Degenerative Politics and Youth Criminal Justice Policy in Canada

Tim Heinmiller, Matthew Hennigar, and Sandra Kopec

Introduction

Based largely on the work of Anne Schneider and Helen Ingram, social constructivism (also known as democratic policy design theory) emerged as a theory of public policy development in the US in the early 1990s (Schneider & Ingram, 1997). Central to this approach is the observation that policies target particular groups of people and assign them benefits or burdens based on the target population’s political power and social construction as either “deserving” or “undeserving”. Social constructivists also argue that, over time, some target populations can become subject to what they term “degenerative politics.” Degenerative politics involves a downward spiral in which vulnerable target groups, particularly those with low power and “undeserving” constructions, are assigned policy burdens that disempower and alienate them from the political process, which facilitates the assignment of further policy burdens, causing more political alienation, and so on (Mondou & Montpetit, 2010, pp. 704-706).

Social constructivism has rarely been applied to explain Canadian public policy, and is restricted to the areas of poverty reduction (Mondou & Montpetit, 2010) and assisted reproduction (Montpetit, Rothmayr, & Varone, 2005). This paper extends the theory to Canadian youth criminal justice policy, and uses the target population of young offenders to test for the presence of degenerative politics in the shift from the Young Offenders Act, 1984 to the Youth Criminal Justice Act, 2002. Young offenders occupy an intriguing space in the context of social constructivist theory: while they possess little power, they may be constructed negatively as undeserving “criminals” or more positively as “youths” worthy of special care and consideration. Which of these has occurred is an empirical question, one that we attempt to answer here through a content analysis of parliamentary debates about the two Acts and a textual analysis of the respective policy burdens contained in each piece of legislation. We find that degenerative politics has occurred, but only for the portion of young offenders who, after the passage of the Young Offenders Act, were increasingly characterized as “serious violent offenders”. Non-violent young offenders continued to be constructed more positively as dependent youth, and not only did they receive no additional policy burdens, they were arguably treated more leniently as the Youth Criminal Justice Act de-emphasized incarceration for such individuals. We can only speculate about why this distinction emerged in the years between the two policy episodes, but it is noteworthy that the Young Offenders Act was quickly criticized for failing to distinguish between non-violent and violent offenders.

It is also likely that policy in this area was influenced by both the broader ideological shift to the right in Canada throughout the 1980s and 1990s, and more specifically, the emergence and electoral success of the conservative Reform/Alliance party, which focused heavily on “law and order”.

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Social Constructivism in Canada

Social constructivism assumes that “...much of the political world is socially constructed, drawing on emotional and value-laden images and symbols rather than objective representations of ‘reality’” (Schneider, Ingram, & DeLeon, 2014, p. 106). Policy-makers respond to and exploit these social constructions for their own political benefit, meaning that public policies are often developed on the basis of popular stereotypes rather than on any deep commitment to problem-solving or the correction of social ills. In fact, some policies can exacerbate the social problems they are ostensibly meant to address simply because they are based on misrepresentative social constructions (Schneider, Ingram, & DeLeon, 2014, pp. 121-124).

One of the central concepts in social constructivist theory is target populations. A target population is a group of people that is targeted by a policy and, through policy design, assigned with either benefits or burdens. Policy benefits include such things as public subsidies, tax breaks, or permissive regulations, while policy burdens include such things as taxes, strict regulations, and even incarceration. The mix of policy benefits and burdens assigned by a policy is typically treated as the dependent variable in social constructivist analyses of policy development, while the attributes of the target population are treated as important independent variables.

Two attributes of the target population, in particular, are regarded as crucial to explaining policy development: 1) the political power of the target population; and, 2) the social construction of the target population (Pierce et al., 2014, p. 5). The power of a target population refers to its financial resources, social standing, and connectedness with policy-makers, resources that it can use to pressure policy-makers into favourable policy decisions that confer many policy benefits and few policy burdens. The social construction of a target population refers to its socially constructed image as deserving or undeserving of policy benefits. Regardless of a construction’s factuality, this image is important because politicians want to be seen as helping the deserving and punishing the undeserving because they will be politically rewarded for this behaviour (Schneider, Ingram, & DeLeon, 2014, pp. 109-116).

The intersection of political power and social construction creates a two-dimensional space in which four distinct types of target populations can be identified, as shown in Figure 1, with different mixes of policy benefits and burdens associated with each group. Advantaged groups are those with a high level of political power and a positive social construction, so they typically receive plenty of policy benefits and few policy burdens. Contenders are those groups with lots of political power but a negative social construction. They also receive more policy benefits than burdens, but the benefits are often hidden from public view so as not to inflame public opposition. Dependents are those with little political power but a positive social construction, and these groups often receive benefits that are “...heavy on rhetoric and low on funding” since policy-makers want to be seen helping them, but the groups lack political power to pressure policy-makers to follow through on their commitments. The final group, with low political power and a negative social construction, are the deviants, who are typically inflicted with all manner of policy burdens. Punishing deviants is an easy political score for politicians who can take advantage of negative public stereotypes against groups who lack the political power to fight back effectively (Schneider, Ingram, & DeLeon, 2014, pp. 110-113).
So, in a social constructivist analysis, if one can identify the target population and determine its level of political power and its social construction, one can reasonably hypothesize the policy design (i.e., the mix of benefits and burdens) that will be assigned to that group. For example, in this paper, young offenders in Canada are the target population. Given that they have little economic clout and are largely disenfranchised from the political process, they are clearly a target population with little political power. However, it is conceivable that they could have either a positive or a negative social construction, depending on whether the construction fixates on the ‘young’ characteristic or the ‘offender’ characteristic of this target population. This would make young offenders either dependents or deviants and one of the aims of this paper is to determine into which of these categories young offenders actually fall, and whether the policy benefits/burdens they have been assigned by Canadian criminal justice policies match the expectations of social constructivist theory.

