

**Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes
Associated with the Tough-on-Crime Legislation**

by

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AUTHOR DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis,
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ABSTRACT

The enactment of tough-on-crime legislation in Canada is questionable given the abundance of research rejecting its underlying premises and goals. While there appears to be ongoing concern in Canada about the tough-on-crime agenda, there is currently a shortfall in information addressing the processes through which Bill C-10 (Part 4) was developed and legislated by the Conservative Government. As such, there is limited data that informs Canadians about the ways in which politicians make meaningful decisions about youth crime policy and legislation.

Consequently, the objective of this dissertation is to provide a better understanding of the individual (micro) and governmental (macro) processes associated with the tough-on-crime approach in Canada, with a specific focus on responses to youth crime. Using a conflict and Marxist/critical perspective (Alvi, 2012; Chambliss & Seidman, 1971; DeKeseredy, 2011; Garland, 2001; Habermas, 1973, 1985; Hall et al., 2013; Quinney, 1970), this dissertation examines the state as a legitimate power and the ways in which it gains and maintains legitimacy. Theorists suggest modern laws work as an instrument of power to reflect the dominant ideology that is reproduced within the social structural system. Thus, this dissertation specifically examines the claim that laws are shaped by a consensus of dominant interests and values that are embodied and preserved in the tough-on-crime legislation, and is ultimately supported by the public.

This research investigates three *central* questions: First, what are the processes through which Bill C-10 (Part 4) developed and was legislated? Second, in what way(s) has tough-on-crime legislation been implemented in Canadian youth courts? Finally, how does Texas (United States) differ in their response to youth crime, relative to their model of crime control and placement on the tough-on-crime spectrum? To examine the tough-on-crime approach, interviews were conducted with twenty-two participants who were either involved in the political debates of Bill C-10 (Part 4) or had intimate knowledge of the youth justice system. The interview data were cross-referenced and compared to the applicable parliamentary records in *Hansard*. Second, a case law analysis was conducted to determine how the tough-on-crime mandate has been implemented within Canadian youth courts (2003-2013). Finally, an analysis of case law in Texas was carried out in order to understand how more punitive jurisdictions respond to youth crime and how their legislation differs from Canada (1996-2013).

The findings suggest the enactment of the tough-on-crime legislation in Canada was a result of a complex interaction between a number of agencies, institutions, and individuals after the Conservative's won a majority government in 2011. Moreover, the findings demonstrate the values embodied within the tough-on-crime legislation reflect the dominant (conservative) ideology and served as a means of maintaining legitimacy (Habermas, 1985; Hall et al., 2013). While the Canadian case law did not indicate that youth in conflict with the law were more adversely affected by Bill C-10 (Part 4), there was no evidence to suggest that future substantive changes in practice would not occur. However, marginalized Canadian youth were noted as most likely to be subject to tough-on-crime measures (Alvi, 2012).

The results from the case law analysis of Texas suggest the state focuses on diversion and rehabilitation, but to a lesser degree than Canada. This is largely due to Texas' transfer laws or ability to impose a determinate sentence. As a result, there appears to be a disproportionate use of the tough-on-crime legislation in Texas, often affecting minority youth. These findings are not only illustrative of a more punitive model of crime control relative to Canada, but point to the potential dangers of enacting tough-on-crime policies.

Overall, the implication of the findings from both jurisdictions is that the tough on-crime movement is a way of deflecting unspecified social problems onto youth as marginal political subjects, in an effort to mobilize the political power of the state (Alvi, 2012; DeKeseredy, 2011; Garland, 2001; Hall et al., 2013). In the Canadian context, there is evidence to suggest the state employed both “adaptive” and “non-adaptive” strategies to address the problem of youth crime (Garland, 1996). In effect, the newly enacted tough-on-crime legislation moves Canada further away from a reliance on various collaborative techniques and community based programs, and therefore supports a strong state-centric approach to crime control.

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CHAPTER 1 - INTRODUCTION

A great deal of research over the past few years attempts to delineate the controversies embedded in the tough-on-crime agenda. Of those publishing their findings in this area, it would seem that the literature indicates an impasse between advocates for and against this approach, with a very strong emphasis on the latter. The tough-on-crime campaign “refers to a set of policies that emphasize punishment as a primary, and often sole, response to crime” (Shah, 2005, p. 43). Historically, this movement can be traced back to the late 1960s and early 1970s in the United States, with minimal signs of its manifestation in Canada. At that time, Canada’s *Juvenile Delinquents Act (JDA)* emphasized a social welfare approach. Presently, however, Canadians are faced with newly enacted amendments to crime legislation with little evidence supporting the need. These sanctions are most notably witnessed in relation to adult crime, but they are also applicable to youth crimes as per Bill C-10 (Part 4).

As an introduction to the study, this chapter addresses the background to the research problems in order to frame the rationale for this study. Further, it attends to the methodology adopted, and the likely contributions of the results. Finally, the chapter concludes with a brief synopsis of the chapters within the dissertation.

1.1 The Tough-on-Crime Campaign

The tough-on-crime mandate put forth by the current Canadian Conservative government is responsible for creating a great deal of dispute within social and political realms. In particular, the deliberation of this campaign is partially due to the contested justification of implementing this legislation, especially given that the policy to deliver harsher punishments has simply failed at yielding positive results in the United States (Caputo & Vallée, 2007; DeKeseredy, 2011; Myers, 2005). Moreover, confusion over the rationalization of this

approach has left disapproving politicians and academics baffled, since Statistics Canada has reported a general decline in crime rates overall and offence seriousness (Boyce, Cotter & Perreault, 2014). In fact, according to police reported crime statistics in 2013, Canada is presently at its lowest overall crime rates since 1969, boasting approximately 1.8 million *Criminal Code* police reported incidents (not including traffic), approximately 132,000 fewer than 2012 (Boyce, Cotter & Perreault, 2014). More notably, the police reported rate at which youth were accused of an offence in 2013 represents approximately 4,346 youth per 100,000 between the ages of 12-17, representing a 16% decrease from 2012 (Boyce, Cotter & Perreault, 2014). This decrease was observed for both violent and non-violent crimes, and evidence suggests that the youth Crime Severity Index has declined by 39% over the last ten years. Despite these statistics, however, the Canadian government has introduced new tough-on-crime legislation.

1.2 Legislative Summary of Bill C-10 (Part 4): An Act to Amend the *Youth Criminal Justice Act* and the *Criminal Code*

As part of the Omnibus Crime Bill C-10, the purpose of Part 4 “is to amend certain provisions of the *Youth Criminal Justice Act (YCJA)* to emphasize the importance of protecting society and to facilitate the detention of young persons who reoffend or who pose a threat to public safety”¹ (Library of Parliament, 2011, p. 123). More specifically, Part 4 of the Bill:

- (a) “Establishes specific deterrence and denunciation as sentencing principles similar to the principles provided in the adult criminal justice system (clause 172)” but appear to be contrary to the principles stipulated in Section 3 of the *Youth Criminal Justice Act*;

¹ Bill C-10 (Part 4), also known as “*An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts*” was initially tabled in the House of Commons on 16 March 2010. For more information, see the Legislative Summary of Bill C-10: Amendments to the Youth Criminal Justice Act [Library of Parliament, 2011; Bill C-10 (Part 4), Clauses 167-204 (Formerly Bill C-4)].

- (b) “Expands the case law definition of a violent offence to include reckless behaviour endangering public safety (clause 167)”;
- (c) “Amends the rules for pre-sentencing detention (also called pre-trial detention) to facilitate the detention of young persons accused of crimes against property punishable by a maximum term of five years or more and those with a history of outstanding charges or findings of guilt (clause 169)”;
- (d) “Authorizing the court to impose a prison sentence on a young person who has previously been subject to a number of extrajudicial sanctions (clause 173)”;
- (e) “Requires the Crown to consider the possibility of seeking an adult sentence for young offenders 14 to 17 years of age convicted of murder, attempted murder, manslaughter or aggravated sexual assault (clauses 176 and 183)”;
- (f) “Facilitates publication of the name of young offenders convicted of violent offences (clause 185 and 189)”;
- (g) “Requires police to keep a record of any extrajudicial measures imposed on young persons so that their criminal tendencies can be documented (clause 190)”;
- (h) “Prohibits the imprisonment of young persons in adult correctional facilities (clause 186)” (Library of Parliament, 2011, p. 123)).

Despite the political appeal put forth by the Conservative government, stricter provisions such as those outlined in Bill C-10 (Part 4) have not been effective in reducing crime amongst youth. There appears to be a lack of conclusive reports that support the notion that the tough-on-crime approach will decrease youth crime (Bala, 2002; Doob & Cesaroni, 2004; Doob & Webster, 2003; Roberts, 2004).

1.3 Public Policy

The evidence presented by opposing politicians and academics on Bill C-10 (Part 4) suggests there is reason to question the basis upon which the Conservative government has gone about making changes to public policy. Much of this argument is formed on grounds which reject several of the underlying principles of the Bill, such as easing the “publication of

names of young offenders convicted of violent offences” and “establishing specific deterrence and denunciation as sentencing principles similar to the principles provided in the adult criminal justice system” (Library of Parliament, 2011 [Bill C-10 (Part 4), Clauses 167-204 (Formerly Bill C-4)]). Given the closing of the Law Reform Commissions in Canada in 2006 and the recent calamity over the decision to cease administration of the long-form Census in 2010 (which was instrumental in determining where public funding should be spent in order to alleviate some of the root causes of social ailments), there is evidence to suggest that majority governments may potentially propose public policy, federal funding, and legislative changes to the law with limited supporting research or reference to empirical data (Mallea, 2010). In the absence of both the Law Reform Commission in Canada and the long-form Census, amendments to public policy or legislation are no longer presented on the basis of impartial policy views, but rather partisan views. As a result, it can be argued that Canadians are not adequately safeguarded against judgements passed on public policy or legislation. In effect, this is the very issue of concern that conflict theorists and critical Marxist/social theorists seek to explain.

1.4 Who Informs the Public of Policy Changes?

The Law Reform Commission in Canada was traditionally assembled as an independent legal research institute. Its main goal at the time was “to inquire into and consider any matter relating to (a) reform of the law having regard to the statute law, the common law and judicial decisions; (b) the administration of justice; (c) judicial and quasi-judicial procedures under any Act; or (d) any subject referred to it by the Attorney General” (Ontario Law Reform Commission Final Report, 1996, p. 17). In addition, a benefit of a commission such as this included independence from government bureaucracy and influence, as well as

access to groups of experts (i.e. the judiciary, the legislative assembly, and legal scholars) in the area under scrutiny. While some Canadian jurisdictions currently have provincial Law Commissions, their main objective is to recommend law reform measures that are accessible to all individuals within that particular province. As such, it is their mandate to simplify or clarify the law, but not to amend it. A provincial law commission can make recommendations to change or modernize laws, but are not specifically responsible for considering matters that pertain to statute laws and judicial decisions.

Consequently, abolishment of the Law Reform Commission in Canada, which is partially due to revoking federal funding, reinforces the hypothesis that governments (especially majority governments) are capable of advocating and implementing changes to policies and legislation without sufficient nonpartisan information. With the absence of the Law Reform Commission in Canada, Canadians are lacking information on 1) reform in statute laws, as per Bill C-10; 2) issues dealing with the administration of justice as per the newly enacted principles of Bill C-10 (Part 4); and 3) matters pertaining to the strengthening of sentencing provisions for repeat young offenders, pre-trial detention rules, and the consideration of adult sentences for youth 14 and older who commit serious violent offences. One can argue Canadians may be misinformed about the nature of projected changes to policies since they are provided with deficient or distorted information, including fragmentary statistics on the matter and skewed perceptions communicated through the media. The heavy reliance on the media to convey information regarding what works and what does not in relation to crime ultimately contributes to the construction of public perception, which has a great deal of influence on politicians to enact tougher legislation (Dowler, Fleming, &

Muzzatti, 2006; Ericson, 1991; Fishman, 1980; Habermas, 1975, 1985, 2006; Hall, Critcher, Jefferson, Clarke & Roberts, 2013; Schulenberg & Chenier, 2014).

1.5 The Debate about Canada's Crime Statistics

While youth crime in Canada exists, there appears to be some discrepancy with regards to the ways in which Canadian statistics report both on the nature and the extent of youth offending patterns. Amongst those claiming that the statistics simply misrepresent the truth when it comes to actual crime rates was Scott Newark (2011), a senior policy advisor to the Ontario and federal Conservative Ministers of Public Safety. Newark (2011) asserts that a defective process of “collection, analysis, and reporting of crime statistics” generated by Statistics Canada is what creates the appearance of a declining crime rate (p. 22). Earlier in 2011, the Macdonald-Laurier Institute for Public Policy² released a review of police-reported crime statistics organized by the Canadian Centre for Justice Statistics (CCJS), just months after the Conservative government's announcement to terminate the mandatory long-form Census. The review made clear that “many of the most common conclusions that are drawn about crime in Canada are in fact incorrect or badly distorted” (Newark, 2011, p. 4). Accordingly, Newark (2011) argues that the biggest culprit of these problems stems primarily from the way the data on crime in Canada is collected by Statistics Canada, followed by a flawed interpretation of the information.

Newark's (2011) argument regarding erroneous data collection is based on the notion that the Uniform Crime Report (UCR) only compiles information on crimes reported to the police. In other words, not all crimes are reported in the UCR because some crimes are never

² The Macdonald-Laurier Institute considers itself to be “Canada's only truly national public policy think tank based in Ottawa”. It also asserts that it is “rigorously independent and non-partisan” (Macdonald-Laurier Institute, 2014).

identified, and some are never brought forth to the police.³ Consequently, the declining youth crime rates was not considered during the tough-on-crime legislation in Canada, yet implementing the approach was argued as necessary by the Conservative Party. This was especially the case since Prime Minister Stephen Harper believed the *YCJA* (pre-Bill C-10 (Part 4) enactment) to be an “unmitigated failure” in that it was unable to hold all youth responsible for their crimes (“Prime Minister Stephen Harper delivers remarks,” 2008).

