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Criminal Justice Theories and Variations in Legal Decisions Across Youth Justice Acts

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in Sociology

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Abstract

Media stories of violent young offenders “signal” to the public that youth crime is on the rise and worse, that today’s youth are capable of horrific crimes. As a result, both the public and politicians call for change – legislation and the courts need to toughen up on youths. The present study, guided by penal populism and focal concerns theory, fills a gap in the literature by examining sentencing decisions of young offenders convicted of violent offences in Ontario, Canada. Three research questions were asked. First, drawing on penal populism is there evidence in Canada, particularly Ontario, of a *penal populist* turn? Are judges taking a more punitive stance in sentencing young offenders convicted of sexual assault and physical assault? Second, drawing on focal concerns theory, do sentencing decisions reflect an offender’s level of blameworthiness and the need for protection of the public? Can extralegal factors, such as age and gender, explain disparities in sentencing? Third, do the sentencing rationales provided by judges vary within and across offence type? To answer these questions, a sample of sentencing decisions was analyzed to uncover quantitative and qualitative trends. The findings provide limited support for penal populism and limited support for focal concerns theory. One prominent finding is that the courts appear to take a more punitive stance towards physical assault offenders regardless of their rehabilitative prospects than the sexual assault offenders. Three explanations are proposed for this difference. First, it appears that judges believe that physical assault offenders are better rehabilitated with a custodial sentence, while rehabilitation for sexual assault offenders is best achieved through non-custodial sentences. Second, a disproportionate number of physical assaults were committed against strangers whereas sexual assaults were disproportionately committed against people known to the offender; the courts may view the former offenders as a greater threat to the community. Lastly, there may be a lag between legislative changes and changes in sentencing patterns, as a result of “judicial inertia”. Although this sample is not representative, there is evidence of increased use of custody within these cases that become precedents for future sentencing decisions. As a result, judicial precedence may, in the future, result in harsher sentences for young offenders convicted of physical assault.

Keywords

Criminology, Juvenile Delinquents Act, Young Offenders Act, Youth Criminal Justice Act, young offenders, young persons in conflict with the law, youth, youth crime.

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Chapter 1

1 Introduction

Criminal justice is one of many social issues that attract the attention of the public. The discussion of sentencing, in particular, takes place in many different contexts, such as politics, the media, the courts, and academic writing, which opens the door for many misconceptions to be repeated and to take hold, particularly amongst those who wield influence (Ashworth, 1995: 251). It may be within the area of sentencing that the media presents the most distorted views especially with respect to youth crime (Bala, 2003: 991; Newburn, 2002: 555; Roberts and Stalans, 1998: 36).

Beginning in the 1990s there has been an increase in news reporting of crimes, particularly violent crimes by juveniles (Pollak and Kubrin, 2007: 60). In fact, it has been argued that public concern over youth crime may not have reached the level it has, were it not for the tragic events that occurred in Bootle, Liverpool, UK, on February 12, 1993 (Newburn, 2002: 556). On the afternoon of February 12, 1993, two-year-old James Bulger was abducted from the Strand Shopping Centre in Bootle (Newburn, 2002). Photographic images from the shopping centre cameras were broadcast on national television showing James walking with, or being led by two young males, from the shopping centre. These seemingly innocent images soon revealed something much more sinister. On February 14, 1993 James Bulger's battered body was found, just two miles from the shopping center, near a railway line in Liverpool, England. Two ten-year-old boys were arrested and charged with the killing of James Bulger. The arrest of the two boys "inspired a kind of national collective agony" (Newburn, 2002: 556). Their trial took place in November 1993, amidst massive national and international media attention with the media's coverage of the case expressing a harshly punitive sentiment, which resonated in many countries beyond the United Kingdom (Newburn, 2002). This event provided further evidence to an already concerned public that "something new and particularly malevolent was afoot" (Newburn, 2002: 556); the youth of the 20th century were violent and out of control.

Concern over youth homicide was not limited to the UK. In Canada, for example, in the later part of the 1990s, the media focused attention on fourteen-year-old Reena Virk who was beaten and killed in Victoria, British Columbia (Batacharya, 2006). On the night of November 14, 1997, Reena Virk was invited to a party near the Gorge waterway in Victoria, B.C. Upon her arrival Reena, was surrounded by seven girls and one boy who proceeded to physically assault her. One of the girls declared a stop to the assault allowing Reena to ‘walk’ away from the attack. Two youths from the group, however, followed Reena to Craigflower Bridge where they continued to assault her. The two offenders dragged Reena Virk into the water and held her head under until she drowned; her body washing ashore some eight days later. Six youths were later charged and convicted of aggravated assault and two were tried for second-degree murder. The eight youths involved in the assault and murder were between 14 and 17 years old when the crime was committed and seven of the eight youths were females. The murder of Reena Virk, similar to James Bulger, drew worldwide media attention with media giants like CNN and Dateline leaping on the story to emphasize what they argued was an increase in girl-on-girl violence (Batacharya, 2006).

In 2004, the year after the Youth Criminal Justice Act was enacted, there was another tragic event, which further contributed to the perception that youth violence was on the rise. This case concerned the assault and murder of nineteen-year-old, Sebastien Lacasse. A seventeen-year-old male was charged as a ringleader in his assault and subsequent murder, and was sentenced to life in prison as an adult (CBC News, 2006; Canadian Criminal Justice Association [CCJA], 2010). Sebastien was murdered at a house party by a group of teens in Laval, Quebec (Casavant and Valiquet, 2011; The Montreal Gazette, 2006; National Criminal Justice Section Canadian Bar Association, 2010; News Canada, 2010;). He was severely beaten (e.g., hounded, covered with Cayenne pepper, trampled) and eventually stabbed to death. While this incident did not receive the same media attention as the James Bulger and Reena Virk cases, the recent 2012 amendments to the YCJA were to commemorate Sebastien Lacasse. Bill C-4, titled “Sebastien’s Law”, set out a number of proposed legislative amendments to the YCJA sentencing principles with the general thrust of the amendments seeking to hold violent young offenders and those that ‘might’ be violent, accountable for their actions by adding such principles as

‘denunciation’ and ‘deterrence’, to section 38(2) (Canadian Criminal Justice Association [CCJA], 2010). These changes were made with the goal of protecting the public (CCJA, 2010).

The three cases (James Bulger, Reena Virk, and Sebastian Lacasse) are definitely horrific; however, what needs to be understood, according to Beaulieu and Cesaroni (1999) is that these are “isolated” events. These crimes, according to Innes (2004: 352) represent “signal crimes” wherein a criminal incident is interpreted as indicative of the collective’s level of risk, security, and hazard. The public’s perceptions of criminogenic risk are, therefore, centered around certain ‘single’ incidents, with some crimes (e.g., murder and burglary) having more of an impact on the collectives’ understanding of crime and disorder (Innes, 2004:352). Citizens, according to Simon (2007: 77) become fearful, classified into two categories: ‘actual’ and ‘potential’ victims. In contrast, criminals – including sex offenders, gang members, drug kingpins, and violent crime recidivists – are classified as “monsters” whose presence forms “a constantly renewed rationale for legislative action.” (Simon, 2007: 77). Horrific crimes and media attention to ‘monsters’ color public perception, thereby contributing to a view that youths are now capable of criminal acts inconceivable in previous decades (Beaulieu and Cesaroni, 1999; Roberts et al., 2003).

A number of scholars (Roberts, et al., 2003 Roberts, 2004; Newburn, 2002, Young, 1996) have argued that the public often lacks accurate knowledge of the real trends in youth crime and youth justice, and instead are left with the impression that crime, in particular violent crime, is rampant, resulting in heightened public fears (Doob, Sprott, Marinos and Varma, 1998; Roberts, 2004: 497; Tanner, 2001: 40). For example, a 1990 public opinion poll found that 75% of Canadians believed that violent crime accounted for 30% of all crimes when in reality, violent offences constituted less than 10% of crimes reported to police (John Howard Society, 1999). In the early 1990s, polls indicated that the Canadian public believed young persons, and especially young offenders had “become worse” (House of Commons, 1993; Corrado and Markwart, 1999: 346). Roberts (2004) found that only 4% of Canadians had faith in the youth justice system and in 1998, 77% said that harsher sentences for all young offenders should be a high priority

(Corrado and Peters, 2015: 558). More recently, Roberts et al., (2007) found that 74% of Canadians perceived sentencing in Canada was too lenient and this was also true of young offenders (Corrado and Peters, 2015: 558). As Corrado and Markwart (1994: 345) argue, when the media sensationalizes youth crime and in particular youth violence, the result is a heightening in public fear, and anxiety about youth crime and the inadequacies of the justice system to deal with it ensues. These media stories, therefore, construct a reality in which violence among youth is pervasive (Pollak and Kubrin, 2007: 74). As a result, a strong consensus surfaces amongst members of the public, politicians, as well as judges that something must be done. Legislation and courts must ‘toughen up’ to prevent crime.

Ashworth (1995: 253) calls this the “hydraulic” theory: the belief is that if sentences go up, crimes go down and vice versa. Many criminologists, according to Ashworth (1995: 253), however, argue this is a rather naïve and perhaps faulty notion: only a small percentage of crimes result in the passing of a sentence and there is a low probability that anything other than very extreme penalties have an impact on the recorded crime rates.

While much of the media attention on youth crime since the 1990s and onwards has focused on violent crimes, the data consistently show that the bulk of youth crime during that period, involved property offences, such as arson, breaking and entering, motor vehicle theft, false pretenses, forgery, fraud, and possession of stolen property (Tanner, 2001). For example, in 1999 approximately half (49%) of young offenders charged were charged with property crimes whereas 21% were charged with violent offences. The remaining 30% were charged with “other” criminal offences (e.g., mischief, arson) (Logan, 2001; Tremblay, 1999). Furthermore, in terms of violent crimes, police statistics reveal that assault, specifically common assault¹, is the reported violent crime committed by young offenders (Tanner, 2001).

¹ In 1997, 13% of all youth charged were charged with common or major assault and young persons charged with these offences comprised approximately 71% of those charged with a violent offence (Tanner, 2001).

More recent figures continue to show that crimes against property² (38%) are more common than crimes against the person (26%) (Milligan, 2010). Further, the crime rate appears to be decreasing (Statistics Canada, 2016); fewer youths were accused of crime in 2015. For example, there were approximately 92,000 youths accused of a Criminal Code offence in 2015 and this was approximately 2,700 fewer than in the previous years. For every 100,000 youth in Canada there were 1,888 youth accused of property crimes by police and an even lower rate were accused of violent crimes (1,265 per 100,000 and this was a 1% reduction) (Statistics Canada, 2016). To summarize, youth crime statistics show that youth crime is often not characterized by extreme violence. In fact, even among those charged with violent offences, the largest proportion is charged with level 1 ('common assault') or level 2 ('assault causing bodily harm or assault with a weapon') assault. It is the non-violent crimes that have remained a staple of youth crime, reflecting the high level of charging for "administration of justice" offences, principally breach of probation and terms of bail (Corrado and Markwart, 1994; Doob and Cesaroni, 2004; Milligan, 2010; Bala and Anand, 2012). Nevertheless, the media's attention to a few tragic cases gives rise to the common misconception that youth crime, in particular violent crime, is out of control, and therefore new levels of punishment are required (Roberts et al., 2003: 90).

1.1 The Current Study

This study focuses on penalties for youth crime and how these may have changed over time. If the public believes that youth are out of control, and penalties have been too light, do these beliefs shape judges' sentencing decisions? Penal populist theory proposes that public pressure is a key factor in fueling not only legislative reform, but also sentencing (Beaulieu and Cesaroni, 1999: 364). Legislation seeks to reform the activity of youth courts, and the sentencing decisions of youth court judges (Beaulieu and Cesaroni, 1999: 365-367). In contrast, focal concerns theory (Steffensmeier et al., 1998; Steffensmeier, Kramer, and Streifel, 1993; Steffensmeier, Ulmer, and Kramer, 1998;

² The most frequent cases were crimes against property: theft (14%), break and enter (8%), mischief (7%) and possession of stolen property (6%) (Milligan, 2010).

Steffensmeier and Demuth, 2001) argues that judges take into account such factors as protection of the public, offender's blameworthiness, practical constraints, age, race, and gender. In this study, I explore judges' sentencing of violent young offenders to assess these theories, and determine their applicability to the Canadian context.

Research on youth sentencing has largely focused on the severity and types of sanctions that are imposed (Daly and Bouhours, 2008). Less attention has given to what is said to young persons in the courtroom on the day of sentencing (Daly and Bouhours, 2008: 497). The current study seeks to fill this gap in the literature by exploring what judges say, and what rationales they provide for their sentencing decisions, during trials held under the Young Offenders Act and the Youth Criminal Justice Act in Ontario, Canada.

In judicial decisions, youth court judges provide not only their official judgments, but also their assessment of an offender's character (Daly and Bouhours, 2008). Sentencing decisions entail the exercise of judgment, as judges weigh aggravating³ and mitigating⁴ factors (Freiberg, 1995; Ashworth, 1995: 259).⁵ Thus, formal sentencing remarks are important, as they constitute the official record (albeit selected and partial) of ways in which the state legitimates and justifies its power to punish (Daly and Bouhours, 2008: 502). Thus, by analyzing the content of decisions, this study seeks to learn what rationales judges, who are the authorized spokesperson for the state in censuring and sanctioning crime, use when sentencing young violent offenders who appear before them.

The focus in this study is on sentences imposed on youth convicted of two types of violent youth crime: *sexual assault* and *physical assault* offences. The two types of

³ An aggravating circumstance is defined as "the fact or situation that increases the degree of liability or culpability for a criminal act" (Black's Law Dictionary, 2004: 277).

⁴ Mitigated is defined as "to make less severe or intense" (Black's Law Dictionary, 2004: 1093). A mitigating circumstance is "a fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce the damages (in a civil case) or punishment (in a criminal case)" (Black's Law Dictionary, 2004: 277).

⁵ Section 718.2 (a) of the Criminal Code of Canada states "a court that imposes a sentence shall also take into consideration the following Principle: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence, or the offender, and, without limiting the generality of the foregoing."

cases were chosen because they are comparable in severity as per the Criminal Code of Canada, the YOA, and the YCJA, but differ on penal populism or focal concerns dimensions.

Three research questions were asked, which are as follows:

1. Drawing on penal populism, this study asks, is there evidence that Canada, in particular Ontario, has experienced a *penal populist* turn in regard to legislative changes? Are judges taking a more punitive stance in sentencing young offenders convicted of sexual assault and physical assault?
2. Drawing on focal concerns theory, do legal decisions in particular, as they relate to the type of sentencing (custodial or non-custodial) within the Ontario youth justice system reflect an offender's level of blameworthiness and need for protection of the public? Can extralegal factors, such as age and gender, explain disparities in sentencing?
3. Is there evidence of variations in sentencing rationales provided by judges upon sentencing within and across offence (physical and sexual assault) type?

Although scholarly attention has been paid to violent young offenders (Bala, 2003; Corrado et al., 2015; Corrado and Markwart, 1994; Doob and Sprott, 2006), few studies have focused on sentencing decisions of youth sexual offenders. For example, it was not until the 1990s that sexual crimes began receiving media attention, but the focus was on adult offenders (Roberts et al., 2003; Bouhours and Daly, 2007). This led to greater societal awareness of the emotional and physical harm experienced by the victims however, media attention fostered the view that 'sex offenders' were all 'sexual predators', raising public anxiety and outrage (Roberts et al., 2003: 131). The public, as a result, began to advocate for more punitive sentencing (p. 132). Thus, youth sexual assault has only recently been approached as a social problem that requires strong legal and clinical responses (Bouhours and Daly, 2007). As a result of the lack of research, very little is known about how such cases are handled in youth courts (Bouhours and Daly, 2007). There is literature on the profile and patterns of youth sexual offending but the literature does not shed light on judges' sentencing with respect to these crimes (Allan et al., 2002; Soothill et al., 2000, and Nisbett et al., 2004; Bouhours and Daly, 2007: 375). There is some concern that the push towards increasing punishment *may* result in

young offenders receiving more punitive sentences (e.g., custody) and not receiving the treatment they need (Roberts et al., 2003: 138).

Morgan and Clarkson (1995: 4) state that judges may not always be consistent when sentencing as there may be a lack of agreement amongst judges as to what criteria ought to be taken into account in the sentencing decision and what weight should be given to such factors as prior record, age, supportive family, perceived future dangerousness, offender's plea, and other such matters. In this study, I explore what factors judges consider upon sentencing young offenders convicted of violent offences. To analyze judges' sentencing decisions for youth convicted of physical and sexual assault, I conducted both qualitative and simple quantitative (bivariate) analyses. Guided by penal populism and focal concerns theory, I sought to identify common themes within judicial decisions to shed an important light on the youth criminal justice system, such as the impact of legislative change and public opinion on youth court judges' decisions.

In summary, by focusing on sentencing decisions, this study breaks new ground. Few Canadian studies have explored the content of youth sentencing decisions, and analyzed the relative weight judges give to various factors. This research not only tells us about the operation of youth courts in Canada, but it also provides insight into how societal values shape social practices, including legal decisions. Moreover, research has not fully explored whether sentencing decisions respecting young offenders vary across offence type and legislative context.

The rest of Chapter 1 will provide vital context for this study by reviewing youth crime legislation in Canada and the trends in youth crime. I will discuss the three pieces of legislation that have governed young offenders in Canada, since 1908. I will begin with a discussion of the *Juvenile Delinquents Act* (1908) (herein referred to as JDA) and will discuss the criticisms that came forward after the enactment of the JDA. I will then discuss the *Young Offenders Act* (1984) (herein referred to as YOA) and will discuss the subsequent criticisms and amendments that emerged. This section will end with a discussion of the Youth Criminal Justice Act (2003) (herein referred to as YCJA) and

will discuss the criticisms of the YCJA along with the recent 2012 YCJA changes under the Safe Streets and Communities Act.

Chapter 2 provides a discussion of the underlying purposes and principles of sentencing along with a discussion of how young offenders are processed within the youth justice system in Canada. Chapter 2 ends with a discussion of the two criminological theories of sentencing (penal populism and focal concerns theory) that guide this study.

Chapter 3 outlines my research questions and discusses the methods used to address them. I explain my data collection, sampling, operationalization of variables, and data analysis strategies. For this study, both qualitative and simple quantitative analyses are used.

Chapter 4 presents the results of the descriptive and bivariate analyses performed to answer research questions 1 and 2. Chapter 5 presents the results of research question 3 by reporting the findings of the in-depth content analysis of the sample of sentencing decisions included in this study. The final chapter discusses the research findings, reviews the shortcomings of the two theories that guide this study, and provides a discussion of the limitations and considers implications for future research.

1.2 The Youth Justice System in Canada: Legislative Changes and Public Concern

Not long after Canada became a nation, youth justice became a social concern (Beaulieu and Cesaroni, 1999). The first criminal laws (Juvenile Delinquents Act, 1908) governing young offenders ensured that children and youth would be confined in separate, custodial facilities ('reformatories') away from adults. The rationale behind having a separate system to deal with young persons was the principle of 'diminished moral blameworthiness' or 'culpability' (Beaulieu and Cesaroni, 1999: 371). The youth justice system was, therefore, to reflect young people's lack of maturity through reduced accountability. It is under this realm of thinking that the Canadian Federal Government, = over the last century, has enacted and amended three pieces of legislation: The

Juvenile Delinquents Act (1908), the Young Offenders Act (1984), and the Youth Criminal Justice Act (2003) to handle young offenders.

It is important to point out that, while there was much concern over the effectiveness of each piece of legislation in decreasing the rate of youth crime in Canada, especially violent youth crime, much of the research has continually shown that youth crime has been on the decline since the early 1990s. Furthermore, all of these Acts affirm the need for a separate system to process young offenders, distinct from that which processes adult offenders. In the following section, I will discuss these three different pieces of youth crime legislation and the criticisms surrounding each piece of legislation in more detail.

1.2.1 Juvenile Delinquents Act (1908-1984)

The Juvenile Delinquents Act (JDA), enacted in 1908, was the first legislative framework for youth justice in Canada. Prior to 1908 there was no separate criminal law that governed young offenders in Canada and as such any youth over the age of seven could be charged criminally and punished under the same laws as adults (Anand, 1998; Doob and Sprott, 2004). Under the JDA, however, a child or youth's negative social environment was seen as the cause of delinquency. For example, youth who received inadequate moral training, poor schooling, experienced hunger, and/or poverty were believed to have learned the "wrong lessons" in life (Rosen, 2000; Tanner, 2001). In order to counteract these wrong lessons, society needed a juvenile justice system that provided active and timely intervention. It was believed this system should be separate from adults and focused on the rehabilitation of juvenile delinquents (Rosen, 2000; Tanner, 2001).

The JDA (1908) was philosophically grounded in the doctrine of "parens patriae"⁶ wherein the state was to intervene as a "kindly parent" in situations where the main

⁶ "Parens patriae means "parent of his or her country" (Latin meaning) and the principle was first stated in *Eyre v. Shaftsbury* (1772), 24 E.R. 659. However, perhaps the best articulation of the definition of *parens patriae* is contained in *R. v. Gyngall* (1893), 2 Q.B. 232 at p. 248, where the court stated that "the jurisdiction... is essentially a parental jurisdiction and the description of it involves that the main

institutions in charge of child-rearing (family, school) were failing (Department of Justice, 2004). The new youth justice system was to permit social intervention to “cure” the emotional ills of children in order to “save” them (Beaulieu and Cesaroni, 1999; Rosen, 2000). The juvenile delinquent, therefore, under the JDA was believed to require help, guidance, and proper supervision (JDA, sec. 3[2]; Doob and Sprott, 2004). They were not to be treated as criminals and instead were to be treated as “misdirected [children]... in need of aid encouragement, help and assistance” (Department of Justice Canada, 2004; Rosen, 2000: 1). Thus, under the doctrine of ‘*parens patriae*’ no distinction was made between the ‘neglected child’ and the ‘delinquent child’; both were perceived as ‘misdirected’ or ‘misguided’ children who needed protection, guidance, education, supervision, and treatment (Beaulieu and Cesaroni, 1999: 372). Furthermore, a juvenile delinquent would no longer be placed within an adult custodial facility and instead would be placed in a provincial training school or reformatory (Rosen, 2000).

The JDA, while being a substantial improvement over the previous treatment of children and adolescents, was considered an imperfect solution (Department of Justice, 2004). Treatment of the offender was paramount under the JDA as the aim was to cure young persons who were actually or potentially criminal (Anand, 1998: 322). By the mid-twentieth century, the Act was increasingly criticized for the imposition of arbitrary and unfair sentences, and the neglect of the interests of youth. Critics argued there was a lack of continuity between the ideals expressed in the JDA and the actual delivery of services to juveniles (Anand, 1999; Hutchinson and Smadych, 2005). For example, the provinces were given the power to decide upon the upper age limit of children who would fall under the jurisdiction of the legislation. Such discretion resulted in inter-provincial variations in the maximum age (from fifteen to seventeen) of young persons being tried as juveniles (Hutchison and Smadych, 2005). For example, in one province a 16-year old ‘juvenile delinquent’ could be punished as an adult and therefore punished more severely whereas

consideration to be acted upon in its exercise is the benefit or welfare of the child” (Black’s Law Dictionary, 2004; Anand, 1998: 321).

in another province a 16-year-old could be punished as a juvenile and receive a lesser sentence (Tanner, 2001).

By the 1960s, criticisms directed at the JDA increased when recorded levels of juvenile crime increased dramatically as the post-war baby boom generation moved into adolescence (Beaulieu and Cesaroni, 1999; Roberts, 2004). The JDA, it appeared to the public, was not able to deter delinquent behaviour and it was therefore labeled too “soft” on youth crime. Not only did reported crime rates reveal an increase in youth crime, but it became apparent that many juvenile delinquents were repeat offenders -- “recidivists” (Tanner, 2001; Beaulieu and Cesaroni, 1999). Other concerns also emerged: the lack of uniformity in upper age limits across provinces, the informality of court procedures that led to widespread disparity in sentencing, and the widespread use of indeterminate sentences, which meant it was much easier for a young offender to ‘get into’ a correctional facility than to ‘get out’ of one. Furthermore, many youth were charged with ‘status offences’ (e.g., “incurability” and “sexual immorality”) under the JDA, as status offences criminalized youth for behaviour that was legal for adults (Tanner, 2001; Beaulieu and Cesaroni, 1999; Spratt and Doob, 2009; Spratt, 2012: 310).

Because the juvenile justice system under the JDA was governed by the overarching principle of the best interests of the child, “due process” rights were minimized in the interests of an informal process and the promotion of the welfare of children (Department of Justice, 2004; Beaulieu and Cesaroni, 1999: 374). For example, since there was an emphasis on juvenile courts using informal dispositions, many juvenile delinquents’ cases were heard without the benefit of legal representation (Tanner, 2001). Juvenile delinquents were denied the basic elements of “due process”, such as the right to counsel, the right of appeal, and determinate sentences as opposed to open-ended sentences (Rosen, 2000).

The apparent ineffectiveness of the JDA (1908) spurred much debate among members of the public and the political parties in Canada. Conservatives drew on data illustrating a rise in youth crime to support their argument that the JDA was ineffective at addressing youth crime. Liberals and left-wing reformers in the legal and “caring” professions, on

the other hand, took a different view, arguing that the civil liberties of young offenders were being violated under the Act (Tanner, 2001). Although, the two dominant political parties held different views, they were in agreement that juvenile justice reform was required.

In 1981, Bill C-61, the Young Offenders Act (YOA) was introduced in Parliament. This Act continued the existence of a separate youth justice system, but under the Act youths were to be held more accountable for their actions (Department of Justice, 2004). Young offenders were no longer viewed as products of their environment but as involved and accountable participants. At the same time, they would be granted due process rights (Casavant and Valiquet, 2011).

1.2.2 Young Offenders Act (1984-2003)

The Young Offenders Act (YOA) was proclaimed in April 1984, and was designed to remedy the shortcomings of the JDA (Department of Justice, 2004). The language used in the YOA highlighted the importance of the protection of society as well as youths' responsibility to the community and the victim (Beaulieu and Cesaroni, 1999). The Declaration of Principle under the YOA states that young persons are not to be held as accountable for their acts as adults are; however, they must still "bear responsibility for their contraventions" (s. 3[1][a]; Bala and Anand, 2012; Rosen, 2000: 3). Thus, underlying the model of justice is the notion that that young offenders need to be supervised, disciplined and controlled but still have "special needs" that require guidance and assistance (Rosen, 2000: 3).

The Act attempted to balance concern for the special needs of youth and the recognition of their legal rights with the protection of the public (Bala, 2015: 132). The Act moved away from the child-welfare philosophy of the JDA by abolishing the vague status offence of "sexual immorality" and focused on criminal offences (Bala, 2015: 132). The Act also increased offenders' rights. The Canadian Charter of Rights and Freedoms (1983) became a fundamental part of the country's constitution and protected, among other things, legal rights such as a person's right to life, liberty, and security of the person. In this spirit, the YOA granted young offenders basic rights and freedoms that

were denied to them under the JDA, including the right to legal representation, the right to have a court-appointed lawyer, the same rights to bail as adults accused of an identical offence, as well as the general rules of evidence concerning the admissibility of evidence, and the right to appeal a conviction (s. 3(1)(e)(f)(g); Department of Justice, 2004; Beaulieu, 1991: 137).

Under the YOA the legal and constitutional rights of young offenders were recognized and as such youths had the right to the least possible interference with freedom that is consistent with public safety. A significant change under the YOA was the provision that raised the minimum age of criminal responsibility to 12 years old and set the maximum age at 17 years old (Department of Justice, 2004; Tanner, 2001).

Custody was to be reserved for serious offences and to be a last resort. When custody was imposed the maximum custodial sentence was two years; however, for more serious offences that would sentence an adult to life imprisonment, the maximum sentence for a young offender was three years. In addition, probation orders could not exceed two years and community-service orders were not to exceed 240 hours (Beaulieu, 1991: 139). A new section was also added and given the title “alternative measures” or what is also known as “diversion” wherein a decision not to prosecute a young person could be made. Instead he or she could be sentenced to participate in an education or community service program (Rosen, 2000). In other words, non-judicial procedures were to be considered, first and foremost to avoid the formal, time-consuming and harmful effects of prosecution and punishment (Rosen, 2000).

The general public, the mass media, as well as many academics and criminal justice practitioners criticized the YOA for not providing clear legislative direction to the courts and agents of the youth criminal justice system respecting its appropriate implementation (Welsh and Irving, 2005). Much of the criticism against the YOA came from the law-and-order lobby groups who believed that the legislative prescriptions of the YOA were not doing enough to control, punish, or deter young offenders (Tanner, 2001). The maximum custodial sentences, for example, were perceived as being too short; with Canadian politicians expressing concerns that the youth justice system was “too soft”

(Bala and Anand, 2012: 92). For example, Conservative politicians were concerned over the inadequacy of the maximum three-year sentence for the most violent offences, such as those convicted of murder (Bala, 2015: 133). Furthermore, in setting the minimum age of criminal responsibility at twelve, it appeared that those under the age of twelve were being allowed to commit crimes, including violent crimes, without consequences (Tanner, 2001). The YOA reflected a hybrid model combining elements of the child - both the welfare and justice models (Anand, 1998; John Howard Society of Alberta, 1999).

Other critics argued that because the use of alternative measures was not mandatory under the YOA, there were large discrepancies between the provinces in youth sentencing (Rosen, 2000; Tanner, 2001). Some provinces, such as Ontario, had higher incarceration rates while some other provinces (e.g., Quebec) were making better use of alternative measures. In addition, provincial police and judicial authorities were given a great deal of discretionary power and as such the administration of justice was unevenly distributed resulting in the public's perception that the YOA was ineffective (Spratt and Doob, 2008).

Youth crime rates had also increased during the 1980s and early 1990s (Carrington 1999), fostering criticism of the YOA, with the media playing a prominent role in raising public concern. As we have seen at the beginning of this chapter, media reports often sensationalize youth crime, especially violent crime. Sensationalized stories encourage public perceptions that legislation is "too lenient" (Roberts et al, 2003; Pratt, 2007; Doob and Spratt, 2004). In fact, a consistent message from the media, along with politicians and the police, was that the increases in youth crime and violence were attributable to the YOA (Jaffe and Baker, 1999). Even though youth crime rates had subsequently declined -- by 1996 the rate of youth crime had returned to the same level as in 1983 -- this decrease did not receive the same level of public and media attention as did the previous increase in crime rates (Carrington, 1999).

Although critics tied high youth crime rates to the YOA, Carrington and Moyer (1994) show that this is unlikely the result of legislative change, since the increase predated the

YOA's enactment. Instead they argue that the per capita increase in youth crime rates can largely be accounted for by temporary "jumps" in police-reported youth crime, especially in Saskatchewan and British Columbia. Moreover, the increase appears tied more to property offences than violent crime. While proportions of young persons apprehended for serious offences against persons increased by 33% in this era, they accounted for very few of the offences relative to all young offenders that were apprehended (3% to 4%). Property offences made up the bulk of all youth crime offences (Carrington and Moyer, 1994). In fact, serious youth crime constituted a lower proportion of all youth crime during 1985-1990 (post YOA) than it did during the 1980-1984 (pre-YOA) period (Carrington and Moyer, 1994).

This trend appears to have reversed in the early 1990s, according to scholars Doob and Sprott (1998). They argue that while the total number of youth court cases declined between 1991 and 1996, the number of cases that involved violence increased 16.4% (Beaulieu and Cesaroni, 1999). However, they contend that youths were not getting more violent; rather "Zero Tolerance" policies towards violence in schools had increased the number of violent cases that were being brought in front of the courts (Doob and Sprott, 1998; Beaulieu and Cesaroni, 1999). For example, their results revealed that there was a 31.3% increase in minor assault cases being brought in front of the court during this five-year period. Doob and Sprott (1998) concluded that school-yard scuffles, which would formerly have been handled more informally, were increasingly turned over to the police (Beaulieu and Cesaroni, 1999). This crackdown on minor offences may have contributed to the perceived increase in crime (Beaulieu and Cesaroni, 1999; Doob and Sprott, 1998).

In summary, while upon first glance the YOA may appear to have caused an increase in youth crime, many scholars (Bala, Carrington and Roberts, 2009; Beaulieu and Cesaroni, 1999; Carrington, 1993, 1998; Doob and Sprott, 1998; Hutchinson and Smandych, 1995; Sprott and Doob; 2008) argue this was not the case.⁷ The YOA had changed the manner

⁷ Many scholars hold that youth crime has decreased, but Gabor (1999) contends that given the limitations of official crime data (e.g., unreported crime and lack of recognition of different crimes emerging) "the concern over youth violence ought not to be dismissed" (p. 389).

in which youths charged with crimes were dealt with in the various provinces (Carrington, 1999; 1993), but under this legislation, inter-provincial variations continued to be evident (Carrington, 1999; Doob and Sprott, 1996; Sprott and Doob, 2008). As a number of scholars argue, since each of the provinces of Canada had a great deal of autonomy in deciding how to implement federal criminal legislation, variations in the treatment of accused and convicted young offenders may be inevitable (Bala, Carrington, and Roberts, 2009: 134).

The YOA granted considerable discretion to provinces concerning how the act would be implemented, and in many provinces, this led to high rates of custodial sentences for young offenders (Bala, 2003; Bala, Carrington and Roberts, 2009; Doob and Cesaroni, 2004; Doob and Sprott, 2004). For example, in 1997/1999, 121,000 youths between the ages of 12 to 17 were charged with a Criminal Code or other federal offence. Of those charges that proceeded to youth court, just over two thirds (67%) of the cases resulted in a finding of guilt (Canadian Centre for Justice Statistics, 1991; John Howard Society, 1999). In 34 percent of youth cases the young offender received a conviction sentence that entailed a custodial disposition (CCJS, 1999; John Howard Society, 1999). As noted, sentencing varied across provinces. A young offender who resided in Ontario, the Yukon, the Northwest Territories, or Prince Edward Island was more likely to serve time in custody. In Ontario, for example, 10,999 (41%) of the 27,033 youth convicted of an offence in 1997/98 received a custodial sentence (John Howard Society, 1999: 7).

It must also be noted that under the YOA, there were no parole provisions. Young offenders who were sentenced to incarceration remained in a custodial facility until the end of their sentence, unless upon judicial review their sentence was modified (Bala, Carrington, and Roberts, 2009). In some instances, this led to harsher penalties for youth. For example, a study conducted by the John Howard Society (1999) compared custodial sentences received by adults and youths for similar crimes (e.g., theft under \$5000). It found that if a youth and an adult were given the maximum sentence of two years, the adult could be paroled after serving one-third (33%) of the sentence. A youth, in comparison, was only able to have their sentences modified after a judicial review that was permitted after serving one year -- 50% of their sentence (John Howard Society,

1999: 4). Furthermore, because judicial reviews were difficult to arrange, they rarely occurred (Bala, 2003; Bala, Carrington, and Roberts, 2009). Even in cases where a review hearing was held, some judges were reluctant to modify a young offender's sentence (Bala, 2003).