As noted above, social constructivists argue that some vulnerable target populations can fall prey to degenerative politics: a downward spiral of political alienation and increasing policy burdens. Those groups caught up in degenerative politics usually end up subjected to severe policy burdens, quite disproportional to their actual negative impact on society. The opposite of degenerative politics is democratic politics, which is an upward spiral of policy benefits and group political engagement resulting in a target population accumulating substantial policy benefits.

Since social constructivism was developed with US policy-making in mind, there is reason to question whether degenerative politics is a distinctly American phenomenon and whether it has application to Canadian policy-making. Mondou and Montpetit (2010) examined this question in a comparative study of poverty policy in Newfoundland and Quebec. They found evidence supporting the existence of
degenerative politics in Quebec but less so in Newfoundland, and explained this divergence by pointing to the provinces’ different policy styles: Quebec’s adversarial policy style was found to encourage degenerative politics, while Newfoundland’s consensual style was found to discourage it (Mondou & Montpetit, 2010, p. 718). In a comparative study of assisted reproduction policy in six countries, Montpetit, Rothmayr and Varone (2005) found that medical professionals in Canada fell into the advantaged group of target populations and, as social constructivism would predict, they were the subject of quite permissive regulations. These two studies constitute the extent of the Canadian social constructivist policy literature and, though they provide reason to believe that degenerative politics can be a feature of Canadian policy-making, they do not resolve questions relating to its prevalence, or the conditions under which it develops.

Youth criminal justice policy provides a useful test case for degenerative politics because it involves a target group – young offenders – whose social construction is uncertain and who could be reasonably constructed as either positive (deserving) or negative (undeserving). As intimated above, young offenders may be constructed as unfortunate, wayward youth in need of government assistance; or, they may be constructed as criminal deviants on their way to a life of crime and in need of stiff punishment. The ‘facts’ of the policy issue can be fashioned into narratives supporting either of these constructions, making young offenders a target population vulnerable to degenerative politics but not necessarily so. Identifying whether degenerative politics is evident in this case, then, will add to our knowledge about when degenerative politics takes place (or not) in Canadian policy-making and it should also allow us to explore some of the factors involved in encouraging/discouraging degenerative politics in Canada, such as Mondou and Montpetit’s (2010) finding with respect to policy styles.

Methodology
Using Gerring’s terms, this study is designed as a diachronic and synchronic case study (Gerring, 2007) (Gerring, 2004). It analyzes the development of youth criminal justice policy across two key policy-making episodes: the passage of the Young Offenders Act (YOA) in 1982, and the passage of the Youth Criminal Justice Act (YCJA) in 2002. This is the diachronic part of the case study because it involves a within-case comparison over time. During preliminary data analysis, it also became clear that young offenders were not being treated by policy elites as a uniform target population; instead, some policy elites went out of their way to distinguish between violent and non-violent young offenders, creating, in effect, two target populations within this single policy area. This became the synchronic aspect of the case study, as within-case comparisons between violent and non-violent young offenders could be made in each policy-making episode. Overall, this has resulted in a case study with four well-defined sub-units, creating a plethora of opportunities for within-case comparisons.

Since this study tested for the presence of degenerative politics, operationalizing the variables involved in degenerative politics was a central challenge.

The dependent variable (policy design) was operationalized by undertaking a close reading of both the YOA and the YCJA and compiling lists of burdens assigned to violent and non-violent young offenders by
each policy. Given that the YOA and YCJA regulate how youths accused and convicted of criminal offences are handled—and the offences are the same for youths and adults—the Acts do not provide policy “benefits” in the sense articulated above, just varying levels of burdens. The lists were then compared to determine whether the policies had become more or less burdensome for the target populations over time, with more burdensome policy indicating the presence of degenerative politics. More burdensome policies in this context generally mean treating youths accused or convicted of a crime more like an adult. In particular:

- harsher penalties, such as longer sentences, the use of incarceration rather than diversion to alternative sentences, or incarceration in adult facilities;
- removing special privacy protections for young offenders, including publication bans on their identity or suppressing their criminal records.

Operationalizing the independent variables (power and social construction) was somewhat more complicated. Power was assumed to be relatively constant throughout the period of study since youths are, in general, not politically powerful and there was no reason to believe that they substantially gained or lost power from the early 1980s through the early 2000s. There was reason to believe, however, that the social constructions of young offenders might have changed during the period of study, and that the social constructions of violent and non-violent young offenders might be distinct from each other, so a concerted effort was made to operationalize ‘social construction’ using qualitative content analysis.

The raw data for the content analysis was drawn from the Hansard record of parliamentary debates during the passage of both the YOA and the YCJA. These debates captured many of the key policy elites involved in the development of these youth criminal justice policies, and they provided a good record of the elites’ publicly stated and publicly defended policy positions and justifications. Many of these statements involved assertions about young offenders and their deservedness of state assistance, so the parliamentary debates provided a good raw data source for measuring social constructions. Hansard material was selected for analysis by searching for all parliamentary statements, in the House and Senate, under the titles of the respective bills, from their time of introduction to their time of final passage. The statements of both elected MPs and unelected senators were included in the raw data in order to create as large a data pool as possible. Later analyses were undertaken to determine whether the social constructions of MPs were somehow different from those of senators within the same party, and no substantial differences were found, so the inclusion of senatorial statements in the data pool was concluded to be non-problematic.