Newark’s (2011) report includes numerous examples of how both the collection process and the interpretation of the data are erroneous, citing problems with (a) the eradication of “historical data that would allow effective comparisons of crime rates over time”; (b) “a model that inappropriately minimizes the volume (and thus the rate) of crime”; (c) the lack of “data on who is committing what kinds of crimes”; (d) negligence for “data on and explanations of unreported and unresolved crimes”; and most importantly, (e) the absence of “vital information about how much crime is committed by those who have already had contact with the system, including those on probation, bail or conditional release”, which is essential to the assessment of “existing rehabilitation and deterrence measures” (p. 4). The report was designed to evaluate the deficiencies in the Juristat reports with hopes of better informing governmental and legislative decision- and opinion-makers in Canada, as well as the general public of more accurate facts upon which meaningful decisions about crime can be made (Newark, 2011).

³ The UCR2, established in the mid-1980s and revised in 1998 and again in 2004, was created in an attempt to gather more precise and accurate information on each incident, victims and accused persons, and made known certain efficiencies for police services. It also lowered the responsibility of response by eradicating or clarifying some of the variables used in the survey, as well as included new variables for violations such as hate crime, cyber crime and organized crime (Statistics Canada, 2013).

Alongside this declaration, the review also addresses issues pertaining to youth crime, announcing that “the 2009 report is especially obtuse when it comes to youth crime information. Most of what is reported is framed on the subjective CSI (Crime Severity Index).” (Newark, 2011, p. 18).⁴ The accusations brought forth by the Macdonald-Laurier Institute for Public Policy against the police reported data are not only shared by other Conservative Party members, but are used as a justification to support the Conservative government’s agenda (Mallea, 2010). However, Newark’s claim that Statistics Canada crime numbers are grossly distorted or misrepresented has received criticism for comparing “figures that cannot be compared”, “presenting figures that are inaccurate”, and discounting “evidence that crime is, in fact, decreasing” (Greenspan & Doob, 2011, p. 1). There is serious disagreement between the government’s tough-on-crime agenda (which claims the only way to reduce increasing crime rates is by imposing tougher penalties), and opponents who suggest crime rates cannot be reduced by implementing tougher laws and harsher sentencing. In essence, there is a gap in the literature between the need for and against the tough-on-crime legislation in Canada (as well as how to improve the youth justice system).

On a broader level, the distortion of the problem of youth crime is not solely grounded in the way statistics in Canada are collected. Moving beyond the collection process, it can be argued that any misrepresentation or fragmented understanding of the problem of youth crime

⁴ The Crime Severity Index is an “analytical tool” for measuring crime in Canada. In measuring the extent of crime across the country, the Crime Severity Index evaluates the differing degrees of severity that subsist between offence types by assigning weights according to a severity scale. In essence, a comparison of crime trends can be carried out in relation to the magnitude of the offences that were reported to the police. The movement towards the Crime Severity Index was necessary in order to develop a means through which the types of crimes occurring in Canada could be assessed according to the relative seriousness, thus achieving a more simplified measure of crime volume. The principle upon which the Crime Severity Index is grounded is that the more serious the crime the more punitive sentence received. The Index relies on actual custodial sentences imposed by judges in the five most recent years. For more information, see Wallace, Turner, Matarazzo, and Babyak (2009).

stems from a combination of the ways in which both youth crime statistics and other amassed evidence (such as the testimonies presented as part of the deliberative process of public inquiries) are used. Together, these sources of data are used or discounted to problematize certain activities (in a way that frames and defines the problem, seriousness and extent of youth crime) to either support or reject (or at the very least, minimize) other ways of thinking about or acting on the existing problem. Historically, this can be understood in terms of the state's previous attempts at governing under the *JDA*, *YOA*, and the implementation of penal-welfare strategies more generally. Presently, the gaps in knowledge on how such evidence is constituted appear to carry great significance on one's understanding of the quality and quantity of youth crime.

1.6 The Tough-on-Crime Approach as a Solution?

There is considerable evidence against pursuing a tough-on-crime mandate in Canada, especially with regards to youth offenders. Studies suggest that implementing harsher punishments serve no purpose in the reduction of crime amongst young offenders, and offer examples from jurisdictions such as the United States to support their arguments (DeKeseredy, 2011; Doob & Sprott, 2006; McCaghy, Capron, Jamieson, & Harley Carey, 2007; Myers, 2005; Shah, 2005). More specifically, legislation that stipulates "denunciation and specific deterrence" is shown to have little effect on youth crime given the nature and broadness of these sentencing principles (i.e., principles that resemble those in the adult criminal justice system).

The argument against tough-on-crime legislation is furthered by the current statistical information provided on the youth crime rates in Canada. The steady decline in the number of youth involved in a criminal incident is illustrative of a downward trend that has been observed over a number of years. This implies that the Canadian youth crime rate has decreased without

applying amendments to the *YCJA* legislation, and thus can be the basis of an argument that the legislative amendments of Bill C-10 (Part 4) are not needed.

More notably, international research indicates that “young people who are put behind bars are 11 per cent less likely to get a job once they get out, compared with those who don’t go to prison, even once researchers account for pre-conviction differences in background and upbringing” (Paperny, 2011, p. 2). Why the Conservative government is convinced that the political response to youth crime consists of increasing punitive sanctions, as opposed to offering programs to help youth reintegrate into the community, remains unanswered. In effect, enacting Bill C-10 (Part 4) essentially undermines certain principles of the *Youth Criminal Justice Act (YCJA)*, since Section 3 of the *YCJA* states its objective is for the rehabilitation and reintegration of youth into society within the parameters of meaningful consequences, and fair and proportionate accountability, in an attempt to “promote long term protection of the public” (*Youth Criminal Justice Act* 2002, par. 3(1) (a)).⁵

Though current statistics show that youth crime rates are decreasing, it would appear that these facts had little influence on Harper’s politically motivated tough-on-crime agenda. As it stands, the argument used by those parliamentarians in line with the Conservative government is that the amendments to Bill C-10 (Part 4) ultimately lead to Canadians feeling more confident in the criminal justice system, while at the same time feel safer from serious repeat young offenders. This research, therefore, begins to address the basis upon which these phenomena occurred. According to the Minister of Justice and Attorney General of Canada Rob Nicholson, who supports Bill C-10 in its entirety, this rationale is linked to the belief that

⁵ Please note that the most recent amendment to the *YCJA* occurred on 28 February 2013, and no longer cites the promotion of long-term protection of the public as one of its objectives. The above statement is in reference to the old version of the *YCJA* prior to amendments as a result of Bill C-10 (Part 4).

Canadians support a tough-on-crime approach (Bill C-4 (Historical) Parliamentary Debates, 6 March, 2012; Cohen, 2012). However, findings indicate that public opinion polls about harsher punishments may not represent an accurate perspective due to the nature of these polls and the way people perceive issues related to youth crime (Roberts, 2003; Spratt, 1996; Spratt, Webster, & Doob, 2013).

Similar findings were also noted during the passing of the *JDA*, but more notably during the enactment of the *Young Offenders Act (YOA)* when the public voiced a great deal of concern about the rising youth crime rates. Like present day, the notion that youth crime rates (particularly violent crimes) were increasing represented only a small fraction of the overall crime rate (Brode, 1993). In fact, less than 15% of all reported youth crime involved violence (Justice Canada, 1993b). Yet, in response to the public's growing beliefs on the nature and extent of youth crime and the need for ongoing protection from victimization by young offenders, many of the political parties in the 1993 federal elections proposed reforms to the youth criminal justice policy as part of their political platform (Begin, 1993).⁶ A great majority of these findings can be witnessed in the number of amendments made to the *YOA* over the years during its enactment, given the neo-liberal policy propositions that gained popularity during the 1980s. Nonetheless, the discrepancy in the debate involving both sides of the argument revolves not around a lack of sufficient empirical evidence, but instead around values, interests, power, and of course, policy-making.

What this suggests then, is that the public is used as a means of gaining and maintaining state authority and legitimacy, which is ultimately dependent on continuous

⁶ There does not appear to be any academic literature on how political parties in the past dealt with police statistics that did not reflect their agendas. Thus, it is difficult to make any comparisons on this with previous Canadian governments when developing crime policy.

processes to exercise legitimate power (Habermas, 1975). It can be argued that a restructuring of the state administration and policy agendas have been influenced by neo-liberal and neo-conservative rationalities (Feeley & Simon, 1992; Garland, 2001; O'Malley, 1999). Such ideology, therefore, manifests itself as part of a systematic process that substantiates the ways in which the law works as an instrument of legitimacy and power. Essentially, these ideologies and laws are implemented through various mechanisms of hegemony (Habermas, 1975; Hall et al., 2013).

1.7 Research Problem and Approach

The purpose of this research is to better understand the individual (micro) and governmental (macro) processes associated with the tough-on-crime approach in Canada, focusing specifically on responses to youth crime. More specifically, this dissertation assesses the ways in which evidence (i.e., the problem of youth crime) is constituted (or discounted on account of the declining youth crime statistics), and how accountability for the problem is delegated onto the youth themselves and is acted upon through various punitive measures (such as adult penalties and sentencing principles similar to those found in the adult criminal jurisdiction). It may be argued that the tough-on-crime movement in Canada is a way to deflect vague or undetermined social problems onto youth (particularly minority youth) as marginal political subjects, in an effort to mobilize the political power of the state. These youth represent those least capable of marshalling political power (i.e., on account of the fact that they do not belong to the dominant group in society) and are most likely unable to participate in democratic elections given their age. In an attempt to show that something is being done to address the social problems responsible for eliciting such strong emotional reactions (i.e., youth crime), specific legislative enactments are therefore implemented.

Using a conflict and Marxist/critical perspective as the theoretical framework, this dissertation examines the mobilization of state power, which is achieved through a number of processes that aspire to win mass public support and thus reaffirm the political legitimacy of the state. At the same time, political authority reflects the dominant ideology which is reproduced within the social structural system to construct laws that are shaped by a so-called consensus of dominant interests and values. It is important to consider whose values are, and whose values ought to be embodied in the law (Chambliss & Seidman, 1971; Habermas, 1975, 1985), and whose conception of what society ought to be like in order to fully appreciate the genesis of this movement towards a tough-on-crime approach. Specifically, how these values are reflected in the tough-on-crime legislation, and how these values are preserved and supported by the public is of particular concern.

Based on the findings from the literature and the relevant theoretical perspectives, there are three central questions. First, this research addresses the processes through which Bill C-10 (Part 4) developed and was legislated. Second, the ways in which Bill C-10 (Part 4) has been implemented within Canadian youth courts is examined. Third, this research focuses on how tough-on-crime policies and legislation in Texas (United States) are consistent with a crime control model of juvenile justice, serving as an illustration of a tough-on-crime philosophy of justice.⁷

The tough-on-crime approach is investigated in three ways. First, this study involved conducting interviews with twenty-two participants that were either involved in the political debates of Bill C-10 (Part 4) or connected with youth within the justice system. The

⁷ The tough-on-crime approach has been implemented in Texas for approximately 20 years, and continues to be fairly punitive for youth in conflict with the law. See Chapter 5 (pp. 172-173) for more information on the selection process and why Texas was chosen for analysis.

perspective of these respondents was vital given that the literature has shown that tough-on-crime measures have little effect on youth, and that the need for these amendments is not supported by most empirical evidence. Thus, in order to fully capture the processes through which Bill C-10 (Part 4) was developed and legislated (see Research Questions #1 and 2), various judges, Crown Attorney's, retired politicians, academics, federal civil servants, and individuals working with youth in conflict with the law were interviewed.⁸ Although 283 Members of Parliament cast a vote either for or against the passing of Bill C-10 (Part 4), none of them were able or willing to participate in this research.⁹

Second, a case law analysis was conducted in order to determine how the tough-on-crime mandate is implemented within Canadian youth courts (see Research Question # 3). This analysis stems as far back as April 2003, when the *Youth Criminal Justice Act* first came into effect, and includes cases up to June 2013. Finally, a legal analysis of legislation in Texas was carried out. Specific case law from Texas was examined to illustrate the ways in which these laws are implemented in the courts on a state-wide basis. Further, the analysis examined the ways in which Texas' youth justice policies and legislation are further along the tough-on-crime continuum when compared to Canada.

The implications of these findings demonstrate the basis upon which tough-on-crime legislation is developed and implemented in Canada (the enactment of Bill C-10 (Part 4)), as well as how Canadians currently respond to youth crime. It also sheds light on the complex processes associated with the enactment of tough-on-crime policies on account of the various

⁸ As this dissertation is qualitative, this research examines respondent perceptions of the process, especially with regards to what is perceived as important reasons for amendments from each participant's perspective.

⁹ For more information on the sample size and technique used in this research, please refer to Chapter 5 (pp. 193-198).

superstructural forces that come into play. Furthermore, an analysis of how Texas oversees and responds to youth crime reveals the ways in which a more punitive jurisdiction embodies the principles of a model that enforces the law and maintains social order. The implications, therefore, not only provide a frame of reference as to where Canada currently sits on the tough-on-crime continuum, but also have a bearing on the future development of youth justice policies and legislation in the Canadian context. This is particularly true given that the enactment of these tougher penalties have been deemed unsuccessful both by youth justice professionals and conservative politicians in Texas. As such, international policies recognizing that more austere legislation does not result in a reduction of crime have the potential to offer Canadian legislation an alternative approach to the tough-on-crime mandate.

The scope and depth of this study provide findings on issues that, because of the new legislation, have not previously been addressed on the tough-on-crime legislation in Canada. Consequently, the findings expand our knowledge within a Canadian perspective and develop our understanding of the micro and macro processes associated with the Bill C-10 (Part 4) legislation. This is especially the case given that both processes have been investigated to a very limited extent in the past, although there is evidence to suggest that the Bill C-10 (Part 4) legislation developed on similar grounds to other Western nations, including Texas, that have enacted comparable tough-on-crime measures.