Jaffe and Leschied (1989: 180) argue that while the principles of the YOA attempted to balance protection of the community and recognition that adolescents may require special guidance because their stage of development, research suggests that this balance has not been achieved (Jaffe and Leschied, 1989; Markwart and Corrado, 1989). Instead, "the Young Offenders Act to date [1989] has meant an increasing demand for custody beds with a dramatic increase in such court dispositions" (Jaffe and Leschied, 1989: 180). This is a trend that was consistent across the provinces except Quebec (p. 180).

Thus, from the time it came into force, the YOA was criticized. By the late 1990s professionals and academics expressed concern over the high rates of use of courts and custody in Canada (Bala, 2015: 134). Some critics argued the Act did not set clear principles to guide its implementation. Other critics complained that too much focus was being placed on the rehabilitation and reintegration of young offenders at the expense of the protection of the public (Casavant and Valiquet, 2011). Beaulieu and Cesaroni (1999) state that "getting tough" on youth crime became the mandate of political pundits, resulting in three amendments to the YOA between 1984 and 1995 (Casavant and Valiquet, 2011). Each amendment aimed to toughen up the Act, and create harsher provisions for young persons charged with serious, violent offences (Beaulieu and Cesaroni, 1999).

In response to these public and political criticisms, that the House of Commons Standing Committee on Justice and Legal Affairs initiated a review of the YOA in the 1990s (Department of Justice, 2004). A number of groups, including criminal justice professionals, children's services organizations, victims, parents, young offenders, educators, advocacy groups, and social policy analysts were consulted. In April 1997, the federal committee produced the "Renewing Youth Justice" report which outlined fourteen suggestions for change. Among the principle recommendations were that youth

courts should be granted the jurisdiction to deal with 10 and 11-year olds, that young offenders names should be published, and that the Act's declaration of principles should be replaced with a statement of purpose and enunciation of guiding principles (Department of Justice, 2004).

In May 1998, the federal government released its response in a report titled "A Strategy for the Renewal of Youth Justice" which outlined how the government would reform juvenile justice (Bala, 2015; Department of Justice, 2004). The report focused on three areas: youth crime prevention; providing young persons with meaningful consequences; and rehabilitation and reintegration of young offenders. The most prominent aspect of the strategy was legislative reform that intended "to respond more firmly and effectively to the small number of the most serious, violent young offenders" by creating the presumption that the most serious cases would result in adult sentences (Department of Justice, 1999; Bala, 2015). Subsequently, the federal government reintroduced Bill C-7, which, after debate and discussion, was adopted and received Royal Assent on February 19, 2002. Providing time to the provinces to prepare for its implementation, the Youth Criminal Justice Act (YCJA) came into force on April 1, 2003, replacing the YOA (Department of Justice, 2004).

1.2.3 Youth Criminal Justice Act (2003)

The 2003 YCJA aimed to address the various criticisms leveled at the YOA. The enactment of the YCJA in essence represented a political compromise (Newburn, 2002; Bala, Carrington, and Roberts, 2009). On the one hand it sought to appease those who called for a "get tough on crime" agenda leading to punitive consequences especially for serious, violent, and repeat offenders (Jaffe and Baker, 1999). On the other hand, the Act appears to reaffirm Canada's commitment to the justice model of the youth court, introduced under the YOA, which evokes the concept of due process within adversarial proceedings and to special legal protections due to their immaturity (Bala and Anand, 2012; Beaulieu and Cesaroni, 1999).

A major change under the YCJA concerns sentencing, most notably as it relates to Canada's over-reliance on the use of youth courts and youth custody. Under the YOA,

there were a large number of youths being processed through the courts and placed in custody, often for non-violent offences (Bala and Anand, 2012; Bala, Carrington, and Roberts, 2009). The YCJA sought to reduce the role of the courts and increase the emphasis on the community. Furthermore, it increased the use of diversionary options and community-based sentences. For example, community supports, including the young person's parents, are expected to work together to encourage young persons who have committed offences to get back on the right track. Parents, family members and the community are seen as having a moral obligation to assist young persons to become law-abiding citizens. To accomplish this, young persons' must be provided with the means and opportunities through which they can maintain or increase continuous contact and involvement with their parents, families, or other meaningful individuals in their lives (Department of Justice, 2002; Bala and Anand, 2012). Such contact and involvement with a young person's parents or significant others is to be guided by and be consistent with the protection of the public, of the personnel who are working with the young person, as well as the young person himself or herself (s. 83[2a]).

As such, the overall presumption under the YCJA is that judicial proceedings shall not be the first choice of action when dealing with an alleged offender, especially those who are first time offenders and/or who have engaged in minor offences. This presumption is made clear in the YCJA's Declaration of Principle. A prominent message, for instance, is that the youth justice system must respond to youth offending in a way that is "proportionate" to the offence (s. 3[1]) (Bala and Anand, 2012: 111). The principles also require police and prosecutors to use restraint when invoking legal sanctions. In this manner, in most provinces and territories (excluding New Brunswick, Quebec, and British Columbia) police could act on their own authority (without consulting the prosecutorial authorities) when deciding whether to lay a charge (Carrington and Schulenberg, 2008: 353). A police officer upon first contact with an alleged offender and before beginning any judicial proceedings or taking any other measures, can choose any of the following: take no further action; give a warning; administer a caution; or refer the youth to a community program or agency (s. 6[1]).

Such progressive intervention is illustrated by Schulenberg (2010: 118) who found that 90% of officers used informal warnings along with involving the parents in their use of social control. When parents appeared supportive and the officers believed there would be consequences imposed at home, they were more likely to use informal actions or divert the youth to a diversion program (p. 123). In comparison, if there was little parental involvement, poor parental attitudes, or no accountability or consequences being imposed at home, a charge was more likely to be laid (p. 124). Schulenberg (2010: 127) concluded that the actions of police officers were in keeping with the principles and objectives (providing meaningful consequences through the use of ‘graduated sanctions’) of the YCJA.

Thus, while the YCJA was enacted under the premise that Canada would “get tough” on youth crime, it, in fact, was directed more towards reducing Canada’s reliance on the use of youth courts and youth custody by increasing the use of diversionary options and community-based sentences. In addition, youth courts and custody were to be focused towards the more serious violent and repeat offenders; even then it is to be a last resort. As the Preamble of the YCJA specifically states,

Canadian society should have a youth criminal justice system, that commands respect, takes into account the interests of the victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent persons (2003).

The most effective means to successfully achieve these objectives, under the YCJA, is to rehabilitate and reintegrate young offenders back into the community. Furthermore, with regards to custody, the YCJA requires that all sanctions be fair and proportionate (s. 3[1]). The justice system must reserve custody for only the most serious and repeat offenders (YCJA Preamble). Further, when a young offender appears in front of a youth justice court, the court is not to impose a custodial sentence unless it has considered all other alternatives to custody (Bala and Anand, 2012: 111). Only after determining that there are no other reasonable alternatives, or a combination of reasonable alternatives, can a court impose a custody order (s. 39[2]).

As noted earlier, under the YCJA (Preamble), there is an emphasis on “extra-judicial measures” especially community-based responses to youth crime. Programs that are viewed as most effective are those aimed at “fostering responsibility”; “ensuring accountability through meaningful consequences”; providing “effective rehabilitation” and “effective reintegration” that is outside the formal justice system (Panko, 2005: 473). In providing such programs (e.g., community based responses, sentencing conferences) it is believed that Canada’s youth justice system will protect society and will reinforce societal values to ensure young offenders will become productive, responsible citizens (Panko, 2005: 473).

In sum, the YCJA signaled a significant shift from the YOA in its attempt to strike an appropriate balance between “toughening up” measures to deal with serious violent offenders and pursuing a more rehabilitative approach with its increased emphasis on alternative measures for both violent and non-violent offenders (National Criminal Justice Section Canadian Bar Association, 2010). The courts and law enforcement agents were also provided with more options for diverting young offenders away from the judicial system, especially first time offenders and those engaging in minor offences. In addition, a number of guiding principles were provided to assist the courts in sentencing. Thus, the YCJA combined elements of the welfare, justice, and crime-control models.

1.2.4 Safe Streets and Communities Act (YCJA post 2012 amendments)

The YCJA soon came under attack with critics contending it was too lenient on youth crime. Interestingly, while there was much criticism over the ineffectiveness of the YCJA, the Act seems to have been effective in achieving its goal of restricting custodial sentences for youth, even for more serious offences that have reached youth court. A study conducted by Milligan (2010), for example, found that not only have fewer youths appeared in court, but fewer youths also have been sentenced to custody. For example, in 2008/2009 only 15% of all guilty cases resulted in a custodial sentence, compared to 27% in 2002/2003 (Milligan, 2010). Bala, Carrington, and Roberts (2009) have also shown that the per capita rate of custodial sentences dropped by 35% in 2003/2004 with a further drop of 36% in the three years following the enactment of the YCJA (2004-2007).

They concluded that this decline represents not only the decrease in the volume of cases in front of a youth court but also a decline in the number of custodial sentences being handed down. The YCJA seems to have been effective, then, in achieving its goal to restrict custodial sentences for youth, even for more serious offences that have reached youth court (Bala, Carrington, and Roberts, 2009).

The trend holds across provinces and territories: there has been a decrease in the proportion of guilty cases receiving custodial sentences (Milligan, 2010), even though variations in the rate at which youths are brought into the court persists across provinces (Sprott and Doob, 2008). For example, Quebec and British Columbia use youth courts the least while Saskatchewan appears to rely on youth courts the most (Thomas, 2005; Sprott and Doob, 2008). The YCJA has had the biggest impact in the Atlantic region and Ontario; both provinces have reduced their use of youth courts (Bala, Carrington, and Roberts, 2009). There has been limited impact in the Prairie Provinces and British Columbia. Overall, though, Canada's youth incarceration rate, which includes custody and detention, has declined by approximately 50% under the YCJA (Bala, Carrington, and Roberts, 2009).

When the Conservative government came into power in 2006, it proposed a complete overhaul. As part of the government's larger and ongoing tough-on-crime overhaul of the Canadian justice system, the Conservative government argued that harsher sentences needed to be implemented, as this would have a deterrent effect especially on repeat offenders and potential offenders. Responding again to both criticisms of the YCJA, the Government of Canada brought forth amendments under the Safe Streets and Communities Act (SSCA). These amendments to the YCJA came into force on October 23, 2012 and were designed to strengthen the ways in which the youth justice system deals with serious violent and repeat offenders. Public protection and accountability were moved to the foreground over rehabilitation and prevention. For example, the legislation broadened the criteria for holding youth in pre-trial detention (s. 29 [2]) and sentenced custody (s. 39[1]) and added deterrence and denunciation as sentencing objectives a youth court 'may' consider (s. 38[2][f]) (YCJA, 2003; Mann, 2014: 60). The amendments were reportedly aimed at better protecting Canadians from violent and

repeat young offenders and making the protection of society the paramount consideration in the management of young offenders within the justice system. While the YCJA, when enacted in 2003, sought to move towards a more rehabilitative model for sentencing, the 2012 amendments appear to have encouraged a transition back towards a “get-tough approach” to young offenders.

Critics of the YCJA, had complained about the “the absence of deterrence as an explicit purpose of sentencing at the youth justice court level” (Roberts and Bala, 2003). The 2012 amendments, therefore, were designed to strengthen the ways in which the youth justice system deals with young offenders. The protection of society continued to be an overriding consideration under the act; however, the principle of deterrence, among other principles (e.g., denunciation), were reintroduced into the YCJA. The amendments were directed towards the handling of violent and repeat young offenders, especially. Thus far, it is not entirely clear whether the 2012 legislation will lead to harsher sentences, or whether the trend towards lighter sentences under the YCJA will continue.

1.3 Chapter Summary

While youth crime statistics have revealed youth crime has been decreasing since the 1990s, high profile media stories suggest to the public that youth are literally getting away with murder. This chapter has provided an overview of youth crime legislation, youth crime trends and youth court statistics, to illustrate how legislative changes, within Canada, have sought to alter sentencing practices of young offenders. In Chapter 2, I will provide a discussion of the underlying purposes and principles of sentencing, giving particular focus to the guiding principles and purposes underlying the YOA and the YCJA. I also will discuss how young offenders are processed within the youth justice system in Canada, followed by a discussion of the two criminological theories (penal populism and focal concerns theory) of sentencing that guide this study.

Chapter 2

2 Introduction

Chapter one outlined youth crime legislation in Canada discussing how this legislation has altered sentencing practices. In general, the chapter revealed a tension underlying political and public debates about how best to deal with youth crime: should we, as a society, be “lenient” with sentencing in order to rehabilitate youth, giving them an opportunity to turn their lives around? Or should we enact harsher sentences, to deter youth from committing crimes and protect society from high-risk violent offenders? Canadian legislation has attempted to find a balance between these two extremes in what essentially has become a debate between protecting the best interests of young offenders and protecting the best interests of the public.

In order to examine the forces that shape sentencing, this chapter looks at the youth justice system, sentencing trends and sentencing theories, to shed more light on the adjudication of violent young offenders. The chapter will proceed as follows: I will begin with a discussion of the judicial system wherein I will discuss the process young offenders’ may experience when they come in contact with criminal justice agents. A section is included on the principles and purposes of sentencing wherein I will discuss the prominent goals or purposes behind youth justice legislation in Canada. Given the prominence of responsibility, accountability, rehabilitation and reintegration, and to a lesser degree deterrence, under the YOA and YCJA, I provide a more detailed discussion of accountability, rehabilitation, and deterrence. I then provide a discussion of youth court judges and sentencing, noting the role of judicial discretion in Canada. The last sections of this chapter will focus on the two theoretical perspectives that guided this study: penal populism and focal concerns theory. Following this section will be an introduction to the present study.

2.1 Judicial System

Canada is a constitutional monarchy, federal state and parliamentary democracy wherein the responsibility for governing at the federal level is shared by the legislative, executive, and judicial branches (Welsh and Irving, 2005). The Constitution Act of 1867 assigned to the federal parliament the authority to enact criminal laws as well as set the procedures that are to be followed in criminal matters. The primary source of both substantive⁸ and procedural⁹ criminal law is the Criminal Code of Canada; yet under the Constitution Act of 1867, Canada's ten provinces and three territories have jurisdiction over the administration of justice and the responsibility to establish and maintain the system of provincial and territorial criminal courts (Welsh and Irving, 2005; Doob, 2016). Thus, under the Canadian Constitution, responsibility for the criminal justice system is a "shared responsibility" between the federal and provincial governments (Welsh and Irving, 2005; Doob and Sprott, 2005). As noted, the federal government legislates criminal laws whereas the provincial governments have the responsibility for administering these laws, which includes the provision of police services, courts, and correctional services (Welsh and Irving, 2005; Doob and Sprott, 2005; Carrington and Schulenberg, 2008: 351).

As with all common-law countries, Canadian law adheres to the doctrine of *stare decisis*, which requires judges to apply established principles of law to all future cases (Hall and Wright, 2008: 92; Lens, 2003: 29). The general principle is that similar fact-based cases are decided in a manner that produces similar and predictable outcomes. The principle of precedent is the mechanism by which that goal is attained. In other words in common law legal systems precedent is a principle or rule established in a previous legal case that is either binding or influential on a court (Lens, 2003 Hall and Wright, 2008).

⁸ Substantive law is defined as "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties (Black's Law Dictionary, 2004: 1567).

⁹ Procedural law is defined as "the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves" (Black's Law Dictionary, 2004: 1323).

The public often has the perception that courts have the ability to reduce or control crime, as it is the courts that impose sentencing restrictions on offenders (Ashworth, 1995). The passing of a sentence, however, is only one stage in a long series of decisions that range from the decision to charge an offender, to the prosecutorial review, the mode of trial, venue, the plea negotiation, the presentation of facts to the court and subsequently to the enforcement of sentences and decisions on early release (Ashworth, 1995: 264). Since discretionary practices are embedded within the laws, the principles of the youth justice legislation (such as the YOA or the YCJA) are applied and interpreted through the discretionary powers of the police, crown attorneys, and the courts. For example, as discussed in Chapter 1, a police officer when dealing with an alleged offender, and before beginning any judicial proceedings or taking any other measures, can choose to take no further action, give a warning, administer a caution, or refer the youth to a community program or agency (YCJA, 2002: s. 6(1); Schulenberg, 2010). It is the police who are most likely the first contact with a youth and are responsible for investigating and laying charges (Bala and Anand, 2012; McGoey, 2004).

Once a charge has been laid, the decision to prosecute is based on the Crown Attorney's assessment of whether there is "credible evidence relevant to what is alleged to be a crime" (R. v. Boucher, 1955: para. 26; Bala and Anand, 2012: 428). This objective standard is higher than a "prima facie"¹⁰ case that requires there be evidence upon which a reasonable jury, properly instructed, could convict. It also does not require a "probability of conviction," wherein a conclusion that a conviction is more likely than not (McGoey, 2004). A recent and more detailed pronouncement of the judiciary role of the Crown within the youth court justice system, is reported by McGoey (2004):

...the role of the Crown Attorney in the administration of justice is of critical importance to the courts and to the community. . . The Crown prosecutor must be a symbol of fairness, prompt to make all reasonable disclosures and yet scrupulous in attention to the welfare and safety of witnesses. *The community looks upon the Crown prosecutor as a symbol of authority and as a spokesman for*

¹⁰ Prima facie is defined as "at first sight; on first appearance but subject to further evidence or information" (Black's Law Dictionary, 2004: 1310).

the community in criminal matters [emphasis added] (R. v. Logiacco (1984), 11 C.C.C. (3d) 374).

In summary, the juvenile justice system is a complex system with a number of players. Sentencing young offenders is but one part of a broader criminal justice process, albeit one that is shaped by the multiple claims and interpretations of the actors involved (Doob, 1995; Ashworth, 1995: 264). The laws define certain “matters” that may legally become the focus of public state action (Minow, 1987; Moore and Wakeling, 1997). Only some portion, however, of all of these events that in principle could become part of the juvenile justice system will actually do so, as there are a number of institutions that determine which ‘potential’ cases become ‘actual’ cases (Moore and Wakeling, 1997). The courts in many jurisdictions, therefore, receive only a selection of cases (Doob, 1995; Ashworth, 1995: 264).

2.2 Principles and Purposes of Sentencing: Young Offenders in Canada

One cannot have a discussion about judicial sentencing without first discussing the goals that are to be achieved (Bushway and Forst, 2012). Criminal law guiding the administration of justice pertaining to violent offences embodies differing policy determinations and philosophies of the juvenile justice system, such as retribution, incapacitation, deterrence, rehabilitation, and accountability (Thomas and Fitch, 1981). There is much controversy and contention surrounding such sentencing principles especially when considering how best to respond to youth crime. Such controversy can and often does lead to sentencing disparities. In this section, I discuss the prominent goals that underlie the principles and purposes of sentencing under Canada’s youth justice legislation.

Rehabilitation plays a key role in the sentencing decisions included in this study, and as such, I provide a more detailed discussion of rehabilitation under the YOA and the YCJA. Since there has been much debate over the meaning of accountability, under the YCJA, I also include a discussion of accountability. Lastly, deterrence has been prominent under the YOA, excluded under the YCJA (2003-2012), and reintroduced after the 2012 amendments of the YCJA, and as such I discuss deterrence as well.

2.2.1 Deterrence Model

Criminal law makers and adjudicators formulate and administer criminal laws under the assumption that laws nearly always influence a person's conduct; it is believed that punishment can prevent future offending. Criminal justice measures which are aimed at apprehending and punishing individual offenders seek to prevent future crimes from occurring either by deterring people from committing offences or by incapacitating offenders (Ashworth, 2002; Bala and Anand, 2012: 138; Robinson and Darley, 2004).

Incapacitation is based on the notion that an offender or group of offenders can be identified who are likely to do harm again in the future, as such, special protective measures (usually in the form of lengthy incarceration) should be imposed (Ashworth, 2002). This approach allows the courts to go beyond "proportionate" sentencing under the guise of 'public protection' and focuses on violent and repeat offenders who are considered likely to do serious harm (von Hirsch and Ashworth, 1996; Ashworth, 2002). For example, if a violent or repeat young offender is incarcerated, they are not and cannot be out on the streets committing crimes; the assumption is that crime rates will decline and delinquency will have been deterred (Tanner, 2001; Ashworth, 2002).

Deterrence theory is based on the premise of rational choice. Beccaria and Bentham, two classical theorists, introduced a "cost-benefit analysis" to illustrate how individuals weigh the costs (consequences) against the benefits (pleasure) gained by engaging in criminal activity (Kennedy, 1983). Under this model, individuals are perceived as responsible and predominantly rational calculating individuals (Ashworth, 2002). Thus, deterrence theory assumes that individuals who fear punishment or the threat of punishment will consider their actions by assessing the costs of offending in relation to the gains of committing the offence (Kennedy, 1983).

There are two types of deterrence: *general* and *specific*. Specific deterrence seeks to deter specific offenders from offending again through punishment (Ashworth, 2002). A first-time offender may require little to no punishment whereas a repeat offender/recidivist may require an escalation of penalties, as the seriousness of the offence is more important. General deterrence, on the other hand, involves calculating

the penalty based on what may be expected to deter others from committing a similar offence. Proponents of the deterrence model emphasize the greatest good for the greatest number of people; as a result they believe it may be justifiable to punish one person severely in order to deter others effectively, even if such sentences override the principle of proportionality (Ashworth, 2002).

The deterrent effect relies on three components: *certainty*, *celerity*, and *severity* of punishment (Lab, 2000). *Certainty* in punishment results when an offender or potential offender is certain that criminal or delinquent behaviours will lead to identification, apprehension, conviction, and sentencing (Lab, 2000). *Celerity* refers to the speed at which punishment is imposed; the longer the delay in determining and imposing sanctions for delinquent or criminal behaviour, the less impact it will have in deterring future offences. *Severity* refers to the severity of the punishment needed to achieve deterrence. Punishment must provide enough pain to offset the pleasure gained from the criminal act. As such the severity of the punishment not only inhibits the pleasure gained but it replaces pleasure with a negative, unwanted pain (Lab, 2000). A criminal justice system that is based on a deterrence model should, therefore, introduce policies that are able to achieve the greatest level of certainty, celerity, and severity of punishment (Goff, 2001). Furthermore, agents of the criminal justice system and lawmakers must make it clear to an offender or a potential offender that the risks or costs are greater than the gains that results from criminal activity (Kennedy, 1983).

2.2.1.1 Deterrence and Young Offenders

Deterrence, as a guiding principle in sentencing young offenders, has been controversial in Canada, illustrating the complexities faced by judges when interpreting the meaning of legislation and considering what sentence best responds to youth crime (Cesaroni and Bala, 2008). The YOA did not clearly articulate the principles that govern youth sentencing, and as a result there was much controversy among judges as to whether to use deterrence as a guiding principle (Cesaroni and Bala, 2008). In 1993, the Supreme Court of Canada resolved this controversy in *R. v. J.J.M.*, concluding that general deterrence should be considered in sentencing, albeit to a lesser extent than it is for adult offenders (Cesaroni and Bala, 2008). The court stated

There is a reason to believe that Young Offenders Act dispositions can have an effective deterrent effect. The crimes committed by the young tend to be a 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 will *deter other members of the group* [emphasis added]. For example the *sentence imposed on one member of a “swarming group” should serve to deter others in the gang* [emphasis added] (R. v. J.J.M., 1993: at para. 34).

With the enactment of the YCJA in 2003, the debate over deterrence continued (R. v. B.V.N. 2004; R. v. B.W.P. 2004; Cesaroni and Bala, 2008). The Supreme Court of Canada in R. v. B.W.P. (2004) upheld the Manitoba Court of Appeal, ruling that deterrence was not to be a factor in sentencing. Relying upon the Preamble to the YCJA, the Declarations of Principles (section 3), the Sentencing Principles (Section 38) and the specific words of Section 50, Justice Charron wrote:

The YCJA introduced a new sentencing regime . . . Hence, *general deterrence is not a principle of youth sentencing under the present regime* [emphasis added]. The YCJA *also does not speak of specific deterrence* [emphasis added]. Rather, Parliament has sought to *promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done* [emphasis added]. . . I conclude that Parliament has not included deterrence as a basis for imposing a sanction under the YCJA (R. v. P. (B.W.), 2006: at para. 4).

While a sentence that holds a young person accountable through the use of meaningful sanctions may have a deterrent ‘effect’, according to Justice Charron (2006), there is a fundamental difference, albeit subtle, between deterrence as an ‘effect’, and deterrence as a ‘purpose’ of sentencing (Cesaroni and Bala, 2008). In other words, while deterrence was a guiding principle under the YOA, it was not to be an approach that should be followed in responding to youth crime, under the YCJA (Cesaroni and Bala, 2008; Bala and Anand, 2012: 142).

As was noted in Chapter 1, the 2012 Safe Streets and Communities Act renewed a “get-tough on crime” agenda, and as a result section 38(2)(f)(i) and (ii) of the YCJA was amended and the following two objectives to sentencing principles were added: “to

denounce unlawful conduct” and “to deter the young person from committing offences”. Hence, recently, deterrence is once again a principle to be considered in sentencing.

2.2.2 Rehabilitation

Rehabilitation and the reintegration of offenders back into the community has been a prominent focus of youth sentencing, especially in Canada (Bala and Anand, 2012). This approach aims to prevent further offending through the use of rehabilitation programs, such as therapy, counseling, intervention in the family, cognitive-behavioural programs, skill training, and so on (Ashworth, 2002). To rehabilitate an offender, the sentences should be tailored to the needs of the young persons and focus on the processes of diagnosis, treatment, and completion of, for example, an accredited treatment/rehabilitation program. The argument behind this model is that some or many criminal offences are to a significant extent determined by social pressures, psychological difficulties or situational problems of various kinds experienced by the offenders. Offenders are seen as unable to cope in certain situations and as such, turn to crime. With the aid of therapy, supports, and expert guidance they can learn to cope with these pressures without further engaging in criminal activity (Ashworth, 2002). We must reveal the general forces leading to such unwanted behavior (Christie, 2004: 108). As Christie (2004) states “punishment should be the last alternative, not the first” (p. 108).

2.2.2.1 Rehabilitation and Young Offenders

It has been recognized, since the introduction of the JDA, that youth justice legislation is to be distinct from the law (Criminal Code of Canada) that is applicable to adult offenders, as adolescents have special and differing needs (Bala and Anand, 2012: 130). The YOA was amended in 1995 with Section 3(1)(a) being added which recognized that “crime prevention is essential to the long term protection of society and requires . . . identifying and effectively responding to children and young persons at risk of committing offending behavior in the future” (Bala and Anand, 2012: 140). Under the guidance of the YOA, youth courts recognized rehabilitation was to be an underlying principle; however, some youth court judges were using incarceration as a means for rehabilitation (Anand, 1998). Parliament attempted to structure judicial discretion in the

sentencing of young offenders with s. 24(1.1)(a) of the YOA; however, this section was too narrowly drafted to be effective (Anand, 1998: 341). Section 24(1.1)(a) directs youth court judges not to give custodial sentences on the basis of rehabilitation (p. 341). Anand (1998) argued that this section was too narrowly drafted, and as such, it left open the option to use custodial sentences for rehabilitative purposes. There is much evidence to show that the courts were sentencing in this manner (Anand, 1998: 341).

Rehabilitation is a central feature of the YCJA's Preamble and Declaration of Principle. A youth justice system is to focus on responding to youths who have committed offences and the crimes they have committed. The best way to protect society is to rehabilitate offenders and as such a youth justice system, whether through the use of extrajudicial measures or a youth justice court decision, should consider the "circumstances underlying [a young person's] offending behavior" (Bala and Anand, 2012: 141). In particular, Section 38(1) states

the purpose of sentencing is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her *rehabilitation and reintegration into society* [emphasis added], thereby contributing to the long-term protection of the public.

In other words, the YCJA recognizes that adolescents are impressionable and amenable to rehabilitation and it is through the use of rehabilitation that the long-term protection of the public can be achieved (Bala and Anand, 2012: 132). For the more serious and repeat offenders it is imperative that their special needs are understood as it is in the offenders' best interest, as well as society's best interest, that they be rehabilitated (p. 133)¹¹.

In summary, the YCJA is distinct from the law that is applicable to adult offenders as it recognizes that adolescents have special needs and are impressionable and amenable to rehabilitation (Bala and Anand, 2012: 130). While the emphasis on rehabilitation is found in the YOA, it is more specifically stated under the YCJA. The YCJA's Preamble

¹¹ It must be noted that some troubled youths have ongoing needs that cannot be met by the criminal justice system and as such, their needs may be best met in child protection, education, or mental health systems, either concurrently with a youth justice response or instead of it (Bala and Anand, 2012: 133).

and the Declaration of Principle places more of an emphasis on rehabilitation. The YCJA rejects the approach of the JDA along with decisions under the YOA; the rehabilitative and welfare needs of a young offender cannot be used to justify a longer sentence in custody (p. 130). It also directs that alternatives to custody “must” be considered when imposing sentencing, especially for Aboriginal young offenders (s. 3[2][d]) (Anand, 2003: 946). Section 38 also makes clear that the principles of offender accountability and proportionality are also to be taken into account when sentencing. The following section focuses on the meaning of accountability, under the YCJA, and responsibility under the YOA.

2.2.3 Accountability

Youth court judges, when considering and making various decisions about sentencing, must balance the principles of accountability, protection of society, as well as how best to respond (e.g., rehabilitation and deterrence) to the needs of a young offender (Bala and Anand, 2012: 133). Accountability was an important consideration under the YOA; however, it was emphasized through holding a young person “responsible” for their actions (Bala, 1994: 647). This is reflected in Section B of the YOA (Principles of the Act), which states “young persons are said not to be as accountable for their acts as are adults, but even so *they must "bear responsibility for their contraventions"* (emphasis added).

Accountability is also mentioned in three of the most important decisions to be made under the YCJA: whether to divert the young person away from the court, whether to impose a custodial sentence, and whether to sentence him/her as an adult (YCJA, 2003; Roach et al., 2009: 1). The YCJA’s Preamble states that along with reducing the use of custodial sentences for all but the most serious offences, the central purpose of the YCJA is to hold young people “accountable” for their wrongdoing. The youth justice system can ensure accountability through the use of extrajudicial measures or a youth court sentence, both of which are proportionate to the seriousness of the offence and the degree of responsibility of the young person (s. 3(1)(a)(i); Bala and Anand, 2012).

Proportionality is encompassed under the notion of retribution, which is based on the idea that punishment should fit the seriousness of the offence and the harm done (von Hirsch, 1976; Bottoms and Preston, 1980; Ashworth, 2002; Bala and Anand, 2012). A criminal sentence is to communicate the degree of censure that an offender deserves for the wrong through the severity of the sanction imposed (von Hirsch, 1984; Roach et al., 2009: 7). As Roach et al. (2009: 7) state “justice demands that we punish each person precisely according to the degree of censure that he deserves in virtue of his moral culpability of wrongdoing”. For example, a long prison sentence communicates a high degree of censure, conversely a less serious sentence (e.g., a small fine) communicates a low degree of censure (Roach et al., 2009: 7). The goals of retribution, unlike incapacitation and deterrence, are, therefore, focused on past events and the focal point in determining an appropriate sentence is based on the nature of the offence committed, not who the offender is or whether the offender may re-offend in the future (O’Grady, 2014). It is wrong, therefore, to impose a harsher sentence on one young offender than would be imposed on another young offender (on the basis of moral culpability for their offence) as both deserve the same degree of censure (von Hirsch, 1985; Roach et al., 2009: 7).

The YCJA did not, however, provide an explicit definition of accountability, which raised the question, what does the YCJA mean when it states that young persons must be held “accountable”? (Roach et al., 2009) This question is one of the central issues that face youth court judges in Canada, with the passing of the YCJA (Thorburn, 2009: 307; Roach et al., 2009: 1). Roach et al. (2009) sought to determine what to make of the YCJA’s language of accountability. While the principle of retribution states that the severity of the sentence should be proportionate to the offender’s moral culpability for the offence, that is only one important aspect of accountability; it is far from an exhaustive list (Roach et al., 2009).

There is to be some concern over proportionality, but there must also be concern over the type of sanction imposed that will ensure the young person recognizes the wrongfulness of their conduct thereby helping to rehabilitate and reintegrate them back into society. Thus, accountability, according to Roach et al. (2009: 3) is concerned with more than just the severity of the sentence; it is also concerned with the decision to impose a custodial

sanction. A youth court judge, for instance, may decide that accountability requires a sentence that does not meet the rehabilitative needs of the young offender. For example, a decision to transfer and impose an adult sentence upon a young offender may be appropriate to hold the young offender accountable, but it is less likely that rehabilitation will occur (Roach et al., 2009). It should, therefore, be recognized as Bala and Anand (2012) state that “while prevention of crime, rehabilitation, and reintegration are important guiding principles for the youth justice system, their application must be realistic” (p. 133). For instance, there are some cases wherein a decision is “relatively easy” and it is possible to impose a sentence that holds a young person accountable while at the same time addressing their rehabilitative needs (Bala and Anand, 2012: 133). In other instances, the decision is much more challenging.

In summary, the fundamental goals of both the YOA and the YCJA, when sentencing young offenders are to impose a sentence with “meaningful consequences” that holds them accountable, but more importantly the impositions must promote the “effective rehabilitation and reintegration” of the young person (Roach et al., 2009: 4). It is difficult and perhaps impossible to achieve all the goals of sentencing, and as such judges are left to weigh the needs of the young offender against the best interests of the community. When sentencing youth, judges are to be concerned not only with matching the seriousness of the young person’s offending behavior but also with ensuring their rehabilitation and reintegration into society, while holding the young person accountable (Roach et al., 2009: 5). With regards to custody, the YCJA provides clear guidelines that a custodial sentence which is more severe than warranted by accountability, should not be imposed to achieve rehabilitative objectives or to address social concerns, such as lack of housing or an abusive home life (Bala and Anand, 2012: 494). Following this notion, it can be assumed that when the court is concerned with the choice between custodial and non-custodial sanctions, under the YOA and the YCJA, both the proportionality and the reintegration/rehabilitation aspects of accountability and responsibility are to be kept in mind (Roach et al., 2009: 5).

2.3 Youth Court Judges and Sentencing

The most fundamental role the courts play in Canada relates to sentencing -- a process whereby judges make reasoned decisions on how to punish convicted offenders (O'Grady, 2014: 210). Guided by legislation and precedent, judges are thought to be 'mechanistic' in that they are perceived to be restrained by rules that prevent their subjective beliefs and opinions from seeping into their decisions (Lens, 2003: 29). Judges do play a central role in the youth justice system but they do not make decisions in a vacuum and instead operate against a backdrop of social change and public pressures (Doob, 2001: 3; Beaulieu and Cesaroni, 1999: 364). Judges, for example, while bound by precedent, do have the ability to exercise discretion when applying the principles that guide the court when sentencing, and as such, we must acknowledge that judges are not isolated from the world around them. Whether consciously or unconsciously their decisions may reflect the philosophy of the time in which they live. In other words, their decisions may be reflective of social needs (e.g., doctrine of 'parens patriae', get tough on crime, reduce incarceration rates) and collective values (Beaulieu and Cesaroni, 1999: 364; Doob, 2016).