The qualitative content analysis was designed using sentences as the coding unit. Accordingly, the Hansard debates were segmented into sentences, each of which was assigned a unique identifier and

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2 We appreciate that some may argue that alternative measures, such as restorative justice processes or intensive counselling, are not “less burdensome” than incarceration or adult sentences, since incarceration asks little of the offender while restorative justice and counselling can entail intense emotional trauma and meaningful reparation to victims. However, from a social construction perspective, a policy emphasis on punishment over rehabilitation and social reintegration is clearly intended to “burden” the offender more, by attaching lasting stigma to their past actions.
was coded using the coding frame (described below). Based on the work of Heinmiller (Forthcoming), each sentence was conceptualized as being comprised of a policy concept and a policy disposition. A policy concept refers to a specific policy idea or objective, while a policy disposition refers to whether the speaker is supportive, unsupportive, or neutral on the stated concept. Take, for example, the following sentence spoken by PC MP Greg Thompson during a debate over the YCJA: “[Parliament] should enact a parental responsibility act to make the parents of young offenders financially responsible for the criminal acts of their children” (House of Commons, 2001, p. 2242). The policy concept in this sentence would be ‘parental liability for young offenders’ and the policy disposition would be ‘supportive’. Breaking down and coding sentences in this way created a rigorous and systematic means of capturing the assertions of parliamentarians pertaining to young offenders and their deservedness.

The conceptualization of sentences as comprising concepts and dispositions necessitated the development of a two-level coding frame. The disposition level of the coding frame was relatively straightforward, as speakers could either be supportive, unsupportive, neutral, or unclear about a particular concept. The concept level was much more open-ended, and developing a set of coding categories for this level involved an inductive process in which the data was scanned to develop a long-list of relevant concepts, then the concepts were defined and refined through subsumption until a set of mutually exclusive and exhaustive categories emerged (Schreier, 2012). In total, the concept level of the coding frame had 26 categories, including an ‘unclear’ category and a residual ‘other’ category. The coding frame and coding procedures were outlined in a coding guide that was used to inform all coding decisions. All of the coding units (i.e., sentences) in the Hansard data were coded once and the results entered into an Excel spreadsheet. A total of 15,530 coding units were coded in this study.³

The resulting dataset was analyzed in a number of steps. First, all coding units that were coded as ‘unclear’ or ‘other’ in either concept or disposition were removed from the dataset because they provided no useful information for our purposes. Then, the data were sorted by parliamentarian, creating rough profiles of what each parliamentarian stated about young offenders in each policy-making episode. In most of the profiles, the same concept was mentioned multiple times, providing an opportunity to refine the profiles according to their internal consistency. If a parliamentarian was consistent at least 75 percent of the time — that is, they showed the same disposition on a given concept in 75 percent of the coding units in which they discussed the concept — this was judged as internally consistent and the concept-disposition pairing was retained in the profile. If they were less than 75 percent consistent, this was judged as self-contradictory and the concept-disposition pairing was dropped from the profile. This procedure ultimately produced parliamentarian profiles providing summary data on how young offenders were being constructed by each parliamentarian in the parliamentary debates. This procedure also provided an internal reliability check on the coding decisions, made necessary by the use of only one coder.

³ Of the 15,530 coding units, the breakdown was as follows: there were 5,463 coding units pertaining to the YOA, 4,759 from the House and 704 from the Senate; and, there were 10,067 coding units pertaining to the YCJA, 6,350 from the House and 3,717 from the Senate.
With the profiles complete, the final step in the data analysis was to look for indicators of positive and negative social constructions. The indicator used was concept-disposition pairings. For example, one of the concepts in the coding frame was the ‘destruction of criminal records’ for young offenders. If a parliamentarian was supportive of this concept, this indicated that the speaker felt young offenders were deserving of state assistance in helping to put their youth criminal record behind them in adulthood, and, accordingly, was an indicator of a positive social construction. Conversely, if a parliamentarian was unsupportive of this concept, this was an indicator of a negative social construction, and if they were neutral on the concept, it was an unclear social construction. All of the possible concept-disposition pairings in the coding frame were sorted in this way, creating lists of indicators for positive, negative, and unclear social constructions. The positive and negative social constructions were then tallied for each parliamentarian, aggregated by political party, and are presented below in Tables 1 and 2.

In sum, this study collected data on both the social constructions and the policy benefits/burdens assigned to violent and non-violent young offenders in two episodes of youth criminal justice policy-making. The data was collected to test for the presence of degenerative politics in this policy field, with the presence of degenerative politics indicated by two trends in the data: 1) an increasingly negative social construction over time; and, 2) the assignment of more policy burdens and fewer policy benefits over time. The next two sections discuss the empirical findings related to social constructions and policy benefits/burdens, and these sections show that the degenerative politics hypothesis is only partially supported by the empirical data.

The Social Construction of Young Offenders
As indicated above, the data in Tables 1 and 2 illustrate how parliamentarians socially constructed non-violent and violent young offenders in the two policy-making episodes analyzed in this study. Using this data, a comparison of the study’s four sub-units yields some interesting insights. First, it appears that policy elites have increasingly made a point of defining violent young offenders as a target population distinct from non-violent young offenders. Second, the social construction of violent young offenders has become increasingly negative over time, particularly amongst policy elites on the centre-right of the ideological spectrum. Third, the social construction of non-violent young offenders has become more negative amongst policy elites on the right side of the political spectrum but, overall, it has changed relatively little.

One of the most glaring differences between the 1982 debates on the YOA and the 2002 debates on the YCJA was the increased willingness of policy elites to distinguish violent young offenders as a distinct target population. In 1982, only about 6 percent of the parliamentarians who participated in the debates went out of their way to define violent young offenders as a group that should be targeted by government policy. By 2002, this number had increased to just over 30 percent and references to violent young offenders as a distinct target group were evident across all political parties, except for the NDP who only had one speaker in the debates. This seems to show the emergence of violent young offenders as a target population distinct from their non-violent counterparts, and is consistent with social
constructivist expectations that “...policies often subdivide target populations, creaming off the most positively constructed of dependent and deviant groups and affording them better treatment” (Schneider, Ingram, & DeLeon, 2014, p. 113). Social constructivists explain the subdivision of target populations as arising – usually – from the effects of past policies, in this case the effects of the YOA. This assertion will be explored in the next section below, but it also seems likely that some significant changes in Canadian party politics also played some role in the subdivision process, as well.