1.8 Chapter Overview

Chapter 2 describes the theoretical foundations in this research by outlining various conflict and Marxist/critical theories. These perspectives offer explanations for both the processes through which Bill C-10 (Part 4) developed and was legislated, and the responses to youth crime in both Canada and Texas. It also sheds light on the ways in which the state acts a

mediator of its complex interests by advancing decisions, and the ways in which authority and legitimacy is gained through the public. In essence, the theoretical perspectives discussed in this chapter emphasize a highly complex and nuanced approach to politics and the state more generally, and therefore partially form the research questions that are investigated in this study.

Chapter 3 provides a review of the significant findings in the literature on the dynamics of legislative change within Canada. In order to clarify the ways in which laws are created and by whom, the findings from prior research are organized in terms of policy creation, media constructions of youth crime, public views and attitudes about youth crime and Canada's youth justice system, the ways in which public views about youth crime influence policy-formation, reactions to youth crime in terms of hegemony, the crisis over penal-welfarism and the various shifts in youth crime governance on account of the ideological movements and discourse of the state, and the social costs of tough-on-crime legislation. The latter part of the chapter addresses some of the statistical findings which attend to both the characteristics of the crimes committed by youth and various youth sentencing practices across the country. In effect, the material outlined in this chapter builds on the theoretical perspectives discussed in Chapter 2 to form a more precise understanding of the complexities involved in law-making as well as the nature of political power.

Chapter 4 presents the legal framework for responses to youth crime in both the Canadian and American contexts. The first half of the chapter addresses the evolution of legal principles in Canada by briefly tracing through the guiding philosophies of the *Juvenile Delinquents Act*, *Young Offenders Act*, the *Youth Criminal Justice Act*, and finally the legislative amendments of Bill C-10 (Part 4). These sections focus on the ways in which a notable shift in youth crime governance can be observed through various changes in youth

justice laws and policies. The chapter then examines the implications of Bill C-10 (Part 4) in relation to the preceding version of the *YCJA*. In addition, a discussion on the conflicting neo-liberal and neo-conservative rationalities, and on the basis of this ideological view, an assessment of the application of adult sentences to young persons as a response to youth crime is presented. The latter half of the chapter considers the ways in which the state of Texas oversees and responds to youth crime through various procedural mechanisms that are consistent with a model of crime control. The provisions that exemplify Texas' philosophy of juvenile justice are addressed in terms of their tough-on-crime legislation. The chapter then addresses the effects of tough-on-crime legislation in Texas, and turns to a discussion on the ways in which the tough-on-crime legislation in both jurisdictions occurred on account of similar processes and transformations in youth crime governance. This review helps contextualize the findings in Chapters 7 and 8 by providing a frame of reference for the analysis. Thus, the final section of this chapter synthesizes what is known and what remains unclear by outlining the areas for further research in Chapter 4. These research questions are derived from the theoretical perspectives and literature discussed in Chapters 2 and 3.

Chapter 5 presents the methods and data used to address the research questions that are listed in Chapter 4. First, the purpose and appropriateness of a qualitative (constructivist) research design is addressed. Second, the sample and data collection techniques are discussed. Third, the approach and methods used to analyze the data are reviewed. Finally, the ethical considerations and the anticipated risks and benefits of participating in the study are outlined.

Chapters 6, 7 and 8 present the findings from analyzing the interview and case law data. Chapter 6 relies on the interview data and investigates the Canadian context for the tough-on-crime legislation in Canada and the processes associated with Bill C-10 (Part 4), by addressing

a) whose values are embodied within the Bill's legislation and whose values should be embodied in the Bill in order to better address youth crime in Canada (see Research Question #1); b) whose conceptions of what society ought to be like influenced the enactment of the Bill (see Research Question #2). In essence, Chapter 6 explicitly attends to the processes through which Bill C-10 (Part 4) was developed and implemented. Chapter 7 examines whether or not Canadian youth have been impacted by the tough-on-crime legislation within the youth courts (see Research Question #3) by analyzing the applicable case law.¹⁰ This chapter addresses the ways in which tough-on-crime legislation is implemented or interpreted within a court of law. Chapter 8, on the other hand, explores the ways in which Texas oversees and responds to youth crime by looking at the governing policies and legislation and considers how tough-on-crime laws are applied to youth in conflict with the law via case law. This chapter relies on the case law data and applicable tough-on-crime legislation in Texas, and to a lesser degree analyzes findings from the interviews. By addressing notable differences in policies in response to youth crime, Chapter 8 is devoted to examining a) how other jurisdictions such as Texas oversee and respond to youth crime and how the legislation is implemented in the courts (see Research Question #4); and b) how policies and legislation in response to youth crime in Texas differ from those of Canada (see Research Question #5). These differences between policies provide a basis for what can be learned from the way a more punitive jurisdiction such as Texas responds to youth crime in terms of their legislation, and in what ways these differences can

¹⁰ The analysis of case law from Canadian youth courts contributes to the dissertation's objective by identifying any differences in sentencing practices from pre-enactment case law to post-enactment of Bill C-10 (Part 4) case law. The overall goal is to assess whether or not youth have been impacted by the legislative amendments, and if so in what way(s).

better inform Canadians on the future development of youth justice policy (see Research Question #6).¹¹

Finally, the significant findings and their implications are summarized in Chapter 9. An overview of the results from Chapters 6, 7 and 8 is provided in consideration of previous research and the theoretical perspectives. The implications of the findings that lend support to the empirical and theoretical framework are discussed in conjunction with the limitations of the study. In light of these findings, the areas suggested for future research and theoretical development are considered.

¹¹ The analysis in Chapter 8 contributes to the dissertation's objective because it has been posited that the tough-on-crime mandate in Canada has been modeled after the American youth justice system. The analysis of case law and applicable policies/legislation from a state that is illustrative of a crime control model not only helps shed light on the potential outcomes of enacting harsher legislation, but also puts into context why Texan politicians presented evidence against Canada's plans to enact a tough-on-crime approach given the costs and failures associated with the legislation.

CHAPTER 2 - THEORETICAL FRAMEWORK

There are a number of theoretical principles which offer explanations of the intrinsic values, interests, and power involved in the policy making process. By using conflict theory and Marxist/critical theory as a basis for this research, this chapter provides the foundational determinants of the ways in which legislation is passed as well as how the state outputs legitimate power and control over law formation and relative decisions. While conflict theorists argue that society's most powerful groups *always* control the law in ways that commonly embrace their values as the normative legal standard for behaviour,¹² Marxist and many other critical theories suggest that much of the political, economic and social power is entrusted to a minute group of ruling class members in democratic, modern capitalist societies. According to this view, the political power gained from the ruling class' monopoly over the market is essentially what allows the manipulation of the political state. These capitalist interests infiltrate the legal and criminal justice systems as a means of maintaining positions of power. Other critical theorists, however, suggest the ruling class is not always able to promote their interests through law due to the state's relative autonomy (Habermas, 1975, 1985). Therefore, while it may be that some enacted laws reflect the interests of society's most dominant groups, this is not always the case because the state has interests of its own (i.e., gaining and maintaining legitimacy, and "steering" the economy) (See Habermas, 1973, 1975, 1985).

While these theoretical perspectives contribute to this research in their own ways, many of their underlying premises are highly interconnected. Thus, this chapter begins with an

¹² This view is reflective of Marx's ruling elite thesis, predominately because this perspective argues that it is the state itself that is the dominant group.

explication of conflict theory with respect to law, criminal justice and criminal behaviour. It then discusses the transition from conflict theory towards Marxist/critical theories which essentially endorse a different understanding of law and criminal behaviour based on its assessment of social, economic and political power in late-capitalist (modern) societies. In an attempt to further nuance these perspectives, consideration is given to the ways in which the varying mechanisms in the social structure (i.e., political, economic, social and cultural systems) add to the complexity of the processes involved in the state's ability to make laws and maintain legitimacy by exercising power. Together, these theoretical lenses are important because they shed light on the various processes through which Bill C-10 (Part 4) was developed and enacted. In addition, it may provide a basis for understanding the ways in which youth justice in other Western jurisdictions have transformed on account of the same processes and challenges. Finally, the last section of this chapter addresses some of the key limitations associated with each theoretical perspective.

2.1 Conflict Theory

Conflict theory examines aspects of political, social, or material inequality in a given social group while criticizing both the existent social and political systems that create an imbalance in power (Bernard, 1983; Chambliss, 1975; Chambliss & Seidman, 1971; Habermas, 1973; Hall et al., 2013; Quinney, 1970; Sellin, 1938; Turk, 1969; Vold, 1958). Research finds inconsistency between the “consensus of values” and “shared beliefs” regarding the constitution of good morals, ethics and acceptable behaviour (Bernard, 1983). While some theorists argue that a “consensus of values” and “shared beliefs” are society's foundational elements, conflict theorists claim that conflicts of interests such as rivalries over scarce resources, stature, prominence and power are the overarching mechanisms that govern human

society, eventually resulting in these “interests ultimately determining values” (Bernard, Snipes, & Gerould, 2010, p. 246; see also Bernard, 1983).¹³

On account of the discrepancy between theorists, differing views have surfaced in relation to the responsibilities of the state and on the disposition of crime (and thus the role of the criminal justice system more generally), as each theoretical branch translates into a divergent set of ramifications on such functions (Bernard, Snipes, & Gerould, 2010). For the most part, the literature pertaining to conflict criminology agrees that interests such as economic acquisitions, individual forfeitures, financial expenditures and personal betterments are disguised as notions of “justice”, “righteousness”, and “goodness” (Bernard, Snipes & Gerould, 2010, p. 246; see also Bernard, 1983). This differs from the views of consensus theorists because under this perspective, it is the state’s responsibility to “mediate these conflicts and to represent the common values and common interests of the society at large” (Bernard, Snipes & Gerould, 2010, p. 246). A consensus theorist’s point of view then, assumes that “values ultimately determine interests, since it is in everyone’s interests to have societies that are governed in accordance with goodness and righteousness and justice” (Bernard, Snipes & Gerould, 2010, p. 246). Conflict theorists, on the other hand, assert,

The organized state does not represent common interests, but instead represents the interests of those with sufficient power to control its operation. As a result, more powerful people are legally freer to pursue self-interests, while less powerful people who pursue self-interests are more likely to be officially defined and processed as criminal. The result is an inverse relationship

¹³ Values are referred to as the commonplace norms or standards in society that construe ideal principles, such as good, bad, right, and wrong. Beliefs, on the other hand, refer to specific concepts or understandings that are accepted to be true. Interests have to do with social outcomes that specifically benefit either an individual or a group over another. These may be objective (underlying) interests or apparent interests. For the purpose of this dissertation, both values and interests are considered throughout the analysis of the processes associated with the development and legislation of Bill C-10 (Part 4).

between power and official crime rates: The more power that people have, the less likely they are to be arrested, convicted, imprisoned, and executed, regardless of their behaviour. And vice versa (Bernard, Snipes & Gerould, 2010, pp. 246-247).

This assertion then, suggests that power is the fundamental element of conflict theory.

2.1.1 Conflict of Cultural Rules and Norms

According to the conflict of cultural rules and norms, people living in modern Western culture are subjected to “certain life situations” which “are governed by such conflicting norms” (Sellin, 1938, p. 66). Modern society experiences varying degrees of conflict due to differing cultural norms amongst various cultural groups. Regardless of one’s response to these circumstances, varying degrees of violation of norms of some social group will occur (Sellin, 1938). These violations are deemed as social maladjustments or disorganization leading to crime. Borrowing from Sutherland’s work (1924), the conflict of cultural rules and norms builds on the discipline of criminology by expanding the analysis of culture conflict. Cultural conflicts, thus,

Are the natural out-growth of processes of social differentiation, which produce an infinity of social groupings, each with its own definitions of life situations, its own interpretations of social relationships, its own ignorance or misunderstandings of the social values of other groups. [...] Such conflicts within a changing culture may be distinguished from those created when different cultural systems come in contact with one another, regardless of the character or stage of development in these systems (Sellin, 1938, p. 66).

In other words, members of differing groups will always appear to conduct themselves in a manner that is to some degree classified and defined as abnormal by an opposing group. Where cultural growth is prevalent, rules and laws are not characterized by the general consensus of members in society, but instead reflect the “conduct norms of the dominant culture” (Bernard, Snipes, & Gerould, 2010, p. 247).

A good illustration of culture conflict between opposing groups can be seen by analyzing laws of a state and the morality of different social groups within a given population. This is particularly the case when the ethical criteria of dominant groups lack congruency with those of the subservient ones. Laws and norms, such as conduct norms embodied in criminal law, are subject to modification upon such time as the values of a dominant group change. In addition, the physics of social growth has the ability to dictate a need for rearrangement of dominant groups and therefore causes fluctuation in, or substitutions of, power. Thus, definitions of acceptable or legal conduct (or unacceptable and criminal conduct) are contingent on the values of dominant groups in power and are susceptible to reinterpretation, redevelopment, and sometimes dissolution. Criminal law, as stated by Sellin (1938), can be seen “in part a body of rules, which prohibit specific forms of conduct and indicate punishment for violations. The character of these rules, the kind or type of conduct they prohibit, the nature of the sanction attached to their violation, etc. depend upon the character and interests of those groups in the population which influence legislation” (p. 21). To elaborate further, it is noted that “in some states these groups may comprise the majority, in others a minority, but the social values which receive the protection of the criminal law are ultimately those which are treasured by the dominant interest groups” (Sellin, 1938, p. 21).

2.1.2 Group Conflict Theory and Social Processes

In 1958, George B. Vold presented a group conflict theory based on “social processes” that understand “society as a collection of groups held together in a dynamic equilibrium of opposing group interests and efforts” (Bernard, Snipes, & Gerould, 2010, p. 247). Vold’s theory suggests that social groups are formed on the basis of shared needs and interests through which interaction may occur. The underlying concept of group conflict theory holds that the ways in which these groups interact is such that it generates a state of upheaval, primarily due

to their desire to either sustain, ameliorate, or expand their position to control resources, in a process of continuous “interaction and competition with other groups” who represent conflicting interests within the political sphere (Bernard, Snipes, & Gerould, 2010, p. 247). Through social interaction, groups are able to stabilize themselves to create conditions that support social order by counterbalancing or acclimatizing to various social settings and circumstances to further their own interests. What is emphasized here is that “social order, therefore, does not reflect a consensus” across all competing groups, but rather reveals an ongoing process of adaptation and transformation common to all “groups of varying strengths and different interests” (Bernard, Snipes, & Gerould, 2010, p. 247).