Under the YOA, for example, there were no explicit sentencing principles and the Act's Declaration of Principle provided only "general guidance" for sentencing (Bala and Anand, 2012: 493). With the lack of clear guidance, individual judges adopted different approaches to sentencing and as a result, as discussed in Chapter 1, there was significant inter-provincial variation in sentencing practices with many young offenders being incarcerated for minor or first-time offences (Anand, 1998; Bala and Anand, 2012: 493; Doob and Sprott 2004; 2005). Reducing the use of custody in youth courts was a central stated objective of the YCJA (Department of Justice, 2009; Doob, 2016: 300). The YCJA provided a detailed set of sentencing principles for youth court judges to apply, which included explicit directions to reduce the discretionary role of the courts in order to reduce the level of custodial sentences being imposed (Anand, 1998; Bala and Anand, 2012; Department of Justice, 2010; Doob, 2016).

Youth court judges in Canada occupy a unique role; one that provides substantial power to affect the composition of the social landscape and includes many non-traditional

functions, such as providing a combination of judicial, administrative, collaborative, and advocacy functions (Edwards, 1992; Beaulieu and Cesaroni, 1999: 364). When sentencing (under the YOA), as noted, judges must balance many different considerations. An illustration can be found in a study conducted by Doob (2001) wherein he asked youth court judges to rate on a five-point scale, the importance of each of the following principles or purposes of sentencing, when sentencing for three types of offences (violent, property, and administration of justice): denunciation, general deterrence, deterring this young person (specific deterrence); proportionality (handing down a sentence in which the severity of the sentence reflects the seriousness of the offence); rehabilitating this young person, incapacitation (ensuring that this young person is separated from society and protection of the public (Doob, 2001).

Doob (2001) revealed that a number of judges indicated it was difficult or impossible to answer the questions posed. Youth court judges, Doob (2001) concluded, appear to work in quite different “youth justice environments” and respond in considerably different fashions to the cases that come before them (p. 59). Doob (2001: 59) reported that on almost every question in the study there were answers at each end of the continuum. For instance, when asked how helpful probation is for controlling young persons, 26% of the judges stated it was very useful, 60% stated somewhat useful, 24% stated that it was only occasionally useful, 2.6% said they did not know, and 0.9% said it depended on the adequacy of resources that are available to probation services and the particular probation officers (p. 59).

Rehabilitating a young person ranked the highest (4.64)¹² for both the violent offences and property offences (e.g., B&E, business establishment), whereas specific deterrence ranked the highest for the administration of justice offences (e.g, failure to appear) and the second highest for the violent offences. Thus, under the YOA, rehabilitation and deterrence were important principles and purposes when sentencing young violent

¹² Rated on a five-point scale (1 = not important at all; 5 = very important).

offenders. Incapacitation ranked the lowest on all three offences: moderately serious violent offences, property offences, and administration of justice offences.

Judges varied with respect to the importance they attributed to the various factors considered when sentencing. In deciding whether to impose a custodial sentence, offence seriousness and criminal record were identified as the two most important factors. Welfare concerns were also relevant in that over a third of judges reported that a youth being “out of control” was a relevant factor in deciding whether to send a youth to custody (p. 60). A youth’s well-being was also a consideration for many judges in sentencing, generally, and in the handing down of short sentences, in particular (p. 59). Thus, Doob (2001) concluded that rehabilitation was an important factor for judges and yet the use of custody as a rehabilitative measure, especially for the “out of control” youths also appeared to be relevant.

What these results illustrate is not only the variation in judges’ approaches to decision making in youth court, but also the level of discretion that is afforded to them (Doob, 2001: 60). Just as no two offenders are alike, no two judges are alike. While bound and directed by legislation and precedent, judges cannot avoid exercising some level of discretion. As one judge commented, “It was not possible to rank on a generalized basis – each case is different” (Doob, 2001: 59).

2.3.1 Judicial Discretion

The YOA (Section 24) gave judges a great deal of discretion in deciding whether or not a custodial sentence should be imposed, which led to much sentencing disparity. The YCJA, however, placed judges under a different sentencing regime. There were more mandatory restrictions on the use of custody in section 39(1) of the YCJA (Bala and Anand, 2012: 494). Moreover, with the enactment of the YCJA, the precedents decided under the YOA became of limited value (*R. v. P. (B.W.)*, 206 at para. 21). The courts would no longer have the “luxury” of turning to precedents from earlier youth justice regimes or to adult sentencing regimes for guidance in the interpretation of the YCJA’s sentencing provisions (Thorburn, 2009: 308). In a sense, judges continued to have discretion, under the YCJA, when making sentencing decisions. The Act sought to

reduce the wide disparities in youth court sentencing that had occurred under the YOA by providing more specific legislative direction (Cesaroni and Bala, 2008; Marinelli, 2002). Nonetheless, judges would continue to have the freedom to choose among different sentencing goals (e.g., deterrence, rehabilitation, retribution, protection of the community), thereby contributing to variations in the exercise of sentencing discretion (Forst and Wellford, 1981; Bushway and Forst, 2012: 204).

Discretion, if used skillfully, can counterbalance any ill-conceived or vague laws and policies (Bushway and Forst, 2012: 215). It can also be used to minimize wrongful arrests and convictions, excessive punishments, and failures to bring culpable offenders to justice (p. 215). Anand (2003), for example, believed that if youth court judges used their discretion to interpret the legislation correctly, it could lead, not only to a reduction in overall youth incarceration rates, but to a better correlation between the seriousness of a young person's offence and the punitiveness of the penalty for committing an offence. It would also increase or lead to better uses of reparative/restorative sentences, and a more equitable use of rehabilitative sentences (p. 946). In addition, if youth court judges interpreted the legislation in accordance with Parliament's objectives, Aboriginal young peoples would be sentenced more leniently than non-Aboriginal young persons who committed similar offences in similar circumstances.

While this is beyond the scope of this study given the small sample size, it should be noted there is some debate over Section 38(2)(d) of the YCJA which states that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to Aboriginal young persons". In particular, while proportionality will determine punishment for many young offenders, it would not determine punishment for Aboriginal offenders and as a result, while judges cannot impose more severe sentences than the principle of proportionality, they may impose disproportionately lenient youth sentences on such offenders (Anand, 2003: 959). In other words, on the one side are those (Rudin and Roach, 2002) that contend sentencing reforms can be used as one of the many remedies for Aboriginal overrepresentation in custodial institutions. Others contend that equality among offenders could be breached by not having proportionality determine sentencing for all

offenders: “it is not fair to sentence non-Aboriginal and Aboriginal offenders differently solely by reason of their race and without regard to any other characteristics which they may share” (Roberts and Stenning, 2002: 84). It should be noted that Roberts and Stenning (2002) are not advocating for more carceral sentences for Aboriginal offenders, rather they suggest a preferable alternative to the Aboriginal sentencing provision, such as a more general “social disadvantage” mitigating factors that would be equally available to all eligible offenders regardless of race, ethnicity, or any other categorical classification (Roberts and Stenning, 2002: 94).

Judicial discretion, on the other hand can be misused or ‘abused’, such as when decisions result in the immediate harm to those convicted or when it results in damages to the legitimacy of the criminal justice system (Bushway and Forst, 2012: 215). According to Simon (2007: 128), most of the complaints against the sentencing process are concerned with the broad discretion held by judges; with many critics arguing that the wide varying use of discretion has been detrimental to both the fairness and effectiveness of criminal sanctions. In the U.S., for example, federal judges, prior to the adoption of sentencing guidelines, could sentence offenders to probation or custody with a wide range of minimum and maximum sentences. A parole officer could release an offender prior to the maximum sentence; however, not before the minimum sentence had been served. As a result, judges had “real” power over who went to prison as well as the length of offenders’ sentences (Simon, 2007: 128).

Research in the United States has documented the misuse of judicial discretion as shown by racial, ethnic, and gender disproportionalities of those charged, convicted and sentenced (Daly and Bordt, 1995; Steffensmeier, Kramer, and Streifel, 1993; Steffensmeier, Ulmer, Kramer, 1998; Spohn and Holleran, 2000; Daly and Tonry, 1997: 202). Racism and sexism, according to Daly and Tonry (1997: 202) are perpetuated and reinforced by ‘white men’s social, economic, and political dominance over less powerful women and minority group men’. Some argue the U.S. judicial system is rife with racial and gender discrimination, favoring the interests of whites over blacks (or other minority groups) and of men over women (Daly and Tonry, 1997: 203). For example, the “war on drugs” in the United States resulted in harsher treatments of Blacks and Latino men and

women and no federal sentencing guidelines were able to reduce such racial discrimination in judicial sentencing (Albonetti, 1997; Spohn and Holleran, 2000; Roberts et al., 2003; Wacquant, 2005). In Canada, it is Aboriginal offenders who are over-represented in custodial facilities. In 2013 it was reported that 21.3% of all federally incarcerated Aboriginal offenders were 25 years of age or younger as compared to 13.6% of non-Aboriginals (Backgrounder, 2013). Aboriginal women are also overrepresented in the federal correctional system compared to Aboriginal men. In 2010/2011, 41% of females and 25% of males sentenced to custody (provincially, territorially, and federally) were Aboriginal (Backgrounder, 2013).

To summarize, in Canada, higher rates of incarceration for Aboriginal peoples have been linked to economic social disadvantages, substance abuse, and intergenerational loss, violence, and trauma (Backgrounder, 2013). More importantly, higher rates of incarceration for Aboriginal peoples have been linked to systemic discrimination and attitudes based on racial or cultural prejudice within the justice system; an illustration of the misuse of judicial discretion. To undo such misuses of judicial discretion, “the courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to [be translated] into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples” (Justice LeBel for the majority in *R. v. Ipeelee*, 2012: at para. 60; Backgrounder, 2013).

2.3.1.1 Judicial Discretion and Sentencing Young Offenders

In theory, the YOA was supposed to transform Canada’s juvenile justice system, from a system that lacked due process rights for young offenders to one that required stringent adherence to their rights (Anand, 1998: 325). Under the realm of sentencing, the YOA was enacted to reduce and structure judicial discretion with the overall goal of enhancing uniformity in the sentencing of young offenders. Noncustodial dispositions could be given to a young offender, under the YOA, regardless of the offence committed; however, a custodial disposition was tied to the type of offence committed and as such was “offence-specific” (p. 326). The Declaration of Principle as well as the principles and purposes of sentences contained many conflicting, inconsistent, and non-prioritized

elements. As a result, youth court judges had considerable discretion when it came to sentencing young offenders. The result was disparity in sentencing with many young offenders being incarcerated for minor and first-time offences (Anand, 1998: 328).

The YCJA, on the other hand, was enacted with the overall goal of promoting continuity and reducing the ambiguity in judicial sentencing. Youth court judges were provided with a great deal of legislative direction, to reduce the level of discretionary power afforded to judges under the YOA (Anand, 2003: 946). The courts' sensitivity to the unique circumstances of young offenders is stated in section 3(1)(c)(iv) of the Declaration of Principle which indicates that a young person who commits an offence should be treated in a manner that "respect[s] gender, ethnic, cultural, and linguistic differences and respond[s] to the needs of Aboriginal persons" (Bala and Anand, 2012: 72). As stated by Bala and Anand (2012), the treatment of Aboriginal peoples in Canada's justice system is a "long and well-documented tragedy" that reflects at best insensitivity at its worst blatant racism (p. 69).

2.4 Sentencing Outcomes: Theoretical Framework

This study asks: what forces and factors shape judicial decisions concerning young offenders who have been convicted of violent offences in Canada? Criminologists have advanced several theories of sentencing and the forces that shape it over time. In this section, I discuss two perspectives that guide this study: Penal Populism and Focal Concerns Theory.

2.4.1 Penal Populism

Sir Anthony Bottoms (1993) was one of the first writers on penal populism (Pratt, 2007: 9). Shils (1956), however, was the first to examine the term *populism*. Populism, according to Shils (1956) exists "wherever there is an ideology of popular 'resentment' against the order imposed on society by a long established, differential ruling class which is believed to have a monopoly of power, property, breeding and fortune" (cited in Pratt, 2007: 9). Canovan (1981) added to Shils' definition by noting that populism is a "particular kind of political phenomenon where the 'tensions' between the elite and the grass roots loom large" (Pratt, 2007: 9). Populism, according to Canovan (1999: 4) "in

modern democratic societies is best seen as an appeal to ‘the people’ against both the established structure of power and the dominant ideas and values of society.” What Shils (1956) and Canovan (1981) are saying, according to Pratt (2007) is that populism represents, in various guises, the moods, sentiments and voices of a significant and distinct segment in society, in particular the segment who feels they have been disenfranchised and who want their voices heard. Thus the term populism reflects particular groups in society such as the victims of crime or those who speak on behalf of victims, who believe they are being ‘ignored’ by the criminal justice system (Canovan, 1999; Pratt, 2007). In fact, Simon (2007: 75) argues that it is the crime victim who is “at the center of this new lawmaking rationality.”

Drawing on this notion of “populism”, Bottoms (1995: 18) coined the term “populist punitiveness” to describe the ways in which politicians tap into and use, for their own purposes, the public’s generally punitive stance. Penal populist researchers (Bartlett, 2009; Bottoms, 1995; Christie, 2004; Freiberg and Gelb, 2008; Garland, 2001; Matthews, 2009; Pratt, 2007; Roberts, 2008; Roberts et al., 2003) argue that when it comes to the creation and implementation of penal policies, most politicians’ are more concerned with winning votes than creating and implementing effective policies that reduce crime and promote justice. Bottoms (1995) argues that politicians will, therefore, draw on claims makers (e.g., pressure groups, citizens’ rights advocates, talkback radio hosts and their callers) in order to present themselves as representing the voice of ‘ordinary people’ within society (Pratt, 2007). The term *penal populism* is, therefore, a label used to describe the pressure on politicians to devise punitive penal policies that are ‘popular’ with the general public (Pratt, 2007). Responsiveness and popularity are two necessary ingredients of populism (Roberts et al., 2003: 5). As Roberts et al. (2003) state “policies are populist if they are advanced to win votes without much regard for their effects” (p. 5). The relationship between public opinion and sentencing policy is, therefore, situated within the broader context of the relationship between law and public opinion, with the central tool of penal populism being incarceration (Roberts, 2011; Pratt, 2007; Roberts et al., 2003: 5).

Penal populists propose that, as a result of legislative changes and public opinion, judges may become harsher in response to either pressure from prosecutors (Crown) or perhaps from judicial perception that society favors the imposition of harsher punishments (Roberts et al., 2003: 18). For instance, youth courts, similar to adult courts, are conducted in an adversarial manner wherein the defence counsel argues for the accused and the Crown prosecutor argues for the people of Canada. The community looks upon the Crown as a symbol of authority and as a spokesperson for the community in criminal matters (R. v. Logiacco, 1984). This is especially true in the U.S. As a result of the war on crime, prosecutors have become more powerful agents that have the potential to affect the lives of every citizen (Simon, 2007: 36). Their role as important government officials is signified by their growing interest claiming a broad mandate to be involved in public policy, under the banner of “community protection” (Simon, 2007: 36). It can, therefore, be inferred that the Crown is more likely to recommend to the court that a harsher more punitive sentence be imposed. In contrast, the defence counsel is more likely to recommend a lighter sentence. In response to such direct or indirect pressures, judges may impose harsher sentences.

2.4.1.1 Penal Populism and Sentencing Literature

Some criminologists contend that a “punitive turn” spurred on by penal populism has been witnessed in several Western countries (Garland, 2001; Pratt and Clark, 2005; Roberts et al., 2003; Simon, 2007). However, others have argued that Canada is the one exception to this trend (Christie, 2004; Comack and Silver, 2008; Crow and Bales, 2006/Doob, 2016; Meyer and O’Malley, 2005; Moore and Hannah-Moffit, 2005; Pratt, 2007; Roberts et al., 2003).

Societies, according to Christie (2004) are constructed in such a way that it is not difficult to define any unwanted behavior as an act of crime (p. 51). When criminal anomalies occur (e.g., murder) within a society, they may result in more state power (p. 45). That is, informal social control mechanisms may be reduced or replaced by more formal measures, including the prison system (Christie, 2004). The penal populist trend is particularly evident in the United States. For example, Christie (2004: 58) shows that while Canada had 116 prisoners per 100,000 inhabitants, the US had 730. Furthermore,

Canada's adult prison population has been steadily on the decline, while the US prison population has risen (p. 59). What can explain this difference? Christie (2004) provides four 'hunches'.

First, Canada is a well-regulated state, with orderly behavior and polite relations. Second, Canada is a 'welfare state' and as a result the situation of the poor is fundamentally different than in the US. Third, Canada's staff of civil servants make a conscious policy to keep the prison population under control. Lastly, Canadian society is less likely to use the penal system as a 'functional alternative' to social welfare. A culmination of these factors has resulted in the steady decline in incarceration rates, thus illustrating Canada's resistance to penal populism (Christie, 2004: 59). Meyer and O'Malley (2005) mirror such claims. Most Canadians feel safe in their community and do not view crime as a priority issue for the government (Public Safety Canada, 2001; Meyer and O'Malley, 2005: 212). Furthermore, support for 'get tough' remedies for handling crime is not very strong, as many Canadians indicate more support for rehabilitative initiatives (Public Safety Canada, 2001; Meyer and O'Malley, 2005: 212).

Comack and Silver (2008) sought to determine whether Winnipeg, Manitoba, with its move to implementing zero-tolerance policing, was affected by penal populism. This study found that while many of the residents who lived and worked in Winnipeg's inner city were concerned about safety and security issues, they had a much more nuanced view of crime control strategies than could be captured by using the term "penal populism". In fact, most of the residents were not supporters of the punitive turn. For example, while the inner-city residents had become accustomed to dealing with the daily presence of gangs, drugs, and violence, they held a strong sense of pride in their community and were optimistic that things could get better. One resident stated "I think this community is a very vibrant community. I think a lot of good things are happening in this community. . . I think that one of the biggest keys to change things is to really focus on this community as a community that has a lot of strength" (p. 839).

The residents did not condone criminal behavior within their neighborhoods, and they also did not support harsher responses either. They believed the police should work

‘with’ the community to implement community-driven solutions for the problems that engender crime and violence (p. 840). Thus, Comack and Silver (2008) concluded that in the case of Winnipeg, many of the citizens were resisting “get tough” strategies of crime control and instead were advocating for a police role in community mobilization (Comack and Silver, 2008: 840).

Moore and Hannah-Moffit (2005) also propose that the punitive turn does not hold true in Canada. While Ontario has embraced some aspects of the new punitiveness, as illustrated by its establishment of boot camps, mega-jails, and the demise of parole, the province has also been committed to following the therapeutic modeling regarding punishment as set out by the Correctional Service of Canada [CSC] (Moore and Hannah-Moffit, 2005: 89). The CSC has specifically not adopted the practices characterized by the punitive model of punishment. For example, the CSC has been moving towards smaller, not larger prisons and has refused to engage in privatization (Moore and Hannah-Moffit, 2005: 89). The CSC also regularly defends the use of programming and parole opportunities, as being integral to the overall goal of reducing recidivism. Thus, even in Ontario, which is often held up as being the most harsh, brutal, and punitive system in Canada, with many Ontario politicians claiming Ontario was going to ‘get tough’ on crime, the punitive turn has not taken hold. Those who are responsible for implementing policy changes have had a strong commitment to the idea of rehabilitation (Moore and Hannah-Moffit, 2005: 89).¹³

Other scholars have examined the influence of “penal populism” on sentencing in Canada. Much of this research, however, has been at the adult level (Hough and Roberts, 1999; Roberts and Doob, 1989) and has suggested that the gulf between the courts and public opinion has been overstated. It was not until 2002, that the first empirical analysis (Tufts and Roberts, 2002) explored public sentencing preferences in cases involving

¹³ Moore and Hannah-Moffit (2005: 96) do note that a dangerous assumption regarding punishment is that a penal system that offers therapeutic intervention is not acting punitively, or is acting far less punitively, towards its inmates. While Canada, as a nation, has not taken a punitive turn, the therapeutic interventions provided by our penal systems, can be punitive in their operation (Moore and Hannah-Moffit, 2005; Meyer and O’Malley, 2005: 207).

young offenders. Tufts and Roberts (2002) compared the sentencing preferences of Canadians to actual sentencing trends in youth court. Their study also explored the effect of three legally relevant factors (age of offender, nature of offence, and criminal history of offender) on public sentencing preferences. Lastly, they sought to evaluate the relationship between important respondent variables (such as victimization history) and attitudes toward the use of incarceration for young offenders (p. 51).

In comparing the incarceration rates derived from the public and youth courts, the study found that the differences between the two did not support the proposition that members of the public are far more punitive than the courts (Tufts and Roberts, 2002). The public also made an important distinction between the sentencing of adults and juveniles, in that the public showed strong support for the imposition of mitigated punishments for young offenders. The type of offence the offender had been convicted of also had an effect on perceptions of the appropriate sanction. For example, the public perceived burglary to be the more serious offence as compared to assault. Furthermore, the odds of choosing a prison sentence was almost five times higher if the offender was a repeat offender rather than a first time offender (Tufts and Roberts, 2002: 53-55).

Tufts and Roberts (2002) proposed that community sanctions, such as probation may not be very salient to people when they think of sentencing. That is, a lack of familiarity with justice alternatives may explain some of the public support for imprisonment (p. 56). Tufts and Roberts (2002) sought to examine whether respondents were familiar with alternatives to incarceration, and if they were, would their support for incarcerating the offender decline. Their results revealed that respondents, who had chosen incarceration when first asked to determine a sentence, were open to substitute sanctions. Specifically respondents were asked “If a judge sentenced the offender to 1 year of probation and 200 hours of community work, would that be acceptable?” Almost half the respondents stated they would find the alternative sanction acceptable as a replacement for a term of imprisonment (Tufts and Roberts, 2002: 57). Tufts and Roberts (2002) therefore concluded that if alternative sanctions were made more available then some of the public’s support for using incarceration, as an appropriate sanction would decline.

Tufts and Roberts (2002) used only two offence categories in their study and as such their study cannot speak to the relationship between public sentencing practices and judicial practices for more serious offences, such as sexual assault, murder, and manslaughter. Public support for incarceration may be found to be higher for the more serious offences (Tufts and Roberts, 2002: 61).

Bouhours and Daly's (2007) study was the first to examine judicial justifications and interactions in sentencing youth sex offenders. They sought to analyze judges' sentencing remarks on youth sexual offenders between the period of 1995 to mid-2001 in South Australian Youth Court. Bouhours and Daly (2007) argue that there is a need to examine not only the youth justice legislation and political rhetoric surrounding youth crime, but to also examine the actual practices in youth courts. Youth sexual violence, up until the 1980s, was largely ignored and as a result it has only recently been viewed as a social problem that requires strong legal and clinical responses. As a result of the lack of research, very little is known about how such cases are handled in youth courts (Bouhours and Daly, 2007). They sought to examine the ways in which judges characterized sexual offences and how judges justified and explained their sentences.

The major finding from Bouhours and Daly's (2007) study is that judges' orientations towards sentencing youth sexual offenders varied, but were consistently patterned by the victims' age, offence, and criminal history. Furthermore, consistent with the literature on adult offenders and child victims, the judges considered sexual offending against young children as a particularly serious form of offending. Moreover, judges were concerned that the youths who abused children had the potential of becoming 'entrenched sexual offenders' unless they received specialized treatment intervention. The young offenders who abused children that were closer in age to the offender, on the other hand, were viewed as less serious and were seen as 'experimenters' whose sexual misbehaviour would disappear with maturity. There was a group of youths who were viewed as dangerous because of their violent or persistent offending; however, the danger was linked to their general anti-social attitude as compared to their sexual offending (Bouhours and Daly, 2007).

When sentencing offenders, judges appeared to use a retributive approach with the serious and persistent offenders; however, the goal was still not so much to punish but to warn the young offender against further offending (specific deterrence) while allowing for their rehabilitation (Bouhours and Daly, 2007). Bouhours and Daly (2007) argue that in general, there was a symbolic and political commitment towards a justice model of accountability for young offending with a 'backward-looking approach' to punishing the crime. The actual court practices suggested there was a continued interest in retaining rehabilitative approaches when dealing with young offenders. Bouhours and Daly (2007) argue that their findings support other studies (e.g., Doob and Sprott, 2006, Kupchik, 2004, and Muncie, 2005) of youth courts in western nations (excluding the United States), and concluded that despite the political rhetoric of punitiveness, especially when responding to violent and sexual offenders, the actual court practices appear to be rehabilitative and reform-oriented.

In a recent study conducted by Doob (2016), it was proposed that in the early part of the twenty-first century a completely different sentencing landscape emerged, brought about by the Conservative Party of Canada, under the leadership of Stephen Harper (p. 2). This sentencing landscape, between 2006 and 2015, was a "striking contrast with Canada's long-standing past traditions" (2016: 2). Not only was the "talk" but also the "actions" of the Conservative government reflective of a get-tough-on crime approach (p. 11). Legislative changes under the Harper government, however, did not have a large effect on Canadian imprisonment rates (p. 23). Thus, Doob (2016) concluded that Canada had "weathered" the penal populist storm. While Doob's (2016) study focused on adult incarceration rates, he found that the criminal justice system was no tougher on crime than it had been in previous decades.

In summary, there is a growing literature exploring the impact of penal populism on the Canadian criminal justice system; however, much of this research has focused on adult offenders. Few studies have applied penal populism to the sentencing of young offenders in Canada. While the research that has been conducted in Canada has supported the claims that penal populism has not taken hold in Canada, Meyer and O'Malley (2005) caution that making such broad claims about Canadian criminal justice policies and

practices is problematic. The criminal justice system, from policing to courts to prisons, is complex, and as shown by previous studies (discussed in Chapter 1) differs from region to region and city to city. As such, to know how a person will be sentenced in Canada, one needs to know the current practices in the trial courts and what the provincial court of appeal has said about the particular offence (Doob, 2016: 23). This present study draws on these claims, and adds to the penal populist literature, by examining penal populist claims and investigating the impact of legislative change in Canada on judicial practices in Ontario youth courts.

2.4.2 Focal Concerns Theory

Focal concerns theory recognizes that sentencing is a multifaceted and complex process wherein judges must simultaneously consider numerous relevant factors and diverse sentencing goals (Kurlychek and Johnson, 2004; Steffensmeier, 1980; Steffensmeier, 1993; Steffensmeier et al., 1998; Steffensmeier and Demuth, 2001; Steffensmeier, Kramer, and Streifel, 1993; Steffensmeier, Ulmer, and Kramer, 1998). The focal concerns perspective first originated with Walter Miller (1994) who introduced and focused on subcultural focal concerns in his study of lower-class delinquency. Drawing on Miller's concept "focal concerns", Steffensmeier and his colleagues (1998) reformulated the theory into what is today known as the *focal concerns theory of sentencing*. Based on prior research and their own work, Steffensmeier et al., (1998) posited three focal concerns that they argue influence judicial sentencing:

- 1) Judges' assessment of the blameworthiness or culpability of the offender;
- 2) Judges' desire to protect the community by incapacitating dangerous offenders or deterring potential offenders;
- 3) Judges' concerns about the practical consequences, or social costs of sentencing decisions (Steffensmeier, 1993; Steffensmeier, 1998; Hartley et al. 2007).

In this context, blameworthiness concerns the perceived permanence of behaviour and predictions as to an offender's level of dangerousness, and includes considerations of both the characteristics of the offender and the offence. It is often associated with the retributive philosophy of punishment and emphasizes the offender's culpability and degree of injury caused to the victims (Steffensmeier, 1998; Baumer, Messner, and

Felson, 2003). Blameworthiness is measured by prior criminal history, the seriousness of the offence, type of offence, and the degree of injury that has been caused by the offense (Steffensmeier, 1998; Hartley et al., 2007). Additional factors linked to blameworthiness include biographical factors, criminal history (increased perceived blameworthiness and risk), prior victimization (mitigates perceived blameworthiness), criminal intent, and the offender's role in the offence (Steffensmeier, 1980; 1993; 1998; Hartley et al., 2007).

Prior research on sentencing, according to Steffensmeier et al. (1998) has found that seriousness of the offence (measured in terms of offender culpability and the harm caused by the offence) is the most significant factor in sentencing. Research has also shown support for the relevance of offender characteristics, such as criminal history (which increases perceptions of blameworthiness and risk), prior victimization at the hands of others (which tends to mitigate perceived blameworthiness), and the offender's role in the offense, such as whether the offender was a leader, organizer, or a follower (which are linked with blameworthiness). It is the more serious crimes and the more experienced criminals who are perceived as more blameworthy, thereby resulting in the increased severity of sentencing (Kurlychek and Johnson, 2004).

The second focal concern, *protection of the community*, involves a judge's ability to predict the future dangerousness of the offender. Thus, the focus is on the likelihood that an offender will reoffend and includes such factors of an offender's criminal history, use of weapons in the offence, education, employment, and family history (Steffensmeier et al, 1998; Hartley et al., 2007). The risk of future violence is measured by criminal history, facts of the crime (e.g., use of a weapon) and the characteristics of an offender (e.g., drug dependency, education, employment, or family history) (Steffensmeier et al., 1998: 767).

The third focal concern of judges relates to *practical constraints and consequences*: a justice system's efficiency with regards to the consequences, or the social costs of sentencing decisions (Steffensmeier et al. 1998). Practical constraints and consequences include organizational concerns such as the relationship among courtroom actors, case flow, and awareness of state and federal correctional resources (e.g., over-crowding)

(Hartley et al., 2007). It should be noted that the third focal concern will not be examined in this study as the information included in the sample of judicial decisions did not permit for a measure of the practical constraints and consequences youth court judges may face upon sentencing.

These focal concerns and their interplay are complex and since judges rarely have complete information with regards to the cases or the defendants, they rely on offenders' demographic characteristics, such as age, gender, race, and ethnicity; what Steffensmeier, et al. (1998) refer to as *perceptual shorthand*. Judges, for example, are often faced with constraints on the amount of time they can spend on each case and other factors, and as a result they generally receive incomplete information on defendants and their cases. As a result, judges may rely on extra-legal factors such as sex, race, ethnicity, and age as markers of blameworthiness or risk to the public. Unfortunately, judges' use of perceptual shorthand may open the door for disparity in sentences as well as the potential for discrimination (Hartley et al., 2007: 60).

Steffensmeier et al. (1998) argue that prior research in related areas of decision making not only supports focal concerns theory of sentencing, but finds evidence of the use of demographic characteristics as perceptual shorthand (p. 768). For example, females may be perceived as less of a risk to the community or less likely to reoffend while male offenders may be perceived as more culpable and therefore more responsible for their crimes (Baumer, Mesner, and Felson, 2003; Steffensmeier, Ulmer, and Kramer, 1998; Rodriquez et al., 2006). As a result, females may be less likely to receive a custodial sentence, and if they do, they receive shorter sentences than males (Rodriquez et al., 2006; Steffensmeier, Kramer, and Streifel, 1993; Steffensmeier, Ulmer, and Kramer, 1998; Ulmer and Kramer, 1996). Males, on the other hand, may not only be seen as more culpable and as such more responsible for their crimes, but they may also be portrayed as being better able to do the time in custody than females (Albonetti, 1991; Baumer, Messner, and Felson, 2000; Rodriquez et al., 2006; Steffensmeier, Ulmer, and Kramer, 1998; Steffensmeier, Ulmer, and Kramer, 1998).

2.4.2.1 Focal Concerns Theory and Sentencing Literature

The imposition of a more punitive sentence may reflect the responsibilities of the courts in ensuring protection of the public. There has been special attention focused on whether the characteristics of the offender, such as sex, age, ethnicity, and socioeconomic status, are correlated to decisions made by the courts. Similar to penal populism, there are few studies that examine sentencing of young offenders, under the age of eighteen years old. Furthermore, there are a limited number of studies that draw on focal concerns theory in a Canadian context. In one of the first significant studies using focal concerns theory, Steffensmeier et al. (1998) explored the effects of *offense type, offense severity, prior record, multiple convictions, type of trial, size of court, race, sex, and age* on the decision to incarcerate as well as the length of sentence. In particular their U.S. study sought to examine whether young black males received harsher sentences relative to young white males and to other race-gender-age groups (e.g., older offenders of both races and younger and older females).

The results of this study revealed that offence seriousness and criminal history were the strongest predictors of sentencing outcome; however, race, sex, and age interacted to affect sentencing. For example, among males, the younger offenders were sentenced more harshly than the older offenders. The effects of age were negligible among female offenders.

Harsher sentencing of black defendants as compared to white defendants occurred for the young offenders but not for the older offenders (older black offenders and older white offenders received similar sentences). For instance, the criminal records of young black males were defined as more serious and indicative of future crime risk compared to other types of offenders (including the older black offenders). Offenders over 50 and under 21 years old received the least severe sentences. In addition, the odds of females being incarcerated were almost half those of males.

Among the black and white offenders, those over 50 years old were the least likely to be incarcerated, and if they were incarcerated they received the shortest sentences. Black and white offenders aged 21-29 received the most severe sentences, as they were

perceived as a greater threat to the community and less likely to reform. This pattern was more pronounced among black than white offenders. It also appeared that some judges were reluctant to send white offenders to state prisons as they feared white offenders would be victimized by black inmates (prison populations were over 65% black). Women offenders and the older offenders were, therefore, defined as being less dangerous to community safety compared to young black males. It was the young black males who were most at risk of receiving the harshest sentences (Steffensmeier, et al., 1998).

Spohn and Holleran (2000) examined sentencing in relation to gender, age, and ethnicity in Chicago, Kansas City, and Miami. Their results revealed that gender had the most significant direct effect on sentencing decisions followed by age and race. In Chicago, both black and Hispanic offenders faced greater odds of being incarcerated than white offenders. In Miami, Hispanics, but not black offenders, were more likely than white offenders to be sentenced to incarceration. Lastly, in Kansas City, black offenders were sentenced to prison at the same rate as white offenders. The effect of gender was similarly variable in that males were significantly more likely than females to be sentenced to prison in Chicago and Kansas City; however, this was not the case in Miami. What is important to note about Spohn and Holleran's (2000) study is that their results provide evidence in support of the notion that 'certain types of offenders' are regarded as more problematic than others and therefore are perceived as being more in need of formal social control.