Table 1 – Social Constructions in the Development of the Young Offenders Act (1982)

<table>
<thead>
<tr>
<th>Parties</th>
<th>Number of MPs Participating in the Legislative Debate</th>
<th>Non-Violent/Unspecified</th>
<th>Violent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Percentage of MPs Constructing Young Offenders as 'Deserving'</td>
<td>Percentage of MPs Constructing Young Offenders as 'Undeserving'</td>
</tr>
<tr>
<td>Liberal</td>
<td>4</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>PC</td>
<td>27</td>
<td>70%</td>
<td>15%</td>
</tr>
<tr>
<td>NDP</td>
<td>5</td>
<td>80%</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>36</td>
<td>75%</td>
<td>11%</td>
</tr>
</tbody>
</table>

Table 2 – Social Constructions in the Development of the Youth Criminal Justice Act (2002)

<table>
<thead>
<tr>
<th>Parties</th>
<th>Number of MPs Participating in the Legislative Debate</th>
<th>Non-Violent/Unspecified</th>
<th>Violent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Percentage of MPs Constructing Young Offenders as 'Deserving'</td>
<td>Percentage of MPs Constructing Young Offenders as 'Undeserving'</td>
</tr>
<tr>
<td>Liberal</td>
<td>23</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>PC</td>
<td>8</td>
<td>75%</td>
<td>25%</td>
</tr>
<tr>
<td>NDP</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Alliance</td>
<td>18</td>
<td>39%</td>
<td>28%</td>
</tr>
<tr>
<td>Bloc Quebecois</td>
<td>19</td>
<td>95%</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>69</td>
<td>80%</td>
<td>10%</td>
</tr>
</tbody>
</table>

Not only do violent young offenders emerge as a distinct target population between 1982 and 2002, they also take on a more negative social construction during this time. In the 1982 debates, only 3 percent of parliamentarians assigned violent young offenders a negative social construction, compared to 25 percent in the 2002 debates. The prevalence of this negative social construction increased in all of the centre-right political parties represented in Parliament, which is important given that these parties formed the government and the official opposition during the 2002 debates and, therefore, had the most influence in shaping policy design. There is also some indication that the 2002 debates were more
polarized than the 1982 debates, as the percentage of parliamentarians positively constructing young offenders was also higher in 2002 than it was in 1982. The positive social constructions were concentrated amongst members of the Bloc Quebecois and the Liberals, the latter of which was internally split between parliamentarians making positive, negative, and unclear social constructions.

As suggested above, it seems that the emergence of violent young offenders as a distinct target group and this group’s more negative social construction may have been partially caused by changes in the Canadian party system that took place between 1982 and 2002. During this period, the entire party system shifted to the ideological right and the traditional centre-right brokerage party (the Progressive Conservatives) declined and splintered into a western-based regional party (the Reform/Canadian Alliance party) and a Quebec-based nationalist party (the Bloc Quebecois). The Canadian Alliance and the Bloc Quebecois were both far more ideological than the brokerage party they eclipsed, and they brought these ideological voices to Canadian policy debates. For the Alliance, in particular, violent young offenders represented something of a political opportunity: defining them as a distinct group and negatively constructing them fit with its ‘tough on crime’ conservative ideology and played well to its conservative, western base. This movement on the Liberals’ and PCs’ right flanks, along with the general rightward shift in the party system, drew some members of these parties to define and negatively construct violent young offenders as well, as both parties feared losing their more conservative supporters to the upstart Alliance. The Bloc, in contrast, was a left-leaning party and knew that negatively constructing violent young offenders would not help them in their Quebec base, so they were less likely to define violent young offenders as a distinct target population and, when they did, they constructed them positively. This led to the increased polarization of the policy debate, as the Bloc (and some Liberals) resisted the strong rightward pull of the Alliance.

While the social construction of violent young offenders became significantly more negative between 1982 and 2002, the social construction of non-violent young offenders did not change much at all and was largely positive. In both policy episodes, an overwhelming majority of parliamentarians constructed non-violent young offenders in a positive fashion: 75 percent in 1982, and 80 percent in 2002. The major exception was the Canadian Alliance in 2002 in which only a minority of parliamentarians constructed non-violent young offenders in a positive way and almost a third of Canadian Alliance parliamentarians constructed this group negatively. This, again, probably has to do with the conservative ideology of the Alliance and its attempts to curry favour with its conservative base in western Canada. Overall, though, the negative constructions of the Canadian Alliance were swamped by the positive constructions of the other parties, so that the overall social construction of non-violent young offenders was largely positive.

On balance, the social constructions data support the degenerative politics hypothesis for violent young offenders but not for non-violent young offenders. That is, the social construction of violent young offenders has become more negative over time, which fits the degenerative politics model, while the social construction of non-violent young offenders has remained relatively stable, indicating that degenerative politics has not occurred. It seems that non-violent young offenders have been treated as dependents in both policy-making episodes, but violent young offenders have slid into the deviant category. However, this is only one half of the degenerative politics equation. The other half is the policy benefits/burdens assigned to these target populations, which will be explored in the next section.
Policy Burdens
To understand the respective policy burdens of the YOA and YCJA, some historical context is required. The YOA was adopted by Parliament in 1982 to rectify the perceived flaws in the Juvenile Delinquents Act (JDA) that had governed youth criminal justice policy in Canada since 1908. The JDA created a distinction between adults and children who engaged in criminal behaviour. A child, even as early as seven years of age, who violated a provision of the Criminal Code, a federal or provincial statute, a municipal ordinance or by-law, or who was “guilty of sexual immorality or of similar vice,” was labelled a “juvenile delinquent”—“a misdirected and misguided child...needing aid, encouragement, help, and assistance” (s. 38)—rather than a “criminal.” Whereas before 1908 child and adult offenders were often treated the same, the JDA reflected a new social welfare approach focused on rehabilitation over punishment, with judges in special juvenile courts playing a quasi-parental role (Bala & Lilles, 1984, 13). That said, children over the age of 14 accused of an indictable offence could be transferred to ordinary (adult) courts, at the discretion of the juvenile court judge.