According to this theory, the successful functioning and conduct of society entirely depends on conflict as a social process (Vold, 1958). That is, the struggle involved in the precarious phase of adaptation brings about a relatively constant state of symmetry of equal forces or social order and social organization. It is asserted that group membership originates through a joint understanding of interests and needs, particularly when individuals recognize that their desires can be advanced through a series of concerted efforts. Thus, as group interests and needs become fulfilled and its goal has been accomplished, the group gradually wanes and eventually dissipates (Bernard, Snipes & Gerould, 2010). Conflict between groups develop when competition amidst individual interests and purposes arise. Bernard, Snipes and Gerould (2010) claim that “conflicts among organized groups are especially visible in legislative politics, which is largely a matter of finding practical compromise between opposing interests” (p. 248). Until such time as conflicting groups find themselves in opposition, each group attempts to secure state support to safeguard their specific rights and corresponding interests (Bernard, Snipes & Gerould, 2010). During the law-making process, it is suggested that the

group most capable of amassing popularity through electoral means (i.e., what Habermas (1973) below describes as widespread loyalty and public support) “will determine whether or not there will be a new law to promote the interests of the one group and to hamper and curb the interests of the other groups” (Bernard, Snipes, & Gerould, 2010, p. 248). Vold’s (1958) theory surmises that group conflict has a tendency to become even more discernible after a new piece of legislation has been set in place. In effect, this is because,

Those who opposed the law in the legislature are more likely to violate the law, since it defends interests and purposes that are in conflict with their own. Those who promoted the law, in contrast, are more likely to obey it and to demand that the criminal justice agencies enforce it against violators, since the law defends interests and purposes they hold dear (Bernard, Snipes & Gerould, 2010, p. 248).

Possessing the power to influence decisions on policies determines who is defined and processed as criminals. In this sense, group conflict theory fully acknowledges that both the enactment and violations of laws are processual, and are intertwined with integral aspects of group interests, conflicts, and control of state/political power. Conversely, Vold (1958) suggests criminal behaviour is an expression of “minority power groups” in that they are unable to successfully “defend their own interests and purposes in the legislative process” (Bernard, Snipes, & Gerould, 2010, p. 248). On the other hand, this theory is limited to some degree in its applicability to criminal law, because it is more so the ways in which the law is enforced that represents group interests, not the law itself.

2.1.3 A Theory of Criminalization

The theory of criminalization delineates “the conditions under which [...] differences between authorities and subjects will probably result in conflict, [and] the conditions under which criminalization will probably occur in the course of conflict” (Turk, 1969, p. 53). Criminality and criminals are socially “defined by the way in which an individual is perceived,

evaluated, and treated by legal authorities” (Turk, 1969, p. 25). Essentially it is argued that both the level of organization and sophistication of authorities and subjects play a role in the probability of conflict between the two (Turk, 1969).

As part of the conditions that influence the probability of conflict between authorities and those under control of authorities (subjects), this theory surmises that authorities are organized given that the mobilization and maintenance of power is established on group association. The organization of subjects further increases the likelihood for conflict given that difficulty in retracting one’s position tends to prevail in a group setting (Turk, 1969). Accordingly, the variable of sophistication affects the probability of conflict because “knowledge of patterns in the behavior of others” is “used in attempts to manipulate them” (Turk, 1969 p. 59). Thus, “conflict between authorities and subjects is *most* probable if the subjects are highly organized and relatively unsophisticated” for example, delinquent gangs, “*less* probable if they are unorganized and unsophisticated, *still less* probable if organized but sophisticated, and *least* probably if unorganized and sophisticated” such as professional con-men (Turk, 1969, pp. 59-60).

The theory of criminalization suggests there are three circumstances under which conflict is expected to result in the direct criminalization of subjects. It is asserted that the primary reason as to why a subject is criminalized is due to the meaning and definition of the act or behaviour, as defined by “first-level enforcers”. Turk (1969) argues that “the norms of the police have a critical impact upon criminality rates, because police have a wide-range of alternatives to strict and dedicated enforcement, some of them legal, some not, and many in a gray area not explicitly covered by manuals and laws” (p. 65). However, first-level enforcers are not only the police; rather, all parties involved in the administration of justice such as

Crown attorneys, judges and politicians. That is, the greater the degree of offensive or illegal behaviour, as per its meaning and definition to first-level enforcers, the greater the likelihood of arrest, prosecution, and condemnation of the act.

Secondly, the criminalization of subjects impinges on the proportionate degree of power between authorities and subjects. Power differences between enforcers and subjects fluctuate from one relationship to the next in which “the enforcers are virtually all-powerful to cases where enforcers and resisters are about equal in resources, including effective organization, manpower, skills, funds, weaponry” (Turk, 1969, p. 67). For the most part, however, the criminalization of subjects is at its best when the power difference between two groups favours the enforcers. Furthermore, if the offensive behaviour being criminalized is solely found amongst those in the least powerful group, the rate of criminalization is apt to be the highest.

Third, the most promising achievement is directly linked to the probability of the approach taken by the subjects or authority. In this sense, criminalization is not defined by sophistication and the use of knowledge of others’ behavioural patterns to manipulate them. Instead, it is measured by how well one achieves (or fails) at manipulating these patterns (Turk, 1969). Therefore, the more sophisticated a party in conflict is, the more likely their moves will be viewed as realistic and bring about a favourable outcome for those amongst the most successful group.

2.1.4 The Social Reality of Crime

While group conflict theory focuses on conflicts amongst interest groups, the social reality of crime emphasizes the importance of conflict amongst “segments” of society. Segments are “people who share the same values, norms, and ideological orientations, but who may or may not be organized in defense of those commonalities” (Bernard, Snipes, & Gerould,

2010, p. 250). For example, individuals who advocate for harsher legislation may be seen as those representing a segment of society with similar or shared morals, principles, norms and ideology, although they are not organized in a manner that protects their interests (as part of any specific interest group). In contrast, interest groups can be seen as those forming opposition parties such as a group of professionals working within corrections and the criminal justice system, The Canadian Bar Association or other conflicting parties. Therefore, the most notable difference between the two units of analysis (interest groups and segments) suggests that organization need not always be present.

Expanding on Sutherland's differential association theory, the social reality of crime considers the likelihood of people violating criminal law strongly correlated to the degree of power and authority their particular segment has on the both the creation and implementation of criminal law (Quinney, 1970). Accordingly, it is argued that the more powerful segments of society are able to manoeuvre in ways that tend to align with accepted patterns of behaviours, and adhere to normative practices that thwart off the probability of being in contravention of the law (Quinney, 1970). In contrast, individuals belonging to a less powerful segment of society do not always display normative patterns of behaviour, and their actions, consequently, are both socially and legally defined as a breach of the law, and are formally processed as criminal.

According to the social reality of crime, individuals involved in the legislative process pursue their own self-interests within a political context (Quinney, 1970). Interests are not only demarcated by a disproportionate power structure but also in the ways in which each segment is able to transform their particular interests into public policy. Quinney (1970) refers to this as the conflict-power conception of the interest structure, and claims that some segments of

society that are highly specialized in their interests become so organized that they are able to manipulate policies pertaining to all individuals in a given state. He asserts,

Groups that have the power to gain access to the decision-making process are able to translate their interests into public policy. Thus, the interests represented in the formulation and administration of public policy are those treasured by the dominant segments of the society. Hence, public policy is created because segments with power differentials are in conflict with one another. Public policy itself is a manifestation of an interest structure in politically organized society (Quinney, 1970, p. 39).

In addition, law is conceived as a form of public policy that controls and constrains the behaviour of all members within a society (Quinney, 1970). Law is both produced and enforced by those most powerful segments in society “which are able to incorporate their interests into the creation and interpretation of public policy” (Quinney, 1970, p. 40). Thus, instead of demonstrating a mutually beneficial concern for all segments of society, the law is put in place to serve as an exclusively advantageous tool to further one segment’s interests at the detriment of others.

The social reality of crime recognizes that all aspects of law creation including substantive regulations and the procedural rules are designed to exemplify interests of those segments of society that are in powerful enough positions to actually construct public policy (Quinney, 1970). By systematically contriving laws, the more powerful segments of society are able to preserve and bolster their own interests, while at the same time manage other segments in a fashion that benefits the former. Quinney (1970) states the administration of justice is influenced by “localized conditions and the occupational organization of legal agents, the interest structure of politically organized society is responsible for the general design of the administration of criminal justice” (Quinney, 1970, p. 40). Therefore, the more powerful

segments in society influence all levels of legal regulation. However, a change in law is also dependent on and subject to dynamic social conditions as changes in the interest structure are generally followed by legal amendments or a reinterpretation of the existing law.

Taken as a whole, Quinney (1970) suggests “conceptions of crime are created and communicated as part of the political process of promoting particular sets of values and interests” that are advanced by groups and individuals in higher segments of power (Bernard, Snipes, & Gerould, 2010, p. 250). More importantly, it is asserted that “the powerful individuals and groups promote particular conceptions of crime in order to legitimate their authority and allow them to carry out policies in the name of the common good that really promote their own self-interests” (Bernard, Snipes, & Gerould, 2010, p. 251). This ability helps to achieve legitimacy because individuals in higher segments are commonly acknowledged as valid and credible. As a consequence, any policy that is implemented is done so under an allegedly well-founded pretext.

2.2 The Evolution of Marxist/Critical Perspectives and Modern Political Power Relations

According to Bernard, Snipes and Gerould (2010), critical criminology is considered “an umbrella designation for a series of evolving, emerging perspectives that are characterized particularly by an argument that it is impossible to separate values from the research agenda, and by a need to advance progressive agenda favoring disprivileged peoples” (p. 267). Of these emerging perspectives, it is asserted that Marxist criminology coincides (to a degree) with the critical framework because it situates the problem of crime into a larger social, political and economic domain delineated by late capitalism.¹⁴ To better understand the complexities

¹⁴ Critical criminology is not entirely compatible or synonymous with conflict criminology, although they do share numerous commonalities. Given the lack of clarity as to what critical criminology actually covers in terms of

associated with the Marxist/critical perspective, it is important to briefly trace through some of the criticisms pitted against conflict criminology in order to appreciate the ways in which modern political power relations in late modernity have evolved. In fact, these limitations provide the basis for an improved (and perhaps superior) theoretical structure.

While critical criminology shares the same intellectual and scholarly legacy as conflict criminology in the works of Marx, traditional conflict theories have been subject to numerous criticisms that have led to the development of a more robust theoretical position. Although both critical and conflict theory view inequality in power as related to crime, one critique of conflict theory is that it lacks an emphasis on the provenance or derivation of power (Bernard, Snipes & Gerould, 2010). Marxist and critical theories, for example, discuss power in terms of ownership of the means of production. Thus, based on theories that have emerged from the Marxist tradition connecting crime to the capitalist economic system, it is not surprising that Friedrichs (2009) argues that the disproportionate allocation of power or of material resources in current society is the inception for all veins of critical criminology.

More significantly, the onset of the 1970s generated simplistic views of both the criminal justice system and criminals more generally, by introducing an instrumentalist position that asserted “that the enactment and enforcement of criminal laws are solely the instruments of a unified and monolithic ruling class that conspires to seek its own advantage at the expense of other groups” (Bernard, Snipes & Gerould, 2010, p. 271). Earlier theories such as those proposed by Sellin (1938), Vold (1958) and Turk (1969) were criticized for

content and validity, it is difficult to say what is covered by which perspective. It has been asserted, however, that critical criminology is much broader than Marxist criminology in that it diversifies itself in feminist theory, left-realism, postmodernism, cultural criminology, peacemaking criminology, etc. (DeKeseredy & Perry, 2006). For the purposes of this dissertation, much of the discussion regarding critical criminology is linked with Marxist tradition given the nature of crime in relation to capitalism and the modern state.

oversimplifying the nature of political power as well as the development of law and policy by making the state into a simple agent of a unified group. In addition, these theories were criticized “for their simplistic portrayal of the ruling class as a unified and monolithic elite, for the argument that the enactment and enforcement of laws reflect only the interest of this ruling class, and for the argument that criminal acts are a political response to conditions of oppression and exploitation” (Bernard, Snipes & Gerould, 2010, p. 271).

2.2.1 Marxist/Critical Criminology

As a result of the criticisms aimed towards the instrumentalist view, the Marxist/critical orientation expands on the foundational ideology introduced in earlier versions of conflict criminology, primarily by complicating the problem of political power in relation to the structural factors that exist within the context of capitalism. That is, this more complex structuralist view in advanced capitalism “[...] attempts to relate criminal behavior and crime policies to the political economy of the particular societies in which they occur, and it relies primarily on historical and cross-cultural studies for support [...]” (Bernard, Snipes & Gerould, 2010, p. 272).

Relative to criminal law and the criminal justice system, this structural Marxist view perceives the role of the state as different from the naive and unsophisticated instrumentalist argument from which it was born. According to Bernard, Snipes and Gerould (2010),

The primary function of the state is not to serve the short-term interests of capitalists directly, but rather to ensure that the social relations of capitalism persist in the long-run. This goal requires that many different interests be served at different times, in order to prevent the rise of conditions that will lead to the collapse of capitalism. Thus, on any particular issue, including the enactment and enforcement of criminal laws, the action of the state may serve other interests besides those of the owners of the means of production. Nevertheless, the owners of the means of production can still be described as a ruling class in that the organized state serves their economic interests in the long run.

Moreover, the owners have an excessive amount of political power in comparison to other groups, with a disproportionate ability to get the state to serve their interests in the short run (p. 272).