Drawing on Spitzer (1975), Spohn and Holleran (2000) argue that it appears there is a certain segment of the deviant population who are viewed as particularly threatening and dangerous (Spitzer, 1975: 645; Spohn and Holleran, 2000: 302). Spitzer (1975) uses the term "social dynamite" to describe this segment of the deviant population (Spohn and Holleran, 2000). Spitzer (1975) argues that social dynamites "tend to be more youthful, alienated and politically volatile" and as such, these are the offenders who are more likely than other offenders to be formally processed through the criminal justice system (Spitzer, 1975; Spohn and Holleran, 2000). Spohn and Holleran (2000) concluded that while the results of Steffensmeier and his colleagues (1998) highlight the "high cost of

being black, young and male,” their results suggest that offenders with other constellations of characteristics (e.g., the social dynamites) also pay a punishment penalty (Spohn and Holleran, 2000).

In another U.S. study guided by focal concerns theory, Kurlychek and Johnson (2004) investigated the sentencing of young offenders (under the age of 18) who were transferred and processed in adult criminal court to compare their sentencing outcomes with young adult offenders (between the ages 18 and 24). They argue that if the purpose of transferring juvenile offenders to adult criminal courts is to redefine these juveniles as ‘adults’ then one needs to determine whether the transferred juveniles are receiving similar sentences to adult offenders. This study found that judges appear to assign a greater level of culpability and dangerousness to juveniles who were transferred to adult court. These young offenders were regarded as more serious offenders, who posed a threat to the community and/or had a low potential for rehabilitation. The young offenders who were convicted of violent crimes and transferred to adult court were also more severely sentenced, in that the length of sentences increased by 97% as compared to their adult counterparts. As a result, it was the young offenders convicted of violent crimes that were viewed as more dangerous and blameworthy by the courts. Thus, Kurlycheck and Johnson (2004) concluded that the transfer process from youth court to adult court may have signaled to the judges and other courtroom actors that these particular young offenders lacked rehabilitative potential.

Overall, the literature has found some support for the focal concerns theory of sentencing. For instance, research suggests that some youths are perceived as more *blameworthy* and lacking in rehabilitative potential, and it is these youths who are more likely to receive tougher sentences, as they pose a greater threat to the community. However, there are no research studies focusing on the sentencing decisions of young offenders convicted of physical and sexual assault, in Canada.

2.5 Summary: Young Offender Sentencing in Canada

As discussed in this chapter, the forces and factors influencing sentencing are numerous. Legislation provides guidance to judges concerning what principles should be considered

in their decisions (Anand, 1998; Bala and Anand, 2012). When sentencing young persons, judges are directed to consider accountability and proportionality, weigh the value of custody compared to other possible forms of punishment, consider prospects for rehabilitation, public protection, and other considerations. They may also be influenced by social pressures such as penal populism and may take into account focal concerns such as blameworthiness, community protection, and the predicted dangerousness of an offender. Although some studies have sought to identify which of these factors are most prevalent in shaping sentencing outcomes, many studies have focused on adult offenders, and have used sentencing data in the United States.

While research on overall crime rates and custodial sentences have found inter-provincial variations, there is a dearth of information on how each province imposes sentences by offence type (Doob, 2016: 23). There is also a dearth of research on youth sentencing in Canada at the court level. To better understand the forces that shape judicial sentencing in Canada, research needs to examine the current practice in the trial courts along with what the provincial court of appeal has stated on the subject of a particular offences (Doob, 2016: 23). This study seeks to fill in the gap by examining the current practices in trial courts.

Perceptions of juvenile delinquency, and the legislation written to address it, have changed substantially over the last century in Canada. With the enactment of the YCJA, for example, youth court judges were required to think in an entirely different way about some of the critical decisions they would have to make about young people who appear before them in the courts. As such, legislation can be said to fundamentally shape sentencing practices. Research, however, has not fully examined how legislative change has, or has not, altered sentencing practices within the judicial court system. This study answers this call, undertaking an investigation of the impact of criminal justice policies and practices on youth sentencing in Ontario youth courts.

As we have seen penal populists contend that judges, in particular in the United States, are influenced by a get-tough approach advocated by the public and politicians. The United States, for example, has adopted statutes that require mandatory minimum prison

sentences for certain violent, drug, and property offences (Roberts et al., 2003: 35). Such mandatory minimum sentences, has not only resulted in increases in sentencing lengths, but also increases in the number of admissions to custody (Roberts et al., 2003: 35). In comparison, Canada, according to a number of criminologists, has not followed the path of its neighbor to the south, and as such is the exception to the trend (Christie, 2004; Comack and Silver, 2003; Doob, 2016; Meyer and O'Malley, 2005; Moore and Hannah-Moffit, 2007; Pratt, 2007; Roberts et al., 2003). Meyer and O'Malley (2005), however, caution that making such broad claims about Canadian criminal justice policies and practices is problematic as criminal justice interventions – from policing to courts to prisons – are complex and may differ from region to region and city to city. They, instead, call for closer investigations of the ways in which criminal justice policies and practices emerge and play out in particular local contexts (Meyer and O'Malley, 2009).

This study, therefore, attempts to fill this gap in the literature by examining whether and how legislative changes has affected judges' sentencing decisions, by examining judicial sentencing decisions heard under the YOA, the YCJA, and the YCJA post the 2012 amendments. Drawing specifically on penal populism, this study asks, is there evidence that Canada, in particular Ontario, has experienced a *penal populist* turn in regard to juvenile justice? Are judges taking a more punitive stance in sentencing young offenders convicted of violent offences (e.g., physical and sexual assault)?

Focal concerns theory, on the other hand, argues that judges consider blameworthiness, the predicted level of dangerousness an offender poses, and potential for rehabilitation when sentencing offenders. Much of the research on focal concerns theory has provided only partial support, as this research has had some theoretical and methodological shortcomings (Hartley, et al., 2007: 62). Furthermore, as Hartley et al. (2007) argue, although testable hypotheses have been developed, this theoretical framework still needs further elaboration (p. 63). This study, therefore, aims to add to the theoretical literature by analyzing the content of judicial sentencing decisions of young offenders convicted of both sexual assault and physical assault, in the province of Ontario. Drawing on focal concerns theory, this study asks do legal decisions, in particular, as they relate to the type of sentencing (within the Ontario youth justice system) reflect an offender's level of

blameworthiness and need for protection of the public? Can extralegal factors (*perceptual shorthand*), such as age and gender, explain disparities in sentencing?

The principles and rationales of ‘accountability’, ‘responsibility’, ‘rehabilitation and ‘reintegration’, and to a lesser degree ‘deterrence’ underlie youth justice legislations in Canada guide the courts. However, it is the presiding judge, drawing on precedent who exercises his or her discretion in determining how to balance these various principles when making sentencing decisions. This study will seek to examine legal decisions as they relate to the type of sentencing (custodial or non-custodial) given within the Ontario youth justice system to determine if they reflect an offender’s level of blameworthiness, accountability, rehabilitation, and the need for protection of the public. This study asks: is there evidence of variations in sentencing rationales provided by judges upon sentencing within and across offence type? While the imposition of a more punitive sentence may reflect the responsibilities being placed on the courts to ensure the protection of the public, it may also reflect the courts’ fear of adverse public criticism. Further, a punitive sentence may reflect the youth court judges’ discriminatory practices.

Chapter 3

3 Introduction

This study is guided by two contrasting theories of sentencing (Penal Populism and Focal Concerns Theory) and analyzes judicial sentencing decisions of young offenders convicted of violent offences. Judicial decisions were chosen for this study as they are detailed repositories that show what kinds of disputes come before courts, and more importantly for this study, how the parties frame their disputes and how judges reason their decisions (Hall and Wright, 2008; 2011). It is from this factual and analytical richness of judicial opinions that this study examines the substantive legal importance of judicial reasoning. These decisions outline judges' rationales and the factors (the facts of a case, legal issues, prior cases) they consider when sentencing (Hall and Wright, 2008; Hall, 2011).

In this chapter, I will outline my research questions and discuss the methods used to address them. I explain my data collection, sampling, and data analyses. This chapter also details how I operationalized the variables that reflect the two theoretical perspectives, penal populism and focal concerns theory. For this study, both qualitative and simple quantitative analyses (descriptive, bivariate, and cross-tabulation analyses) were used.

3.1 Research Questions

Building on my review of the literature, I began with an interest in what factors shaped judicial decisions concerning young offenders in the province of Ontario. Did the type of crime or the characteristics of the offender appear to be significant? Was there attention to populist beliefs in sentencing rationales? What other factors appear to be significant? I decided to limit my analysis to two kinds of judicial sentencing decisions (cases): young offenders convicted of physical assault and young offenders convicted of sexual assault. The two types of cases were chosen because they are comparable in severity (as per the Criminal Code of Canada, the YOA, and the YCJA), but could differ on penal populism or focal concerns dimensions, such as protection of the public.

I began my analysis with three general, and open-ended questions. First, what do Ontario youth criminal justice decisions tell us about how judges deal with *physical assault* and *sexual assault* cases in relation to sentencing? Second, drawing on penal populism, is there evidence that decisions have changed over time, influenced by legislative change? For instance, do cases post-2003 (after enactment of the YCJA) and post the 2012 amendments, demonstrate more or less of a ‘get-tough-on-crime’ approach than cases under the YOA? Third, drawing on focal concerns theory, what themes emerge in the judicial decisions especially as they relate to the judge’s discourse upon sentencing?

I moved towards greater precision as more information emerged, during my analysis, with my final research questions as follows:

1. Drawing on penal populism, this study asks, is there evidence that Canada, in particular Ontario, has experienced a *penal populist* turn in regard to legislative changes? Are judges taking a more punitive stance in sentencing young offenders convicted of sexual assault and physical assault?
2. Drawing on focal concerns theory, do legal decisions in particular, as they relate to the type of sentencing (custodial or non-custodial) within the Ontario youth justice system reflect an offender’s level of blameworthiness and need for protection of the public? Can extralegal factors, such as age and gender, explain disparities in sentencing?
3. Is there evidence of variations in sentencing rationales provided by judges upon sentencing within and across offence (physical and sexual assault) type?

To answer these research questions, I analyzed the content of judicial sentencing decisions tried in youth court between 1993 and 2016. These judicial decisions were obtained from the database Quicklaw. The start date of 1993 was chosen because this was the date of the first sentencing decisions given under the YOA yielded by the Quicklaw database search.

To address research question one and two, I conducted simple quantitative analyses of the data. To answer research question three, I conducted a more detailed content analysis. Guided by focal concerns theory and the sentencing principles under the YOA and the YCJA, I paid particular attention to the themes “rehabilitation”, “responsibility”, and “accountability”. In Section 3.2.2, I will discuss how the sample of cases was selected for this study.

3.2 Data and Sampling

This study examines judicial discourse – the official record of judicial decision-making – and explores decisions made by judges, and the rationales provided by them for these decisions. The sample utilized in this study consisted of 44 judicial decisions on physical and sexual assault cases tried in youth court between 1993 and 2016. More details regarding case selection is provided below in 3.2.2. These decisions are a highly valuable source for systematic study as they are the published opinions that set legal precedent and guide lawyers. Judges intend their published opinions to not only be forms of communication to the parties in the case but they also recognize that these are forms of communication with other judges, other lawyers, other litigants, and other actual and potential participants in the legal system (Trujillo, 2005; Hall and Wright, 2008). After all, in “the theory of the common law, these opinions *are* the law; they stand in the centre of the legal system. Their power is enhanced by the common law doctrine that links them in a chain of influence and causation – the doctrine of precedent” (Friedman, 2006; Hall and Wright, 2008: 92).

3.2.1 Violent Offences Against Persons

3.2.1.1 Physical Assault

The focus of this analysis was on two types of violent offences against persons, sexual assault and physical assault cases. Under s. 265(1) of the Criminal Code of Canada, a person commits an *assault* when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or a gesture to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs (Criminal Code, 1985). Section 266 of the Criminal Code states that everyone who commits an assault is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction for a term of maximum 6 months or a fine of \$5000 (Criminal Code, 1985). The above range of sentences under the Criminal Code are

sentences imposed upon adult offenders; the sentences for young offenders are restricted (guided by the YOA and the YCJA) and will be discussed later in the chapter.

Section 267 of the Criminal Code states that an *assault with a weapon or causing bodily harm* occurs “when an individual, in committing an assault (a) carries, uses or threatens to use a weapon or an imitation thereof, or (b) causes bodily harm to the complainant and is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months” (Criminal Code, 1985).

Section 268 (1) states an *aggravated assault* occurs when the “assault wounds, maims, disfigures or endangers the life of the complainant.” A person “who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years” (s. 268 [2]).

In summary, assault is categorized into three levels under the Criminal Code of Canada. Level 1 (s. 265) assault is the least serious form of assault and can include such behaviours as pushing, slapping, punching and face-to-face threats. If convicted of a level 1 assault, the maximum indictable punishment (for adults) is 5 years or 6 months or \$5000 fine if convicted of a summary offence.¹⁴ A level 2 (s. 267), assault, represents an assault with a weapon or an assault that causes bodily harm. If convicted of a level 2 assault, the maximum indictable sentence is 10 years and the maximum sentence is 18 months if convicted of a summary offence. Level 3 (s. 268) or aggravated assault represents an assault that wounds, maims, disfigures or endangers the life of the victim and a person found guilty of an indictable offence is liable to imprisonment for a term not exceeding fourteen years (s. 268[2]).

For this study, the term *physical assault* will be used and represents the level 2 and level 3 assault categories. It is important to recall that under the YOA and the YCJA, custodial

¹⁴ Summary offences are less serious and are usually tried at a lower-level court, such as a provincial court. As compared to indictable offences, which are more serious and are tried at a higher court (Department of Justice, 2015).

sentences are to be reserved for the serious violent and repeat offenders and as such, only the offences for which custody could be a potential sentence were included in this sample; level 1 assaults were excluded.

3.2.1.2 Sexual Assault

In 1983, the Criminal Code of Canada was amended to replace crimes of rape and indecent assault with three new categories of sexual assault offences. *Sexual assault* under Section 271 of the Criminal Code is defined as

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Those guilty of *sexual assault with a weapon, threats to a third party or causing bodily harm*, under s. 272 include

- (1) every person who in committing a sexual assault,
 - (a) carries, uses or threatens to use a weapon or an imitation of a weapon;
 - (b) threatens to cause bodily harm to a person other than complainant;
 - (c) causes bodily harm to the complainant; or
 - (d) is a party to the offence with any other person
- (2) every person who commits an offence under subsection (1) is guilty of an indictable offence and liable:
 - (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of:
 - (i) in the case of a first offence, five years, and
 - (ii) in the case of a second or subsequent offence, seven years;
 - (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to minimum punishment of imprisonment for a term of four years; and

- (a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and
- (b) in any other case, to imprisonment for a term not exceeding fourteen years.

Those guilty of *aggravated sexual assault* under Section 273 include those who, in committing a sexual assault, wound, maim, disfigure or endanger the life of the complainant. Persons who commit an aggravated sexual assault are guilty of an indictable offence and are liable

- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of:
 - (i) in the case of a first offence, five years, and
 - (ii) in the case of a second or subsequent offence, seven years;
- (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and
- (b) in any other case, to imprisonment for life.

In summary, assault and sexual assault are categorized into three levels under the Criminal Code of Canada. This study focuses on level 2 and level 3 assault and level 1 and level 2 sexual assault, because the maximum sentences under the Criminal Code of Canada are similar in severity. Furthermore, given the principles under the YOA and the YCJA, it would be the violent offences that could result in custodial sentences. Crown prosecutors are obligated to consider seeking an adult sentence when a youth is found guilty of murder, attempted murder, manslaughter, or aggravated sexual assault (Department of Justice Canada, 2015). Hence, level 3 sexual assaults are treated differently, and were excluded from this study.

The unit of analysis in this study, therefore, consists of judicial decisions respecting physical assault and sexual assault in Ontario youth courts heard under the YOA and the YCJA. There is a lack of research on how decisions are rendered in each province in Canada. While all provinces currently operate under the YCJA and prior to 2003, the YOA, there has been a great deal of interprovincial variation (John Howard Society, 1999; Rosen, 2000; Tanner, 2001; Bala, Carrington, and Roberts, 2009; Sprott and Doob, 2008; Thomas, 2005). I chose to focus on Ontario for this study, as it is often held up as being the most harsh, brutal, and punitive system in Canada (Hannah-Moffit, 2005). For example, during the mid 1990s, more of Ontario's youth per capita were dealt with in youth court than most other jurisdictions in Canada. In fact, Ontario during that period was higher than the national average and almost three times higher than Quebec (John Howard Society of Ontario, 1998: 2). Further as discussed in Chapter 2, under the YOA, a young offender who resided in Ontario was more likely to serve time in custody.

I chose violent offences against persons, as these are the crimes that, as illustrated in Chapter 1, often become the focus of both media publications, and social and political debate. While young persons, under the YOA and YCJA, are subjected to the same substantive criminal laws as adults, Section 50¹⁵ makes clear that the principles and provisions of the Criminal Code as they apply to adults, do not apply to the sentencing of young offenders (Bala and Anand, 2012: 492). In other words, the Criminal Code defines the offences from which both adults and youths can be charged and convicted, but it is youth justice legislation (e.g., YOA and the YCJA) that governs Canada's youth justice system and ensures that adolescents who are found guilty of criminal offences are dealt with by a different set of principles than that of adults (Bala and Anand, 2012: 493).

¹⁵ Subject to section 74 (application of Criminal Code to adult sentences), Part XXIII (sentencing) of the Criminal Code does not apply in respect of proceedings under this Act except for paragraph 718.2[3] (sentencing principle for Aboriginal offenders), sections 722 (victim impact statements), 722.1 (copy of statement) and 722.2 (inquiry to court (subsection 730[2]) (court process continues in force)) and sections 748 (pardons and remissions), 748.1 (remission by the Governor in Council) and 749 (royal prerogative) of that Act, which provisions apply with any modifications that the circumstances require. (2) Section 787 (general penalty) of the Criminal Code does not apply in respect of proceedings under this Act.

Under the provisions of the YOA, and especially the YCJA, custodial sentences are to be reserved primarily for serious repeat and violent offenders. The Act also provides that a young person is not to be sentenced to custody unless, for example, the young person had committed a violent offence, which is interpreted as an offence in which the young person causes, attempted to cause, or threatened to cause bodily harm (Department of Justice, 2016).

The YCJA provides youth court judges with different sentencing options which include both community based sentences (e.g., the youth serves his or her sentence in the community, often under strict conditions) and custody and supervision sentences (hereafter CSO) which include both a period of time in a youth custodial facility and a period of community supervision (Department of Justice, 2015). Section 42(2)(n) directs that for most offences, the maximum sentence of custody and supervision is two years. For offences from which an adult can be punished by a maximum sentence of life imprisonment, a young person may receive a sentence of up to three years of custody and supervision (Bala and Anand, 2012: 617). Section 15 directs youth courts that if more than one youth sentence is imposed with respect to different offences, the continuous combined duration of those sentences shall not exceed three years, except if one of the offences is first degree or second degree murder in which case the combined duration shall not exceed ten years and seven years respectively (YCJA, 2002).

In summary, I chose to focus on the violent offenders (level 2 and level 3 assaults, and the level 1 and level 2 sexual assaults) as they are both violent offences with identical range of sentencing. Secondly, given the principles under the YOA and the YCJA, it would be the violent offences that could result in custodial sentences.

3.2.2 Data Collection

The sample of cases (also referred to as judicial sentencing decisions) used in this study, was obtained from LexisNexis Quicklaw. LexisNexis Quicklaw and WestlawNext Canada are the two main legal research services in Canada. After consulting with

practicing lawyers for advice as to how best to undertake a search for this study, I chose Quicklaw.¹⁶ Quicklaw is an electronic legal research database that provides court decisions from all levels of Canadian courts, provincial and federal legislation, as well as news reports, journals, and a wide range of other legal commentary (LexisNexis, 2016). This web-based search engine also provides users with access to case law and statutes and contains a comprehensive up-to-date collection of legislation that enables users to search statutes, regulations, and Rules of Court cases (LexisNexis, 2016). As confirmed by the legal experts who I consulted for this study, using Quicklaw would allow me to obtain a sample of cases that are representative of the discourse of official case law that gets replicated and debated in courtrooms across Ontario. It should be noted, however, that the decisions in Quicklaw are not representative of all cases that appear before the courts, as not all cases are reported to Quicklaw, which is a limitation for this study. Nevertheless, the cases that are reported constitute the official record of judicial decision-making. More specifically, these cases constitute a primary source of case law upon which the Crown attorneys and Defence counsel rely when preparing and presenting their submissions and recommendations to the court. These are also the decisions that judges rely upon in their decision-making.

Under the guidance and advice of legal experts (practicing lawyers) it was advised that I choose keywords that would be broad enough to capture the violent offences (level 2 and level 3 physical assault and level 1 and level 2 sexual assault) but would also provide a manageable number of retrieved cases. Thus, the keywords used to obtain the physical assault cases were “aggravated assault” because it narrowed the search results such that only the assaults causing bodily harm (level 2) and aggravated assault (level 3) offences were identified. In order to obtain decisions that include sexual assault (level 1 sexual assault) and sexual assault with a weapon (level 2 sexual assault), I used the keyword “sexual assault”. In the next section, I will discuss the steps that were followed to retrieve legal decisions under Quicklaw.

¹⁶ To increase the trustworthiness of the sample, I did a quick comparison search using Westlaw. Upon a quick review of the cases, the search produced the similar number of cases as was produced under the Quicklaw search.

Once I retrieved the physical and sexual assault cases in Ontario, under each piece of legislation, I reviewed each case to determine if it was eligible for inclusion in this study. After retrieving the cases, I read each fully. I then categorized the sample of cases into ten groupings: “Court of Appeal Decisions”, “Transfer Decisions/Adult Sentences”, “Admissibility of Evidence Decisions”, “Trial Decisions” (conviction or acquittal), decisions relating to “Other Criminal Charges” (e.g., cases showed up in search because offender had a youth record), cases pertaining to “Charter of Rights and Freedoms Decisions”, “Interim Release Decisions”, “Miscellaneous Decisions” (e.g., child protection, stay motions, motions for publication), “Non-Youth Decisions (adult decisions showed up in search keywords) and “Sentencing Decisions”. Table 3.1 and Table 3.2 provide a summary of the number of cases that were included in each category by offence type and legislation.

Guided by both penal populism and focal concerns theory, it was decided that the “Sentencing Decisions” were best suited for this study. The Court of Appeal decisions are based on appeals over errors of law or principle and as such, they did not provide insight into all the facts of the case that were dealt with in the trial decisions. Further, the original trial and sentencing decisions, upon which the appeal decisions were based, were not produced through the Quicklaw search. The cases relating to admissibility of evidence, other criminal charges, decisions related to Charter Rights and Freedoms, and the miscellaneous decisions did not relate to the research questions, and therefore they were excluded from the sample.

The test for transfer decisions under the YOA and for adult sentencing under YCJA differs, and, therefore these cases were excluded from the sample. Under the YOA (section 16), a transfer to ordinary (adult) court was automatic in instances where the young person was 16 or 17 years of age at the time of the offence, and was charged with a serious indictable crime such as homicide, manslaughter, or aggravated sexual assault (YOA, 1984; John Howard Society of Alberta, 1999). A transfer was also possible if an accused was over 14 when he/she committed a serious offence and the court decided it was in the best interest of both the youth and the community to try the young person as an adult. The transfer hearing had to take place prior to the trial and the adjudication of a

youth. Either the prosecution (Crown) or defence could apply for a transfer; however, the onus fell on the applicant to show that a transfer was appropriate (YOA, 1985; John Howard Society of Alberta, 1999).

The YCJA eliminated the transfer hearing to adult court. Deciding if an adult sentence is appropriate takes place after a finding of guilt in youth court. Whether an adult sentence is appropriate depends on the type of offence, for example, an adult sentence could be given if the youth has been found guilty of one of the following serious violent offences: first or second degree murder, attempt to commit murder, manslaughter, aggravated sexual assault. The Crown must give notice to the youth and the court, if they are seeking an adult sentence and must satisfy the court that the seriousness of the offence and the threat to society posed by the youth requires an adult sentence (YCJA, 2003; John Howard Society of Alberta, 1999; Bala, 2015: 160).

Therefore, after careful consideration of the different categories of cases, I decided to focus on “sentencing decisions” as these decisions provided the most detail and were best suited to testing penal populism and focal concerns theory. In the next section, I provide a discussion of Quicklaw search that I followed to obtain both the physical assault and sexual assault cases, heard in Ontario, under the YOA and the YCJA.

First, to obtain the physical assault decisions heard under the YCJA, I conducted a “basic search” using the terms and connectors “aggravated assault” and “Youth Criminal Justice Act”. I selected “all Canadian jurisdictions” and “all Canadian courts”. The search produced 392 cases, which I sorted from newest to oldest. I then selected only the “Ontario judgments” from within those cases. Choosing only the cases in Ontario narrowed the sample down and I was left with 122 reported physical assault cases.¹⁷

¹⁷ The sample of sexual assault cases heard under the YOA included in this study occurred between 1993 and March 31, 2003. The sample of physical assault cases, heard under the YOA, occurred between 1997 and March 31, 2003. The sample of sexual assault and physical assault cases heard under the YCJA included in this study occurred between April 1, 2003 to 22, 2012. The sample of sexual assault and physical assault cases that were heard under the SSCA and included in this study ranged from October 23, 2012 to August 2016.

The same steps were followed to identify sentencing decisions under the YOA. First I searched for “aggravated assault” and “Young Offenders Act” to obtain a sample of physical assault cases heard under the YOA. I selected “all Canadian jurisdictions” and “all Canadian courts”. This search produced 345 cases which I sorted from newest to oldest. I then selected only the “Ontario judgments” from within those cases, which narrowed the sample of cases down and I was left with 82 judicial decisions respecting physical assault cases between 1993 and March 31, 2003.

After separating the cases into their respective categories, as discussed above, I was left with eighteen physical assault sentencing decisions heard under the YCJA. I divided these cases into two groups (see Table 3.3): Group 3 represents the cases heard under the YCJA between the period April 1, 2003 to 22, 2012. Group 5 represents the cases heard under the SSCA (the YCJA cases post October 23, 2012 amendments under the SSCA).

Since the YOA was enacted in 1984, I chose only the cases between 1985 and March 31, 2003 (the date the YCJA was enacted). It should be noted that if a young person was charged under the YOA, the young person would be tried and sentenced under the YOA even if the trial was heard after the enactment of the YCJA. As such, I confirmed in my search that there were no cases past April 1, 2003 that should be included in the YOA sample. Group 1 (see Table 3.3) represents the ten decisions heard under the YOA.

Table 3.1: Selection of Physical Assault Sentencing Decisions

Cases	Young Offenders Act	Youth Criminal Justice Act
Court of Appeal Decisions	6	7
Transfer Decisions/Adult Sentences	10	0
Admissibility of Evidence	4	17
Trial Decisions (conviction or acquittal)	6	14
Other Criminal Charges	5	10
Charter of Rights and Freedoms Decisions	3	2

Miscellaneous Decisions	16	13
Non-Youth Decisions	24	28
Interim Release	5	8
Sentencing Decisions	3	23
Total Cases (Physical Assault)	82	122

Similar steps were followed to retrieve sexual assault cases under the YCJA and YOA. A basic search for sexual assault cases under the YCJA in Canada produced 568 cases. I then selected only the “Ontario judgments” from within those cases. By choosing only the cases in Ontario, the sample was narrowed down and I was left with 191 reported sexual assault cases between the period of 2003 and 2016. The search for sexual assault cases under the YOA initially produced 932 cases. Selecting only the “Ontario judgments” narrowed the sample of cases down and I was left with 253 reported sexual assault cases between the period of 1985 and 2003.

Table 3.2 provides a summary of the number of cases that were included in each category by offence type and legislation. After separating the cases into their respective categories, as discussed above, I was left with ten sexual assault sentencing decisions heard under the YCJA. I divided these cases into two groups (see Table 3.3): Group 4 represents the cases heard under the YCJA between the period April 1, 2003 to 22, 2012. Group 6 represents the cases heard under the SSCA (the YCJA cases post October 23, 2012 amendments under the SSCA).

Since the YOA was enacted in 1984, I chose only the cases between 1985 and March 31, 2003 (the date the YCJA was enacted). It should be noted, if a young person was charged under the YOA, the young person would be tried and sentenced under the YOA even if the trial was heard after the enactment of the YCJA. As such, I confirmed in my search that there were no cases past April 1, 2003 that should be included in the YOA sample. Group 2 (see Table 3.3) represents the three physical assault cases heard under the YOA.

Table 3.2: Selection of Sexual Assault Sentencing Decisions

Cases	Young Offenders Act	Youth Criminal Justice Act
Court of Appeal Decisions	27	19
Transfer Decisions/Adult Sentences	23	4
Admissibility of Evidence	36	29
Trial Decisions (conviction or acquittal)	40	35
Other Criminal Charges	23	15
Charter of Rights and Freedoms Decisions	22	15
Miscellaneous Decisions	21	19
Non-Youth Decisions	48	33
Interim Release	3	4
Sentencing Decisions	10	18
Total Cases (Physical Assault)	253	191

The final sample for this analysis was comprised of 44 judicial cases, five of which dealt with multiple offenders, for a total of 54 offenders. Of the 54 offenders, 26 were convicted and sentenced for physical assault and 28 were convicted and sentenced for sexual assault. All decisions were made between 1993 (the first reported sexual assault sentencing decision that resulted from the Quickaw search) and 2016.

To keep the hard copy of the cases in order, I organized them into categories by offence (physical assault and sexual assault). I then organized the cases by date (year), and by governing statute (YOA, YCJA, and YCJA post the 2012 amendments). I then grouped each judicial decision into six groupings:

Group 1: Sentencing of young offenders convicted and sentenced for sexual assault under the Young Offenders Act;

- Group 2: Sentencing of young offenders convicted and sentenced for physical assault under the Young Offenders Act;
- Group 3: Sentencing of young offenders convicted and sentenced for sexual assault under the Youth Criminal Justice Act;
- Group 4: Sentencing of young offenders convicted and sentenced for physical assault under the Youth Criminal Justice Act;
- Group 5: Sentencing of young offenders convicted and sentenced for sexual assault under the Youth Criminal Justice Act (post the 2012 amendments); and
- Group 6: Sentencing of young offenders convicted and sentenced for physical assault under the Youth Criminal Justice Act (post the 2012 amendments).

The number of cases in each group is shown in Table 3.3. Group 1 contained 10 judicial sentencing decisions for sexual assault convictions, heard under the YOA, between 1993 and March 31, 2003. Group 2 contained 3 judicial sentencing decisions for physical assault convictions, heard under the YOA, between 1997 and March 31, 2003. Group 3 contained 13 judicial sentencing decisions for sexual assault convictions, heard under the YCJA, between April 1, 2003 and October 22, 2012. Group 4 contained 18 judicial sentencing decisions for physical assault convictions, heard under the YCJA, between April 1, 2003 and October 22, 2012. Group 5 contained 3 judicial sentencing decision for a sexual assault conviction, heard under the YCJA, post the October 23, 2012 amendments (October 23, 2012 to August 2016). Group 6 contained 4 judicial sentencing decisions for physical assault convictions heard under the YCJA, post the 2012 amendments (October 23, 2012 to August 2016).

Table 3.3: Judicial Decision Groupings¹⁸

Offences	YOA	YCJA	SSCA ¹⁹
Sexual Assault	Group 1: 10 decisions heard between 1993 and March 30, 2003	Group 3: 13 decisions between April 1, 2003 and 2012 October 22, 2012	Group 5: 5 decisions between October 23, 2012 and August 31, 2016
Physical Assault	Group 2: 3 decisions heard between 1997 and March 30 2003	Group 4: 18 decisions between April 1, 2003 and October 22, 2012	Group 6: 5 decisions between October 23, 2012 and 2016

Once the judicial decisions were categorized into groups, I conducted content analysis. I coded the decisions, and subsequently inputted the data into Excel and SPSS software programs. These steps will be discussed in the following sections.

3.3 Content Analysis

To analyze the judicial decisions, I drew on what Krippendorf (1980) calls “open coding”, which refers to making notes and headings while reading and relating these themes to what is written in the text. Content analysis is an appropriate methodology for this study because it can be applied to any piece of writing or communication and provides researchers with a tool to identify conceptual and relational themes that arise when examining the written text. For this study, content analysis allowed for the examination of certain wording, phrasing, and concepts within judicial decisions, and the exploration of what interpretations and discourse are used by the courts in sentencing

¹⁸ While the YOA was enacted in 1985, the first reported sentencing decisions for sexual assault and physical assault obtained from the Quicklaw database search was in 1993 and 1997, respectively. The cases prior to 1993 and 1997 were not sentencing decisions and as such were excluded from the sample.

¹⁹ Groups 5 and 6 represent the cases heard under the YCJA, post the 2012 amendments under the Safe Streets and Communities Act (2013-2016).

young offenders convicted of sexual assault and physical assault, heard under the YOA (1984), the YCJA (2003) as well as the YCJA (post the 2012 amendments).

Content analysis was first used in the nineteenth century to analyze written, verbal, or visual communication messages such as hymns, newspapers, and magazine articles, advertisements and political speeches. It has been increasingly used in the fields of journalism, sociology, psychology, and business (Cole, 1988; Krippendorff, 1980). The epistemological roots of content analysis for exploring judicial decisions; however, lies in the study of Legal Realism, which argues that the law is what judges *do* (Hall and Wright, 2008).

Fred Kort (1957), a political scientist was the first to use content analysis to explore written judicial opinions (Hall and Wright, 2008). Kort sought to study all United States Supreme Court opinions discussing the constitutional right to legal counsel in criminal cases; which comprised a total of 28 cases decided between 1932 and 1956. In his study, Kort (1957) developed a coding scheme to record and categorize various facts that were discussed in the judicial decisions. He developed a coding system that would allow a reader to predict the outcome of similar cases and used that scoring system to correctly predict the outcomes of 12 of the 14 remaining cases in his study with an 85% accuracy rate (Kort, 1957; Hall and Wright, 2008).

During the same period, the late 1950s and early 1960s, lawyers and legal scholars were beginning to develop a self-taught method that mirrored content analysis (Hall and Wright, 2008). P.J. Federico, an attorney, moved beyond traditional legal commentary on case law towards a more systematic reading of the texts in his 1956 analysis of patent invalidity decisions. He studied fifty recent United States Courts of Appeal decisions, which invalidated a patent and recorded consistent information about each of them, including the stated grounds for invalidity. While content analysis of judicial decisions began in the 1950s, it was not until the 1990s, that legal and other scholars adopted content analysis at accelerating rates (Hall and Wright, 2008).

In summary, content analysis is a method of analyzing documents that allows researchers to examine theories and obtain a more detailed and enriched understanding of written

content; it is concerned with meanings, intentions, consequences, and context (Cavanagh, 1997; Downe-Wamboldt 1992; Krippendorff, 1980). Further, it is a research method that makes replicable and valid inferences from data to their context, in order to provide knowledge, new insights, an accurate representation of facts, and a practical guide to action. Thus, content analysis was used for this research study as it enabled a systematic and objective means for describing and quantifying phenomena (Krippendorff, 1980). I also chose content analysis as it can be used with both qualitative and quantitative data, and it can be used in both inductive and deductive research.