Notwithstanding the virtues of this less-punitive approach, the JDA was criticized on a number of grounds. Amongst these were that juvenile court judges were given extremely wide discretion over sentencing, which could include placement in foster care, fines, or committal to industrial schools or reformatories; not surprisingly, with no clear guidelines sentencing was dramatically inconsistent across judges and provinces. Youth who were institutionalized were often sent with indeterminate sentences, up to age 21, subject to the discretion of the institution’s administrators. There was also no consistent definition of “child.” While the Act stipulated 7 years old as the minimum age at which a child could be charged (with no institutionalization under the age of 12), the Act allowed provinces to set their own maximum age ranges, and they varied from 16 to 18 years. Over time, it also became apparent that the system stigmatized and punished behaviours as “delinquent” (such as loitering or skipping school) that were actually regarded as fairly normal (The John Howard Society of Alberta, 2007), and that double-standards were applied to girls and visible minorities (Sangster, 2002). Finally, juvenile court trials lacked procedural protections for accused youths, such as legal representation, a fact that acquired considerable significance after the adoption of the Charter of Rights and Freedoms in 1982, with its extensive set of “due process” (Packer, 1964; Roach, 1999) rights to counsel, presumption of innocence, and a fair trial, amongst others.

The YOA was adopted under Pierre Trudeau’s Liberal government in 1982. It embodied a significant shift in approach from the JDA, with greater policy harmonization across the provinces and a more legalistic, due process approach to youth accused of a crime, but also greater emphasis on public protection (Bala & Lilles, 1984, p. 172). Nonetheless, in the language of social constructivism theory, overall the YOA

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4 Indictable offences are typically more serious offences, and can only be created by the federal government; they are roughly analogous to felonies in the US. Indictable offences allow harsher penalties, but also more formal processes: the prosecution (Crown) proceeds “by indictment,” and the accused has a right to a preliminary inquiry before a judge to determine if there is sufficient evidence to proceed. The accused may opt for trial by judge and jury for serious indictable offences, and the most serious (such as murder) require a jury. In contrast, “summary offences” are less-serious, can be created by both the federal and provincial governments, have lighter punishments, and do not entail either preliminary inquiries or juries. Many offences in Canada are “hybrid” or “dual procedure”, in that the prosecution chooses whether to proceed by indictment or summarily.
lessened the burdens on accused and convicted juveniles. This can be seen in several of the Act’s provisions, beginning with its uniform definition (as of April 1, 1985) of “youth” as age 12-17 years. This raised the minimum age at which juveniles could be prosecuted for a criminal offense compared to the JDA, and in some provinces extended the maximum age at which a youth would be treated differently than adults (from 16). Directly related to this change was the YOA’s narrowed scope of application relative to the JDA, to only more-serious federal offences, most notably the Criminal Code. Criminal behaviour by those under the age of 12, provincial and territorial offences, and municipal by-law infractions would be left to the provinces or territories, and generally entailed only low fines or the intervention of child welfare agencies. By ending the JDA’s practice of applying the criminal process to juveniles for non-criminal conduct (particularly vaguely-defined “sexual immorality” or vice), “[t]he narrower offence jurisdiction of the Y.O.A. ensures that young persons are not held more responsible than adults for their conduct” (Bala & Lilles, 1984, p. 9).

Section 3 of the YOA lists several of the Act’s guiding principles, which emphasize that while youths deserve special treatment, they should also benefit from the principles of due process and natural rights that characterize the regular criminal justice system in the Charter era. As Alvi (2012, p. 12) writes, the YOA “was a ‘hybrid’ of the Juvenile Delinquents Act and a new set of principles emphasizing the rights of society to protection from crime, the rights of accused young persons to fair, equitable and consistent justice, and the notion that young people should be held accountable for their actions, but not in the same way as adults.” Section 3(1)(c) in particular characterizes young offenders as not fully responsible for their behaviour, stating: “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.”

Special, less “burdensome” treatment of young offenders compared to adults took three principal forms under the YOA. The first was a preference, when it was consistent with both the interests of the young person and the protection of society, to divert alleged young offenders away the full weight of the criminal justice system. Section 3(1)(d), for example, encouraged the justice system not to intervene at all when possible (typically, by police screening). When intervention was warranted, s.4 permitted the diversion of alleged young offenders away from the judicial system through recognized “alternative measures” programs, which might entail restitution to victims, community service work, counselling, or participation in a recreational or community program. To qualify for such alternative measures, the youth had to acknowledge responsibility for his or her actions, and freely consent to the measures after having an opportunity to consult with legal counsel. The goal of diversion was to “avoid the stigmatizing and potentially harmful effects of processing in the criminal justice system.” (Alvi, 2012, p. 12). Even for youths whose cases went to court, they would be heard in special youth courts, unless transferred to “ordinary” court to be treated as an adult. Transfers, as governed by s.16 of the YOA, were considered very serious and required an extensive process. Transfer was only possible upon request from the Attorney General or accused for youths who were 14 and older when they committed an indictable offense, and several property crimes were exempted. The transfer decision rested with the youth court judge, who had to take into account many factors including the best interests and input of the youth, and the youth had the right to counsel. It is important to understand that transfers were not intended to be punitive, but rather to
ensure that when an older youth was accused of a very serious crime, they would receive the full procedural protections of an adult court. That is, the benefits of the ordinary courts in such cases were deemed to offset the “potentially harmful effects.”