Contrary to the instrumentalists view then, this more nuanced perspective suggests state authorities act to support long-term interests of the dominant group, but the state is relatively autonomous of the short-term demands of the ruling class. In other words, the state makes decisions on behalf of the ruling class, but can make laws that support other interests in an attempt to reduce conflict and maintain legitimacy. Overall, this conflicts with the instrumentalist position in that it implies not all laws reflect the interests of the ruling class, although both explanations agree that the long-term interests of the laws and the legal system are to protect and maintain the interests of the more powerful groups. Thus, the theory becomes more diverse when it is modified to include various structural conditions, contradictions and the relationship between power and conflict relative to the larger social structure (see the works of Habermas, 1975, 1985 in the following sections).

Marxist/critical criminology also expands the structuralist perspective by emphasizing the ways in which the conduct of the owners of the means of production exhibits elements of “harmful behaviour” as a consequence of fulfilling their “pursuit of economic self-interest” (Bernard, Snipes & Gerould, 2010, p. 272). In line with the argument asserted by earlier conflict theorists regarding society’s most dominant groups and their relative power to develop and form the legislation of criminal laws, the structuralist view also recognizes and purports the unlikelihood of the ruling class’ behaviour to be construed and labelled as unlawful (Bernard, Snipes & Gerould, 2010). While there is evidence to support the notion that “public’s victimization by the ruling class is much greater than their victimization by street criminals”, there appears to be a general lack of willingness on the part of the criminal justice

agencies to criminalize the behaviour of the ruling class, particularly because such actions are committed by those in positions of power against the powerless (Bernard, Snipes & Gerould, 2010, p. 272). In other words, many of the actions and behaviours of the ruling class “are not defined as criminal at all; when they are defined as criminal, the laws are rarely enforced; when enforced, the punishments are usually minimal compared to punishments that are routinely imposed on street criminal whose actions cause less objective harm” (Bernard, Snipes & Gerould, 2010, p. 273).¹⁵

On this note, Reiman (1998) suggests the long-term interests of the ruling class are best achieved when the criminal justice agencies themselves are incessantly unsuccessful at governing or regulating street crime, which is most often associated with lower-class crime or “underclass” behaviour. It is when the public is preoccupied with lower-class (or “underclass”) crime that it remains in a chronically distressed mode (Reiman, 1998). Thus, it is suggested that those in more economically prominent and powerful positions take advantage of these opportunities to ensure that the public’s concerns about “underclass” crime redirects the focus from issues pertaining to the potential discrimination and oppression of the general population by the ruling class (Reiman, 1998).

The Marxist/critical criminological explanation for lower-class or “underclass” crime is currently understood in terms that are similar to those found in “more traditional

¹⁵ There are a number of detrimental behaviours that have been considered by Marxist theory (but not by conflict theories) that are not officially defined or processed as criminal (Bernard, Snipes & Gerould, 2010). According to Marxist criminology, there is some degree of impartiality when it comes to determining what constitutes a crime. These include behaviours such as “violations of human rights due to racism, sexism, and imperialism; unsafe working conditions; inadequate child care; inadequate opportunities for employment and education; substandard housing and medical care; crimes of economic and political domination; pollution of the environment; price-fixing; police brutality; assassinations; war-making; violations of dignity; denial of physical needs and necessities; and impediments to self-determination, deprivation of adequate food and blocked opportunities to participate in relevant political decisions” (Bernard, Snipes & Gerould, 2010, p. 273).

criminological theories” (Bernard, Snipes & Gerould, 2010, p. 273). However, one of the main differentiations between the two arguments stems from the notion that the Marxist/critical interpretation of lower-class criminal behaviour is directly correlated with their fundamental view of the “political-economic systems and the historical processes in which those systems change” (Bernard, Snipes & Gerould, 2010, pp. 273-274). That is, the conception of lower-class or “underclass” crime is expressed in terms of “the pathological consequences of the social structure of advanced capitalism” (Bernard, Snipes & Gerould, 2010, p. 273). While many Marxist/critical theories contend that engaging in criminal activity is a socially learned behaviour, such behaviour is commonly accepted as conduct that is acquired by ordinary people under conditions that are systematically framed by the various social mechanisms embedded in modern capitalism (Akers & Sellers, 2008; Bernard, Snipes & Gerould, 2010). On the whole, the ways in which people conduct themselves is typically influenced and supported by their economic positions and corresponding interests. This notion, however, has been criticized to some degree because crime also exists in non-capitalist economies and societies. Therefore, this cannot be the only reason as to why criminality flourishes.

In general, this view claims that the economic and political structures found within most Western nations is directly connected to the various elements of criminality found within that given society (Block & Chambliss, 1981). In fact, Block and Chambliss (1981) note that the entire structure of society requires a series of transformations in order to dissolve many of the disagreements and inconsistencies found within the political and economic systems. Thus, if criminal behaviour is a natural product of the disparities or crises found within the political and economic systems, it is suggested that the system itself is responsible for producing such

manifestations within society (Block & Chambliss, 1981).¹⁶ Similarly, DeKeseredy (2011) notes that Marxists and critical criminologists place a great deal of emphasis on the “structural and cultural changes within society”, because they are vital to encouraging social justice while diminishing crime (p. 7). From this perspective then, the primary interest for critical criminologists entails examining marginalized persons both socially and economically to argue for “progressive short-term policies that target the major social, political, cultural, and economic forces that propel people into crime, such as poverty, sexism, and deindustrialization” (DeKeseredy, 2011, p. 8-9).

Both Marxist and critical criminology emphasize “the political nature of crime and deviance” (DeKeseredy, Ellis, & Alvi, 2005, p. 22). Overall, this branch of theory claims “the law is a tool used by powerful social groups to promote and protect their interests, and that definitions of crime favour those in privileged economic and political positions” (DeKeseredy, Ellis, & Alvi, 2005, p. 22). Despite some limitations stemming from the inability to accurately summarize this theoretical framework due to its denouncement of mainstream definitions of crime and criminology, Marxist/critical criminology sheds some light on the ways in which “crime and the present-day processes of criminalization are rooted in the core structures of society” (DeKeseredy, 2011, abstract).

2.2.2 Left Realism

Known as a sub-theory of Marxist/critical criminology, left-realism focuses on the existing issues of crime by employing a slightly more narrow and restricted perspective (Cottee,

¹⁶ According to Greenberg (1993), the enactment of crime control policies (or tough-on-crime legislation for that matter) is problematic because it does not address any of the root causes of crime that are generated by the political-economic system. Thus, these types of policies and legislation are indicative of the ways in which the issues of crime are managed as opposed to being dealt with in larger socio-political-economic sense. Greenberg (1993) argues that it is necessary to modify the dynamics within the political-economic structure in society for any noticeable change in crime to be realized.

2004). While the Marxist/critical criminology described above stresses the importance of altering the dynamics of the political-economic system in capitalist society, left-realists acknowledge the ongoing criminological issues that plague minorities, the working-class (including the lower-class or “underclass”) and individuals in less powerful positions within society (Alvi, 2012; DeKeseredy, 2011). The predominate difference between these branches, however, rests in the notion that left-realism advances the possibility of addressing such problems through various mechanisms (such as the criminal justice system) regardless of whether or not the current capitalist political and economic systems are subverted (Bernard, Snipes & Gerould, 2010; DeKeseredy, 2011; Matthews & Young, 1992). Accordingly, one distinguishing feature of this theory is the “rejection of solutions to crime measures such as zero-tolerance policing [...], three-strikes sentencing, private prisons, coercive counselling therapy, and so on” (DeKeseredy, 2011, p. 7). Based on some of the recommendations and responses proposed by left-realists, a great deal of importance is placed on the ways in which crime policies and legislation “attempt to reduce economic marginality, social alienation, and political oppression that characterize class-based capitalist society” (Bernard, Snipes & Gerould, 2010, p. 275).

In this sense, left realism is said to analyze crime in relation to the multifaceted relations between individual (micro) and governmental (macro) level phenomena, such as the interplay between “the state, the offender, the victim, and the general public” (Wortley, Seepersad, Mcalla, Singh, Madon, Greene & Roswell, 2008, p. 210). Left realism is important to the study at hand because it largely focuses on how “inequality and power impact upon and reflect lawmaking, lawbreaking, victimization, reactions to crime, and social harm” and how “structural forces, cultural ideologies, and social processes create, sustain, and exacerbate

social problems” (Wortley et al., 2008, p. 211). DeKeseredy and Perry (2006) propose that continuing research in this area is imperative because failure to recognize the importance of left realism intensifies the power dynamic between those in more powerful positions and those in less powerful positions by allowing “right-wing politicians in several countries to manufacture ideological support for ‘law and order’ policies that are detrimental to the socially and economically disenfranchised” (p. 20).

In addition, left realists assert that “the left’s ongoing failure to take working-class victimization seriously contributes to the right’s hegemonic control over knowledge about crime and policing” (DeKeseredy & Perry, 2006, p. 20). Further, this theoretical perspective has been given “selective inattention by conservatives seeking to preserve the status quo and by left-wing scholars who inaccurately portray this relatively new direction in critical criminology as little more than ‘an exercise in dubious politics and the cult of personality’” (DeKeseredy & Perry, 2006, p. 19). Nonetheless, the theory focuses on the various ways in which the overarching expansion of political, social, and cultural dynamics both frames and characterizes crime and its control (DeKeseredy & Perry, 2006).

According to this perspective, any legislation that specifically promotes the interests and values of powerful interest groups within society necessarily excludes those in less powerful positions. As a result, these underprivileged groups are strategically situated on a course that both encourages crime for the powerless, and supports the Conservative position of law and order with tough-on-crime policies (see DeKeseredy, 2011). The emphasis of the theory, therefore, is placed on proposing alternatives to conservative policies and theories.

2.3 The Political-Economic Structure and the Complexities of the State in Modern Society

A discussion on the complexities of the late-capitalist state relative to the political-economic structure in modern society is important because it demonstrates the intricacies in the existing relationship between the state, polity, government, and other fundamental institutions. The ways in which the law is used as an instrument of power and legitimacy, therefore, must be analyzed against the political-power relations that both define and characterize it. The modern political-power relations discussed in the works of Habermas (1973, 1975, 1985) provides a highly sophisticated overview of the ways in which the theoretical complications of the conflict perspective is understood. While this view coincides with much of the critical views presented earlier, this section of the chapter seeks to elaborate on the particulars of the state as an apparatus that pursues authority and legitimacy through various mechanisms, and acts as a mediator of a broad range of complex interests. In essence, this discussion goes beyond the scope of the critical criminological theories addressed in the preceding sections because it analyzes the relationship between power and the state relative to current political discourse.

Drawing on Marx's foundational work, Habermas (1973, 1975) considers the contemporary developments witnessed over the last hundred years in light of the ostensible dynamism of modern society. Similar to the argument posed by Marx regarding the nature of social evolution, Habermas (1975) views the progression and development of a given system as a product of various contradictions or crises found within the social structure.¹⁷ Described as

¹⁷ According to Habermas (1973), the development of a "system crises" first originated with Marx as part of a compelling sociological theory. In modern society, any notion of social or economic crises is perceived in light of Marx's conceptualization (Habermas, 1973, p. 644). A crisis, for Habermas (1975) involves a subjective and objective dimension. This suggests there must be the perception of threat by the public regarding social identity

“steering problems”, these inconsistencies result in weaknesses that consequently provide the basis for an unsustainable system.¹⁸ In such cases, there is an element of social disintegration given the threat of a collapse of the “normative structures” on account of a change in the system (for example, a lack of social identity) and the crises that *may* ensue.¹⁹

The disintegration of any given system is almost always associated with the political organization of society, although this is deeply connected with other important structural features of late-capitalist societies (Habermas, 1973). First, the economic system considers the ways in which the private and public areas are regulated both by production and competition, and are controlled by government or private firms. Second, the administrative system is seen as an instrument that not only “regulates the overall economic cycle by means of global planning” (that is, by controlling the insignificant decisions put forth by private enterprise to counteract any negative consequences while balancing the state’s role in superseding the “market mechanisms” in instances where the government constructs or ameliorates the circumstances for appropriating surplus capital), but as a tool that “improves the conditions for utilization capital” (Habermas, 1973, p. 646). This suggests that the administrative system is responsible for balancing “fiscal and financial measures to regulate cycles, as well as individual measures to regulate investments and overall demand” (Habermas, 1973, p. 646). In essence, this system is burdened with the responsibility of managing crisis by establishing a “compromise between

(subjective), and that there are ongoing problematic issues within the structure of the system, such as economic challenges or “steering problems” (Habermas, 1975, p. 4).

¹⁸ “Steering problems” may be understood in terms of unresolved crises within a social system. This notion is linked to the “steering mechanisms” (such as the economy) within society, as well as the development of organizational forms (Habermas, 1975, see pages 4-7 for more information).

¹⁹ Normative structures are defined as “values and institutions of a society” (Habermas, 1975, p. 4). Thus, the normative structures of the socio-cultural subsystem, for example, are related to the “status system; subcultural forms of life”. The normative structures of the political subsystem are linked to “political institutions (state). The normative structures for the economic subsystem have to do with “economic institutions (relations of production)” (Habermas, 1975, p. 6).

competing imperatives” such as “steady growth, stability of money value, full employment, and balance of trade” (Habermas, 1973, p. 647). Finding a middle ground to establish equilibrium in this sense can be understood in terms of the state’s obligation towards “unemployment”, “welfare”, “ecological damage”, “universal education”, “programs of training and re-education”, “housing”, “transportation”, “support for scientific research”, etc. (Habermas, 1973, p. 647).