3.3.1 Coding

Hall and Wright (2008: 88) argue that content analysis may lose relevance, or external validity, in situations where aspects of legal interpretation are impossible to code objectively (e.g., nuances that are related to infrequent or complex factual and procedural patterns). However, “content analysis is internally valid if it accurately measures the particular components of the decision that the researcher wants to study” (Hall and Wright, 2008: 88). To increase internal validity, I used systematic defined coding techniques in order to remove and minimize elements of researcher bias and to improve the thoroughness, precision, and accuracy of the analysis. I developed a strategic, systematic technique for sorting cases to assist in identifying cases that belonged in the final sample and kept records of those removed from the initial sample. For example, I kept recording sheets for each category of cases (discussed in the previous section) wherein I recorded the case number, the name, year, and description of each case. Such coding strategies strengthen the objectivity and replicability of such case law interpretation (Hall and Wright, 2008: 88).

Once I decided upon the sample of cases (sentencing decisions) that would be included in this study, I read each judicial sentencing decision again in more detail and made notes and headings on separate “coding sheets” in order to discover themes related to the two theoretical perspectives that guided this study. I sought to establish whether there were any identifiable themes with regards to penal populism, in particular whether or not I could establish a concern for punitiveness underlying the sentences imposed by the courts. I also sought to establish whether there were any identifiable themes linked with

focal concerns theory, such as whether or not the courts referred to the level of offenders' blameworthiness, their prospects for rehabilitation, and whether age and gender influenced sentencing.

In the next stage of the data coding and thematic analysis, I drew upon the "coding sheets" and reviewed the cases again. I manually coded the hard copies (e.g., making notes of themes that could potentially be linked to penal populism and focal concerns theory) of the sentencing decisions by studying the cases repeatedly to allow emerging themes (or categories) to develop. I considered the possible meanings behind each theme and coded category to determine how and if they fit within each developing theme. When new codes and themes emerged, I changed the coded categories accordingly and the judicial decisions were reread according to the new coding structure.

For the third stage of data and coding (discussed in more detail in Section 3.4), I coded the cases electronically by importing them into NVivo (a qualitative software program) and stored the data in both Excel and SPSS (discussed in more detail in the following section). The three stages of coding enabled me to double-check and verify my analysis, since I was the main person coding and analyzing the data. Throughout each stage of coding, I sought to identify themes, and often times returned to cases that were already reviewed and coded to re-examine potential links between cases, and to make certain that nothing was missed in the early rounds of thematic coding. Once the themes were initially selected, I maintained a level of flexibility by returning to the cases to develop more refined, analytical themes, thereby increasing the level of trustworthiness of the research process.

Overall, as I will explain in more detail in the next section, I identified and coded offenders' characteristics (e.g., gender, age), case details (e.g., plea, criminal history, offence, pre-trial custody), and other details (e.g., Crown's recommended sentence, court-imposed sentence). I imported the cases into NVivo (discussed in more detail in Section 3.4) to further identify and verify the variables in order to increase the reliability of these measures, which I then imported into Excel. I then imported the data from Excel into SPSS to calculate descriptive statistics and to conduct simple statistical analyses. I

subsequently identified themes (e.g., blameworthiness and prospects for rehabilitation and sentencing principles) first by manually coding the hard copies. I also used NVivo's "word query" function (discussed in more detail in Section 3.4 and later in Chapter 5) to identify the frequency and location of the key and consistent principles or purposes of sentencing that are found under the YOA, the YCJA, and the SSCA (responsibility, accountability, rehabilitation, and reintegration).

3.4 Data Analysis

This study sought to document what judges "do", rather than to assess how well judges perform. Three software programs (NVivo, SPSS, and Excel) were used to assist in the coding and analysis of the textual data. First, I chose NVivo, as it is a software program that supports both qualitative and mixed methods research (QSR International, 2016). NVivo, is a qualitative data analysis software that facilitates analytical flexibility and enhance transparency and trustworthiness of the qualitative research process (Kaefer, Roper, and Sinha, 2015: 1). Another important advantage of using NVivo is that it is compatible with SPSS (Statistical Packages for the Social Sciences), which I used to calculate descriptive statistics, and to conduct simple quantitative analyses to examine and explore the relationships between the variables used in this analysis. Third, NVivo is designed to help organize, analyze, and find insights in unstructured, or qualitative data, such as interviews, open-ended survey responses, articles, and so on. It is also an electronic storage place wherein I was able to store and manage my data in an organized manner that facilitated data analysis. Lastly, it provided me with a tool that allowed me to ask questions about the data in a more efficient way, in order that I could examine the theoretical perspectives guiding this study along with the sentencing principles that guide the YOA, the YCJA, and the SSCA (QSR International, 2016). NVivo was used as it allowed this study to include quantitative elements, such as word frequency analysis (Mayring, 2000; Kaefer, Roper, and Sinha, 2015: 4).

As previously discussed, I developed a systematic technique for sorting and coding the judicial decisions. These cases were subjected to detailed readings, and key themes related to the theories being examined were identified. The use of certain words and the presence of themes were counted by running Word Frequency queries, using NVivo.

Word frequencies determine the number of times the words appeared and where within the judicial decisions that words, such as responsibility, accountability, rehabilitation, and reintegration occurred. Subsequent analyses and readings were conducted that focused on the meaning attached to these words and whether such meanings appeared to vary within and across offence type.

Once I assigned codes to the cases, I entered the coded information into Excel spreadsheets. The Excel spreadsheets were used as codebooks in order to organize the data²⁰ according to the many categories, including case characteristics, trial name, date of hearing, type of offence, age and gender of offender, interim custody, and the legislation in effect (YOA, YCJA, YCJA post 2012 amendments). I examined penal populism themes. For example, did the Crown recommend a custodial or non-custodial sentence and what was the sentence imposed by the court (e.g., custodial versus non-custodial). In addition, were the courts more punitive under the YCJA than under the YOA? I also considered themes relating to focal concerns theory. For example, what was the offender's plea (guilt or not guilty), was the offender a first-time offender or repeat offender, the court's prediction as to the level of risk to the community as reflected by an offender's prospects for rehabilitation and, lastly, did the young offender serve time in interim custody. Each of these categories or variables will be discussed in more detail in the following section.

After the qualitative content analysis, I conducted some basic quantitative statistical analyses of the study data and SPSS was used for this portion of the analysis.

3.5 Research Question 1

The first research question draws on Penal Populism and asks: is there evidence that Canada, in particular, Ontario, has experienced a penal populist turn in regard to legislative changes? Are judges taking a more punitive stance in sentencing young

²⁰ See Table 3.4 for a list of variables included in this study.

offenders convicted of sexual assault and physical assault? In the following section, I will discuss the themes identified and the variables created for this study.

3.5.1 Penal Populism: Themes and Variables

Roberts et al. (2003: 17) propose that official sentencing policy is not the only explanation for trends with respect to increases in incarceration rates. A second explanation, and one that is potentially more likely, is that judges may become harsher in response either to pressure from prosecutors or from judicial perception that society favours the imposition of harsher punishments (Roberts et al., 2003: 18).

To operationalize and examine penal populism, I considered first, whether the sentencing recommendations of crown prosecutors, whose role is to represent the public interests in court, influenced the sentences imposed by the courts. Second, to capture public perceptions, I took into account the legislation and period under which each case was tried. The YOA, for example, did not provide a single, primary goal for sentencing young offenders and as a result in the years following its enactment, as discussed in earlier chapters, provincial youth courts had considerable discretion concerning how the act would be implemented which led to high rates of custodial sentences (Bala and Anand, 2012; Carrington, 1999; John Howard Society; 1999; YOA, 1984). Alternatively, the overall presumption under the YCJA is that judicial proceedings are not to be the first choice of action, especially for first time offenders and/or those who have engaged in minor offences. Deterrence, in particular general deterrence, was not to be a guiding principle of sentencing. As a result, according to the stated goals of the YCJA and as shown in studies reported in Chapter 2, Canada experienced an overall decline in custodial sentences handed out to young offenders under the YCJA compared to the YOA.²¹

With the emphasis, under the YCJA, on reducing incarceration and in particular using custody as a last resort, one might expect that even the young offenders convicted of

²¹ The Safe Streets and Communities Act (2012) pushed for a more get-tough approach to sentencing and as a result deterrence was reintroduced as a guiding principle of sentencing under the YCJA.

violent offences would receive lighter sentences (e.g., non-custodial sentences). In contrast, penal populism would suggest that custodial sentences would continue to be imposed at high rates for violent offences. Simple quantitative analyses were conducted to determine if there is evidence of either trend.

To examine penal populist theory, the following variables were constructed. The first represents the *court-imposed sentence* and was a measure to contrast custodial sentences (open and closed) and non-custodial sentences (e.g., probation). Three other variables were created. *Crown's recommended sentence* reflects whether or not the Crown recommended a custodial sentence or a non-custodial sentence. *Legislation* reflects the three pieces of legislation (YOA, YCJA, and the YCJA post the 2012 amendments) that govern young offenders in Canada since 1985. Lastly, a variable *offence* was created to distinguish the physical assault and sexual assault offenders. If the push towards punitive policies is influencing the judicial decisions included in this study, then one would expect that the court-imposed sentences would vary with time (e.g., across legislation), and would be in line with the Crown's recommended sentence.

3.5.2 Court Imposed Sentence

Sentencing involves a two-stage process wherein first a judge makes a decision whether to incarcerate a young offender. Second if incarceration is imposed what is to be the type and length of custody and probation, and if incarceration is not imposed what is the type and length of the non-custodial sentence to be imposed. The variable, *court-imposed sentence*, for this study is a dichotomous measure of sentencing outcome, which reflects the first decision made at sentencing. Did the offender receive a custodial sentence (which included both closed and open custody) or a non-custodial sentence (which included probation)?

3.5.3 Crown Recommended Sentence

As discussed in Chapter 2, “the community looks upon the Crown prosecutor as a symbol of authority and as a spokesman for the community in criminal matters” (R. v. Logiacco, 1984: paras. 378-379). In this respect, I infer that the Crown will be more ‘punitive’ and as such will seek a harsher sentence, in particular recommending a custodial sentence be

imposed. To examine the ‘punitiveness’ of the judge, in this study I compare the Crown recommendation with the sentences that are actually imposed by the courts. As such, a variable was created that reflected the Crown’s recommended sentence as it relates to custody. Here I contrast whether the Crown recommended a custodial sentence, or a non-custodial sentence.

3.5.4 Legislation

Judges must interpret, implement and maintain their focus on the guiding principles and purposes that underlie each piece of legislation, which also raises the question whether judges are influenced by the penal populist agenda. To assess if legislative changes are associated with judges’ sentencing and punitiveness, a nominal variable, *legislation*, was created. This measure reflects the legislation under which each case was brought before the court: the YOA, the YCJA, and the YCJA after the 2012 amendments.

3.5.5 Offence

A third measure was created, *offence*, to contrast sentences for physical assault and sexual assault. Recall under the Criminal Code, physical assault (level 2 and level 3) and sexual assault offences (level 1 and level 2) are treated the same in terms of offence severity as reflected in the maximum sentences that can be imposed. As such, one would expect that the courts would perceive the level of blame would be no different for the physical assault offenders as compared to the sexual assault offenders. Nevertheless, there is evidence, recounted in Chapter 2, that the public regards sexual assault to be the more egregious offence. Penal populist theory (Roberts et al., 2003) suggests if the courts are influenced by public and political pressure, the sexual assault offenders would receive harsher sentences compared to the physical assault offenders.

3.6 Research Question Two

Drawing on focal concerns theory of sentencing, this study asks: do legal decisions, as they relate to the type of sentencing (custodial or non-custodial) within the Ontario youth justice system, reflect an offender’s level of blameworthiness and the need for protection of the public? Can extralegal factors, such as age and gender explain disparities in

sentencing? In the following section, I provide a discussion of the themes and variables created to answer the second research question.

3.6.1 Focal Concerns Theory: Themes and Variables

Focal concerns perspectives on sentencing also provided a valuable framework to guide this study. This theory recognizes sentencing is a multifaceted and complex process wherein judges must simultaneously consider numerous relevant factors and diverse sentencing goals (Kurlychek and Johnson, 2004; Steffensmeier, 1980; Steffensmeier et al., 1998; Steffensmeier and Demuth, 2001). Judges, according to focal concerns theory assess three primary considerations before making a sentencing decision: 1) the level of offender's blameworthiness, 2) protection of the public (reflected by the potential for offender rehabilitation), and 3) the practical constraints and consequences of their decision. Lastly, extra-legal factors such as age, gender, and race (referred to as perceptual shorthand). Therefore, drawing on focal concerns theory, I assess whether judicial decisions, in particular as they relate to sentencing within the Ontario youth justice system, reflect the level of an offender's blameworthiness, their prospects for rehabilitation (the latter is related to the level of public protection that is required), as well as age and gender. Practical constraints and consequences of their decision were not included in this analysis as the judicial decisions did not provide enough information about these issues.

3.6.2 Level of Blameworthiness

The first focal concern is the *level of blameworthiness* of the young offender and is usually associated with the retributive philosophy of punishment; the punishment should be proportionate to the seriousness/harm of the crime (Hartley, et al., 2007; Steffensmeier, et al., 1998; Steffensmeier & Demuth, 2000). In addition to offence severity, an offender's criminal history, and level of remorse are aspects of blameworthiness considered in this study.

A dichotomous variable was created to measure whether the offender was a *first time offender* (FTO) or a repeat offender. Drawing on focal concerns theory, one would expect that the repeat offender would be perceived as being more blameworthy than the

first-time offender. Repeat offenders could also be perceived as a greater threat to the community, which of course is the second focal concern identified by this theory.

A second dichotomous variable was created to measure the *level of an offender's culpability* (Plea), which reflects a young offender's level of remorse, represented by whether they entered a guilty. One would expect that a convicted offender who pled not guilty to the offence with which they were charged would be perceived by the courts as being less blameworthy as compared to the offender.

A third measure was created, *offence*, which measures offence type and severity. Recall, under the Criminal Code physical assault (level 2 and level 3) and sexual assault offences (level 1 and level 2) would be treated the same in terms of offence severity. As such, one would expect that the courts would perceive the level of blame would be no different for the physical assault offenders as compared to the sexual assault offenders.

In summary, in this study, it was expected that if the courts perceived an offender as having a higher level of blame, they would be more punitive towards the repeat offender, and the offender who pled not-guilty to the offence. Since the two offences (sexual assault and physical assault) included in this study reflect similar levels of severity as reflected under the Criminal Code, it was expected there would be no difference in the perceived level of blame by the courts.

3.6.3 Protection of Community

The second focal concern is *protection of the community*, which focuses on incapacitating offenders or deterring would-be offenders (Steffensmeier et al., 1998). The YOA and the YCJA require that criminal justice agents, which include judges, consider public safety and the prevention of recidivism, when assessing an offender's prospects for rehabilitation. Coding for this variable was a much more detailed and difficult process because it required me to make inferences about the judges' rationales upon sentencing.

Using content analysis to identify themes related to the protection of community, I examined the discourse used by judges to determine whether judges demonstrated concern for the 'protection of the community' when sentencing. In particular, I examined

whether the judges took into consideration an offender's prospects for rehabilitation. Included in this measure are judges' assessments concerning the likelihood of a repeat offence. The assumption is that if a young offender had favourable prospects for rehabilitation, they would pose less of a risk to the community and as such would require a less punitive sentence. Conversely, if a young offender had less favourable or poor prospects for rehabilitation, they would pose a higher risk to the community and as such would require a more punitive sentence.

Some indicators were clear cut. For example, in *R. v. A.B.* (2010), a sexual assault case heard under the YCJA, the judge was "... favourable towards A.B.'s rehabilitation and his low risk to re-offend". In contrast, the judge in *R.v. D.A.* (2011), a sexual assault case heard under the YCJA, stated the offender "exhibits a dishonest nature and an aversion to social rules of conduct. He is at high risk to re-offend" (para. 34). These two cases were less difficult to code as the judge made clear references to the offender's prospects for rehabilitation. Such statements, I coded as being illustrative of a judge perceiving the offender as having favourable and less favourable prospects for rehabilitation, respectively.

At times, however, a judge did not explicitly state that an offender showed favourable or less favourable prospects for rehabilitation. In these instances, I made inferences based on judges' statements. For example, in *R. v. D.A.* (1996), a sexual assault case heard under the YOA, the judge stated that "there is no indication of deviant thinking or behaviour, either sexual or otherwise, and no indication he was uncooperative when charged for this offence" (26). Such statements, I coded as being illustrative of a judge perceiving this offender as having favourable prospects for rehabilitation. On the other hand, if a judge made reference to an offender's less favourable conduct or behavior during the period between the offence charge and sentencing hearing, I coded as the judge perceiving the offender as having less favourable prospects for rehabilitation. For example, in *R. v. A.A.* (2004) the judge in referring to BC stated "it is entirely clear that this offender unfortunately has been directionless for many months, and has no obvious educational or employment prospects" (at para. 22).

Another variable constructed for this study, concerned *interim custody*. As it is stated under Section 7.1 of the YOA (1984), a youth who would otherwise be detained prior to trial can be released to the care of a “responsible person” if the judge deems this appropriate (YOA, 1984). Similarly, section 31(1) of the YCJA states that a young person who has been arrested for certain crimes may be placed in the care of a responsible person instead of being detained in custody if a youth justice court or a justice is satisfied that the person is willing and able to take care of and exercise control over the young person; and the young person is willing to be placed in the care of that person (YCJA, 2002). The YOA and the YCJA, therefore, requires that judges inquire as to the availability of a responsible person with whom the youth may reside.

Interim custody (also referred to as pre-sentence custody), for this study, is taken as an indicator that a young person who has been charged with an offence is perceived as being a threat to the community and requires pre-sentence custody. Further, if the youth served interim custody this would indicate that the youth did not have a responsible adult who was able or willing to exercise control over the youth. One would expect these offenders would receive more punitive sentences as they would be perceived to pose a higher risk to the community.

3.6.4 Perceptual Shorthand

Because judges often have limited information to accurately determine the level of an offenders’ dangerousness, culpability, and likelihood for recidivism, they develop a *perceptual shorthand* that is based on stereotypes and attributions that are linked to an offender’s characteristics, such as race, sex, and age (Steffensmeier et al., 1998: 767; Hartley et al., 2007: 66). A phenomenon referred to as the age-crime curve reveals that crime rates tend to peak in the mid to late teens (16-18 years old) (Alam, 2015; Brennan, 2012; Hirschi and Gottfredson, 1983). As such, the variable *age* was created as a measure of the offender’s age at the time of the offence. The ages ranged from 12 to 17 years old. I grouped the ages into two categories, 12-15 years old and 16-17 years old.

Focal concerns theory argues that young offenders are perceived by the judge as being less dangerous and crime prone, as compared to the adult offenders. Drawing on both

focal concerns theory and the age-crime curve phenomenon, one might expect that the younger offenders (12-15 year olds) in this sample would receive lighter sentences than the 'older' young offenders (16-17 year olds). In addition, I considered *gender*. Drawing on both focal concerns theory and previous research (Heidensohn, 2002; Rodriguez et al., 2006; Steffensmeier, Ulmer, and Kramer, 1998), which reveals that males commit more violent acts than females, we might expect that judges regard males as more dangerous than females. As such, female offenders would be expected to receive a less punitive sentence as compared to male offenders.

3.7 Research Question Three

The third research question asks if there is evidence of variations in sentencing rationales provided by judges, upon sentencing within and across offence type. In order to answer this question, I conducted additional qualitative analyses to explore differences in sentencing offence type. For this analysis, I considered the principles of sentencing outlined in youth justice legislation, with a particular focus on offender's prospects for rehabilitation and accountability. In the following section, I will provide a more detailed discussion of the methods used to answer the third research question.

3.7.2 Further Analysis: Rehabilitation and Sentencing

The Principles of the YOA (1984) state "that young persons are said not to be as accountable for their acts as are adults, but even so they must bear responsibility for their contraventions" (Preamble). Rehabilitation is also an underlying principle of sentencing: custodial sentences were to be a last resort under both the YOA and the YCJA.

Rehabilitation, however, cannot be the sole focus for legal intervention, as the courts must also take into account the protection of the public. As the Preamble of the YCJA (2002) states, the criminal justice system is to foster responsibility and ensure accountability through meaningful consequences and effective rehabilitation and reintegration into the community.

I analyzed the content of the judicial decisions carefully, as discussed earlier to determine if and why sentencing decisions may vary within and across offence type. Drawing on the principles and purposes of sentencing under the YOA and the YCJA, I, first, ran word

frequency queries to count the number of times responsibility, accountability, rehabilitation, reintegration were used. This query allowed me to identify the location within the decisions that these words were referenced and as such, I could then examine the meanings the courts' attached to these principles and whether such principles played a significant factor upon sentencing.

3.8 Data and Study Limitations

This study sought to build on prior sentencing research; however, there are limitations to this study that must be noted. The Quicklaw database is not absolutely comprehensive and it is difficult to determine exactly how cases are selected, thereby raising the problem of representativeness. Cases pass through an editorial filter that could be biased in some way (Justice Canada, 1992: vii). As a result, the decisions obtained for this study are not representative of all cases that appear before the court. The sample included in this study reflects a convenience sample, albeit one comprised of significant and influential sentencing decisions. Therefore, sample results analyzed here cannot be generalized to the larger population. An additional limitation is the small number of cases included, which prevents detailed and more sophisticated quantitative analyses and limits the ability to determine statistical significance.

Nevertheless, the sample here has several benefits. As recounted earlier, the cases that are catalogued and imported into Quicklaw are a major source of case law in Canada. Recall that there is much sentencing disparity across provinces in Canada; thus, while the cases included in this study are not representative of the population of young offenders, they are representative of the discourse of official case law that gets replicated and debated in courtrooms in the province of Ontario.

The sample of cases, included in this study may pose limitations, however, any "bias" that may be created when courts justify their decisions, according to Hall and Wright (2008) is precisely what researchers may wish to study (Freidman, 2006; Hall and Wright, 2008). The facts and reasons judges select are the substance of an opinion that creates law and binding precedent and as such they merit careful study. Content analysis is, therefore, beneficial to scholars seeking a measurable understanding of substantive

law or the legal process (Hall and Wright, 2008). It can verify or refute descriptions of case law that are based on anecdotal or subjective study and more importantly, it can identify surface patterns (which may be hidden from the naked eye of casual readers), to be explored more deeply through interpretive, theoretical, or normative legal analysis (Hall and Wright, 2008).

Since one cannot assume that the sentencing reports capture accurately all the facts and rationales underlying the judges' decisions, researchers do need to be cautious about the meanings they attach to the observations made through their analyses. Nonetheless, the cases do lend themselves to theoretical exploration, despite their lack of generalizability to all sentencing decisions. Furthermore, this methodological approach offers the most precise way of documenting what judges decide and how they explain their decisions. As Hall and Wright (2008) argues "this method creates a vessel for exporting the analytical insights of legal scholars in a form that the rest of the social science world will treat seriously" (p. 122). In this vein, this study sought to identify the factors that motivate judges upon sentencing by identifying themes within judicial decisions. In essence, this study sought to examine what judges 'do'; after all, as Hall and Wright (2008) argues, scholars study cases not simply because they reflect or respond to the law, but because they 'are' the law (p. 122).

Table 3.4: List of Variables

Penal Populism Variables	Description
Legislation	YOA, YCJA; YCJA post 2012 SSCA amendments
Crown Sentence	Yes (custodial sentence was sought by the Crown); No (non-custodial sentence was sought by the Crown); or N/A (no specification of Crown's recommendation of sentencing)
Court-Imposed Sentence	Non-custodial sentence; custodial sentence
Offence	Sexual assault; physical assault

Focal Concern Variables

Court-Imposed Sentence

Non-custodial sentence; custodial sentence

Level of Blameworthiness

First-time offender (FTO)

First-time offender, or repeat offender

Offender's Plea

Guilty or Not Guilty

Protection of Community

Prospects for Rehabilitation

No mention; less favourable or poor prospects for rehabilitation, favourable or good prospects for rehabilitation

Interim Custody

No interim custody served; interim custody served

Perceptual Shorthand

Age

Groupings: 11-15 year olds, 16-18 year olds, age not provided

Gender

Males; females

Chapter 4

4 Introduction

This chapter addresses research questions one and two introduced in Chapter 3. The results of the descriptive and simple quantitative analyses performed to answer the two research questions will be presented. Chapter 5 will present more detailed qualitative content analysis to answer the third research question about variations in sentencing outcomes within and across offence type. In this chapter, I first provide an overview of the case characteristics from this sample of young offenders' convicted of sexual and physical assault and sentenced in Ontario youth courts between the years 1993 and 2016. This overview includes a summary of offenders' demographic characteristics (age and gender), the frequency of the physical offences and sexual offences, the frequency of decisions heard under the YOA, the YCJA, and the SCA (the YCJA post the 2012 amendments), the frequency of the Crown recommended sentences, interim custody, and court imposed sentence for the young offenders convicted. I will then provide results of bivariate analyses that were conducted to examine research questions that have been guided by penal populism and focal concerns theory.

4.1 Demographic Descriptives

The sample, for this study, was comprised of 44 judicial cases, three of which dealt with multiple offenders, for a total of 54 offenders. Of the 54 offenders, 26 (48.1%) were convicted and sentenced for physical assault and 28 (51.9%) were convicted and sentenced for sexual assault. The decisions covered the time frame between 1993 and 2016. As noted in Chapter 3, throughout the remaining chapters, the terms judicial decisions, sentencing decisions, and cases are used interchangeably, as they relate to the results of this study.

Descriptive statistics are presented in Table 4.1. The modal age of the full sample was 17 (27.8%) years old, followed by 16 (22.2%) and 15 (14.8%) year olds, which was not surprising given the age-crime curve, which reveals that crimes are most prevalent during mid to late adolescence (Gottfredson and Hirschi, 1990; Hirschi and Gottfredson, 1983).

These results are also consistent with Canada's police-reported data which have consistently shown that crime rates tend to peak during late adolescence and early adulthood (Brennan, 2012; Alam, 2015: 6). The results are also consistent with Canadian court data, which illustrate a similar trend (Brennan, 2012; Alam, 2015: 6). For example, in 2013/2014 young offenders aged 16 and 17 continued to make up the largest proportion of accused persons, representing 62% of cases completed in youth court; youth 12 to 15 years old comprised 38% (Alam, 2015: 6). Therefore, the offenders included in this sample fall within the age-crime-curve.

Of the 54 young offenders included in this analysis, 48 offenders (88.9%) were male and 6 were female offenders (11.1%). This gender breakdown is not surprising given that research shows that males are arrested, charged, and convicted of more offences than females. Females have lower arrest rates than males for all crime categories except prostitution (Tanner, 2001: 183; Canadian Crime Statistics, 1993). In this sample, of the six female offenders included in this study, one (16.7%) was convicted of sexual assault and five (83.3%) were convicted of physical assault. Of the 48 males, 21 (43.8%) were convicted of physical assault and 27 (56.3%) were convicted of sexual assault.

Of the 54 young offenders sentenced, there were 42 (77.8%) first-time offenders in the sample and 12 (22.2%) were repeat offenders. When criminal history data were provided, the previous offences listed for offenders convicted of physical assault included mischief under \$5000, uttering threats, assault, theft, theft and mischief, property offences, and breaches of recognizance (R. v. JPG_GE, 1997; R. v. AS(2), 2013; R. v. KK, 2011; R. v. RB, 2010; R. v. SL, 2012). In comparison, when criminal history was provided for offenders convicted of sexual assault they included prior sexual assaults, assault, weapons charges, trafficking drugs, and failing to comply with probation orders (R. v. AA, 2004; R. v. CC, 2002; R. v. KS, 1998; R. v. NP, 1998).

Thirty-six (66.7%) young offenders pled guilty prior to their conviction and 18 (33.3%) pled not guilty. Further, of the 54 cases, 30 (55.6%) offenders served interim (pre-trial) custody, 24 (44.4%) did not serve interim custody.

The Crown prosecutors recommended custodial sentences in 48 (88.9%) cases as compared to 2 (3.7%) cases wherein the Crown recommended a non-custodial sentence. There were 4 (7.4%) cases wherein there was no specification with regards to the recommended sentence by the Crown. These descriptive results are not surprising given that the Crown is a ‘spokesperson for the community’, and may be, as was previously discussed, increasingly pressured by the public to take a more ‘get-tough-approach’ when handling young offenders.

Of the 54 young offender cases, 13 (24.1%) decisions were heard under the YOA, 31 (57.4%) were heard under the YCJA, and 10 (18.5%) were heard under the YCJA post 2012 amendments. Lastly, of the 54 cases, 43 (79.6%) of the young offenders in this sample received a custodial sentence as compared to 11 (20.4%) young offenders who did not receive a custodial sentence.

Table 4.1: Demographic Descriptives

Variable	N	Percentage
Gender	54	
Male	48	88.9
Female	6	11.1
Legislation		
YOA	13	24.1
YCJA	31	57.4
YCJA (2012) ²²	10	18.5
Offence		
Physical Assault	26	48.1
Males	21	80.8
Females	5	19.2
Sexual Assault	28	51.9
Males	27	96.4
Females	1	3.6

²² YCJA post 2012 amendments

First Time Offender		
Yes	42	77.8
No	12	22.2
Plea		
Guilty	36	66.7
Not Guilty	18	33.3
Interim		
Yes	30	55.6
No	24	44.4
Crown Sentence		
Yes	48	88.9
No	2	3.7
Not Applicable	4	7.4
Custodial Sentence		
Yes	43	79.6
No	11	20.4
Age		
12	2	3.7
13	4	7.4
14	4	7.4
15	8	14.8
16	12	22.2
17	15	27.8
Not Applicable ²³	9	16.7

4.2 Penal Populism

Drawing on penal populism, the first research question asked if there is evidence that Canada, in particular Ontario, has experienced a penal populist turn in regards to juvenile justice. In particular, are judges taking a more punitive stance in sentencing young offenders convicted of violent offences, like sexual assault and physical assault?

To determine whether judges are becoming more punitive as a result of legislative changes, I examined the sentencing outcomes of young offenders convicted of violent

²³ There were 9 judicial decisions in which the offender's age, at the time of the offence, was not provided.

offences (sexual assault and physical assault) heard under the YOA, the YCJA (2003-2012), or the YCJA (post the 2012 amendments).

Table 4.2 shows, of the 54 young offenders included in this analysis, 13 (24.1%) decisions were heard under the YOA, 31 (57.4%) were heard under the YCJA and 10 (18.5%) were heard under the SSCA (YCJA post the 2012 amendments). Of the 13 sentencing decisions heard under the YOA, over half (7) of the young offenders (53.8%) received custodial sentences. Of the 31 sentencing decisions heard under the YCJA, 26 (83.9%) offenders received custody. Of the ten cases heard under the YCJA, post the 2012 SSCA amendments, all ten (100%) offenders received a custodial sentence.

As discussed in Chapter 1, under the YOA, there were a large number of youths being processed through the courts and placed in custody, often for non-violent offences (Bala and Anand, 2012; Bala, Carrington, and Roberts, 2009). The YCJA, however, sought to reduce the role of courts and increased an emphasis on community involvement through extra-judicial measures (e.g., diversionary options and community-based sentences). Thus, while the results of this study may suggest that Canada, in particular Ontario, is taking a more punitive stance towards young offenders, this increase in custodial sentencing may reflect the success of extra-judicial measures under the YCJA, thereby resulting in a disproportionate number of serious violent offenders processed through the court system.

Table 4.2: Court Imposed Sentence by Legislation

			Custody Yes	No	Total
Act	Young Offenders Act	Count	7	6	13
		% within Act	53.8%	46.2%	100.0%
		% of Total	13.0%	11.1%	24.1%
	Youth Criminal Justice Act	Count	26	5	31
		% within Act	83.9%	16.1%	100.0%
		% of Total	48.1%	9.3%	57.4%
	SSCA	Count	10	0	10
		% within Act	100.0%	0.0%	100.0%
		% of Total	18.5%	0.0%	18.5%
Total	Count	43	11	54	
	% within Act	79.6%	20.4%	100.0%	
	% of Total	79.6%	20.4%	100.0%	

To further examine whether judges are becoming more punitive as a result of legislative changes, I explored whether judges' decisions were influenced by the Crown's recommended sentence. As I previously discussed in Chapter 2, the Crown prosecutor represents a symbol of authority and as such they act as a spokesperson for the community in criminal matters and may recommend a more punitive sentence. Of the 54 sentencing decisions, 89% (48) recommended a custodial sentence. Content analyses suggest this was indeed the case. For example, in *R. v C.E. (2000)*, a sexual assault sentencing decision heard under the YOA, the crown counsel asked not only that CE be sentenced to a period of incarceration, but to a very lengthy period of incarceration of twelve to sixteen months (at para. 2). The Crown based the submission partly on the following grounds of general deterrence (at para. 3) and stated "a message must be sent to the public that society will not countenance this behaviour, the Court will not countenance this behaviour, and the Court will take these offences seriously" (at para. 3).

Thus, if the penal populism explanation holds, one would expect that the sentences imposed by the courts would be consistent with the Crown's recommendation (a custodial sentence). The bivariate table (see Table 4.3) shows, of the 48 cases in which the Crown recommended custody, a custodial sentence was received by 85.4% (41) of the

offenders; only 7 offenders (14.6%) did not receive a custodial sentence when one was recommended was the Crown. These results may suggest that judges may be influenced by the Crown's recommendation.

To explore this finding further, I analyzed the judges' sentencing rationales. In these decisions, there was little discussion by the courts of the Crown's recommendation (either in support of or against). There were two particular cases, however, wherein the judge did make reference to supporting the Crown's position. First, in *R. v. A.R.* (2008), a physical assault case heard under the YCJA, the Crown recommended a six month custodial and community supervision sentence on the grounds that there was a negative pre-sentence report that described AR as not making any significant changes to her life (at para. 4). AR was not in school and had not pursued full time employment because she feared her wages would be garnished if she were to be sued by the victim. AR did have strong family support; however, she claimed to be using drugs to forget her problems and had subsequently stopped attending a local drug treatment day program. The judge when imposing the sentence concluded that the sentence proposed by the Crown was both required and appropriate (at para. 8). Furthermore, the judge agreed with the Crown that the activities involved in the offence were extremely reckless and inherently dangerous. Thus, a custodial period was clearly required and in the judge's opinion it would provide the structure and rehabilitation that AR needed and had failed to obtain in the year prior to her sentencing (at para. 8).

The second case, *R. v. J.J.A.* (2012), was a sexual assault case heard under the YCJA. The judge upon sentencing concluded that a custodial disposition was consistent with the sentencing regime in the YCJA (at para. 19). Furthermore, the judge stated "I agree with the range of sentence advanced by the Crown – it is a measured response to the offence and the offender" (at para. 19).