The second form of less-burdensome treatment was lower sentences ("dispositions") for youths compared to adults. Under the original YOA, if the adult sentence would have been life in prison, young offenders could face a maximum of only 3 years' incarceration, in a youth facility. For offences that adults would serve less than a life sentence, youths could receive only a maximum of 2 years (s. 20(1)(k)). These maximums would continue even if the youth turned 18 while incarcerated. Fines were capped at $1000, and youth courts were ordered to take into account the young person’s ability to pay (s.21(1)) and to ensure that an order for a fine or community service “does not interfere with the normal hours of work or education of the young person” (s.21(7)(b)). Provinces could create alternative work programs for youths who could not pay fines, although “wilful failure or refusal to pay the fine” could result in a custodial disposition. As well, youths held in custody had to be kept separate from adults (s.24(10)), and could be sentenced to “secure” custody (as opposed to “open” custody in a group home, child care facility, community residential identical, or camp) only if they were at least 14 years old and had committed a serious indictable offence (section 24(3) and (4)).

The third form was protecting the privacy of youths accused and convicted of criminal offences, so that they were not stigmatized for life by actions taken while young. In this, the YOA reflected the belief that young offenders could be rehabilitated, and that the ability to find employment as adults was a key factor in preventing recidivism. Privacy protection took two forms: publication bans on the identity of youths charged or who were involved in court proceedings (sections 17, 38, 39), and record suppression (sections 36, 40-45). Section 36 provided that youths would have no criminal record once they completed their dispositions (sentences). This was intended to help youths start with a “clean slate,” but also to provide an incentive for them to complete their dispositions, which was believed to assist them with rehabilitation (Bala and Lilles 1984, 280). Section 45 further ordered the destruction of a youth’s records if he or she was acquitted, or if the charges were dismissed for some other reason, or following a conviction if the person had not been charged with or found guilty of another offence (2 years after a summary conviction, 5 years after an indictable conviction). These provisions gave youths a second chance to live without the burden of a criminal record, but also a strong “incentive to refrain from further involvement in illegal activity” (Bala & Lilles, 1984, p. 329).

The YOA was criticized for multiple reasons, but two in particular stand out, and they reflect opposing ideological views on how to deal with youth crime. The first, from supporters of the YOA’s intent, was that the Act was not achieving its own goal of diverting young offenders from the criminal justice system, particularly for less-serious offences. As Alvi (2012, p. 16) writes, based on evidence by Bala, et al. (2009), by the time Canada repealed the YOA, it “had one of the lowest rates of diversion from the system, and one of the highest rates of youth custody in the world,” and 75% of both youth court cases and those sent to “secure” custody were for minor offences (Doob & Sprott, 2009). The second, from the political right and encouraged by mainstream media, was that the YOA was not “tough enough” on youth crime. This view was rooted in the broader shift to more neo-conservative values—including a preference for “law and order” based on deterrence and “crime control”—in Canada and other Western
democracies throughout the 1980s and 1990s. The political right acquired a strong institutional voice at the federal level in the Reform Party after 1988, and their election to Parliament with 52 seats in 1993, and Official Opposition status in 1997; criminal law reform was a frequent theme raised by its MPs in House debates. Alvi (2012, p. 15) also points to the influence of a “media environment in which youth crime was being sensationalized as ‘being out of control,’ a problem that was exacerbated by horrific, but rare cases.” Relatedly, the YOA was criticized for making “no clear distinction...between serious violent offences and less serious non-violent offences” (Endres, 2004, p. 529).

The growing influence of criticism from the right can be seen in subsequent amendments to the YOA, which acquired a progressively more punitive tone. In 1992 the maximum sentence for murder was raised by the Progressive Conservative government from 3 to 5 years, and to 10 years for 1st-degree and 7 years for 2nd-degree in 1995 by the Liberals. Also in 1995, the law regarding transfers to adult court for trial was changed (s.16(1.01)), so that 16 or 17-year-olds who were charged with the most-serious violent offences—murder, attempted murder, manslaughter, or aggravated sexual assault—would presumptively be heard in adult court (although the accused or the Attorney General could request that it stay in youth court, and the decision rested with the youth court). Furthermore, such individuals could be sentenced upon conviction to incarceration with adults, at the discretion of the sentencing judge (s.16.2(1)). At the same time, however—and arguably paradoxically—the 1995 amendments included an addition to the Declaration of Principle (s.3(c.1)) reaffirming the rehabilitative goal of the system: “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.”

Even after these amendments, the YOA was the subject of a comprehensive review by both a Federal-Provincial-Territorial Task Force on Youth Justice in 1996, and by the House’s Standing Committee on Justice and Legal Affairs in 1997. The resulting reports called for extensive reforms to youth criminal justice policy, a position echoed at First Ministers meetings in 1997 and by the federal government itself in 1998 and 1999 (Alvi, 2012, p. 16). This led to the replacement of the YOA by the YCJA in 2002.

The YCJA reflects the competing criticisms of the YOA, with the result that the Act is a compromise between conflicting views about how best to deal with youth crime (Bala et al., 2009). On one hand, there is some continuity with the YOA. For example, the age range of youths subject to the law (12-17) is unchanged, as is the scope of the law (federal offences only), and the new preamble and Declaration of Principles (s.3) still emphasize the goals of rehabilitation, social reintegration, respecting the rights of the accused, and treating youths differently than adults because of the former’s “greater dependency” and “reduced level of maturity”. On the other hand, those sections also introduce new language emphasizing themes consistent with the “crime control” and closely-related “victims’ rights” models of criminal justice (Roach, 1999): recognizing the harm to victims and the need to include and respect them

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5 However, s.20(1)(k.1)(i) and (ii), also adopted in 1995, limited the custodial portion of the sentence (that is, incarceration) to 6 and 4 years respectively, with the remainder served in the community “under conditional supervision”.

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in the process; the need for “promptness and speed”; the importance of protecting the public; reinforcing “respect for social values”; and ensuring “accountability” through “meaningful consequences” for offending.