Third, the legitimation system is born out of necessity to uphold the fundamental imperatives specific to the production process by directly engaging in it (Habermas, 1975). For example, while some philosophical views have faded (i.e., what Habermas refers to as “bourgeois ideology”) as a result of system breakdowns, there appears to be an ongoing need for legitimation (Habermas, 1975).²⁰ In fact, Habermas claims “re-coupling the economic system to the political – which in a way repoliticizes the relations of production – creates an increased need for legitimation” (Habermas, 1975, p. 36). Accordingly, Habermas (1973) discusses this process in terms of a “government apparatus” that requires legitimation “in the growing realms of state intervention, even though there is now no possibility of reverting to the traditions that have been undermined and worn out in competitive capitalism” (p. 647-648). One of the most obvious remnants of the “bourgeois ideology” is understood in terms of formal democracy, whereby elections contribute to legitimation that can only be divorced from

²⁰ Legitimacy is defined as “a political order’s worthiness to be recognized” (Habermas, 1979, p. 178). It is considered to be a process and a state of affairs, and is based on three different sources (Weber, 1954). It is asserted that legitimacy is required for the types of anticipated outcomes outlined by a political order (in a form of justification for the authority), as well as the support needed by the public to meet these expectations (Friedrich, 1972). In a more practical sense, legitimacy is understood in terms of general acceptance by the public of a governing authority that is given political power through a process of mutual agreement. The political power is bestowed upon the governing authority. Thus, it is not taken through coercion. There are instances, however, where political power is seized by intimidation or coercion. The concept of achieving political power through coercive legitimation is discussed in the works of Gramsci (1971) in Chapter 3.

such a structure in “extraordinary” and “temporary” situations (Habermas, 1973, p. 648). This process in itself ensures that it is the citizens of society that play a decisive role in the formation of government, although the participation of the public in “political will-formation” brings about consciousness that is caused by the inconsistencies found in the administrative system. Thus, in order to keep this awareness restrained, Habermas (1973) contends,

The administrative system has to be sufficiently independent of the shaping of legitimating will. This occurs in a legitimation process that elicits mass loyalty but avoids participation. In the midst of an objectively politicized society, the members enjoy the status of passive citizens with the right to withhold their acclaim (p. 648).²¹

This statement elucidates one main point. Habermas (1973) suggests the administrative system must remain as separate as possible from the legitimating system. In other words, administrative or political outcomes/resolutions are reached outside of any specific intention or rationale of the public, through a process of legitimation that captures widespread desire but circumvents any real involvement in the administrative system (see also Habermas, 1975, p. 36).

Finally, class structure in late capitalism can be understood “as reaction formation to endemic crisis” that is averted by concentrating “all socially integrative strength on the conflict that is structurally most probable” (Habermas, 1973, p. 648). Aside from preventing the system from entering into a state of crisis, this is done in order to keep the underlying conflict concealed. While the “quasi-political wage structure” plays a role in which the government

²¹ The administrative system is one of the most important structural features of late-capitalist (modern) societies (Habermas, 1975). It is responsible for managing and organizing the economic cycle in its entirety by reconstructing the ways in which capital is used. It also serves the function of managing crises when necessary (Habermas, 1975). In addition to this, Habermas (1973) includes the economic system, the legitimation system and class structure to form the remaining aspects of modern society. See Habermas (1973), pages 645-649 for more information.

must establish a degree of compromise in the demands between “increasing productivity, qualifying labor power, and improving the social situation of the wage workers” there are numerous social and economic costs of the “immunization of the original conflict zone” (Habermas, 1973, p. 648). Such ramifications include “(1) disparate wage developments; (2) a permanent inflation with the corresponding short-lived redistribution of incomes to the disadvantage to [...] marginal groups; (3) a permanent crisis in government finances, coupled with public poverty - i.e., pauperization of public transportation, education, housing, and health; (4) an insufficient balance of disproportionate economic developments [...]” (Habermas, 1973, p. 649).²² While Habermas (1973) notes that most late-capitalist societies have managed to suppress or pacify crises in relation to class structure and conflict, there are currently remnants of a distorted perception of “class consciousness” and “social identity” (p. 649). In essence, the concessions made as part of the late-capitalist structure ensure that “nearly everyone both participates and is affected as an individual – although, with the clear and sometimes growing unequal distribution of monetary values and power, one can well distinguish between those belonging more to one or to the other category” (Habermas, 1973, p. 649). Part of this is achieved through metastasizing the maladjustments of other systemic crises (such as an economic crisis) and dispersing them across other “quasi-groups” (such as “school children and their parents”, “the sick”, “the elderly”, “or divided groups difficult to organize” (Habermas, 1973, p. 649).

What this suggests is that modern capitalist societies are subject to a sort of “repoliticization” or “anonymization” of class structure in comparison to other preceding types

²² Alvi (2012) p. 31-45 discusses the effects of capitalism and late modernity on youth, particularly with regards to familial socio-economic status, education and health.

of capitalist societies (Habermas, 1975). While traditional forms of class domination in pre-capitalist societies were characterized by the blatant monopolization of the economic structure, modern capitalist societies are no longer dominated by the same direct political form. That is, advanced or late-capitalist societies rely on a type of legitimation that is generated through the masses but are still based on “universalistic bourgeois ideologies”, so long as they are fortified by reason (rationality) as opposed to tradition (Habermas, 1975) According to Habermas (1975) older forms of legitimacy (e.g., religion or tradition) are eroded by advanced capitalism. Instead, it is up to the administrative system to balance and control the economic system on account of any systemic variation or inconsistencies caused by competitive capitalism. The success of this form of control therefore cannot be characterized by explicit or politicized class conflict. As such, social conflicts in modern capitalist societies disguise themselves as other forms of crises, such as those that materialize or transpire within the economic or political system. This perspective provides a more complex or nuanced understanding of the state apparatus relative to class structure, in that it goes beyond the instrumental view that suggests the state serves *only* in favour of the interests of the ruling class. Thus, crises associated with class conflict in modern society are unlikely to occur in its pure form (Habermas, 1975).

2.3.1 Disturbances to the System and the Legitimation Crisis

The role of the state in relation to late capitalism and the disturbances specific to the system are not straightforward. Theories regarding the state apparatus have been widely deliberated as a result of the varying interpretations of the relationship between capitalist structures and the ways in which it seeks various types of capital through alternative means (Habermas, 1975). Habermas (1975) asserts that there are four possible crises tendencies which can occur and consequently cause disruption to the system (or even “political eruption”

(Habermas, 1975, p. 45)). These include economic crises, rationality crises, legitimation crises and motivation crises.²³

The state itself is not only viewed “as a system that uses legitimate power”, but as one that requires maintenance of such legitimacy (Habermas, 1973, p. 655). The political system, like all other systems, requires a source of input and output whereby input into the political system is that of “mass loyalty that is as diffuse as possible” (Habermas, 1975, p. 46). The output of such a system can be understood in terms of administrative functions that are independently carried out via legitimate power. Input crises then, are characterized by a legitimation crisis when the system requiring legitimation is unable to cultivate the necessary degree of “mass loyalty while the steering imperatives taken over from the economic system are carried through” (Habermas, 1975, p. 46). In comparison, output crises occur in instances where “the administrative system does not succeed in reconciling and fulfilling the imperatives received from the economic system”, and subsequently take shape in the form of a rationality crisis (Habermas, 1975, p. 46). Crisis tendencies in the political realm do not share a unified set of features. More specifically, Habermas (1975) asserts,

The rationality crisis is a displaced systemic crisis which, like economic crisis, expresses the contradictions between socialized production for non-generalizable interests and steering imperatives. This crisis tendency is converted into the withdrawal of legitimation by way of a disorganization of the state apparatus. The legitimation crisis, by contrast, is directly an identity crisis. It does not proceed by way of endangering system integration, but results from the fact that the fulfillment of governmental planning tasks places in question the structure of

²³ This statement does not suggest that these types of crises are mutually exclusive from one another, since there is a great degree of likelihood that certain crises develop from a disruption to another system and, at times, disturbances or crises permeate other systems. Although the systems listed above are interconnected with one another, this discussion is limited in scope so as to stay within the confines of the research on the problem of political power.

the depoliticized public realm and, thereby the formally democratic securing of the private autonomous disposition of the means of production (p. 46).

Said differently, rationality insufficiencies or shortfalls in public administration is necessarily equated to the state's inability to effectively "steer" the economic system, while a lack of legitimation suggests that it is "not possible by administrative means to maintain or establish effective normative structures to the extent required" (Habermas, 1975, p. 47).²⁴

This suggests then, that political crises may develop on the basis of a number of different reasons. First, such crises can occur under circumstances where, as a result of late capitalism and the structural systems of modern day, traditional values dissipate and can no longer serve as a source of legitimation. Second, crises may occur when various policies are interpreted by the public as ineffective. Third, a disturbance to the system may occur in situations where there is a lack of reasonable control over the economy. Finally, crises may be cultivated when there are problems with legitimation when mass loyalty ceases to exist.²⁵

The state's role in developing a balance between the inherent contradictions outlined in the sections above pose issues for legitimation. More specifically,

The state apparatus does not just see itself in the role of the supreme capitalist facing the conflicting interests of the various capital factions. It also has to consider the generalizable interests of the population as far as necessary to retain mass loyalty and prevent a conflict-ridden withdrawal of legitimation. The state

²⁴ "Normative structures" coincide with subsystems. For example, the political subsystem is linked to political institutions (state) as its "normative structure". The "normative structures" associated with the economic subsystem are the economic institutions. The socio-cultural subsystem is tied to the status system as its "normative structure". See Habermas, 1975, p. 6. Crises occur when there are disparities in the "normative structures" which lead to steering problems.

²⁵ Through the works of other theorists, Habermas (1973) offers his interpretation of the circumstances in which a state of crisis develops. One possibility has to do with the inconsistencies found between the state's responsibility to encourage or generate economic growth and support a welfare state simultaneously (see Habermas (1973) on Claus Offe, p. 655-666). Since there is a disjuncture between the governing principles of organization for each enterprise, it is said that as the state strengthens and develops one end, the other, by nature, will be weakened.

has to gauge these three interest areas (individual capitalism, state capitalism, and generalizable interests), in order to find a compromise for competing demands (Habermas, 1973, p. 657).

Thus, it may be said that the state itself has the responsibility of fulfilling interests of its own, such as “steering” the economy and preserving state legitimacy.²⁶

When considering how this perspective fits in with the enactment of legislation, it may be said that it coincides with the earlier suppositions which suggest that not all laws represent the interests of the dominant group because the state is not always in a position to do so. While legitimate power is necessary for proper administrative functioning, there is a strong reliance on the public to legitimate this power by way of “formal democratic means” (Habermas, 1973, p. 656). Problems regarding legitimation may be managed in a fashion that essentially separates the state into two parts. From this perspective, one section of the state is responsible for administrative planning and functioning, while the other is dedicated to strengthening, reinforcing and expanding legitimacy by generating “a universal willingness to follow” (Habermas, 1973, p. 657). According to Habermas (1973), this has already been accomplished by “the personalizing of objective issues, the symbolic use of inquiries, expert opinions, legal incantations, etc.” (p. 657). In addition, propaganda and advertising alike are subjugated in a strategic attempt to manipulate the public. Habermas (1973) refers to this practice as “resorting to emotional appeals”, given that “they arouse unconscious motives, occupy certain contents positively, and devalue others” amongst the public since it is their role to provide legitimation

²⁶ Although the concept of “steering” the economy is not explicitly echoed in the works of Chambliss and Zatz (1993), Hall et al. (2013), and Miliband (2009), these theorists argue that the state is relatively autonomous of the dominant or ruling-class group. However, these theorists also recognize that there are ruling-class interests in lawmaking as well as in other facets of law. Habermas (1973) views this as an element of class structure, class consciousness, and institutionalized power. Chambliss and Zatz (1993), Hall et al. (2013) and Miliband (2009) acknowledge that ruling-class interests are not the only force responsible for law creation or law implementation, but that they do influence the process relative to the social structure of modern day. There are, however, both limitations and strengths of the ruling-class’ power on social order.

(p. 657). The purpose of the public, in this sense, is then to make known current and contemporary issues that require attention while diverting any interest from other problematic areas. In effect, this diminishes the degree of importance on other matters and removes them from the spotlight (Habermas, 1973).²⁷

There is no question that the ways in which the state itself gains power and legitimacy are complex. It involves continuous processes to exercise legitimate power, but is narrowly restricted in scope.²⁸ Much of this limitation has to do with the notion that the development of modern society through ideology has caused the economic or socio-cultural²⁹ systems to permeate areas such as the political system. Presently, there is little guarantee that a standard full-blown economic crisis can be observed in late-capitalist society given the strategic and systematic shift of such crises into the political structure. However, the administrative system (i.e., planning and activity) is subject to limitations as well. For example, an excessive amount of manipulation of the public by the state runs the risk of exposing the means through which legitimacy itself is attained (Habermas, 1973). In this sense, any revelation of acquirement in

²⁷ This is also discussed in the works of Hall et al. (2013) in light of the state's reliance on the media and other institutional forces to manipulate and appeal to the masses. Please see Chapter 3.

²⁸ In late-capitalist societies, governmental legitimacy is derived from a consensus amongst various (autonomous) structural institutions in society. Aside from the structural institutions discussed in this section, these may also include judicial and legislative components. The source of legitimacy is formed on the basis of a democracy through which the public elects a party to office. That is, the public must perceive that the governmental party they elect governs the state in a manner that is consistent with the doctrines outlined by democracy, and that the government is held responsible for their actions to the people (see Habermas, 1975, p. 36-37 for more information).

²⁹ The socio-cultural system is a structure which is part of a larger system. Habermas (1975) refers to this as a system of production and reproduction, or more specifically, "the cultural tradition (culture value systems), as well as the institutions that give these traditions normative power through processes of socialization and professionalization" (p. 149, Note 15). The socio-cultural system is interpreted as a life-world that essentially consists of a socially integrated arena of social interactions. The purpose of this system is to generate meaning that seeps across all other (sub) systems in order to motivate individuals to the appropriate degree of either political or economic conduct (Habermas, 1975). According to Edgar (2005), the output of the socio-cultural system is "constituted by the network of norms, meanings and worldviews that secure social integration" (p. 128). This is accomplished through the proper and relevant normative structures. Law, then, can be viewed in terms of an institutionalized type of communication or discourse on rules and social norms.

legitimacy jeopardizes itself (Habermas, 1973). This is particularly the case for the socio-cultural system, which challenges the authority by administrative activity, because “there is no administrative creation of meaning, there is at best an ideological erosion of cultural values [...] Thus, there is a systemic limit for attempts at making up for legitimation deficits by means of well aimed manipulation” (Habermas, 1973, p. 657). This suggests that cultural traditions cannot be replaced by contrived ideology, but instead can be worn or manipulated in a limited sense in an effort to gain legitimacy.³⁰ Thus, any incongruency found amongst cultural traditions (which are fairly resistant to discontinuity) and the administrative efforts put forth by the state are bound by certain restrictions so as to not destroy pre-established politically strategized legitimacy.

