rate than adults (see Table 1) and

clearly, the judicial acceptance of general and specific deterrence is partially responsible for the increased use of custodial sanctions by the youth court since the enactment of the YOA.

Denunciation is another consideration that has come to the forefront of sentencing in youth court. Under the JDA, the court did not use custody to denounce an act. That is, it did not use a custodial disposition to express its disapproval of a delinquent act because children's special needs were primary. Section 31 provided that "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" (Juvenile Delinquents Act, S.C. 1908, c. 40). In essence, the use of denunciation in sentencing would be contrary to the purpose of the legislation. Because the YOA's Declaration of Principles were vague and presented competing values, denunciation was allowed to become a legitimate factor for consideration in the sentencing of youths, and has (like the previously mentioned principles of general and specific deterrence and child-welfare considerations), contributed to an increased use of custody for young offenders since 1984.

In the case *R. v. H. (S.R.*), it was decided that secure custody can be imposed for purposes other than the protection of the public, including "the expression of society's abhorrence of certain crimes" (cited in Marinos, 1998, p. 373). Denunciation is held by many judges to be an important consideration when sentencing serious and violent young offenders, but also frequently comes into play with less serious offences. In cases with a lower degree of seriousness, short sharp shock custodial sentences are often seen to be sufficient to express society's condemnation, while probation or fines would fall short of this goal, and are often applied in conjunction with short periods of custody (Marinos, 1998). Because denunciation of crime requires custodial sanctions for a large number of offences, we can see how its incorporation into the judicial decision making process in the youth court has led to an increase in the proportion of youths sentenced to custody and a decrease in custodial sentence length for youths since the introduction of the YOA.

POTENTIAL IMPACT OF THE YOUTH CRIMINAL JUSTICE ACT ON THE INCARCERATION OF YOUNG OFFENDERS

Bill C-68, the Youth Criminal Justice Act (YCJA) recently passed its first reading in the House of Commons in March of 1999. Following a second reading, the Act will be subject to hearings of the Standing Committee on Justice and Legal Affairs. It must then receive a third reading in Parliament before proceeding to the Senate. If the Act passes, it will require Royal Assent before becoming law. Implementation of the Youth Criminal Justice Act could begin in 2001, if no major roadblocks to its passage arise. In the years to follow, we shall see if the YCJA will have had any effect on the frequency of custodial dispositions in the youth court.

The YCJA is representative of Parliament's commitment to reserving the use of custodial sanctions for only the most serious of young offenders. The legislation "is based on an accountability framework that promotes consequences for crime that are proportionate to the seriousness of the offence" (Department of Justice, 1999b). Under the YCJA, youths who have committed lesser offences, such

as property crimes, would be diverted from the formal justice process via alternative measures or community based sentences (Department of Justice, 1999b). It is hoped that judges will no longer consider general or specific deterrence and denunciation when sentencing young people for crimes of a less serious nature, and this will effectively lessen the youth courts' reliance on custody as a disposition. It is also hoped that youth court judges will be less inclined to take child-welfare concerns into account when sentencing a young person to custody. Section 37 (1) of the YCJA outlines the principles of sentencing, including statements that a young person's sentence must be similar to those given to other youths under similar circumstance, and must not exceed those given to adults. Furthermore, the sentence given to a young person must be warranted by the offence, and must take into account the degree of responsibility a youth holds. These clear principles should steer judges away from other considerations, such as the home life of the young offender, and leave it to the child welfare system to deal with the youth when he/she is released.

The YCJA strongly promotes the use of police warnings and cautions instead of formal processing of young offenders. Section 4 of the YCJA states that extrajudicial measures are "often the most appropriate and effective way to address youth crime," they are adequate measures for first-time non-violent offenders and may be used to deal with youths with a prior conviction or those who have been subject to extrajudicial measures in the past, if appropriate. Extrajudicial sanctions (similar to alternative measures under the YOA) may be used if a warning, on one hand, and formal processing, on the other, are both inappropriate, and the sanction is part of an authorized program. By widening the application of warnings and extrajudicial sanctions, it is hoped that the use of custody for young offenders will decrease.

DISCUSSION

The use of custody for young offenders has risen significantly since the introduction of the YOA in 1984. Under the JDA, custody was reserved for young people who could not be helped through any other means. Young offenders were to be thought of as people in need of guidance and support, not as criminals. The YOA, on the other hand, effectively incorporated the designation of 'criminal' into the definition of young offender. The treatment of youths by the justice system increasingly became like that afforded adults in terms of both legal rights and case outcomes. However, the use of custodial dispositions by the youth court at present is, in fact, greater than that of the adult court. Youths are incarcerated at a much higher rate, in part, because they are more likely to be convicted of at least one charge per case and because they are also more likely to be sent to custody once found guilty.