The subsequent provisions of the *YCJA* reflect this compromise, by promoting less-burdensome treatment of youths accused or convicted of minor offences, but introducing harsher punishments for a “serious violent offence”—a phrase that appears 28 times in the Act, and the word “violent” another 8 times by itself. In contrast, violence is never mentioned explicitly in the original *Young Offenders Act*. This shift in the law clearly reflects the language of the parliamentary debates on the *YCJA*, particularly the contributions by MPs in the Canadian Alliance and some in the Liberal Party. To illustrate the Act’s distinction between violent and non-violent offenders, let us revisit the three forms of lower burdens on youths compared to adults: 1) shielding accused young offenders from the full weight of the criminal justice system; 2) lower sentences for convicted youths compared to adults; and 3) protecting the privacy of youths accused and convicted of criminal offences.

First, notwithstanding the more punitive tone of the early sections of the *YCJA*, section 4 states that “extrajudicial measures are often the most appropriate and effective way to address youth crime” and “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 not previously been found guilty of an offence” [emphasis added]. Such measures could include police or prosecutors issuing warnings, cautions, or referrals to a community program or agency “that may assist the young person not to commit offences”; in more serious cases, “extrajudicial sanctions” that are identical to the “alternative measures” in the *YOA* are recommended (i.e., restitution, counselling, community service, etc.). Diversion is thus presented as the optimal approach, with major exceptions for violent and repeat offenders. Early evidence suggests that diversion has in fact increased under the *YCJA* as hoped, with the proportion of youths accused of a crime being formally charged falling from 63% in 1999 to only 42% in 2010, and the number of youth court cases dropping from 76,204 in 2002/2003 to 56,234 in 2009/2010 (Department of Justice Canada, 2013, pp. 5-6).

The *YCJA* appears to eliminate the *YOA*’s provisions allowing transfers to “ordinary” or adult courts (Department of Justice Canada, 2013, p. 15), but this appearance is somewhat misleading. The *YCJA* provides that when a youth is charged with murder, or faces the possibility of an adult sentence, he or she can choose (“elect”) trial in a regular superior court (with or without a jury); in cases of murder, the Attorney General can require a trial by superior court judge and jury, even over the wishes of the accused (s. 67). Although superior courts in such cases will be designated as “youth justice courts,” they are in fact regular adult courts and may be less familiar with the *YCJA* and the needs of youth (Bala, 2003, p. 513). As such, transfers to regular court can still occur, although they are now chosen by the accused (or the AG, in murder cases) rather than by the youth court judge. Again, as with the *YOA*, transfers in cases of very serious crimes can be understood as providing those youths with more procedural protections than trial by judge alone, and so are not inherently more burdensome; in any case, there is effectively little change from the *YOA* to the *YCJA* regarding transfers.
On the second measure, there is a marked shift in the YCJA toward treating youths convicted of serious crimes more like adults, but also discouraging custodial sentences for less-serious crimes, to remedy the YOA’s perceived over-use of incarceration. The Act creates a new distinction between “youth sentences” and “adult sentences.” Youth sentences are very similar to the dispositions authorized by the YOA, and could entail a reprimand, an order to compensate or restore property to the victim, community service, mandatory counselling, up to a $1000 fine, probation, supervision in the community subject to conditions, and custody in a secure youth facility (s.42(2)). Section 39(1) prohibits custodial youth sentences, however, except for violent and repeat (indictable) offenders, to apparently significant effect: from 2002 to 2010 the number of youths in custody was cut almost in half (Department of Justice Canada, 2013, p. 13). Even for violent and repeat offenders given youth sentences, the courts are instructed not to impose a custodial sentence unless the court has considered and rejected all reasonable alternatives (s.39(2)). Among custodial youth sentences, the maximums in the YCJA for first- and second-degree murder are considerably longer than in the original YOA, but are identical to those adopted in the more-punitive 1995 amendments to the YOA; other custodial youth sentences are comparable to those in the YOA.

Adult sentences—that is, “any sentence that could be imposed on an adult who has been convicted of the same offence” (s.2)—are introduced for youths aged 14-17. Adult sentences were intended to be applied in two situations: first, the Act originally made adult sentences the default option for a class of “presumptive offences,” including first and second degree murder, attempted murder, manslaughter, and aggravated sexual assault, but also if it was the accused’s third serious violent offence (echoing the infamous “three strikes” rule in the US). “Serious violent offence” is defined in s. 2 of the Act as “an offence in the commission of which a young person causes or attempts to cause serious bodily harm,” but s.42(9) actually leaves it up to the youth court judge at the time of sentencing to decide if that classification will be applied. The Attorney General could waive the presumption and seek a youth sentence, and the accused could petition the youth justice court to be given a youth sentence. Furthermore, the Act permitted youths convicted of presumptive offences to be incarcerated with adults, even if under the age of 18 (s. 76(2)), although only if in the judgment of the youth justice court it would be in the best interests of the young person or was necessary for the safety of others.6 Notably, the Supreme Court of Canada narrowly (5-4) struck down the presumptive offence provisions of the YCJA as unconstitutional in R. v. D.B. (2008 SCC 25), on the grounds that they created a “reverse onus” for the accused, and that the provisions were inconsistent with the Charter’s section 7 “principle of fundamental justice” that young people are entitled to a “presumption of diminished moral blameworthiness” because they have “heightened vulnerability, less maturity and a reduced capacity for moral judgment” (R. v. D.B. 2008 per Abella J. at para. 41). The Court nevertheless permitted adult sentencing in narrow circumstances.