These cases, while informative, do not provide clear support for penal populism. Upon further exploration, there were but two cases wherein the judge made clear and explicit reference to supporting the recommendations put forward by the Crown. Secondly, the judge's rationale did not specifically make reference to meeting public demands for harsher punishments. In the first case, *R. v. A.R.* (2008), the judge in considering the

‘appropriate sentence’ placed more emphasis on rehabilitation. In the second case, R. v J.J.A. (2012), the judge emphasized proportionality, the punishment fitting the crime.

Table 4.3: Court Imposed Sentence by Crown Recommended Sentence²⁴

		Custody		Total	
		Yes	No		
Crown	Yes	Count	41	7	48
		% within Crown Sentence	85.4%	14.6%	100.0%
		% of Total	82.0%	14.0%	96.0%
	No	Count	1	1	2
		% within Crown Sentence	50.0%	50.0%	100.0%
		% of Total	2.0%	2.0%	4.0%
Total		Count	42	8	50

To further examine penal populism, bivariate analyses were conducted to examine the relationship between *offence* and the *court-imposed sentence*. Penal populist theory suggests that the sexual assault offenders would be expected to receive harsher sentences than the physical assault offenders as the public deems sexual assault the more egregious offence (Roberts et al., 2003). Table 4.4 shows that, of the 28 physical assault offenders in this sample 24 (92.3%) received a custodial sentence. There were 24 sexual assault decisions of which 19 (67.9%) received a custodial sentence. Therefore, a higher percentage of young offenders convicted of physical assault received a custodial sentence compared to the young offenders who were charged with sexual assault.

²⁴ Data was missing for some cases and these were excluded from the analysis.

Table 4.4: Court Imposed Sentence by Offence

Offence			Custody		Total
			Yes	No	
Physical Assault	Count		24	2	26
	% within Offence		92.3%	7.7%	100.0%
	% of Total		44.4%	3.7%	48.1%
	Count		19	9	28
	% within Offence		67.9%	32.1%	100.0%
	% of Total		35.2%	16.7%	51.9%
Total	Count		43	11	54
	% within Offence		79.6%	20.4%	100.0%
	% of Total		79.6%	20.4%	100.0%

4.2.1 Penal Populism Summary

Overall, the findings provide limited support for the penal populism theory of sentencing. On the one hand, there is some evidence that, at least in this non-representative sample, penalties for violent offences have become harsher both, post the 2012 (SSCA) amendments and under the YCJA (2003-2012) compared to the YOA. These results may suggest that Canada, in particular Ontario, is taking a more punitive stance towards young offenders; however, this increase in custodial sentences may reflect the success of extra-judicial measures under the YCJA, thereby resulting in the serious violent offenders being processed through the court system. There was no evidence to support the hypothesis that judges adopt the harsher sentences advocated by the crown. Furthermore, if we look more closely at judges' sentencing decisions, harsher sentences are often justified with reference to rehabilitation and other factors (e.g., retribution). It is not entirely clear that the harsh sentences are intended to punish or to 'get-tough' on crime (the justifications provided by judges are explored in more detail later in Chapter 5). Last, it is not the case that sexual assault offenders receive harsher sentences than physical assault offenders, despite the public's negative reaction to these crimes. Thus, it would appear from the results of this study that Ontario youth court judges are not becoming more punitive as a result of legislative changes in Canada. Further, the results may indicate the success of the YCJA in reducing the number of minor offences being processed through the judicial system.

4.3 Focal Concerns Theory

Drawing on focal concerns theory, the second research question asks: Do legal decisions, as they relate to the type (custodial versus non-custodial) of sentencing within the Ontario youth justice system, reflect an offender’s level of blameworthiness and need for protection of the public? And, can extralegal factors, such as age and gender explain disparities in sentencing?

To answer this question, I first conducted bivariate analyses to examine the relationship between offender’s criminal history (as reflected by whether an offender was a first-time or repeat offender) and the sentence imposed by the court. It was inferred that first-time offenders would be viewed as less blameworthy than repeat offenders. The results in Table 4.5 show that of the 42 first-time offenders, 34 (81%) of the offenders received a custodial sentence. Similarly, of the 12 repeat offenders, 9 (63%) received a custodial sentence.

Table 4.5: Court Imposed Sentence by Offenders' Criminal History

			Custody		Total
			Yes	No	
FTO	Yes	Count	34	8	42
		% within FTO	81.0%	19.0%	100.0%
		% of Total	63.0%	14.8%	77.8%
	No	Count	9	3	12
		% within FTO	75.0%	25.0%	100.0%
		% of Total	16.7%	5.6%	22.2%
Total	Count	43	11	54	
	% within FTO	79.6%	20.4%	100.0%	
	% of Total	79.6%	20.4%	100.0%	

The second variable I created to assess the level of blameworthiness was ‘offender’s plea’ which was taken as a measure of the level of remorse expressed by the offender. Offenders who plead guilty, may be seen as more remorseful and therefore judges might perceive them as being less blameworthy, resulting in a lighter (non-custodial) sentence. Table 4.6 shows that of the 36 offenders who pled guilty to an offence of either sexual assault or physical assault, 30 (83.3%) were sentenced to custody. Comparatively, of the

18 offenders, included in this study, who pled not guilty to either a sexual assault or physical assault, 13 (72.2%) were sentenced to custody.

Table 4.6: Court Imposed Sentence by Offender's Plea

Plea	Guilt	Count	Custody		Total
			Yes	No	
			30	6	36
		% within Plea	83.3%	16.7%	100.0%
		% of Total	55.6%	11.1%	66.7%
	Not Guilty	Count	13	5	18
		% within Plea	72.2%	27.8%	100.0%
		% of Total	24.1%	9.3%	33.3%
Total		Count	43	11	54
		% within Plea	79.6%	20.4%	100.0%
		% of Total	79.6%	20.4%	100.0%

The third variable measures the level of blameworthiness by *offence*, which represents sexual assault and physical assault. Since both physical assault and sexual assault are defined as violent offences against persons under the Criminal Code, the YOA, and the YCJA, focal concerns theory would lead us to expect that there would be no difference in the judge's perceptions concerning offenders' level of blameworthiness or seriousness of the offence. In other words, the court imposed sentences for the sample included in this study, should be similar. As Table 4.4 showed, a higher percentage of offenders convicted of physical assault received harsher sentences than those convicted of sexual assault, which runs counter to focal concerns theory.

Focal concerns theory also proposes that judges often have limited information to accurately determine the level of dangerousness, culpability, and likelihood for recidivism and as such develop, a 'perceptual shorthand', which is based on stereotypes and attributions linked to an offender's age and gender (Hartley et al., 2007; Steffensmeier et al., 1998; Steffensmeier, Kramer, and Streifel, 1993; Steffensmeier, Ulmer, and Kramer, 1998). This perceptual shorthand can explain disparities in sentencing and often leads to discriminatory practices by the judiciary. Unfortunately, there were too few females in this study to conduct a proper comparison. As Table 4.7

shows, of the 6 females in this sample, 4 (66.7%) females received a custodial sentence compared to 39 (81.3%) of the 43 of males.

Table 4.5: Court Imposed Sentence by Gender

Gender		Count	Custody		Total
			Yes	No	
Male	Count	39	9	48	
	% within Gender	81.3%	18.8%	100.0%	
	% of Total	72.2%	16.7%	88.9%	
	Female	Count	4	2	6
		% within Gender	66.7%	33.3%	100.0%
		% of Total	7.4%	3.7%	11.1%
Total	Count	43	11	54	
	% within Gender	79.6%	20.4%	100.0%	
	% of Total	79.6%	20.4%	100.0%	

Table 4.8 presents the bivariate analyses for sentencing outcomes by age-group. While young offenders are viewed as less blameworthy than adults, drawing on focal concerns theory and the age-crime curve, one could expect that the younger offenders (12-15 year olds) would be perceived as less blameworthy than the “older” (16-17 year olds) younger offenders and would therefore receive a less punitive sentence (e.g., probation). As the table shows, 15 (83.3%) of the twelve to fifteen year olds in the sample received a custodial sentence. Similarly, 21 (77.8%) of the offenders aged 16 and 17 years old received a custodial sentence.

Table 4.6: Court Imposed Sentence by Age

Custody Yes	No Custody
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AgeGroup	12-15	Count	15	3	18
		% within AgeGroup	83.3%	16.7%	100.0%
		% of Total	33.3%	6.7%	40.0%
	16-17	Count	21	6	27
		% within AgeGroup	77.8%	22.2%	100.0%
		% of Total	46.7%	13.3%	60.0%
Total		Count	36	9	45
		% of Total	80.0%	20.0%	100.0%

With respect to the second focal concern ‘protection of the community’, I used two variables: interim custody and prospects for rehabilitation. Drawing on focal concerns theory, it was expected that a higher percentage of young offenders who served interim custody would receive a custodial sentence, as they would be the offenders perceived by the courts as being a risk to the community. Table 4.9 looks at interim custody by sentencing outcome and the results revealed that of the 30 offenders who served interim custody, 24 (80%) received a custodial sentence. Of the 24 young offenders who did not serve interim custody, 19 (79.2%) received a custodial sentence.

Table 4.7: Court Imposed Sentence by Interim Custody

		Custody		Total	
		Yes	No		
Interim	No	Count	19	5	24
		% within Interim	79.2%	20.8%	100.0%
		% of Total	35.2%	9.3%	44.4%
	Yes	Count	24	6	30
		% within Interim	80.0%	20.0%	100.0%
		% of Total	44.4%	11.1%	55.6%
Total	Count	43	11	54	
	% of Total	79.6%	20.4%	100.0%	

I next assessed the significance of offenders’ prospects for rehabilitation and sentencing outcomes. Drawing on focal concerns theory, it was inferred in this study, that offenders who have poor or less favourable prospects for rehabilitation would be perceived by the courts as posing a greater risk to the community. As such, it would be expected that a higher percentage of young offenders, assessed as having poor or less favourable

prospects for rehabilitation, would receive a more punitive sentence (custody). Comparatively, the offenders who are perceived as having favourable prospects for rehabilitation would be viewed as posing less of a risk to the community and as such would receive a less punitive sentence (probation). The results presented in Table 4.10 show that of the 29 young offenders who were perceived by the court as having favourable or good prospects for rehabilitation, 23 (79.3%) received a custodial sentence. Of the 18 young offenders who were perceived as having less favourable prospects for rehabilitation, 15 (83.3%) received a custodial sentence. To the extent that offenders' prospects for rehabilitation reflect the level of risk they pose to the public, focal concerns theory is not supported here.

It should be noted that in about 89% of the cases, judges commented on an offender's rehabilitation prospects. There were six cases (3 sexual assault and 3 physical assault) for which I was unable to clearly identify the courts' perceptions with regards to an offender's prospects for rehabilitation. These cases were excluded from the analysis shown in Table 4.10.

Table 8: Court Imposed Sentence by Prospects for Rehabilitation

			Custody		Total
			Yes	No	
Rehabilitative Prospects	Favourable	Count	23	6	29
		% within Rehabilitative	79.3%	20.7%	100.0%
		% of Total	43.4%	11.3%	54.7%
	Not Favourable	Count	15	3	18
		% within Rehabilitative	83.3%	16.7%	100.0%
		% of Total	28.3%	5.7%	3.7%
Total	Count	38	9	47	
	% of Total	80.9%	19.1%	100.0%	

4.3.1 Summary Results: Focal Concerns Theory

To summarize, my analyses provides no empirical support for focal concerns theory. First time offenders and those who pled guilty received comparable sentences to those who were repeat offenders and did not plead guilty. Similarly, offenders who are perceived as having better prospects for rehabilitation received comparable sentences to

those who are perceived as having poor or less favourable prospects for rehabilitation. In addition, focal concerns theory would lead us to expect no difference in sentencing between the two offences, but the results revealed a higher percentage of physical assault offenders received a custodial sentence as compared to the sexual assault offenders.

4.4 Chapter Summary

This chapter presented the results of the descriptive and simple quantitative analyses conducted to answer my first two research questions, which examined the focal concerns and penal populist theories of sentencing. These analyses provide, at best, only limited support for penal populism and no support for focal concerns theory. For instance, in support of penal populism, there was some evidence that the penalties for violent offences may have become harsher under the YCJA and post the 2012 amendments to the YCJA, than under the YOA. However, it should be noted that the results may reflect the success of extrajudicial measures under the YCJA. It is not clear that judges simply follow the recommendations of the Crown when sentencing. Furthermore, the content of sentencing decisions never referenced penal populists beliefs. In addition, while penal populists suggest that the sexual assault offenders would be expected to receive harsher sentences compared to the physical assault offenders, the results showed the contrary. As such, the results would suggest that Canada, in particular the province of Ontario, has not adopted a penal populist agenda.

The results provided no empirical support for focal concerns theory in that there was no relationship between the court-imposed sentence and the court's perception of an offender's level of blameworthiness, as measured by criminal history and offenders' plea. Further, offenders who were perceived as having favourable prospects for rehabilitation were no more likely to receive a custodial sentence than those perceived as having less favourable prospects. It also appears from the results, that contrary to the argument that sexual assault and physical assault are not viewed as similar in severity (in terms of the legislative definition and corresponding sentencing ranges), as this study found that a higher percentage of physical assault offenders received custodial sentences as compared to the sexual assault offenders.

The following chapter focuses on this surprising finding. Using content analysis, I answer the third research question: Is there evidence of variations in sentencing rationales provided by judges upon sentencing within and across offence (physical and sexual assault) type? To answer this question, I explore whether the sentencing rationales provided by judges upon sentencing varies within and across offence (physical assault and sexual assault) type? In particular, I seek to account for the differences in sentencing outcome between the physical assault cases and the sexual assault cases.

Chapter 5

5 Introduction

The results, as presented in Chapter 4, provided no empirical support for focal concerns theory. However, an interesting finding did reveal itself in the bivariate tables. Recall that under the Criminal Code of Canada, sexual assault (level 1 and level 2) and physical assault (level 2 and level 3) are defined as being of equal severity as measured by the sentences available upon convictions. Hence, it was proposed that the courts would perceive physical assault as no more severe than sexual assault, and as such the sentence received for each would be similar. Analyses presented in chapter 4, however, showed that a higher percentage of physical assault offenders (92%) received a more punitive, custodial sentence than the sexual assault offenders (68%). Also surprising – and inconsistent with focal concerns theory – is the finding that 79% of young offenders who were perceived by the courts as having favourable prospects received a custodial sentence and, similarly, 83% of those with poor prospects for rehabilitation received a custodial sentence. In line with focal concerns theory, it was expected that those with poorer prospects for rehabilitation would be seen as a greater threat to the community, and hence would be more likely to receive a custodial sentence; however, the results did not support this assumption.

This chapter focuses on these surprising findings and seeks to answer research question 3, is there evidence that the sentencing rationales provided by judges upon sentencing, vary within and across offence type? To answer this question I report the findings of an in-depth content analysis of sentencing decisions. Why have a higher percentage of young offenders convicted of physical assault received a custodial sentence as compared to those convicted of sexual assault? What rationales do judges provide for their sentencing decisions? In seeking explanations, I draw on Focal Concerns Theory and return to the principles of sentencing that underlie youth justice legislation, especially, responsibility, accountability, and rehabilitation. Specifically, I consider whether the differences in sentencing within and across offence (physical and sexual assault) type are explained by

differences in prospects for rehabilitation or whether other factors, such as accountability, weigh on judges' minds.

In earlier chapters, I outlined the Principles of the YOA and the YCJA, which identify rehabilitation as being a guiding principle upon sentencing: it is believed that many youths can be reformed and returned to the community. Nonetheless, rehabilitation cannot be the sole focus for legal intervention, as the courts must also take into account the protection of the public by imposing a meaningful consequence to foster responsibility and accountability. The YCJA states these principles more succinctly. As stated in the Preamble, Canada should have a youth criminal justice system that fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration into the community (YCJA, 2003). In this manner, when sentencing young offenders, judges should consider responsibility, accountability, rehabilitation, and reintegration into the community, under the YOA and the YCJA.

To explore the significance of these considerations to sentencing outcomes, in this chapter I first present the results of the word query analysis (discussed in Chapter 3). Next, I explore whether the differences in sentencing within and across type of offence are explained by rehabilitative prospects. Particularly, were the offenders convicted of sexual assault perceived as more likely to be rehabilitated than their physical assault counterparts? In the next, main, section of the chapter, I present ten case summaries, detailing the sentencing rationales provided by judges. I chose these specific ten case summaries as they provide the necessary information to give the reader a detailed, meaningful, and representative illustration of the research findings more broadly. These cases, not only illustrate the disparities both within and across sentencing, but also provide insight into the judicial disposition process for young offenders. Further, they provide a representative illustration of the 'general' two-step process (discussed in section 5.5 of this study) that captures or illuminates the process of sentencing and the factors that judges consider upon sentencing.

The ten cases include five physical assault and five sexual assault sentencing decisions. I also discuss the content of these decisions to illustrate the factors and considerations that

shape sentencing and provide possible explanations for sentencing disparities within offence type. Lastly, I provide three possible explanations for sentencing disparities across offence type. Ultimately, I argue that focal concerns theory's emphasis on 'protection of the community', under the guise of rehabilitation, was the prominent consideration upon sentencing young offenders. Thus, while there is much disparity in sentencing practices and considerations shaping sentencing are complex, they are generally consistent with focal concerns theory.

5.1 Word Query Analysis

Taking into account the sentencing principles guiding the YOA and the YCJA (responsibility, accountability, rehabilitation, and reintegration), I ran word queries using NVivo, to determine the number of times these words were used, where in the decisions these terms were located, and whether such principles weigh upon judges' mind upon sentencing. The term accountability, which included the stemmed word accountable, occurred 130 times in the physical assault decisions and 95 times in the sexual assault decisions. The term responsibility, which included the stemmed words responsible, responsibilities, and responsibly, occurred 131 times in the physical assault decisions and 97 times in the sexual assault decisions. The term rehabilitation, which included stemmed words rehabilitate, rehabilitated, and rehabilitative, occurred 181 times in the physical assault cases and 276 within the sexual assault cases. Lastly, the term reintegration, which included the stemmed words reintegrate and reintegrates, occurred 68 times in the physical assault decisions and 52 times in the sexual assault decisions.

It would appear from the word queries that rehabilitation was a major focus in sentencing decisions. Accountability and responsibility were also important considerations with reintegration being relevant but not emphasized as much as the other terms. Although this word query analysis is informative, highlighting the centrality of rehabilitation to youth court judges' decision-making, its significance should not be overstated. Several sentencing decisions simply cited or quoted from youth justice legislation, repeating the key terms to remind the court of the principles embedded in the legislation. Nevertheless, the word queries were helpful in that the query located wordings within the decisions,

and thereby facilitated further exploration as to how these terms were used, and what meanings were attached to them.

5.2 Rehabilitation and Offence Type

Since the word ‘rehabilitation’ was mentioned more often in the sexual assault cases, it was anticipated that the sexual assault offenders might be seen as having higher prospects for rehabilitation. Conversely, it was expected that physical assault offenders would have lower prospects for rehabilitation, thus leading to higher rates of incarceration. To determine if rehabilitative prospects explain the differences across offence type, I conducted a bivariate analysis. The findings reported in Table 5.1 are counter to expectations. A higher percentage of offenders convicted of physical assault (62%) were perceived by the courts as having favourable prospects of rehabilitation, compared to the offenders who were convicted of sexual assault (46 %), as reported in Table 5.1. These findings are consistent with those reported in Table 4.10 (reported in Chapter 4) which showed that differences in sentencing outcomes were not dependent on rehabilitation prospects, and in fact hinted that those with favourable prospects for rehabilitation might be *more* likely to receive a custodial sentence than those with poorer prospects.

Table 5.1: Offence by Prospects for Rehabilitation

Offence			Physical Assault	Sexual Assault	Total
Rehab	Favourable Prospects for Rehabilitation	Count	16	13	29
		% within Offence	61.5%	46.4%	53.7%
Less Favourable Prospects for Rehabilitation	Less Favourable Prospects for Rehabilitation	Count	7	12	19
		% within Offence	26.9%	42.9%	35.2%
Total		Count	23	25	48
		% of Total	47.9%	52.1%	100.0%

Thus, although word queries and initial bivariate analyses suggest that rehabilitation, along with accountability and responsibility, are important considerations in sentencing decisions, their impact is not straightforward. It is not clear how these considerations shape differential sentencing outcomes by offence type. To understand the significance of these considerations, a closer look at the sentencing decisions is required.

In the following section, I present detailed summaries of the cases, highlighting their key elements to illustrate the disparity in sentences imposed for physical assault and sexual assault in youth court cases.

5.3 Sample of Physical Assault Cases and Sentencing

Of the 26 physical assault offenders, 14 (54%) offenders received a secure/closed custodial sentence that would be followed by open custody and/or probation, 10 (38%) received an open custodial sentence followed by probation, and only two (8%) received a non-custodial (probation) sentence. These differences illustrate a disparity in sentences imposed for physical assault convictions of young offenders. This section provides detailed summaries of five sentencing decisions to illustrate the significance of rehabilitation within offences type (physical assault). At the end of this section, I highlight the importance of rehabilitation prospects and accountability to the sentencing decisions.

5.3.1 Case 1: R. v. D.G.J. (2008)

In R. v. D.G.J. (2008), D.G.J. was convicted of five counts each of aggravated assault and the discharging of a firearm. Five victims suffered serious bodily harm as a result of gunshot wounds. DGJ was also convicted of one count of conspiring to commit aggravated assault and a series of firearm charges (e.g., possession of a restricted weapon; possession of a firearm without a license) (at para. 3). DGJ was 17 years old at the time of the offence. This was his first offence and he pled not guilty.

The court determined that DGJ was the ‘prime mover’ in this offence: “this must be stressed from the outset. Mr. D.G.J. was found to be the prime mover in this operation” (at para. 6). The court found that DGJ had arranged for the acquisition and disposal of the firearms and ammunition as well as contracting the transportation needed to move the other individuals involved in the offence. Following the shooting, DGJ skillfully managed the escape of all involved (at para. 6). The judge stated “these are serious

offences that threatened the sanctity of life and the general safety of the community and this young man is fully responsible for what occurred that night” (at para. 11).

Five people were shot and as stated by the court and “only by an Act of Providence was anyone not killed” (at para. 7). One round of ammunition found its way into a residential dwelling. No one was harmed; however, the court could only wonder “as to what would have occurred if someone had been in its path” (at para. 7). The injuries of each of the victims were not life threatening and it was expected they would make substantial recovery with time (at para. 7). Regardless, as stated by the judge, DGJ had

displayed a total disregard for human life . . . and he has learned little or nothing from that experience. He is quite capable of performing the cold act of planning the shooting of another human being and not caring if people other than his target find themselves in the line of fire (at para. 11).

The judge considered DGJ’s pre-sentence report, which described DGJ as a young man who had a stable upbringing, nurtured by attentive and caring parents and siblings. He was not performing at a level forecasted by his intellectual potential and instead displayed undisciplined and confrontational tendencies. The judge, further, noted that DGJ did not accept ‘responsibility’ for what had occurred the evening of the events and maintained that he was innocent of any wrongdoing, a position that DGJ took in face of the overwhelming evidence presented to support the findings of guilt (at para. 8-9).

The court in considering whether to impose a custodial sentence referenced the principles of sentencing, which state the YCJA “aims to hold young people accountable for their actions with meaningful consequences that will impose the least restrictions on the youth’s liberty and freedoms while ensuring his rehabilitation and reintegration into society” (at para. 10). In addition, “a Court must consider all sentencing alternatives short of incarceration before ordering the loss of a youth’s liberty, and if incarceration is in order, the Court must explain why it was necessary to do so” (at para. 10). The court considered the principles along with DGJ’s behavior during the pre-sentence trial period and concluded that DGJ’s prospects for rehabilitation were favourable. In the judge’s words, “it is of note that his behavior and attitude towards legitimate authority has

improved since the time he has been at Brookside. He is a person of great potential, heretofore wasting” (at para. 12).

Upon sentencing the judge stated “nothing short of incarceration will bring home to this young man the seriousness of his actions, nor will anything short of incarceration ensure his rehabilitation and safe reintegration into society” (at para. 12). In addition, “incarceration will ensure that his potential will be well on its way to being fully realized by the time he is released” (at para. 12). Given that the maximum sentence inclusive of probation that can be imposed by the court was 3 years, DGJ was sentenced to 12 months secure custody and credited 5.5 months for his time spent in pre-sentence custody (at Brookside). The secure custodial sentence was to be followed by 10 months custody and supervision and a subsequent period of 12 months of probation.

5.3.2 Case 2: R. v. A.S. (2013)

In the case R. v. A.S. (2013), ZN was one of four offenders involved in a ‘brutal attack’ on two victims (AK and NK) (at paras. 1-5). ZN was 17 years old at the time of the offence and had pled guilty to three offences: assault with a weapon (a machete) against AK, aggravated assault against AK, and aggravated assault against NK.

The events had taken place during a birthday party. AK and NK had stopped by the birthday party to hang out with friends and while standing in the mall outside of the banquet hall, where the party was being held, AK and NK were attacked by four young persons, one of which was ZN. The injuries NK suffered from the assault included: a gash (10 cm long and 5 cm wide requiring 14 staples), a fracture to his forearm, a gash near his knee (8 cm long, 4 cm wide and 3 cm deep), required 13 staples, and a 2 cm gash to his eyebrow. AK suffered a machete slice to the back of his neck which measured 10 cm long, 8 cm wide, 5 cm deep and required 5 stitches and 10 staples. In addition, the cut to the back of his neck was within an inch of AK’s spinal cord and was deep enough to expose his spine, leaving AK unable to move for a month after the attack. He also suffered gashes to his leg, a 5 cm long, 4 cm wide, 4 cm deep cut that required 5 staples and a cut to his lower leg that needed 2 stitches (paras. 2-11).

In determining ZN's role in the offence, the court found ZN to be "the primary assailant and by far the most culpable of the four young persons" (at para. 15). ZN had been the only one who wielded the machete and he inflicted the gravest wounds. In addition, it was determined from a surveillance video that it was ZN's chain of decisions, such as his running to his car, returning with his machete and hacking both victims over and over again that recalibrated this incident from a group attack into a brutal, terrifying assault that resulted in devastating injuries (at para. 15). The judge further stated "not only did ZN bring the machete into the scene, but he wielded it with such vicious force that he broke N.K's arm and slashed A.K's neck literally to the bone" (at para. 15). As such, the court found that not only was it ZN's weapon that inflicted the most grievous harm, but it was also ZN's brutality that was the engine that drove the attack. It was ZN, not the other offenders involved, who directed the full fury of his violence at both AK and NK (at para. 15).

The judge considered ZN's pre-sentence report, which illustrated ZN's expression of remorse. ZN had also written letters of apology to both the victims and the two witnesses who attempted to stop the attack (at para 18). He had repeated the apology in court stating that "he was sorry to everyone affected by the incident, would take it back if he could and has learned from his mistake" (at para. 18). He also expressed profound remorse for the impact the offences had on his mother (at para. 19).

ZN was reported to have a loving and supportive family, he was close to his parents but had damaged the relationship, especially with his father, as a result of his oppositional and now criminal behavior (at para. 19). Since being in pre-sentence custody, Z.N. had completed his high school diploma and planned to go to university, which in the court's view demonstrated ZN's aptitude, commitment and ability to follow through with plans and to do well (at para. 21).

ZN along with the other three offenders involved pled guilty to the offence, which demonstrated their remorse and acknowledgement of responsibility to the court and pre-empted the victims from having to testify again at trial (at para. 57). The guilty pleas, however, had not been entered until the end of a lengthy preliminary inquiry and only

after two victims and two civilians (witnesses) had provided evidence. Nevertheless, the court was of the view that the four offenders had acknowledged their culpability and were seeking to be held accountable for their crimes (at para. 57). This was viewed by the court as a major step towards fulfilling the objectives of the YCJA; all four (including ZN) were initiating and taking ownership of their rehabilitation process (at para. 58).

Upon sentencing, the judge noted that ZN had already spent 14 months and 11 days in secure, pre-sentence custody and during this time he had made impressive progress, and had taken advantage of the programs and resources that were available to him. For example, the judge commented,

in my view, Z.N.'s growth and maturation since this offence illustrate that he has the strength and character to accomplish his personal goals and to become a fine man and citizen. Moreover, I believe that he has the capacity to turn this experience and his pivotal, reprehensible role in these grave offences into a source of wisdom, empathy, and renewal. Whether or how he makes use of all that he has learned since July 29, 2012 [day of offence] remains to be seen. The choice is his (at para. 23).

As such, he was credited 21 months and 17 days for time served in pre-sentence custody and was sentenced to an additional 21 days of open custody and supervision followed by 14 months of probation (at para. 105).

5.3.3 Case 3: R. v. M.A.Z. (2013)

R. v. M.A.Z. (2013) was a physical assault case heard under the YCJA, post the 2012 amendments, which permitted “a Court to consider deterrence and denunciation as factors on sentencing” (at para. 12). MAZ pled guilty to aggravated assault, assault with a weapon and failing to comply with a recognizance (at para. 1).

After school, two victims (AN and BL) were outside a library having a cigarette when a car pulled up, driven by three males (MAZ and two other males). The three males exited the car and approached AN and BL. MAZ said to AN “why are you fucking with my cousin” at which point he proceeded to strike AN, who fell to the ground. MAZ along with a second offender (HB) both punched and kicked AN. The second victim, BL, made attempts to stop the attack although he was unsuccessful as MAZ had pulled out a knife and begun stabbing AN. AN was stabbed four times in the torso but since he was

wearing a down filled jacket and was moving backwards during the attack he had avoided being cut. MAZ proceeded to walk over to BL and began stabbing him in the chest. After stabbing BL, the three males all fled in the car (at para. 5-6)

The judge made reference not only to the seriousness of the offence but also the harm and impact the offence had on the victims stating, “the harm caused to the victims was serious” (at para. 32). While AN had not been physically injured, BL had been stabbed in the upper chest and this had punctured and collapsed his lung. In addition, a tendon in BL’s hand was severed which resulted in him spending three days in the hospital, requiring surgery and physiotherapy (at para 7-9).

The judge was of the view that there are “many aggravating features of this case” (at para. 22). For example, “this was a very violent attack” (at para. 23). Not only was the weapon concealed and then used but the attack “was clearly premeditated” (at para. 23). MAZ had come looking for his victims for the purpose of attacking and stabbing AN and BL with both being stabbed multiple times. There were multiple attackers and it was “over the most trivial of slights” (at para. 23). In addition, MAZ had accepted extra-judicial sanctions on the day of the attack and was on recognizance (for an earlier offence that was not discussed in this decision) which was “very aggravating” (at para. 23). Lastly, the concealed weapon in the earlier charge was a knife all of which added to the aggravating factors (at para. 23). The mitigating factors were that MAZ had pled guilty and he was still young and had no prior records.

MAZ had served 229 days pre-trial custody and according to his pre-sentence report MAZ was admitted to the Roy McMurtry detention center. While he had acted appropriately at first, less than a month later, he was involved in an altercation. Four months later there was another more serious incident wherein MAZ and another youth were involved in an attack on a corrections officer (at para. 20).

Upon sentencing the judge stated “the need to hold M.A.Z. ‘accountable’ is great. And that determination is made before any consideration of the need for specific deterrence or denunciation. M.A.Z. needs to be specifically deterred from committing further offences” (at paras. 34-35). The judge was further of the view that MAZ was not ready

for open custody as indicated by his prior conduct while serving pre-sentence custody, which demonstrated that he continued to need to be controlled for the safety of others (at para. 42). The judge was of the view that it would be in MAZ's interests to return to school in September, and if he successfully reintegrated into society, it would be in the public's interest as well, all of which would promote his rehabilitation and would contribute to the protection of society (at para. 42). MAZ was sentenced to a further two months secure custody, followed by six months of open custody that would be followed by four months supervision and one year probation (at para. 44).

5.3.3.1 Brief Summary

Case 1 (DGJ), Case 2 (ZN) and Case 3 (MAZ) dealt with physical assault cases, all of which involved the use of weapons with the victims suffering significant injuries. The disparity in sentencing outcomes appears to reflect the court's view of the offenders' behavior after the offence, and their level of culpability as measured by their level of remorse expressed, in addition to their prospects for rehabilitation. For example, DGJ was not remorseful, and appeared defiant and uncooperative during pre-sentence custody; however, the court perceived him as a 'person of great potential', therefore, having favourable prospects for rehabilitation. Given the seriousness of the offence (use of firearm), his lack of remorse, and the risk to the victims as well as those who had been in the path of the bullets, the court believed nothing short of incarceration would send the message to DGJ as to the seriousness of his offence and would promote his 'potential' rehabilitation and reintegration into the community (at para. 12). As a result, DGJ was sentenced to secure custody to be followed with open custody and probation.

MAZ showed remorse for his actions, but the court appeared to place a higher weight on his lack of progress and maturity since the offence, which revealed less favourable prospects for rehabilitation. As a result, the need to hold him 'accountable' was 'great' and more specifically he needed to be deterred from reoffending (at paras. 34 and 42). As a result, MAZ was sentenced to a secure custodial sentence, followed with open custody and probation, like DGJ. ZN, on the other hand, was remorseful and appeared to have learned from his actions and had made 'impressive progress' after the offence, which illustrated his favourable prospects for rehabilitation. Since he had already begun

to make progress, and had spent 14 months in secure custody, he was sentenced to open custody and probation (at paras. 104-105).

5.3.4 Case 4: R. v. K.C. (2011)

In R. v. K.C. (2011), KC is an Aboriginal female who was 17 years old at the time of the offence (at para. 1). KC was a first-time offender and she pled guilty to the offence of aggravated assault (at para. 1). KC's developmental years were described as being marred by abuse, alcohol, drugs, multiple changes in residences, and instability and as a result she had felt a profound lack of hope and an overwhelming sense of despair (at para. 38). KC wanted to leave the community she had been living in because many of the young people were drinking alcohol or smoking marijuana and there was nothing to do there. As such, at the age of 16 she chose to live with her mother again (at paras 33-34). Unfortunately, after KC began to live with her mom, off the Reserve, she experienced significant social challenges (at para. 35).

Feeling isolated and alone, KC left her mother's residence, where she had lived for the four months before the offence and KC planned to return to the Reserve where she had lived most of her life (between 4-16 years of age) (at para. 28). During her travels back to the Reserve, KC randomly selected and approached CC's (victim) house for help (at para. 29). Instead of asking for help, a confrontation occurred and KC stabbed and seriously injured CC with a large knife (at para. 29). Both the Crown and the defence counsel sought a serious violent offence designation,²⁵ with which the judge was in agreement stating, "no other designation would be appropriate"²⁶ (at para. 26).

²⁵ Defined as "an offence in the commission of which a young person causes or attempts to cause serious bodily harm" (YCJA, s. 2).