These facts are contrary to the belief of the general public, fuelled by the news media, that youths are coddled by the youth justice system. The public must be made aware of the role that sensationalism plays in the reporting of criminal events. In recent years, perhaps due to increased competition or to the voracious appetite of the public for shocking stories, the news has become less a source of information and more a source of entertainment. The extensive coverage of the Columbine School massacre garnered significantly more media attention than the war in Yugoslavia or any other current events for weeks afterward. The North American public was enthralled by the story because it

seemed to be a 'sign of the times,' while the events in Yugoslavia were simply the outcomes of war, and so were of less concern. The media chose to focus on Columbine because the public wanted to know about it and the wider an audience a newspaper or television news program attracts, the greater the advertising dollars it can demand. The media sensationalise youth crime stories because the public is interested in hearing and reading about violent crimes, and with each additional incident of youth violence reported in the media, the public's concern with youth crime is heightened. This leads to an exaggerated perception of the prevalence of youth crime and a belief, based on faulty premises, that youth crime is on the rise. With the wide exposure that the Canadian public has to the American media, Canadians' attitudes toward youth crime are undoubtedly influenced by events like the Columbine massacre, and even though this particular crime occurred in the United States, it has heightened fears of similar crimes within Canadian communities.

Despite that the Canadian public has remained unaware that youth crime has been decreasing and that youths are, under the YOA, treated more punitively than adults, Parliament has taken notice and has introduced the Youth Criminal Justice Act in an effort to reduce the prevalence of incarceration for young offenders. Under the YCJA, only violent young people and those who are serious recidivists will be subject to incarceration, and the vast majority of young people, who do not fall into either category, will be removed from the formal justice process. In sentencing, it is likely that deterrence and denunciation will not be considerations in lesser offences as they had been under the YOA, because the YCJA unequivocally states that the least restrictive measures must be used when dealing with young people - deterrence and denunciation lead inevitably to a more severe punishment than warranted by the offence. A youth's right to the least possible interference with his freedom was also provided by the YOA, however, that Act's Declaration of Principles was sufficiently vague to allow many considerations into the judicial decision making process. The YCJA has clear statements of principle not only for the entire Act, but for sentencing and custody as well. It is likely then, given the Act's strong focus on reducing the prevalence of custody for young people and its clearly defined principles, that young people will no longer be incarcerated to denounce their criminal acts or to deter them or others from similar behaviours. It is unclear if child-welfare concerns will continue to be a rationale for sentencing youths to custody, but again, it is likely that the youth court will opt to provide a sentence that is proportionate to the offence committed, and let child-welfare authorities deal with the youth after he or she is released.

Further research needs to be done on the relative treatment of young offenders and adults by the Canadian criminal justice system, both under the YOA and after the implementation of the YCJA. We will then be able to assess the success or failure of the legislation to reduce the court's reliance on custody, and to bring the use of custody for youths below that seen in the adult system. Qualitative data on the experiences of youths and adults while incarcerated and while on probation would also facilitate a more complete comparison of the treatment of adults and youths by the justice system. The collection and presentation of quantitative court and corrections data could be improved to allow for easier comparisons between the youth and adults systems. For example, if Superior Courts were included in the Adult Criminal Court Survey, conviction and sentencing data for the most serious offences could be compared. Further, if 'time served' data were available, we

could make a definitive comparison of the relative proportions of custodial sentences served by adults and youths.

From the youth and adult criminal court and corrections data presented in this analysis, we know that youths are treated in a more punitive manner, based on the higher frequency of custodial dispositions in the youth court. Some would argue that just because youths are more likely to be sentenced to custody, and less likely to receive short sentences of 1 month or less, we can not infer that they are treated more punitively. But it is our position that incarceration is incarceration - it is the removal of one's freedom whether that person is under or over 18 years of age, and it is the most punitive sanction available to the youth and adult courts. We can not compare the treatment of adults and young offenders while in custody, because qualitative data has not been collected for such a purpose. Even if these data were available, the fact that youths are more likely than adults to receive a custodial disposition would remain true. In Canada, we deny the freedom of young people by incarcerating them more than we do adults, despite Parliament having repeatedly declared, in juvenile legislation that youths should not be held as accountable for their actions as adults. Clearly, if young people are to be held to a lower standard of accountability, the youth court must look to alternatives to incarceration for young offenders.

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