6 As noted above, a similar provision was added to the YOA in 1995 for the four offences “presumptively” transferred to ordinary court, but the original YOA did not permit youths to be incarcerated with adults at all. Section 76(2) also required transfer to a provincial adult facility or federal penitentiary upon reaching the age of 18.
Second, an adult sentence could be imposed by the youth justice court upon request of the Attorney General if the young person “is or has been found guilty of an offence...for which an adult is liable to imprisonment for a term of more than two years, that was committed after the young person attained the age of fourteen years” (s.62). Since, at the time, the sentencing threshold for indictable offences was two years’ imprisonment, this implied that any youth of at least 14 could face an adult sentence even for a first, non-violent property offence, like theft over $5000. This would represent a dramatic increase of burdens, but it was unlikely from the outset that Crowns would seek adult sentences for anything other than serious violent offences (Bala, 2003, p. 308), or repeat offenders. This provision is puzzling because it is stunningly inconsistent with the rest of the Act, which clearly discourages the use of incarceration for non-violent crimes, and even violent crimes given a youth sentence. Notably, section 72(1) leaves the decision about whether to apply an adult sentence with the youth justice court, and reminds judges that accountability must be “fair and proportionate” and “consistent with the greater dependency of young persons and their reduced level of maturity.” As such, s.62 may send a political message about “getting tough on crime,” but the subtler message to judges seems to be the opposite for non-violent offences. Unfortunately, Statistics Canada’s Canadian Centre for Justice Statistics does not track the use of adult sentences under the YCJA, so we cannot know if they have in fact been restricted to serious violent offences as expected.

Finally, on the third measure of privacy protection, the YCJA reproduces the differential treatment of violent and non-violent offenders. While the YOA’s publication bans and record suppression were retained for non-violent offenders given a youth sentence, both are removed in the YCJA for those who received an adult sentence (section 110, 117 and 118). As well, there is no publication ban if a youth is convicted of a “presumptive offence” but given a youth sentence, although the accused or Attorney General could apply to impose one (s.75; this provision was also struck down as unconstitutional in R. v. D.B. (2008)).

Discussion
Overall, evidence from Canadian youth criminal justice policy seems to provide partial support for the social constructivists’ degenerative politics hypothesis. In order to show degenerative politics, one would need to find a target group with an increasingly negative social construction and increasingly onerous policy burdens, as a result.

In the case of young offenders between 1982 and 2002, the target population became sub-divided between violent and non-violent offenders, and the social construction of violent young offenders became more negative, but the social construction of non-violent young offenders remained relatively stable. This supports the possibility of degenerative politics for violent young offenders, at least on the social construction side of the degenerative politics hypothesis, but rules it out for non-violent young offenders. The sub-division of the target population is anticipated in social constructivist theory, and would be explained by social constructivists as resulting from negative feedback from established policies, in this case the YOA. There is some evidence to support this explanation, as noted in the previous section, but it also seems very likely that the overall rightward shift in political culture and the
emergence of a new and influential right-wing party in the Canadian party system are also part of the explanation. Without the presence of right-wing policy elites to capitalize on some of the shortcomings of the YOA, it seems unlikely that the sub-division between violent and non-violent offenders would have taken place.

On the policy design side of the degenerative politics hypothesis, a comparison of the burdens assigned to young offenders in the YOA and the YCJA shows that violent young offenders were assigned with more policy burdens over time, while non-violent young offenders were not. Though there are mixed signals in the YCJA, the overwhelming message is to ‘get tough’ on serious violent offenders and repeat offenders, but to use more rehabilitative, restorative, and non-punitive measures for all other youths in trouble with the law. Getting tough generally means that violent young offenders are treated more like adults in the criminal justice system, that they receive longer sentences, and that they lose the privacy protections extended to other youths. As such, the policy burdens increased between the YOA and YCJA for the subset of violent young offenders, but did not change for other young offenders, and arguably were lightened with the reduced reliance on custodial sentences. This confirms the presence of degenerative politics for violent young offenders and its absence for non-violent young offenders, which, overall, provides partial support for the degenerative politics hypothesis.

This finding of partial support is interesting when considered in light of the existing Canadian social constructivist literature. It seems to echo the findings of Mondou and Montpetit (2010) who found evidence of degenerative politics in Quebec poverty policy but not in Newfoundland poverty policy; that is, degenerative politics happens in Canadian policy-making under some conditions but not others. The conditions that Mondou and Montpetit point to are varying “policy styles” in the two provinces. They define policy styles as: “...policymaking procedures, which fall within institutional bounds, but are dependent on policy actors’ intentions, habits, and cultures” (Mondou & Montpetit, 2010, p. 707). They argue that Quebec has an adversarial policy style and Newfoundland has a consensual policy style, and that degenerative politics is more likely to occur when an adversarial policy style prevails.

Our findings with respect to federal youth criminal justice policy seem to support this policy styles explanation, at least to some extent. Federal policy-making is much more adversarial than consensual, and this adversarial style might help explain why violent young offenders have been subject to degenerative politics. However, there is more to the explanation than just policy style, as this does not explain why degenerative politics has been absent with respect to non-violent young offenders. This again echoes the findings of Mondou and Montpetit who pointed out that “…the predictive power of policy styles is simply insufficient to fully account for [policy] outcomes; ....intervening variables possibly distort the effect of policy styles on policy design in one way or another” (Mondou & Montpetit, 2010, p. 719). The findings in this paper allow for some speculation as to what one of these intervening variables might be.

One variable that seems to have been important in the youth criminal justice case was the ideological polarization of the policy elites. When the YOA was developed in 1982, the policy process was dominated by two centrist brokerage parties. In this context, the social constructions of young offenders were quite positive and there was minimal sub-division of this target population between violent and
non-violent offenders. By 2002, one of the centrist brokerage parties had gone into permanent decline and was displaced by smaller ideological parties on both the right and left. These ideological parties felt much freer to sub-divide young offenders as a group and to socially construct them in manners that comported with their respective ideologies. Thus, it was not just the adversarial policy style, but also an increased ideological polarization between adversarial policy elites that contributed to the onset of degenerative politics for violent young offenders. This is a potentially important finding – and one that also seems to fit with Mondou and Montpetit’s (2010) research – but it remains to be confirmed by future social constructivist research.

**Bibliography**