²⁶ Section 42(9) of the YCJA allows the Crown attorney to make an application to have an offence designated as a serious violent offence (SVO) which would become part of the youth's official record and may affect the sentencing being done, or for later offences a youth commits, subsequent SVOs. For example, a third offence designated as a SVO is an offence from which there is a presumption that an adult sentence would be imposed (s. 42[5][a]); Bala and Anand, 2012: 597).

CC (victim) spoke of the pain he suffered from being stabbed. His lungs had been punctured and his physical recovery had lasted for four months. He and his family continued to feel unsafe in their home and there was continued tension between his wife and himself that did not exist prior to the incident (at para. 36-37). The judge stated that “the actions of K.C. in confronting and stabbing C.C., a person K.C. did not know, while intentional or reckless, were in the main reactive and were not premeditated or planned” (at para. 39).

The court, in determining whether to impose a custodial or non-custodial sentence, took into consideration KC’s level of remorse, which was demonstrated by her plea of guilt, as well as that she was a first-time offender and of Aboriginal status²⁷ (at para. 42-65). In addition, KC had served 28 days in pre-sentence custody and following her release was on strict house arrest for 7 months without incident. Upon sentencing, the court stated that KC’s case posed “very difficult considerations for the court” (at para. 63).

Nevertheless, the judge believed a reasonable alternative to custody existed for KC as a non-custodial sentence would provide “a meaningful consequence to K.C. and would best promote her rehabilitation and reintegration into society” (at para. 64). As such, KC was sentenced to two years’ probation, which according to the judge was “the maximum non-custodial sentence this court can impose” (at para. 65).

5.3.5 Case 5: R. v. A.R. (2008)

In R. v. A.R. (2008), AR was 17 years old at the time of the offence, and had pled guilty to a charge of aggravated assault. AR and her boyfriend had brought their vehicle to a stop at a bus stop when AR leaned out the window to shoot pedestrians waiting for the bus, with a paintball gun. The paintball struck one victim (Ms. R.) in the face and exploded her eye. The victim sustained permanent damage and it was reported that she was unlikely to regain useful vision in her eye. The victim (Ms. R.) had specifically recalled hearing AR laughing as the two drove away (at para. 1-2). In this case, the

²⁷ “The YCJA directs that alternatives to custody must be considered when imposing sentences, especially for Aboriginal young offenders (s. 38(2)(c)).

defence conceded that the offence met the definition of a “serious violent offence” as described in the YCJA stating the “Crown properly put before me the facts and law to support the designation I make that this senseless brutal act constitutes a serious violent offence”²⁸ (at para. 1). A second victim (AS) was shot in the leg.

AR’s presentence report was not positive, in the judge’s view, as it was reported that since AR’s arrest, she had not made any significant changes to her life. For example, she was not in school and had not pursued full time employment as she feared her wages would be garnished, if she was to be sued by the victim. This negative report diminished greatly, the judge’s view of AR’s remorse that “she professes to feel” (at para. 4). While she had strong family support, AR claimed to be using drugs to forget her problems and had discontinued her attendance at a local drug treatment day program. She had also been apprehended by police for being in possession of drugs but was let off with a warning. Thus, the court stated “the only mitigating factors present are the absence of a record and the plea and early acceptance of responsibility” (at para. 4).

The harm to Ms. R., according to the judge, was extreme and permanent. She had suffered tremendously through prolonged treatment and surgeries with more surgeries planned for the future. As stated by the judge the

Crown suggests, and I agree, the activities here are extremely reckless and inherently dangerous. To shoot at people at a bus stop, in a drive by shooting, is significantly dangerous and callous because they had no forewarning, no ability to escape or take defensive action. I consider very aggravating the fact that the accused laughed as they sped off. A custodial period is clearly required (at para. 8).

²⁸ Section 64(1) of the YCJA states the Crown may make an application to the youth justice court for an order that the young person is liable to an adult sentence if the young person is or has been found guilty of an offence from which an adult would be liable to imprisonment for a term of more than two years and the young person committed the offence after he/she attained the age of 14 years old. Further, under section 42(7) a youth justice court may make an intensive rehabilitative custody and supervision order . . . if the young person has been found guilty of a serious violent offence (a[i]) or the young person has been found guilty of an offence and which caused serious bodily harm for which an adult would be liable to imprisonment for a term of more than two years, and the young person had been found guilty of at least two prior such offences (a[ii]).

AR was sentenced to a period of six months open custody and community supervision, followed by 18 months of probation. The judge was of the view that the six-month sentence was “clearly required” in order to provide the structure and rehabilitation AR needed and had failed to address in the year prior to sentencing (at para. 8). The judge also made reference to other aggravated assault sentences stating “the sentences that have been imposed on youth for aggravated assault have almost exclusively been custodial in nature, and there is nothing in this case which would justify a non-custodial sentence” (at para. 8).

5.3.5.1 Brief Summary

Case 4 (KC) and Case 5 (AR) are physical assault offences with a weapon. Both KC and AR were 17 years old at the time of their offences. KC was an Aboriginal female, who had a troubled past. While the assault was serious, her actions appeared to the courts as being reactive and unplanned. In addition, while not explicitly stated by the court, it appears that since KC had made attempts at improving her life and family situation, a non-custodial sentence was viewed as better suited for KC’s rehabilitation and reintegration into the community. On the other hand, AR received an open custodial sentence. AR had shown no remorse for her actions and her behavior after the offence was not exemplary. The court concluded that a custodial sentence would provide the structure necessary to promote AR’s rehabilitation. AR and KC were two females and the court’s leniency in terms of the punitiveness of their sentences as compared to the male offenders in this sample, may reflect their gender.

Given the small sample size, an analysis of gender differences in sentencing is beyond the scope of this study. However, it should be noted that research (Statistics Canada, 2009; Minaker & Hogeveen, 2009; Bala and Anand, 2012) has revealed that youth courts are more lenient with female young offenders than with males, as an adolescent female is less likely to receive a custodial sentence for any given offence than male youths (Bala and Anand, 2012: 76). Such leniency may appear, on the surface, advantageous to females may reflect judicial biases about females; however, Bala and Anand (2012) propose this leniency may instead reflect a judicial recognition that females have lower rates of recidivism (p. 76). In instances where a custodial sentence is imposed, the goal is

directed towards “protecting them” from engaging in high-risk activities (e.g., prostitution and drug use) as compared to concerns about accountability or protection of the public (Sprott, Doob, and Zimring, 2009; MacDonald and Chesney-Lind, 2001; Bala and Anand, 2012: 76). A disproportionate number of female offenders have been victims of physical and sexual abuse and given that females constitute a relatively small proportion of the young offender population, there is inadequate number of programs and services and as such female young offenders do not have access to adequate treatment in custody (Bala and Anand, 2012).

5.3.6 Physical Assault Section Summary

The previous sections provided sentencing summaries for five young offenders convicted of physical assault. Rehabilitation was a key consideration in all decisions and there was much discrepancy between sentences. Custody, for example, was seen as a means to facilitate, and in some instances continue, an offender’s rehabilitation. In other cases, where the prospects for rehabilitation were less favourable, custodial sentences were viewed as holding young offenders accountable to ensure their rehabilitation and future reintegration into society. In both instances, the courts appear to be attempting to predict the level of dangerousness and threat the offender posed to the community at large, which mirrors focal concerns theory ‘protection of the community’.

Other factors, highlighted by judges, appeared to have shaped sentencing outcomes. First family and personal circumstances were frequently noted. For instance, DGJ and ZN had come from stable upbringings, with attentive, supportive, loving, and caring family members. ZN’s supportive family may have been a factor in encouraging a lighter sentence. A supportive family, however, was not enough to benefit DGJ as the seriousness of the offence and his lack of remorse appeared to outweigh a stable home life. The lack of remorse appeared to increase DGJ’s level of culpability, resulting in a more punitive sentence being imposed to hold him accountable for his behavior. MAZ had demonstrated some level of remorse (by pleading guilty) but the judge still felt that he needed to be held accountable for his actions because of the seriousness of his offence and a closed custody sentence was issued. In addition, MAZ’s trial was heard after the

amendments to the YCJA, which reintroduced deterrence as a principle of sentencing, which also provides the courts with the opportunity to impose a more punitive sentence.

Behaviour since arrest was also taken into account. For instance, the court was concerned that AR had not made any significant changes to her life since her arrest, suggesting that she had not taken responsibility for her actions. As a result, a custodial sentence was ‘clearly required’ to provide her with structure and rehabilitation. KC, on the other hand, was a young Aboriginal female who appeared to be attempting to improve her situation both before and after the offence. The court took these attempts into consideration upon sentences and as a result, a non-custodial sentence was imposed so that KC’s progress would not be hindered by the imposition of a custodial sentence.

5.4 Sexual Assault Cases

It should be noted that, of the 28 sexual assault offenders, 10 (36%) received secure custody followed by open custody and probation, 9 (32%) received open custody followed by a period of probation, and 9 (32%) received a non-custodial (probation sentence). This section provides summaries of five cases, allowing for an analysis of what factors judges take into consideration when sentencing.

5.4.1 Case 6: R. v. K.H. (2000)

In R. v. K.H. (2000), KH was convicted of sexual assault and forcible confinement of victim (TA). It was reported that TA (victim) had met with KH at a friend’s apartment where the two had consensual sex. Subsequently KH facilitated TA’s sexual assault by several others. While TA was getting dressed and as KH was leaving the bedroom, CE, a friend of KH, entered the room and asked TA if he could have sex with her, and TA said no. TA was only clothed from the waist up and had a blanket covering her legs. CE proceeded to force TA to submit to sexual intercourse, while she was fighting and telling him to get out. TA also yelled out for KH’s help, but he ignored her (at para. 2).

While CE was attacking TA, KH came to the bedroom door, ignoring her pleas for help, and asked how to buzz DH into the building. After the incident with CE, TA began to get dressed again and just as she was about to leave the bedroom KH came in with a “new

spectator” (DH). After a brief verbal exchange, both KH and CE left the bedroom, leaving TA alone with DH. DH sexually assaulted TA. KH was viewed as facilitating DH’s sexual assault of TA. KH also forced TA to stay in the apartment when she tried to leave, further facilitating the ongoing sexual assault and confinement. TA was subsequently sexually assaulted by C(1), an individual by the name of C, with KH’s encouragement (at paras. 6-12).

The court, after considering all the evidence and while “suspicious there is a conspiracy here to make TA available to others for “sexual sports” (at para. 11) concluded that “I cannot say that there is sufficient hard evidence that K.H. was orchestrating the series of attacks and confinements of T.A.” (at para. 11). As such, the court concluded that KH had “aided and abetted and encouraged at various times at least three other young men in their sexual assaults and confinement of T.A.” (at para. 12). He had demonstrated appalling disrespect for TA, according to the court, including her physical, emotional, and sexual integrity and “facilitated a horrific violation of her person that undoubtedly had a lasting emotional effect” (at para. 13). The judge described TA as being an “emotionally reserved, self-contained individual,” which made it impossible to “say what the extent of the emotional effect was beyond what could be described as lasting” (at para. 13).

In consideration of KH’s pre-sentence report, which the court stated “is a very good report” demonstrating that KH had the capacity to show respect for other people, to counsel others and showing he had respect for other youths’ physical integrity whether it be sexual or simply physical violence (at para. 16). The court was impressed by the extent that KH had availed himself of the opportunities with various youth service organizations and youth committees. As the judge stated KH “has made an impressive contribution in everything he has done in that capacity” (at para. 16). It was also recognized that KH had the support of his mother, which was considered a “significant indicator of an individual who has considerable potential for rehabilitation . . . it is almost impossible to account for what appears to be something relatively out of character for his life experience to this point” (at para. 16).

The judge when considering the appropriate sentence made reference to the sentencing features of the YOA stating it requires

among other things that deterrence be given less significance than it would in the adult court, nevertheless it is my view that because of the horrific violation of T.A.'s sexual integrity on this date and the necessary ensuing emotional repercussions, it must be demonstrated by this court that the community will not tolerate this kind of activity without some severe sanction being imposed (at para. 18).

KH was sentenced to eight months open custody on the first offence (sexual assault) and eight months open custody concurrent on the second offence (forcible confinement), meaning that the total length of custody was eight months. The period of custody would be followed by a two-month period of probation (at para. 20). Upon sentencing, the judge stated this was the

appropriate level of incarceration because, in my view, K.H. would be best rehabilitated in the kind of setting where he can continue on his contact with his mother in an effective way with his family and continue in whatever work is available through agencies he has been currently employed. That is an advantage to him. It is an advantage to the community. I do not see that there is any significant security risks that K.H. function at that level of custody and I do not think that the deterrent requirements of sentence necessitate a secure custodial sentence. In my view, that length of sentence is an ample demonstration of the significance of the effect of this offence on T.A. and the type of sanction that the community would expect for this particular offence (at para 19).

In this manner, the judge emphasized a variety of factors in sentencing KH, including rehabilitation, community well-being, deterrence, and accountability.

5.4.2 Case 7: R. v. D.H. (2014)

In R. v. D.H. (2014), DH was found guilty of one count of sexual assault and two counts of sexual interference. The assaults had occurred over a period of five years. The victim was his cousin who was six years of age when the assault began. DH was thirteen at the outset of the assault, however, at the time of the sentencing hearing, the victim was twenty-two and DH was thirty (at paras. 1-2)²⁹ The victim was DH's paternal cousin and from the time she was an infant she had regularly spent weekends at DH's home, where

²⁹ In Canada, there is no statute of limitations for sexual assault or any indictable offences.

her father, although rarely present, had resided (at para. 2). Since the victim's mother worked on weekends, DH's mother and paternal grandmother looked after her and it was reported that the victim had regularly slept in DH's bedroom and bed. The abuse included repeated acts of a sexual nature (at para. 3).

The victim did not tell anyone until she was eleven years old at which time she informed her mother. She did not report the abuse to the police until 2011 (at paras. 2-3). The victim reported that she was slow to disclose and subsequently to report the abuse because she was 'embarrassed; and 'disgusted' (at para. 3). There was considerable evidence from both the victim and her mother about the victim's behavioural problems during the years in which the abuse took place, which included persistent anger, defecating in her underwear, smearing feces, and sexual acting out (at para. 4).

During her testimony the victim was also highly emotional and volatile and repeatedly shouted at DH and his mother. The victim had also been diagnosed with Crohn's disease and she testified that the stress and anxiety before and during the trial were making her sick (at para. 4). The victim stated "... I feel so worthless... Like I feel disgusting. It's embarrassing and it hurts so much..." (at para. 4). The Crown submitted a written victim's impact statement, which the judge called "a statement of abject despair" and concluded, "it is apparent that the psychological and emotional consequences of D.H.'s offences have been severe" (at paras. 5-6).

DH had continued to deny his guilt and there was no evidence of remorse. He stated the victim had "made up the stories" (at para. 7). In fact, the only indication of remorse that occurred was when DH was 17 years old. During a phone call (which he subsequently denied took place) his mother had confronted him about the abuse, and he replied "Yes I did it. I was experimenting. You can send the police to pick me up because I know what I did was wrong" (at paras. 21-23). Upon sentencing the judge stated "because D.H. has never faced his responsibility, there is no obvious route to a rehabilitation plan" (at para. 21). And in determining the sentence, the judge stated

I must consider all available sanctions other than custody that are reasonable in the circumstances. Would it be reasonable to impose a period of probation, or of deferred custody-dispositions which would permit D.H. to serve his sentence in

the community? Upon reflection I have concluded that such sentences would be unreasonable, and inconsistent with the sentencing principles of the *Act*. In my view, a community sentence would not achieve the purpose of holding D.H. accountable, because the consequences would not be meaningful to him. Nor would a community sentence promote his rehabilitation, his sense of responsibility, or his acknowledgement of the harm done to the victim and the community. Despite the restrictions on his way of living inherent in a probation or deferred custody order, the effect of such sentences, would permit D.H. to continue to avoid confronting the facts about his behavior, and the harm he has caused to the victim (at para. 22).

In considering the phone call between DH and his mother, what the judge found striking about the exchange was DH's response "I was experimenting" (at para. 23). The judge concluded that "neither at that time, nor since has DH acknowledged the humanity of the victim. Nor has he acknowledged even the possibility that his behavior caused her trauma" (at para. 23). And while DH was a youth during the period the abuse was taking place, "this was not impulsive behavior. The victim was, for him, an object available for his experimentation. The victim knew this, and it has devastated her" (at para. 23).

The court concluded that a period of incarceration was required and DH was sentenced to a closed custody and supervision order of 9 months followed by a period of probation of 18 months (at para. 26).

5.4.3 Case 8: R. v. A.A. (2004)

R. v. A.A. (2004) was the first case of gang rape governed by the sentencing regimes of the YCJA. BC was one of the four offenders involved in the rape. Although the facts of the case were minimally reported in this decision, the court made reference to the Victim Impact Statement, which discussed the impact on the victim (EA). Under the heading "Personal Reaction", EA made statements such as, "When I went to court and I saw all of them again, that bothered me a lot. The physical pain and emotional pain I went through on my birthday. I have had nightmares at first and still once in a while do. Some were so bad I woke up crying. I feel so angry from what happened now that sometimes I almost completely isolate myself from everyone. It still often bothers me. I still often cry. I dream about it, and even daze off about it and it scares me" (at para. 10).

BC was the second oldest of the four offenders (at para. 20) and while he had no previous records at the time of the offence, he had committed subsequent offences (e.g., failed to comply with conditions of his bail, assault of a fellow student, possession of prohibited substances) while on bail for the current sexual assault offence. The judge stated

obviously I cannot consider them [the subsequent offences] as aggravating factors in sentencing. I presume that the probation officer who wrote the PSR [Pre-Sentence Report] included the references to these charges both to provide some factual context for what has happened recently in the offender's life, and in support of her pessimistic conclusion that, based on his "not... positive" probation reporting history to the date of completion of the PSR on March 25, 2004, he is unlikely to comply very readily with either mandatory or optional conditions of any probation order (at para. 21)

The judge further stated

I caution myself that it is not my function to punish the offender for being a reluctant probationer, the overall impression presented is of a person who is willing to assume ownership of an involvement in only that which he finds pleasurable, and who will evade his responsibilities whenever convenient and wherever possible (at para. 23).

The court carefully read through, several times, a letter written by BC. The portion the judge wished to highlight was that the note did not contain any express recognition or acknowledgement of the harm he caused to the victim (at para. 26). At the same time, reference was made to an Ontario Court of Appeal ruling, which cautions trial judges not to consider lack of remorse as an aggravating factor in sentencing, except in very rare circumstances *R. v. Kozy* (1990) 58 C.C.C. (3d) 500; *R. v. Valentini* (1999) 132 C.C.C. (3d) 262; *R. v. Levert* (2001) 159 C.C.C. (3d) 7 (1) (at para. 26). The judge concluded, the fact that BC had not pled guilty and appeared to maintain his innocence was a matter that was between himself and his conscience. As such, the court would not increase his sentence for either of those reasons (at para. 26).

Further, the judge stated

In the case at bar, I propose to deal with this as follows: in this province, I am the initial decision-maker as to whether this sentence is to be served in secure or open custody. Despite what Crown counsel has proposed, I see no reason why these offenders need to be warehoused – for that is largely what it amounts to – in

secure custody for any portion of their sentences. Thus, all sentences will be served in open custody (at para. 50).

BC was sentenced to concurrent terms of 21 months which were to be served as 14 months in open custody followed by 7 months community supervision and 14 months of probation (at para. 52 and 54).

5.4.3.1 Brief Summary

Case 6 (KH), case 7 (DH) and case 8 (AA_BC) are sexual assault cases. The courts viewed KH as having favourable prospects for rehabilitation, since his pre-sentence report was a 'very good report'. KH came from a supportive and loving family and his actions appeared to be out of character and unexpected. Although not proven, the court may have suspected that KH had conspired and orchestrated the series of attacks and the confinement of the victim, who was also his girlfriend, thereby requiring a more punitive sentence (open custody versus probation).

DH and BC, both showed no remorse for their actions, and the courts perceived the offenders as having less favourable prospects for rehabilitation. In order to ensure DH received meaningful consequences to hold him accountable for his actions and to promote his rehabilitation, the court imposed a secure custodial sentence. On the other hand, even though BC did not express remorse or acknowledge the harm he had caused his victim, the judge 'saw no reason to warehouse the offenders' in a secure custodial setting (at para. 50) and BC received an open custodial sentence followed by probation. DH was sentenced after the 2012 amendments to the YCJA, which reintroduced deterrence as a principle of sentencing, which may have provided the courts with the opportunity to impose a more punitive sentence.

5.4.4 Case 9: R. v. C. B. (2010)

In R. v. C.B. (2010), CB pled guilty to three counts of sexual assault and two counts of child pornography. CB was 16 years old at the time of the offences and had molested nine and ten year old children and filmed the molestation using his cell phone. The first victim (JS) was ten years old at the time of the incident and was staying at the same resort as CB's family. JS and CB were alone in the change room after swimming and CB asked

JS to fondle his penis in exchange for a form of credit relating to the Pokemon videogame. Similar incidents occurred the following two days and on the second consecutive day, CB asked JS if he could make a video of the sexual acts. The video was approximately ten seconds long and both CB and JS were reported to have watched the video. CB told JS that he had deleted the video, although, upon a search of CB's cell phone incidental to the arrest, the police received other video clips from the memory drive, which disclosed CB touching JS and JS touching CB (at paras. 3-8).

The police also found three additional clips of two unidentified young boys and as a result another investigation ensued in an attempt to locate the two additional young victims. CB was arrested for the offences against the two victims known as John Doe 1 and John Doe 2. A search of CB's residence led to the seizure of various items that included cameras, computers, and media storage devices as well as CB's diary. One entry of CB's diary, which was presented as evidence, described the evolution of his attraction to young boys and how he had engaged in twenty-five to thirty-five sexual encounters with MB, which had escalated to oral sex and masturbation. At a later date, CB provided the names of the two John Does (MD and MB) on the videos (at paras 3-15).

JS, the victim in this case, did not himself make a victim impact statement, but his parents' spoke on his behalf. His parents described the emotional turmoil for their family and spoke of how their child had been "robbed of his innocence" that the incidents had left them all facing a lifetime of dealing with the impact of the crime. They described how their son had changed from a confident, innocent, and trusting young boy to a child filled with anxiety, self-doubt, guilt and shame. The judge stated "the statement speaks eloquently of further consequences of C.B.'s conduct and the fact that the family is apparently in counseling to try to deal with the 'shock, pain and outrage of this crime'" (at para. 17).

CB, it was reported, had a supportive family with both parents being present at every court proceeding. He was described as being a high achiever, excelling both academically and athletically at school and was viewed by his teachers as having

leadership qualities. There were no reported substance abuse problems and he maintained positive peer associations. Both his parents and his teachers never considered him to have any behavioural issues (at paras. 31-33).

CB's "Psychological Assessment" rated him on a "qualitative estimate" to be in the low to moderate range for reoffending (para. 23). A psychiatrist, assessed CB as suffering from pedophilia, a disorder wherein the preferred method for achieving sexual arousal and gratification is through the fantasy of or interaction with prepubescent or early pubescent children (para. 27). This psychiatrist noted that pedophilia is a lifelong disorder with no known treatment that has been scientifically proven or established effective in changing sexual orientation or preference (para. 28). He also felt that CB should not have unsupervised access or care of children and should have psychological treatment to understand the implications of his sexual preferences (para. 29). While both doctors were in disagreement over CB's diagnosis, they did agree that CB was at low to moderate risk of reoffending (para. 25).

CB had no prior record and it was reported that since his arrest he had experienced symptoms of anxiety and depression. CB had also pled guilty to the charges and "accepted responsibility from the outset" and "appears to be a young person who is distressed over his action" (at para. 34). He had also directed comments to the court, which the judge assessed "clearly show that his remorse for his actions is genuine and sincere" (at para 34). The judge, in response to both physician reports, stated "it is clear from both doctors' reports that understanding and treatment will be of assistance to C.B. in preventing him from becoming involved in similar behavior in the future. The prospects of rehabilitation appear to be excellent and I am satisfied the safety of the community will not be compromised at all by C.B. remaining in the community" (at para. 56).

CB was sentenced to two years' probation, which the judge felt would both hold him accountable and facilitate his rehabilitation (at para. 60). In determining the appropriate sentence, the judge stated "This is a difficult sentencing . . . I have come to the conclusion that the purposes and principles of sentencing set out in the YCJA are best

accomplished in this particular case with this particular offender by imposing a non-custodial sentence and placing him on probation for a two year period on strict terms and conditions” (at para. 58-60).

Upon sentencing, the judge further stated

I am of the view that this sentence will hold him accountable and promote his rehabilitation and reintegration and thus will benefit the community in the long term. He is involved in programming in the community, has the support of his family and although a custodial sentence certainly may be viewed as an available disposition, I feel that such a sentence would not ultimately recognize the progress and the steps that C.B. has taken nor the commitment that he has made as evidenced by not only his words, but more importantly by his actions to date. I have no concerns about the protection of the public being a factor by allowing C.B. to remain within the community (at para. 60).

Thus, in sentencing CB, the judge balanced accountability, rehabilitation, and the best interests of the community. Rehabilitation was seen to be best achieved outside of custody.

5.4.5 Case 10: R. v. P.S.P. (1997)

R. v. P.S.P. (1997) was a case heard under the YOA, wherein PSP was convicted of sexual assault on ASP. The assaults had taken place over a period of approximately three years. The events of the assault were minimally reported in this decision but it was reported that the victim was his six-year-old cousin and PSP was 16 years old at the time of the offence (at para 5-10).

The judge read a victim impact statement wherein the victim stated

My life has been terrible since I’ve been abused by my cousin. I’ve had nightmares, migraines, and problems at school getting my work done. I’m afraid to walk out the road and in my back yard because I’m afraid someone will hurt me. I’m afraid to go out at school. I am upset about Grandma S.P. because we were close at one time and now they have turned against me. It hurts me when I say hi to Grandma and she walks away from me. (at paras. 11-13).

The judge made an additional two comments stating

The report parallels victim impact statements that the Court has seen from persons who have been sexually mistreated. It confirms in the Court’s mind that we really

do not understand, as a community, the significance of the mistreatment of young persons in a sexual context, particularly in a context where persons are related or where there is the aspect of breach of trust in that one person is older or one person has a special responsibility towards the other persons. I am not surprised at the disruption to the complainant. As I say, it parallels many victim impact statements which I've seen, which to me underscores the seriousness of the results of the experience to the victim. The second point I want to make is that the incident also can be a source of disruption in the family, or in the community, that goes beyond the two persons involved. It is very disruptive and pits family member against family member and causes serious dislocation (at paras 14-16).

The judge also drew on the pre-sentence report, which described PSP as a disadvantaged person who was struggling to be useful in the community. He was unemployable and seemed to not have much "applicability" (at para. 42). He was also described as being emotionally immature, illiterate, dependent on his extended family, and uncertain about his future. He had the emotional development of half of his chronological age (at para. 49 and 51). The judge considered the harm done to the victim along with her potential for recovery and the particular disadvantage of the accused and his vulnerability in society as well as the administration of the criminal justice system, where the accused would be particularly vulnerable (at paras. 55-57). Taking all of this into consideration, the judge imposed a term of probation for the "longest period possible", that being 24 months (at para. 67).

Upon sentencing the judge stated

In this case there are two matters that concerns me. I have in a sense, I believe, understated the vulnerability of the accused as reflected in the pre-sentence report before the Court. The accused in my opinion, looking at pre-sentence report, is borderline dysfunctional. He has great problems in functioning in anything but a helpful, sympathetic, non-threatening environment. In addition to that, I am concerned that if the accused is sent into a purgatory, . . . - - that is, the Court is alerted that we just don't know where or what would happen to him as a result of a custodial disposition, - - . . . that there is a hazard that could have serious consequences upon this accused, unlike other persons who don't suffer his particular vulnerability (at paras. 64-65).

5.4.5.1 Brief Summary

Case 9 (CB) and case 10 (PSP) are sexual assault cases wherein the offenders received non-custodial sentences. The two offenders differed. For instance, CB was viewed by the court as having favourable prospects for rehabilitation whereas PSP was viewed as

having less favourable prospects for rehabilitation. The victims of both offenders were young children (below the age of 10) and both offenders were 16 years old when the assaults began. CB came from a supportive family and took responsibility for the offences. The court believed CB did not pose a risk to the community as he had ‘excellent prospects for rehabilitation’. These considerations led to a non-custodial sentence. PSP, on the other hand, was found to have the emotional development of half his chronological age and was unable to function in anything but a helpful, sympathetic, non-threatening environment (at para. 64). PSP’s vulnerability appears to have encouraged a non-custodial sentence (probation).

5.4.6 Sexual Assault Section Summary

Of the five sexual assault cases discussed, two offenders (KH [Case 6] and CB [Case 9]) were perceived by the court as having favourable prospects for rehabilitation, while three of the offenders (DH [Case 7], BC [Case 8], and PSP [Case 10]) were perceived as having less favourable prospects for rehabilitation. Whether a person received a custodial sentence or not was not as closely tied to the offenders’ prospects for rehabilitation in these cases. Rather, the courts took other factors into consideration. These factors better explain the sentencing disparities within offence type.

First, sentencing decisions frequently make reference to the offenders’ character. For example, the court did not take lightly that DH and BC were evading responsibility, and refusing to express remorse. As a result, DH and BC both received custodial sentences. In contrast, KH was praised for his willingness to take advantage of opportunities provided to him, post-arrest, and his capacity to demonstrate respect. KH received an open custodial sentence, as it was believed this kind of setting would be the best environment for him to continue his rehabilitation (at para. 19).

The courts appeared troubled by offenders who showed no remorse or guilt for their actions, as illustrating by the judges’ disgust at DH’s statement he “was experimenting” (at para. 23). As we have seen DH’s lack of remorse and his statement he ‘was experimenting’ likely encouraged the judge to sentence him to secure custody. At the same time, BC also refused to express remorse or acknowledge the harm he had caused

his victim and while the judge ‘saw no reason to warehouse the offenders’ in a secure custodial sentence, BC did receive a custodial sentence, albeit open custody (at para. 50).

A related concern appears to have been offenders’ vulnerability. In the case of PSP, whose emotional development was half his chronological age, the judge provided a light sentence. It was believed that PSP was unable to function in anything but a helpful, sympathetic, non-threatening environment. The court considered what sentence would be in the best interests of the offender, as well as society more broadly.

5.5 Analysis

A key principle of sentencing is to hold a young person responsible and accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. In the previous section ten cases were provided to illustrate the complexity of sentencing: judges are not only guided by the legislation but also consider a wide range of factors. In particular, as focal concerns theory contends, protection of the community appears to be a fundamental consideration.

This study reveals at least two key steps and considerations that judges follow in reaching sentencing decisions.³⁰ First, the courts determined and analyzed the details of the offence(s) and the involvement of the offender in order to gain an overall picture of what occurred. For example, the courts took into consideration the facts underlying the conviction, such as the offender’s role in the offence, as well as the harm and impact on the victim. This step helps the court make a ‘general’ assessment as to whether a custodial or non-custodial sentence would best foster an offender’s responsibility and accountability for the offence. More punitive sentencing is believed to hold offenders more accountable for their actions. Central to this step is determining the

³⁰ Each judge approaches sentencing with their own individualized approach and as such, there is no one ‘specific’ formula for sentencing. For this study, I constructed a ‘general’ two-step process that captures or illuminates the process of sentencing and the factors that judges consider upon sentencing.

‘blameworthiness’ of the offender, such as an offender’s level of remorse and plea of guilty or not guilty, as highlighted in focal concerns theory.

In the second step, the courts considered offenders’ actions before and after the offence, their plans for their future, growth and maturity, and overall health (e.g., physical, emotional, and mental). The courts also took into account other special considerations including offenders’ family background, and the challenges they face in their lives, such as abuse. If these actions and special considerations were favourable, the sentence was often reduced from what it might have otherwise been. Many of these considerations concern the likelihood that the offender will re-offend as reflected in their prospects for rehabilitation, and perceived threat/risk to the community; hence mirroring the focal concern “protection of the community”.

Overall, the courts try to achieve a difficult balance, considering the best interests of society, and the best interests of young offenders by predicting an offender’s level of dangerousness, their likelihood to reoffend, and their prospects for rehabilitation. From these case studies, it appears that rehabilitation can be achieved a number of different ways depending on the particularities of the case and the offenders’ character.

5.5.1 Comparing Physical and Sexual Assault Sentencing

In the previous section, I outlined the key steps and considerations that judges appeared to follow when sentencing young offenders. These steps, in and of themselves, cannot fully account for the variations in sentencing observed across offence type. Nevertheless, they are informative, as they draw our attention to key elements in sentencing, including the nature of the offence, and the character of the offender. In this section, I propose three possible explanations for sentencing variations across offence type, by drawing on the sample cases presented earlier in the chapter, and a few others included in this study.

First, it appears that judges believed rehabilitation for the two different crimes was best achieved in different settings. Specifically, a custodial sentence was believed to be best for rehabilitating many physical assault offenders. Judges explicitly stated that physical assault offenders would benefit from closed custody. For example, in *R. v. J.P.G. (1997)*,

the judge noted that GE -- one of four offenders convicted of kidnapping, forcible confinement, assault causing bodily harm, aggravated assault, and manslaughter (at headnote) -- had made a great deal of progress while being in a structured environment, during his pre-sentence custody. It was believed that this was the environment in which GE could continue to progress (at para. 1560: "It [pre-trial custody] has provided the consistency, structure limits, rules and discipline that have enabled Mr. G.E. to make significant progress. It is clearly a rehabilitative setting" (at para. 156). GE received a secure/closed custodial sentence. Similarly, the judge upon sentencing DGJ (Case 1) stated that 'nothing short of incarceration will ensure his rehabilitation and safe reintegration into society' (at para. 12). This pattern was evident in other cases included in this sample, such as MAZ (Case 3) and ZN (Case 2) which were profiled earlier.

In contrast, a secure/closed custodial sentence was less common for sexual assault offenders and when it was used the goal seems to have been accountability, rather than rehabilitation. Recall, Case 7, R. v. D.H. (2014), in which the court concluded that a community sentence would not hold DH accountable as such a consequence would not be meaningful to him (at para. 22). To ensure that DH confront the "facts about his behavior" as well as the harm caused to the victim, DH was sentenced to a closed supervision order (at paras. 22 and 26).

Judges appear to take the view that rehabilitation would be best served for the sexual assault offenders in an open custodial sentence or a non-custodial sentence. For example, recall Case 8, R. v. A.A. (2004), the first gang rape tried under the YCJA, the judge 'saw no reason why the offenders needed to be warehoused' and sentenced the offenders to open custody followed by probation. Similarly in the case against KH (Case 6), the offender was deemed to have "considerable potential for rehabilitation" and hence was sentenced to open custody. In the sexual assault case against CB (Case 7), the judge felt that two years of probation would facilitate his rehabilitation. Thus, it would appear that judges are of the view that physical assault offenders would be better rehabilitated in a secure/closed or open custodial sentence, whereas the sexual assault offenders were better rehabilitated in open and non-custodial sentences. This finding runs contrary to research,

which has shown that custody is neither a deterrent nor a rehabilitative measure (Anand, 1998; Bala and Anand, 2012; Corrado and Peters, 2015: 557).