³⁰ This is an example of ideological movements and discourse within the government that acts as a driving force to ensure that the enactment of legislation is in everyone’s interest. A good example of this can be observed when crisis deepens on account of general disenchantment (either economically or politically), which consequently results in difficulties to maintain consensus. Thus, key ideological features or symbols are presented as a means of re-establishing legitimacy of the entire subsystem. In this case, the issue of crime and criminality is used to unite groups despite structural differences (i.e., class structure) or other conflicts. This is done in order to ensure that the crisis is diverted away from the state institutions and deflected onto other facets (such as youth crime or racial conflicts). This is also discussed by Habermas (1975) in the following section. According to Finlayson (2005) Adorno’s view on ideology is understood in terms of “socially necessary illusions” or “socially necessary false-consciousness” (p. 11). This suggests that “ideologies are the false ideas or beliefs about itself that society somehow systematically manages to induce people to hold” (Finlayson, 2005, p.11). That is, “ideologies are false beliefs that are widely assumed to be true, because virtually all members of society are somehow made to believe them. Moreover, ideologies are functional false beliefs, which, not least because they are so widespread, serve to shore up certain social institutions and the relations of domination they support” (Finlayson, 2005, p.11). Habermas (1985) modifies the notion of ideology by claiming that people are “funnelled by economic and administrative systems into certain patterns of instrumentally rational behaviour” (Finlayson, 2005, p. 24). In essence, it is the systems that carry with it a number of obscure or covert “strategic or instrumental aims” which ensure the continuation of “oppressive social systems” (Finlayson, 2005, p. 24). According to Finlayson (2005), Habermas believes that “oppressive social systems survive, not because individuals mistake their own interests, but because their actions fall into pre-established, bewildering complex patterns of instrumental reasons. Because of the inherent opacity in social systems, the significance of actions exceeds the capacity of the agents to understand and to take responsibility for them” (p. 24).

2.3.2 The Need for Legitimation in Modern Society

There are latent consequences of administrative planning and activity which increases the need for legitimation in modern society.³¹ According to Habermas (1973), this consists of the ongoing development of state activity which calls for greater legitimacy on the basis of acquiring public allegiance. Not only is this linked to the notion of an expansion in the responsibilities of the state, but also to a shift in the “boundaries of the political system vis-à-vis the cultural system” as a corollary of this development (Habermas, 1975, p. 71). The effect of this outcome results in a growth of the administrative system (i.e., the planning area) for issues that previously fell under the political system. That is, it brings into the limelight problematic matters that were traditionally withheld from the public (Habermas, 1975). As Habermas (1975) asserts,

At every level, administrative planning produces the unintended unsettling and publicizing effects. These effects weaken the justification potential of traditions that have been flushed out of their nature-like course of development. Once their unquestionable character has been destroyed, the stabilization of validity claims can succeed only through discourse. The stirring up of cultural affairs that are taken for granted thus furthers the politicization of areas of life previously assigned to the private sphere. Efforts at participation and the plethora of alternative models [...] are indicators of this danger, as is the increasing number of citizens' initiatives (p. 72).

A second example of how Habermas' (1975) argument can be illustrated is within the context of “participatory planning” (p. 72). Participatory planning includes individuals outside of the government to participate in the planning process, particularly those whom are affected

³¹ There are many unintended consequences of administrative planning which increase the need for legitimation. These are not included in this discussion, however, because it goes beyond the scope of this dissertation. For more information, see Habermas, 1975, pp. 71-72.

by the contentious topic.³² Given that there is a degree of infiltration of administrative planning on the cultural system, this type of participation allows the public to share in the discussion even though, as Habermas (1975) notes, it is uncertain as to whether participation will ameliorate or hinder the conflict.³³ According to Habermas (1975),

The more planners place themselves under the pressure of consensus-formation in the planning process, the more likely is a strain that goes back to two contrary motives: excessive demands resulting from the legitimation claims that the administration cannot satisfy under conditions of an asymmetrical class compromise; and conservative resistance to planning, which contracts the horizon of planning and lowers the degree of innovation possible (p. 72-73).

Overall, Habermas' (1975) views on the issues associated with administrative planning lend support to the argument that there is a need for an increase in legitimation on the basis that legitimation crises undoubtedly exist in modern society.³⁴

On the one hand, a crisis of legitimation occurs in late-capitalist societies when the socio-cultural system increases confidence or boosts expectations which cannot be met by the rewards allotted by the system, and when the motivation provided by the socio-cultural system wears down (Habermas, 1973). On the other hand, missing legitimation can be compensated by rewards "such as money, time and security", so long as it conforms to the system (Habermas, 1973, p. 659). On the whole, this assertion suggests that the structural system found in modern society is one that is extremely fragile. While all systems within the structure are threatened to

³² The cultural system that is affected by administrative planning is influenced by "the deep-seated representations of norms and values of those affected – and renders traditional values uncertain" (Habermas, 1975, p. 72). A good example of this can be observed in the ways in which victim's groups are used by the government to support tough-on-crime legislation.

³³ This claim is also illustrated in the works of Garland (2001), who provides a fairly detailed analysis of the role of the public and more specifically of the various interest groups in the participatory planning stage and the effect this has on law enactment. Please see Chapter 6.

³⁴ This discussion is linked with the works of Friedrichs (1980) on the evidence used by sociologists to claim that such crises exist in late-capitalist societies. Please see Chapter 3.

a degree (i.e., the economic system is susceptible to a loss in profit), the political system suffers from insufficient loyalty which often results in a legitimation crisis. Unlike during liberal-capitalism where the system relied on traditional vestige for maintenance, the development of late-capitalism has destabilized the social structure and the system within it through its own rationality. In essence, this has resulted in the public politicization of traditions, norms and loyalties which has ultimately contributed to the deterioration of its own system (Habermas, 1975).

2.3.3 Law as an Instrument of Governing Power

The role of the state in relation to law and order has evolved from the foundation upon which it first emerged centuries ago. The law, and more specifically the criminal justice system, may be seen as a proponent of the state and its relative structural system which reflects its stance on the apprehension and punishment of those in contravention of the law. Aside from the state's responsibility to produce a type of social conformity to the economic structure discussed above, the system requires a degree of control over other systems that fall outside this scope (such as the juridical apparatus).

In their analysis, Hall et al. (2013) suggest the generation of order and social solidarity, control, regulation, and at times coercion are all products of the state. The state not only controls and normalizes through culture, politics, and ideology, but also maintains and safeguards the obscurity of class by advancing notions of political autonomy or the "general will" of the public (i.e., what Habermas (1973) refers to as "will-formation" or "legitimizing will") (Habermas, 1973; see also Hall et al., 2013). In essence, the law is viewed as a mediator of social cohesion and integration that acts as a stabilizer in modern society, and as a power that usurps legitimacy from the compliance and submission it commands from its subjects (Habermas, 1985). The legitimacy of the law relies not only on power, but requires an element

outside of this domain. Thus, it is highly dependent on the consensus of the people in the form of widespread loyalty (Habermas, 1975).³⁵ The legal system, then, is viewed as an educative instrument which is responsible for institutionalizing norms and creating new cultural developments, but only on the grounds that it is able to secure an extensive degree of consent (Habermas, 1985).

Habermas (1985) argues the ways in which the law in modern society develops and functions is directly related to both the larger social structural system and the life-world. The law itself serves as a means to legally institutionalize the autonomous operation of power and capital, respectively, in the administrative (public) and economic (private) systems. In this regard, the proximity of the state to the law manufactures a highly authoritative area which is subjugated by political ideology. The autonomy of the law, therefore, expels a form of persistent sectarian domination upon other systems in the social structure. This, Habermas (1985) and Hall et al. (2013) claim is done in a manner that not only strives to safeguard the deep-rooted purpose of preserving capital, but one that camouflages any non-legal disparities that could potentially disrupt the system. Further, this domination seeps into the social relations of the state in a way that reinforces it as a legitimate structure (Hall et al., 2013).³⁶

The concept of legitimate authority is considered with respect to the existing relationship between politics and the law. According to Habermas (1975), the nature of this association has much to do with what Weber argues as “rational authority”, in that it is “the

³⁵ Much of this discussion is related to Habermas’ (1975) views of universalistic morality and its distinction between ethics (see pp. 86-92). For example, there are contradictions between the “human being” and the “loyalties of the citizen” which should be separated from one another in the formation of law in modern society. The law, according to Habermas (1975, 1985) may be understood as having a normative function that requires moral justification achieved through discourse.

³⁶ This discussion coincides with Habermas’ (1985) interpretation of ideology and the ways in which widespread beliefs are filtered through and by the various subsystems that form the larger part of modern society.

legally formed and procedurally regulated type of authority characteristic of modern societies” (p. 97). In the words of Weber (1978), “experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as a basis for its continuance. In addition every such system attempts to establish and cultivate the belief in its legitimacy” (Habermas, 1985, citing Weber, p. 213). What this suggests then, is that every system within the social structure strives to legitimate itself through the various mechanisms available in society, but that the power found within it has few boundaries. Legitimacy under rational-legal authority, therefore, is gained from the legal system and the laws that are enacted within it, while the power is derived from the administrative system that is legitimized through the public. In a more practical sense, legislation may be understood as a form of political function while the enforcement of the law is ensured by the government by controlling the enactment of legislation.³⁷

2.4 Theoretical Limitations of Conflict Theory and Critical Theory

There are a number of theoretical limitations associated with both the traditional conflict theory and the critical conflict theory discussed. One major limitation of conflict theory is that other theoretical explanations, such as macro-level threat theory and non-conflict interpretations are also able to account for similar trends present in crime and the justice system (Bernard, Snipes, & Gerould, 2010). Given that studies suggest there are numerous challenges in testing conflict theory (Beck, 2000; Chamlin & Cochran, 2000; Greenberg, Kessler, & Loftin, 1985; Hagan, 1974; Krisberg, Schwartz, Litsky, & Austin, 1987; Liska, 1992; McCarthy & Smith, 1986; Moore, 1987; Pope & Feyerherm, 1990; Walker, Spohn, &

³⁷ The concepts of rational-legal authority and the modern state as a bureaucracy have been simplified and condensed for the purposes of this dissertation. See Habermas (1975), specifically pp. 97-102 for an in-depth analysis of his understanding of Weber’s concept of legitimacy, and see Weber (1978) for more information.

DeLone, 2000), it is difficult to confidently comment on the magnitude of the political and economic influence in relation to this process. As such, determining the real impact of power is a tricky pursuit through this theoretical lens.

According to Akers and Sellers (2008), the empirical testing of conflict theories are isolated and infrequent, likely due to a question of measurement as well as the character of the framework which attests to the social structure as problematic, given the countless number of interest groups constantly struggling to achieve power. Thus, a major criticism of conflict theory revolves around a lack of rigour to test the propositions of the theoretical perspective, especially since only a small range of crimes (i.e., political and ideological) can be explained by the theory. Although Ellis, Cooper and Walsh (2008) assert that a few studies have attempted to test the validity of this model, it appears as though the methods and measures used (i.e., surveys and scales) to test the propositions of these theories are unable to provide enough empirical evidence to persuade other criminologists towards acceptance of the theory due to a general lack of support for a theoretical explanation.³⁸

To complicate matters further, the traditional conflict theory presented takes on an instrumentalist view which describes the “state as the instrument of a specific social class” (Kasinitz, 1983, p. 135). Aside from their widespread analysis of the state that contests political pluralism, it is asserted that society’s most dominant groups maintain control of the state by using it as an instrument to advance their interests and preserve their position of power within the economic system (Kasinitz, 1983). According to Kasinitz (1983), one of the weaknesses of such a perspective is rooted in the fact that there is little evidence to suggest that “elite members” or the dominant class *always* rule in favour of their interests. In addition, this

³⁸ See Brunk and Wilson (1991) for details on testing the propositions of conflict theory.

view appears to diminish “the whole relationship of the state and economy to that of capitalists and bureaucrats” (Kasinitz, 1983, p. 138). The notion of exercising power by the dominant group in ways that favour their interests seems to be overly simplistic in that they do not consider how other interest groups have influenced change or a restructuring of sorts, especially during social or economic hardships (Kasinitz, 1983). Thus, this view limits the ways in which one may understand how the state is used as a tool by other groups to further their interests. Since the instrumentalist view does not perceive the state as autonomous, it is relatively naïve and idealistic in that it does not account for the fact that the state has interests of its own.

The major limitation associated with the Marxist structuralist view stems from the fact that it places a great deal of emphasis on the relationship between crime and capitalism (Schwendinger & Schwendinger, 1976). This perspective suggests that crime is a natural by-product of a capitalist system and that the criminal justice system is used as a tool not only to maintain the interests of the ruling class, but also to control problematic or dangerous populations. In effect, this limitation is twofold. First, the theory is deficient in the sense that it advocates for the movement away from capitalism to a socialist system (Schwendinger & Schwendinger, 1976). Second, the theory does not account for individual or group behaviour that contribute to the cause of crime within a given society (Schwendinger & Schwendinger, 1976). Thus, while there is a discussion about the rates of crime within a capitalist society, it does very little to address any additional underlying factors. Together, these prevent the theory from being accurately tested.

The critical conflict theory discussed in the works of Alvi (2012), DeKeseredy (2011), and Habermas (1975, 1985) consider the role of capitalism and class structure in relation to

(youth) crime and the role of the state. The foundation upon which critical theory is built has developed from the preceding theoretical orientation that takes a relatively instrumentalist (pluralistic) view of the state apparatus and the ways in which it is manipulated by the dominant groups in society. Although critical theory may be viewed as a multidisciplinary approach to understanding society (more specifically the subsystems that are characterized by larger social structure in which they preside), one of its major limiting factors is that the theory itself has not been able to achieve a consensus about its definition (Bernard, Snipes & Gerould, 2010). In effect, critical theory has been criticized for being confused with other advancements of social theory which may also be critical in nature (e.g., postmodernism, pragmatism, etc.) (Bernard, Snipes & Gerould, 2010).