Second, the offenders' relationship to the victim appears significant in shaping sentencing outcomes across offence type. In the ten cases presented earlier, many of the physical assaults were crimes against acquaintances and random strangers, while many of the sexual assaults were crimes against intimates. In further follow-up analyses of all the cases included in this study, this pattern held. Of the 40 victims of physical assault, 26 (65%) were random assaults (the victim was unknown to the offenders). In contrast, of the 43 victims of sexual assault, only 4 (9%) were random assaults. It appears that the courts took a more punitive stance when the assaults were random attacks, given that a higher percentage of physical assault offenders (92%) received a custodial (open and closed) sentence as compared to the sexual assault offenders (68%). Follow-up analysis examined this hypothesis and revealed that of the 21 offenders who assaulted a random victim 19 (91%) received a custodial sentence. Comparatively, of the 31 offenders who assaulted victims known to them, 24 (77%) received a custodial sentence. Drawing on these results, sentencing differences between physical and sexual assault offenders could, therefore, be explained by offenders' relationships to the victims. Those who attack strangers at random may be perceived as greater threats to the community at large, than those who attack intimates. This explanation is consistent with the focal concern 'protection of the community'.

Lastly, it is also possible that the physical assault offenders were more likely to be sentenced to a custodial sentence as the result of precedence. As Anand (2003: 957) states, "one of the largest obstacles to overcome in reducing the use of youth incarceration is judicial inertia". Anand (2003: 957) maintains that even though certain provisions under the YCJA have been drafted in such a way that significantly reduces the scope of creative judicial statutory interpretation, there is the real prospect that some judges may choose to ignore the requirements of a new legislative regime. An example of this can be seen in Case 4, R. v. A. R. (2008), a physical assault case, a 17-year old female offender who had been convicted of aggravated assault. The youth court judge sentenced AR to six months open custody and community supervision, to be followed by

18 months of probation (at para. 9). This was a random attack of violence labeled “dangerous and callous” by the judge (at para. 8). The judge also added, “the sentences that have been imposed on youth for aggravated assault have almost exclusively been custodial in nature, and there is nothing in this case which would justify a non-custodial sentence” (at para. 8).

The utilization of precedent is not restricted to cases dealing with similar charged offenders but can be broad enough to include the consideration of similar applicable principles. An example of this can be found in *R. v. J.D.* (2015) a physical assault case, heard under the SSCA (post-2012 amendments) wherein the court referred to *R. v. N.B.* (2011), a sexual assault case heard under the YCJA (pre-2012 amendments), and which was included in this study. The judge stated “similar to Justice Hearn in *R. v. N.B.*, I want to emphasize that here there is at least one gateway to custody in this case under s. 39 (1)(a) and the court is of the view that s. 39 (1)(d) is also appropriate” (at paras 64-66).

On the one hand, while the YCJA was enacted with the overall goal to reduce the number of young offenders being incarcerated, “judicial inertia”, through the application of precedence, according to Anand (2003), may hinder the reduction in youth incarceration, in particular, for the physical assault offenders. Further, one can only wonder if the re-introduction of deterrence into the YCJA, as a result of the amendments under the SSCA, will continue to encourage courts to resort to incarceration. While previously incarceration was adopted under the guise of rehabilitation, judges may now invoke incarceration under the guise of deterrence.

On the other hand, if judicial inertia plays a role in the sentencing of young offenders convicted of sexual assault, it does not encourage incarceration. This may reflect research, which has shown that while many sexual offenders begin their offending in adolescence, only a small percentage of juvenile sex offenders reoffend into adulthood (Knight, Ronis and Zakireh, 2009; Riser et al., 2013: 10). According to Riser et al. (2013: 9), adult sex offenders are among the criminals with the highest likelihood of sexual reoffending. In contrast, adolescents are more likely to respond positively to treatment, and as such this group represents an excellent opportunity for prevention and

intervention efforts (Knight, Ronis and Zakireh, 2009; Riser et al., 2013: 10).³¹ In other words, recidivism among young sex offenders decreases when these youths receive treatment.

5.6 Analysis Summary and Application of Focal Concerns Theory

The results of this study have revealed that the courts appear to be more punitive when sentencing young offenders convicted of physical assault as compared to sexual assault, in that they were more likely to receive a custodial (secure and open) sentence. Even when custodial sentences were imposed for young offenders convicted of sexual assault, they were less punitive than those imposed on the physical assault offenders. I proposed three possible explanations for these differences, two of which mirror focal concerns theory ‘protection of the community.’ First, in this study, protection of the community is balanced with the rehabilitation of an offender. More importantly, when the offence is a physical assault, rehabilitation in a custodial setting appears to be more promising. Second, an attack on a random victim may appear to be more dangerous and threatening to the well-being of society and therefore, a custodial sentence will not only rehabilitate offenders, but will protect the community, at least for the time they are in custody. Lastly, while not in line with focal concerns theory, ‘judicial inertia’ may have played a role as there may be a lag between legislative changes and changes in sentencing patterns, as a result of judicial precedence.

While the overall findings of this study provided limited support for penal populism and focal concerns theory, neither theory was able to capture all of the nuances inherent in sentencing. As the detailed look at sentencing decisions provided in this chapter reveals, sentencing is complex, with many factors taking into consideration. Chapter 6 will explore these nuances, review the shortcomings of these two theories, and consider implications for further research.

³¹ It should be noted that the number of sexual assaults reported by police in Canada is an underestimate of the true extent of sexual assault cases as these types of offences are likely to go unreported (Boyce, 2015: 17; Statistics Canada, 2010).

Chapter 6

6 Introduction

This study arose out of an interest in how legislative changes affect judicial decisions concerning the sentencing of young offenders convicted of violent crimes. After a review of the literature, I discovered that there was a gap in the literature pertaining to the analysis of judicial decisions, in particular as they relate to young offenders convicted of violent offences in the province of Ontario. This study sought to fill that gap and to add to the criminological and sociological literature examining young offenders in Canada.

I focus on judicial sentencing decisions for young offenders convicted of physical assault and young offenders convicted of sexual assault. I chose these two types of decisions for two reasons. First, physical assault and sexual assault are considered violent offences in that, in the commission of the crime, they both involve violence against persons. Second, both offences are treated under the Criminal Code of Canada, the YOA, the YCJA, and the SSCA, as similar in severity, as both are subject to the same potential range of custodial sentences. An examination of judicial decisions for young offenders convicted of these two crimes was used to illuminate the broader social and cultural forces that shape the judicial system. Overall, an analysis of judicial discourse upon sentencing can reveal the competing pressures on the courts, as judges must balance the public interest, with the dictates of youth crime legislation, and the needs of young offenders convicted of violent crimes.

The findings of this study provided limited support for penal populism and limited support for focal concerns perspective; neither theory was able to capture all of the nuances inherent in sentencing. In this chapter, I will explore these nuances, provide a summary of the findings, review the shortcomings of these two theories, discuss the limitations of this study, and consider implications for further research.

6.1 Scope of the Current Study

During the late 1990s, the media began broadcasting an increasing number of stories about youth violence, leaving the Canadian public with the impression that youth crime was on the rise (Bala, 2003; Batacharya, 2006; Beaulieu and Cesaoni, 1999; Corrado and Markwart, 1999; Dorfman et al. 1997; House of Commons, 1993; Innes, 2004; Newburn, 2002; Perrone and Chesney-Lind, 1977; Pollak and Kubrin, 2007; Roberts and Stalans, 1998; Roberts et al., 2003, 2004; Tanner, 2001; Young, 1996). These media stories fostered the view that legislation (the Young Offenders Act) governing the criminal justice system was not effectively handling youth crime. Members of the public and politicians began calling for change. Conservative politicians and federal opposition parties, along with provincial governments, demanded that Canada adopt a “get tough” approach to youth crime (Bala, 2003: 991). During the same period, however, academics and youth justice system professionals, including the judiciary, expressed concerns that Canada was being too tough on young offenders as there was an overuse of both the courts and custody under the YOA (p. 991). The federal government, in enacting the YCJA, attempted to balance a get-tough approach with a commitment to rehabilitation. The YCJA would reduce the reliance on courts and custody, while ensuring young offenders, in particular violent and repeat offenders, were made accountable for their actions. The Act focused more on violent and repeat young offenders providing the courts with direction to provide ‘meaningful consequences’ that would ensure ‘accountability’ and ‘rehabilitation’, with the protection of society becoming the overriding consideration.

The YCJA also had its critics; it was viewed as being too lenient on youth crime (Roberts and Bala, 2003; Bala and Anand, 2012). In 2006, the Conservative government proposed a complete overhaul of the YCJA, arguing that harsher sentences needed to be implemented. Parliament brought forth the Safe Streets and Communities Act (SSCA) with amendments coming into force in October 23, 2012 (Bala and Anand, 2012; Leschied, 2015; Roberts and Bala, 2003). These amendments were designed to strengthen the ways in which the youth justice system dealt with young offenders. The principle of ‘deterrence’ was reintroduced into the YCJA. After 2012, judges could again

(as was the case under the YOA) consider deterrence, along with rehabilitation and accountability, when sentencing.

Ashworth (2002) states the adjudication and imposition of a sentence on an offender is probably the most public face of the criminal justice process, and as such it is through sentencing that existing social structures can be legitimized and ideologies (e.g., get-tough on crime, rehabilitation, protection of the community) can be constructed and reinforced within society (Chimombo and Roseberry, 1998; Hall, 2008, 2011). When sentencing, judges must navigate through complex political and public climates, and take into account a variety of concerns, principles, and influences (Beaulieu and Cesaroni, 1999; Corrado and Markwart, 1999). This may be particularly true in youth court. Several theories have been advanced to account for these various influences and concerns shaping sentencing. This study examined two theoretical perspectives: penal populism and focal concerns perspectives of sentencing.

Penal populists (Bartlett, 2009; Bottoms, 1993, 1995; Canovan, 1981, 1999; Freiberg & Gelb, 2008; Garland, 1996, 2001, 2002; Matthews, 2009; Pratt, 2007; Roberts, 2008; Roberts et al., 2003; Shils, 1956) argue public and media pressure encourage politicians to radically redefine official thinking on crime and punishment. The results are new policy agendas with new laws and policies aimed at implementing harsher punishments for criminals (Garland, 2002: 172). These pressures affect criminal justice actors and agencies, may reduce their discretion, and force them to 'get tough' on crime.

As we have seen penal populists contend that judges are influenced by a get-tough approach advocated by the public and politicians. For example, the United States has adopted statutes that require mandatory prison sentences for certain offences, such as violent, drug, and property offences, which as resulted in increases in sentence lengths as well as an increase in the number of admissions to custody (Roberts et al., 2003). In comparison, a number of criminologists have argued that Canada has not followed the path of its neighbor to the south, and as such is the exception to the trend (Christie, 2004; Comack and Silver, 2003; Doob, 2016; Meyer and O'Malley, 2005; Moore and Hannah-Moffit, 2007; Pratt, 2007; Roberts et al., 2003). Meyer and O'Malley (2005), however,

caution that making such broad claims about Canadian criminal justice policies and practices is problematic as criminal justice interventions – from policing to courts to prisons – are complex and may differ from region to region and city to city. They, instead, call for closer investigations of the ways in which criminal justice policies and practices emerge and play out in particular local contexts (Meyer and O’Malley, 2009).

This study, therefore, attempts to fill this gap in the literature by examining whether and who judges’ sentencing decisions have been affected by legislative changes by examining judicial sentencing decisions heard under the YOA, the YCJA, and the SSCA (the YCJA post the 2012 amendments). Drawing specifically on penal populism, this study asks, is there evidence that Canada, in particular Ontario, has experienced a *penal populist* turn in regard to juvenile justice? Are judges taking a more punitive stance in sentencing young offenders convicted of violent offences (sexual and physical assault)?

Focal concern theorists argue that judges take into consideration at least one of three focal concerns – blameworthiness, protection of society, practical constraints -- when sentencing offenders (Hartley et al. 2007; Kurlychek and Johnson, 2004; Steffensmeier, 1980; Steffensmeier et al., 1998; Steffensmeier, 1993, 1998; Steffensmeier and Demuth, 2001; Spohn and Holleran, 2000). Proponents of this theory argue that the more blameworthy an offender is perceived to be, the more likely they are to be incarcerated and required to serve a longer sentence. Moreover, they contend that judges evaluate the risk to the community if and/or when the offender is released back into the community (Hartley et al. 2007; Steffensmeier, 1993; Steffensmeier, 1998). Further, judges may consider practical constraints including an offender’s ability to do ‘the time’, for example, whether an offender is the caregiver of a child or children, or how a sentence will impact their ability to seek or maintain employment (Hartley et al. 2007; Steffensmeier, 1993; Steffensmeier, 1998). Last, judges may take into account extra-legal factors (*perceptual shorthand*) such as age, race, and gender, when sentencing.

Drawing on these two theoretical perspectives, and an analysis of judicial sentencing decisions, this study sought to answer three research questions, which will be discussed in more detail in the following sections.

6.1.1 Research Question One

The first research question asks: is there evidence that Ontario has experienced a penal populist turn in regards to juvenile justice? That is, are judges taking a more punitive stance in sentencing young offenders convicted of sexual assault and physical assault as a result of legislative changes?

To examine this theory, this analysis focused on three dimensions. First, penal populism suggests that sentencing is becoming harsher (more likely to involve custodial sentences) over time. Hence, it was expected that sentencing would be harsher under more recent legislative regimes (YCJA, 2002 and the YCJA, post the 2012 amendments). Second, it was expected that judges would be influenced by the Crown's recommended sentence, as it is the Crown who represents the voice of the people – the inference being Crown attorneys are more likely to recommend to the courts a more punitive sentence be imposed (Roberts et al., 2003). Third, penal populists would argue that even though physical assault and sexual assault are viewed as similar in severity under the Criminal Code of Canada, the public views sexual assault offenders as reprehensible. Influenced by public opinion judges may punish those convicted of sexual assault more severely (Roberts et al., 2003).

The results of this study provide, at best, limited support for the penal populist perspective. The results of simple quantitative analysis revealed that all (100%) of the offenders whose case was heard under the YCJA (post 2012 amendments) received a custodial sentence, compared to 54% of the offenders whose case was heard under the YOA, and 84% of the offenders whose case was heard under the YCJA (prior to the 2012 amendments). These results are consistent with the penal populist argument; however, it must be remembered that the cases analyzed here are not representative. Further, as previous research (Bala, Carrington, and Roberts, 2009; Milligan, 2010; Sprott and Doob, 2008) has found, the YCJA has achieved its goal of reducing court hearings and incarceration for young offenders. Therefore it may only be the most serious cases that now result in a trial and a sentencing hearing. An increase in more punitive (custodial) sentences may not reflect penal populism, but rather suggest that diversion, under the

YCJA, has been successful. Cases that resulted in lighter sentences under the YOA, may not even reach the courts under the YCJA.

The relationship between the Crown's recommended sentence and the court-imposed sentence were not consistent with penal populism. Youth court judges did not appear to impose a custodial sentence as the result of recommendations by the Crown. This finding is, therefore, not consistent with the penal populism perspective (Roberts et. al. 2003), which suggests that the courts may place greater weight on the Crown's proposed sentence.

Lastly, the relationship between offence and court-imposed sentence is not consistent with penal populism. While some penal populists (Roberts et al., 2003) suggest that the public views sexual assault as more reprehensible than physical assault, in the judicial decisions analyzed the sexual assault offenders received lighter sentences. Of the 26 offenders convicted of physical assault, 92% received a custodial sentence as compared to the 68% of the 28 sexual assault offenders.

The findings of this study, therefore, suggest that penal populism has not influenced the sentencing of young offenders in Ontario to any great extent. This finding is consistent with the Canadian literature (Christie, 2004; Doob, 2016; Meyer and O'Malley, 2005; Moore and Hannah-Moffit, 2005; Roberts et al., 2003). As Doob (2016) states, the legislative changes under Harper's Conservative government may reflect a penal populist turn; however, this was a short-term trend in Canada, and one that had little impact on sentencing practices. The results of this study suggest that, at least in Ontario, the youth courts have not become more punitive as a result of legislative changes.

6.1.2 Research Question Two

Drawing on the focal concerns perspective (Hartley et al. 2007; Kurlychek and Johnson, 2004; Steffensmeier, 1980; Steffensmeier, 1993; Steffensmeier et al., 1998; Steffensmeier and Demuth, 2001 Spohn and Holleran, 2000), the second research question asks: do judicial sentencing decisions, within the Ontario youth justice system, reflect an offender's level of blameworthiness and the need for protection of the public? Do sentencing disparities reflect differences in age and gender?

In this study, to assess ‘blameworthiness’, I considered whether offenders were first-time offenders or not, and whether they pled ‘guilty’ or not were perceived as more blameworthy. I examined what percentage of first-time offenders and those who pled guilty received a custodial sentence as compared to repeat offenders and those who pled not guilty. Analysis showed that first-time offenders did not receive lighter sentences (e.g., probation versus custodial sentence). Neither did those who pled guilty. Thus, it is not clear that judges considered ‘blameworthiness’ when sentencing young offenders: the first-time offenders and those who pled guilty were viewed as no less culpable or blameworthy than the repeat offenders and those who pled not guilty.

The focal concerns perspective suggests judges may have incomplete information when imposing a sentence and as a result may use age, gender, and race as a ‘perceptual shorthand’ to assess danger, with females, the young, and members of racial majorities being perceived as less threatening. This study had limited data on race, and there were few female offenders in the data set, making it impossible to assess the role of race and gender. For instance, there were only 6 females in the study, four (67%) of whom received a custodial sentence; this number is too small to draw conclusions. Analyses to assess age groups showed that judges did not treat the ‘older’ young offenders (16-17 year olds) more harshly than the younger ones (12-15 year olds). However, it may be the case that all young offenders, regardless of age, may be treated differently.

Community protection was assessed through variables measuring interim custody and prospects for rehabilitation. The results revealed no association between serving interim custody and sentencing outcome; it appears that young offenders who served interim custody were not perceived as being more of a risk to the community than those who did not serve interim custody. Similarly, there was not a clear association between prospects for rehabilitation and sentencing outcome. In fact, the offenders who were perceived as having favourable prospects for rehabilitation (79%) were just as likely to receive a custodial sentence as those who were perceived by the courts as having less favourable prospects for rehabilitation (83%).

With respect to sentencing variations between offence type the, focal concerns perspective of sentencing would lead us to expect no differences between offence, since physical assault and sexual assault are ‘crimes against persons’ and defined as equal in severity under the law. However, the analyses showed that the physical assault offenders received harsher sentences. In combination, the findings of the quantitative analyses provided no support for focal concerns theory.

6.1.3 Research Question Three

The third research question aimed to explain sentencing differences within and across offence type through an examination of sentencing rationales. The question asks, is there evidence of variations in sentencing rationales provided by judges upon sentencing within and across offence?

I explored possible answers to this question by taking an even closer look at the content of judges’ sentencing rationales to identify patterns in sentencing that may illustrate judicial discretion when sentencing young offenders convicted of a violent offence. In seeking explanations, I began with a consideration of the principles of sentencing that underlie youth justice legislation, considering the role of accountability and in particular, rehabilitation. I considered whether the differences in sentencing across offence type could be explained by differences in prospects for rehabilitation or whether other factors, such as accountability, appeared to weigh on judges’ minds. In other words, how are judges interpreting the legislative principles of sentencing and does their interpretation differ by offence type?

Since the physical assault offenders (92%) had a higher percentage of custodial sentences as compared to 68% of the sexual assault offenders, I assumed the physical assault offenders would also be perceived by the judges as having less favourable prospects for rehabilitation and therefore required incarceration to protect the public. Interestingly, the results showed the opposite. Of the 26 physical assault offenders, only 27% were perceived by the courts as having less favourable prospects for rehabilitation as compared to 62% who were perceived as having favourable prospects for rehabilitation (in 11% of the cases prospects for rehabilitation were not clearly specified). More of the sexual

assault offenders (43%) were perceived as having less favourable prospects for rehabilitation, but they received less punitive sentences regardless.

The content analyses showed that judges considered a wide range of factors when imposing a sentence. In particular, judges assessed what sanction would best ensure both ‘rehabilitation’ and ‘accountability’ for young offenders – as they are required to do under young offender legislation; however, these concerns led them to treat the two groups of offenders differently. After careful consideration of cases, I proposed three explanations for these differences between offence types. First, it appears that judges believed that physical assault offenders would be better rehabilitated with a custodial sentence (secure and open), while rehabilitation for sexual assault offenders was often believed to be better achieved by non-custodial sentences (e.g., probation).

The Crime Severity Index suggests that sexual assault is a much more severe crime than physical assault and yet the findings of this study suggest that, for youth, it is taken less seriously. This difference may be explained by an examination of the relationship between the young offender and the victims. The physical assaults were predominantly committed against strangers, while the sexual assaults were committed disproportionately against people known to the offender. I suggest that – in accordance with focal concerns theory – those random attacks on strangers may be perceived to be a greater threat to the community than attacks on people they know. Custodial sentences would, therefore, serve two purposes, one being to rehabilitate the offender and the second being to protect the community. These findings are consistent with focal concerns theory, since protection of the community (attacking random strangers) and prospects for rehabilitation, appear to have been taken into account by judges in their decision-making. Lastly, ‘judicial inertia’ (Anand, 2003) may have played a role in that there may be a lag between legislative changes and changes in sentencing patterns, as a result of judicial precedence. Past practice may have been to incarcerate young offenders convicted of physical assault, so this has continued over time. Sexual assaults committed by young offenders may have traditionally been treated more leniently.

6.2 Evaluating Focal Concerns Perspective

The focal concerns perspective attempts to explain and quantify what influences judicial decision-making, arguing that it is a “complex interplay” (Steffensmeier et al., 1998: 767) between three different focal concerns (Hartley et al., 2007: 58; Pierce, 2012: 19). While Steffensmeier et al. (1998) have provided a number of variables to test the focal concerns perspective, they have been criticized for not clearly explaining how each of these variables should be measured (Pierce, 2012). The findings of this study support this observation. For instance, consider the concept ‘protection of the community.’ The perspective tells us judges assess protection of the community by attempting to predict the level of dangerousness of an offender, generally defined as the risk of future violence and measured by criminal history, facts of the crime (e.g., use of a weapon), and the characteristics of an offender (e.g., drug dependency, education, employment, or family history) (Steffensmeier et al., 1998: 767). In this study, prospects for rehabilitation were also found to be an important consideration for judges; however, the impact of rehabilitation prospects was complex. Whether a judges’ assessment of rehabilitation prospects resulted in a custodial or non-custodial sentence varied across offence. This finding has two implications for the theory. First, it suggests that rehabilitation should be recognized as an important focal concern relating to protection of the community. Second, it indicates that the impact of this focal concern can be complex, and may vary in meaningful ways, not currently accounted for by the theory.

Focal concerns approaches also define blameworthiness in terms of an offender’s culpability and the degree of harm caused (Steffensmeier et al., 1998: 767). This focal concern is associated with retribution/proportionality: the view that the punishment should fit the crime. In addition to offence severity, the main factors that influence judges’ and other criminal justice agents’ assessment of an offender’s level of blameworthiness are biographical factors, such as criminal history (increased perceived blameworthiness and risk), prior victimization (mitigates perceived blameworthiness) and offender’s role in the offence (Steffensmeier, 1998: 767). Drawing on the findings in this study, it may be argued that sexual assault offenders may be perceived by the judges as being less blameworthy and less of a risk than the physical assault offenders, and

therefore, seen as less of a threat to the community as they are more likely to assault someone they know. An alternate explanation is that young sexual assault offenders may be viewed as more likely to age out of such behavior, and therefore, are regarded as less blameworthy and less of a risk, thereby requiring a less punitive sentence. The physical assault offenders, on the other hand, may be perceived as more blameworthy and a greater risk to the safety of the community, as they may be more likely to assault a stranger. In this sense, 'blameworthiness' is clearly 'offence-specific' and context-dependent, as sentences may vary by type of offence or status as a young offender versus adult. Young offender status appears more important than age per se since no difference between the sentences received by younger and older young offenders was observed.

Focal concerns theory has been used to explain the disparities in sentencing outcomes between males and females, especially among adult offenders, with females being perceived as less blameworthy, posing less of a risk to the community, and less able to serve a custodial sentence due to practical constraints, such as childcare (Hartley et al. 2007; Steffensmeier, 1993; Steffensmeier, 1998). In this small sample, there is no clear evidence of gender disparities in sentencing. Larger, more diverse samples are likely necessary to test this aspect of the theory.

When applying this perspective in a Canadian context, it is important to understand that judges, while having judicial discretion, may have limited discretion as they are guided by sentencing principles established through youth justice legislation. Focal concerns perspectives pay limited to no attention to legislative guidelines and principles, but these are important 'concerns' that should not be under-valued. Overall, I suggest several improvements can be made to strengthen focal concerns theory, especially as it is applied in Canadian contexts. First, legislative principles in youth justice legislation – accountability, rehabilitation, and at times deterrence – should be included as potential focal concerns. Second, the approach should consider how core concepts are best operationalized and measured. Third, the perspective should perhaps take into account the importance of precedence in shaping judicial decisions. Fourth, the theory should be altered to explain when and how focal concerns (and their application and/or interpretation) may vary across offence type and social context. Variations across

legislation are particularly important. With such changes the perspective's applicability to the Canadian context would be improved significantly.

6.3 Contributions

The main contribution of this study to the sociological and criminological literature is the insight it provides into judicial discourse, and the sentencing of violent young offenders. Specifically, the findings suggest that physical assault offenders, regardless of their prospects for rehabilitation may face harsher penalties upon sentencing. Drawing on the data, I have proposed several possible explanations for this finding, which future research can explore in greater detail. Further, there is a limited amount of research examining judicial discourse surrounding young offenders, particularly decisions heard in Ontario youth courts; as such this research fills a gap in the literature. Moreover, much of the research provides quantitative analyses of custodial sentences in Canada, focusing on incarceration rates, but few studies examine judicial decisions (case law) to identify the factors shaping judicial decisions, and to determine how judges explain or rationalize their decisions.

A prominent finding of this study revealed that a higher percentage of physical assault offenders, were perceived by the courts as having favourable prospects for rehabilitation, and yet a high percentage of physical assault offenders received a custodial sentence. Drawing on Anand (2003), I suggested that 'judicial inertia' may have led to the continued punitiveness directed at young offenders convicted of physical assault. Such uses of incarceration is in direct opposition to the original goals of the juvenile justice system, which are to reduce the number of custodial sentences under the YOA and more importantly to focus on the rehabilitation of young offenders, under the YCJA, rather than to simply punish them by imposing a custodial sentence.

Another key finding of this study is the increase in custodial sentences with successive pieces of legislation. While this sample is not a representative sample, the finding is concerning, as the cases that are imported into Quicklaw constitute the official record of judicial decision-making. More specifically, these cases are the primary source of case law upon which Crown attorneys, and Defence counsel rely when preparing and

presenting their submissions and recommendations to the court, and on which judges draw upon when imposing a sentence. In other words, the cases reported to Quicklaw are reasoned decisions; they are precedential and are relied upon by the agents of the justice system (Busby, 2000). Thus, whether, it be the result of ‘judicial inertia’ or ‘judicial precedence’, these are the cases that set precedence for future cases being decided by the courts. The result may be higher rates of incarceration for young offenders tried in courts in the years to come. In addition, one can only wonder if the re-introduction of deterrence into the YCJA, as a result of the amendments under the SSCA, will only encourage incarceration, which now can be justified on the grounds of deterrence rather than (or in addition to) rehabilitation.

6.4 Limitations of Study and Future Research

The sample of cases used in this study were obtained from Quicklaw. In using Quicklaw, I obtained a sample of cases that, while being a small sample, are representative of the discourse of official case law that gets replicated and debated in courtrooms across Ontario. The decisions obtained in Quicklaw, however, are not representative of all cases that appear before the court. As such, one of the limitations of this study is that the decisions included in the analysis, are not an accurate sampling of the range of situations that come before the court (Busby, 2000). Since Quicklaw filters the cases that are reported and given that the focus of this study was on sentencing outcomes of young offenders convicted of sexual and physical assault in Ontario, the sample of cases is small, which limited more sophisticated quantitative analysis and statistical significance and the results cannot be generalized to the larger population.

Further, the cases did not provide enough information to adequately measure all the variables, outlined by the two perspectives that guided this study. For example, a comparison of gender, race and sentencing was not available as there were few reported cases of young female offenders and minority youth. There were young Aboriginal offenders included in this sample; however, similar to the number of females, there were few reported cases, thereby limiting a test of focal concerns theory’s concept ‘perceptual shorthand’. Moreover, it is possible that the lack of support for both focal concerns theory and penal populism was related to the operationalization of their core concepts.

For example, the third focal concern, ‘practical constraints and consequences’, is based on both organization and individual concerns. Organizational concerns include the maintenance of working relationships among the courtroom actors, ensuring a stable flow of cases, and being sensitive to local and state correctional crowding and resources (Steffensmeier et al., 1998; Steffensmeier et al., 1993). The courts may weigh individual concerns, such as the offender’s “ability to do time” (e.g., health conditions, special needs, costs to be borne by the correctional system, disruption of ties to children and other family members) (Steffensmeier et al., 1998; Steffensmeier, 1980; Steffensmeier et al., 1995; Ulmer and Kramer, 1996). This study suggests that organization and individual concerns, for young offenders, may be especially relevant. As was seen in the case *R. v. P.S.P* (1997), presented in Chapter 5, wherein the court appeared to be concerned with PSP’s vulnerability and his lack of ability to function in anything but a helpful, sympathetic, non-threatening environment.

In this study, there was not enough data within the cases to further examine such practical constraints and consequences. I have criticized focal concerns theory for its ambiguity, but it is possible that different measures could reveal more support for the two theories than identified here. Thus, this study suggests that focal concerns theory may be improved by taking into consideration how a young offender’s status interacts with organization and individual constraints.

In terms of future research, this study suggests many possible directions. First, research on judicial decisions using a more representative sample would be worthwhile for testing various theoretical accounts. A larger sample also leads to more representative results. Unfortunately, I was not able to examine gender in its institutionalized form as the cases included in this study did not warrant such an analysis. Thus, increasing the sample size would allow for a proper examination of if / how gender shaped sentencing outcomes. In other words, an examination could be conducted to determine whether the assumptions about gender and the mechanisms that reproduce gender inequality are embedded within the system.

More research on changes in judicial decisions across legislation – again using a more representative sample and more recent cases – would be valuable; this study has hinted that the greater emphasis on deterrence under the Safe Streets and Communities Act could lead to more custodial sentences, amongst those cases that are tried in youth court. Lastly, this study has focused on two violent offences – physical and sexual assault – whether the findings hold for other offences is worth exploring. In particular, research should explore whether the relationship between the offender and the victim plays a significant role in sentencing, as it appears to be here.

A continued examination of judicial discretion through the judicial interpretation of youth justice legislation especially with regards to young sexual offenders is also necessary. It is important to not just examine what interventions are most effective but also what judges are ‘doing’ when young violent offenders are in front of the courts. Future research would benefit from an examination of other provinces to determine whether this is a consistent theme across Canada. Quebec, for example, is less likely to criminalize youth misbehavior and is more willing and able to use alternative measures to the youth justice system (John Howard Society of Ontario, 1998: 2). The province of Quebec has historically had a unique approach to youth justice (Public Safety Canada, 2009: 6). More than the other provinces in Canada, Quebec has promoted a child welfare/child protection approach to youth at risk of offending. Dating back to the late 1970s (introduction of Quebec’s Youth Protection Act) Quebec has espoused a social development philosophy where rehabilitation and reintegration are the primary goals through the use of both diversion and alternative sentences (Public Safety Canada, 2009: 6). Thus, while Ontario became the starting point for this study a comparison study of Ontario and Quebec in future research would be valuable, as Quebec is the province that is closest to Ontario in size and urban make-up.

6.5 Conclusion

There has been “an unprecedented increase in worldwide interest in youth violence” (Leschied, 2015: 144) as a result of increased media attention, public pressure, and political discourse; however, there is limited research examining how the courts are responding to youth violence in Canada. This study examined the forces and factors that

shape sentencing of young offenders in the province of Ontario. Rehabilitation and protection of the community are fundamental goals of the youth justice legislation (YOA and YCJA) in Canada, and while there is much literature to suggest that rehabilitation is effective in reducing the recidivism rates in young offenders, the actual sentencing practices, as illustrated in the current study, do not conform to such views – at least among physical assault offenders.

This study found a higher percentage of physical assault offenders received custodial sentences, and while imposing a custodial sentence may protect the community in the short-term, it does not protect it in the long-term. Research has shown that incarceration is a well-established contributor to juvenile delinquency (Bala, Carrington, and Roberts, 2009: 134); as such, the results of this study not only raise the question as to why there are differences surrounding how violent offences are perceived within the juvenile justice system, but it opens up the dialogue around the use of custody as a rehabilitative tool for certain offences, like physical assault. Following Leschied (2002), I contend that the criminal justice system can be improved for youth, as law reform alone can neither decrease the number of custodial sentences nor reduce the incidence of reoffending (Leschied, 2002: 84). The results of this study suggest that while there is a greater emphasis under the YCJA for the use of community-based sanctions and the reduction of custodial sentences, it is the sentencing judges who must, first, be convinced to re-think the role of custody as a means to rehabilitating young offenders and protecting the public (Leschied, 2002: 84).

Furthermore, the public must also be educated as to the harms of ‘getting tough’ on crime, especially with regards to young offenders. As the New Brunswick’s Office of the Child and Youth Advocate (2015: 151) purports, crime prevention is not primarily a matter of corrections and courts, rather it is an overall community matter. As such, it requires the informed efforts of police, lawyers, and judges as well as government Departments, such as Public Safety, Health (Addiction and Mental Health), Social Development, Education, and Early Childhood Development, Justice, and the office of the Attorney General (p. 151).

While there may always be offenders who commit crimes that are egregious enough that they warrant incarceration, we cannot forget that most young offenders ‘age out of crime’. In addition, we cannot forget that adolescence is a critical stage of development, a period when interventions (e.g., programs and services to address mental health and behavioural needs) can help at-risk youths attain a healthy developmental trajectory into adulthood (Rawana et al, 2015: 251). As research has continued to show, incarceration harms not only youths but society in the long term. The results of this study, therefore, provide further support for the argument that there needs to be education as well as commitment on the part of youth court justices towards cooperative and continual dialogue between all agents of the criminal justice system as well as other community and social services within society towards addressing and treating the root cases of crime. As the Office of Child and Youth Advocate (2015) states “perhaps most importantly it [crime prevention] requires the efforts of various members of civil society, including families, youth peers, non-governmental organizations, community volunteers, group home staff and foster parents” (p. 151).

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