A second limitation of critical theory is that it does not situate itself in a predetermined set of methodological techniques, nor does it outline a specific set of theoretical propositions because it has so many different branches. While the various theories themselves offers a comprehensive means of understanding social theory that is distinct from the theories from which it was born (i.e., Marxism and Neo-Marxist tradition), the empirical testing of this theory in general is challenging. Aside from the plausible explanations that are given, there is little evidence to support some of the more significant theorems proposed by critical theorists (Zaret, Edelman, Tar, McNall, Harkness & van den Berghe, 1980). Instead, the assertions are set against a historical background that is interpreted within a relatively idealistic framework in an attempt to legitimate the views (Zaret et al., 1980). To further add to this limitation, there

are a number of differing trends in the arguments posed by critical theorists which often present varying extremes within the perspective.³⁹

Finally, a significant weakness of critical theory is based on the notion that it seldom provides alternative explanations about the practice of free and private enterprise and its effects on crime, or the democratic state and system as a forum for legitimation. In essence, there is no real attempt at outlining any surrogate factors that may determine such political arguments (Finlayson, 2005). Notwithstanding these limitations, however, the theory itself offers a rich analysis of the processes that extend beyond the boundaries of capitalism and any of its consequences relative to democracy, legitimacy, law and crime by emphasizing the relationship between power, history, culture, economics and politics.

2.5 Conclusion

Using both conflict and critical theory as the building blocks to assess the relationship between class structure, power, the state, the law and criminal justice, this chapter has provided an overview of the distinct yet highly interconnected explanations of these correlations. While the conflict theory (instrumentalist view) and later the Marxist view discussed in the first half of the chapter places a great deal of emphasis on the role of the ruling capitalist elite in that the state and thus the enactment of legislation serves the interests of those in society's most dominant positions, the second half further complicates the role of the political state by characterizing it as relatively independent of the ruling class, which may result in legislation that, at times, reflects the interest of those in less powerful groups. Thus, it may be said that critical social theories build on Marxist theories in an attempt to analyze the larger social

³⁹ One example of this is the way in which critical theorists perceive the state (e.g., the state as autonomous vs. the state as relatively autonomous vs. everything in between).

structural framework which includes various institutions, culture, political power structures, roles, traditions, values, and state formations that accompany late-capitalist societies.

Together, these theoretical lenses form the basis of this research in two ways. First, by drawing from the conflict (instrumentalist) view, this dissertation places emphasis on various inconsistencies (such as the unequal distribution of power amongst the dominant class and various interest groups) that are directly correlated with the ways in which law or punishment upholds the status quo or the interests of the powerful. Second, by drawing from the Marxist/critical theories, this dissertation looks at some of the more complex relationships, effects and dangers of Western democratic states in relation to the political institution. That is, during times of crises on account of economic or administrative system contradictions, political decision-making frequently occurs on the basis of ideological misrepresentation and partiality towards society's most powerful groups. When particular groups (such as minority youth) are deprived of effectively advocating for their interests during the "participatory planning" stage in the legislative process, they are not only more likely to be burdened and impacted by laws that do not represent their interests, but are also susceptible to further estrangement, marginalization and negativity. In essence, this contributes to their overall plight and may eventually threaten the established social order.

The position taken in this dissertation is not one that suggests that those in less powerful groups were not permitted to participate in the deliberative process of Bill C-10 (Part 4). The decision-making process was open to influence by the public from both sides (those for the enactment of the Bill, and those against). In this sense, the law was correctly passed by the government, which was subject to input from the public, and considered all representations. This ensures legitimacy of the law in that the public is part of its formation (Habermas, 1985).

However, the governmental strategies used today by most Western nations is one that bases its decisions on the input received from various interest groups, professionals or experts, which in turn is assigned or appropriated to “bureaucratic elites” (Habermas, 1985; see also Garland, 2001; Habermas, 2006; Hall et. al., 2013). Thus, it can be argued that the legislative assembly is used as a means to officiate policies as opposed to providing a forum in which the public may actively participate in the contemplative process of “deliberative politics” (Habermas, 2006). This suggests that the process of developing policy and enacting legislation is somewhat ambiguous in that it is not formed on a transparent basis despite it taking on such an appearance (Bernard, Snipes & Gerould, 2010). Instead, it is part of a larger mechanism which essentially bogs down the communicative process in the interest of practicality, efficiency or potentially for other alleged advantages (Bernard, Snipes & Gerould, 2010). As discussed in Chapter 3, it is the media that is responsible for disseminating these policies into the public sphere (Sacco, 1995). Although this step is integral to the passing of legislation in order to manufacture large-scale public consent as part of a scheme to legitimate decisions, this is merely one component of the overall governmental decision-making process (Garland, 2001).

CHAPTER 3 - THE DYNAMICS OF LEGISLATIVE CHANGE

The most notable research on rule creation and the dynamics of legislation stems from the analysis of the criminal justice system in relation to conflict, and specifically examines how laws are enacted and enforced within the system (Becker, 1963; Chambliss & Seidman, 1971; Davis, 1962; Easton, 1953; Korn & McCorkle, 1959; Marvick, 1961; Parsons, 1962; Polsby, Dentler, & Smith, 1963; Quinney, 1970; Rosenblum, 1955). Moreover, the law making process itself is scrutinized in order to decipher whether or not it is deemed as an objective venture (Chambliss & Seidman, 1971; Habermas, 1973, 1985; Lasswell, 1936; Lasswell and Kaplan, 1950; Quinney, 1970; Schubert, 1963). The following sections in this chapter discuss a) the ways in which law is created as well as the specific types of people involved in the creation of law; b) the ways in which the media constructs crime; c) the existing link between the public's opinion and attitudes about youth crime in Canada and the potential influence it may have on legislation; d) the reaction to youth crime and the issue of hegemony; e) the penal-welfare crisis and shift in youth crime governance; f) the social costs associated with tough-on-crime legislation, particularly with respect to discriminatory practices against marginalized youth; and finally, g) current Canadian youth crime statistics in order to gain a better understanding of whether or not a need to amend the *YCJA* legislation exists (or existed).

3.1 The Creation of Laws

According to Becker, the birth of a specific rule or new piece of legislation stems from a consensus in shared values (Becker, 1963). As Becker notes, "people shape values into specific rules in problematic situations. They perceive some area of their existence as troublesome or difficult, requiring action" (Becker, 1963, p. 131). Generally, rules or laws are structured to uphold the values associated with them (Horowitz & Liebowitz, 1968). In addition, they clearly distinguish what type of behaviours or actions are acceptable or

forbidden, and as part of the differentiation between the two, the implementation of a sanction is attached to the breaking of that rule (Becker, 1963; Cohen, 1972; Hall et al., 2013; Hills, 1971).

During the process of enacting a new rule or new legislation, the activities of enterprising groups is a “moral enterprise, for what they are enterprising about is the creation of a new fragment of the moral construction of society, its code of right and wrong” (Becker, 1963, p. 145). According to Hills (1971), moral entrepreneurs “who by virtue of their imitative, political power, access to decision-makers, skillful use of publicity, and success in neutralizing any opposition” are perfectly capable of converting specific interests and values into public policy (p. 6). Moreover, the creation and application of rules and laws can be said to be accompanied by individuals seeking the support of “coordinate groups using the available media of communication to develop a favourable climate of opinion” (Becker, 1963, pp. 145-146).⁴⁰ Likewise, the processes concerned with the enforcement of the law are shaped by the level of involvement and organization of the group, “resting on a basis of shared understanding in simpler groups and resulting from political manoeuvring and bargaining in complex structures” (Becker, 1963, p. 146).

In Westernized societies, the ways in which the government is arranged intrinsically allows for an abundance of interest groups, or, moral entrepreneurs. Not surprisingly, these groups are capable of impressing certain values and interests on the legal structure itself due to

⁴⁰ This view is also shared by Habermas (2006), who argues that “media professionals produce an elite discourse, fed by actors who struggle for access to and influence on the media. Those actors enter the stage from three points: Politicians and political parties start from the centre of the political system; lobbyists and special interest groups come from the vantage point of the functional systems and status groups they represent; and advocates, public interest groups, churches, intellectuals, and moral entrepreneurs come from backgrounds in civil society.” (p. 417).

existing power imbalances amongst groups. The legal order, that is, “the rules which the various law-making institutions in the bureaucracy that is the state lay down for the governance of officials and citizens, the tribunals, official and unofficial, formal and informal, which determine whether the rules have been breached, and the bureaucratic agencies which enforce the law” is explained as a system in which interest groups in dominant positions are able to maintain power and privilege (Chambliss & Seidman, 1971, p. 4).⁴¹ To a degree, this coincides with Habermas’ (2006) views on the political public sphere, whereby the involvement of various interest groups and moral entrepreneurs is of particular importance. The involvement of such actors in the public domain assures that these groups either represent certain interests within the deliberative process (interest groups),⁴² or create public awareness for issues that are otherwise overlooked (moral entrepreneurs). Although Habermas (2006) notes the purpose of the contemplative process that occurs within the political public realm is expected “to ensure the formation of a plurality of considered public opinions”, the prospect of accomplishing such a challenging feat is recognized (p. 417).

3.1.1 The Creators of Laws

In relation to the specific types of people who take initiative due to an interest to create rules, the “crusading reformer” is said to be the driving force behind all legislation. Crusading

⁴¹ According to the Anti-Corruption Resource Centre (Martini, 2012), “interest groups” or “special interest groups” are defined as “any association of individual or organisations that on the basis of one or more shared concerns, attempt to influence public policy in its favour usually by lobbying members of the government”. They also state that “the advantages and disadvantages of interest group influence will depend on how much power such interest groups have as well as on how power is distributed among them” (Dur; Bievre, 2007, cited in Martini, 2012). See sections entitled ‘Interest group Influence on Policy Making’ and ‘Pros and Cons of Interest Group Influence’ for more information.

⁴² Habermas (2006) suggests that “Given the high level of organization and material resources, representatives of functional systems and special interest groups enjoy somewhat privileged access to the media, too. They are in a position to use professional techniques to transform social power into political muscle. [...] It follows that compared with politicians and lobbyists, the actors of civil society are in the weakest position.” (p. 419).

reformers are explained as those who are fairly interested in and concerned about the content of laws, whereby existing laws do not appear to be satisfactory (Becker, 1963). Crusading reformers simultaneously enterprise while employing publicity techniques to obtain support from already established, credible organizations (Becker, 1963; Cohen, 1972). Emerging as individuals set out to better those in less fortunate positions, moral crusaders are “typically dominated by those in the upper levels of the social structure” (Becker, 1963, p. 149).⁴³ Essentially, the relationship between moral crusaders and those in more powerful positions is two-fold. First, moral crusaders are given power by those in superior positions in society in the process of bringing forth their initiative. Second, moral crusaders add to the power they gain from the legitimacy of their moral position, strengthening the pre-existing power amongst those in more astute positions within the social structure (Becker, 1963).

In order to succeed at creating new legislation, Cohen (1972) notes that the moral crusader “must either be in a position of power himself or must have access to and be able to convince such power institutions as the mass media, legal and scientific bodies, and political authorities” (p. 91). Within the legislative process, a moral crusader presents problematic issues as conflicting with values in a manner that appeals to certain interest groups, and successfully advances the problem by magnifying it to national proportions which demand governmental accountability.⁴⁴ Chambliss and Seidman (1971) suggest that those which are

⁴³ According to Becker (1963), “it is appropriate to think of reformers as crusaders because they typically believe that their mission is a holy one” (p. 169). Thus, the terms “moral crusaders” and “crusading reformers” are used synonymously throughout this chapter.

⁴⁴ This statement coincides with Habermas’ (2006) view on the “power structure of the public sphere” relative to mass communication. Habermas (2006) notes that this type of power may be understood in terms of a “social power”, which “depends on the status one occupies within a stratified society; such statuses are derived from positions within functional systems” (p. 428). He continues to state the types of individuals involved in interest groups or social movements have a political impact, although they “do not possess ‘power’ in the strict sense but

most likely to be effective in crusading are either the individuals or groups that control (or at the very least influence) the economic or political institutions of society. In other words,

A society is composed of individuals occupying positions that are defined by the normative structure. Every demand for a change in the rules of law, therefore, is a demand that the society be changed to that extent. Every demand for a change in the law reflects the sort of society envisaged by those who demand it; that is, it reflects their values and goals (Chambliss & Seidman, 1971, p. 17).

According to this view, any piece of enacted legislation or any change to the existing legislation appears to axiomatically support the view of those whom are most inclined to demand it.

According to Chambliss & Seidman (1971), there are two aspects of law passing. First, it is noted that some laws are enacted mainly as a symbolic gesture to moderate the behaviour of some group that is capable of disrupting the ongoing process of society (Chambliss & Seidman, 1971). Essentially, laws are passed to appease other interest groups that are either in conflict with the dominant one, or that pose a threat to society's day-to-day activities, symbolizing a compromise (see also Miliband, 2009). This not only suggests that not all laws are passed in the interest of more dominant groups, but that the state itself is relatively autonomous from complete ruling class control. However, the second point states that "laws which are passed under these conditions are rarely if ever enforced with the same vigour as characterizes the enforcement of those laws which are in the best interests of persons in position of power" (Chambliss & Seidman, 1971, p. 65). In other words, those belonging to more powerful groups are rarely penalized in the same manner, or even to the same degree, as

derive public influence from the 'social' and 'cultural capital' they have accumulated in terms of visibility, prominence, reputation, or moral status" (pp. 428-429).

those in more subordinate groups.⁴⁵ Ultimately, both of these underlying law passing traits illustrates the unequal dispersion of power amongst varying interest groups in society.

Upon closer inspection, Chambliss and Seidman (1971) note that the nature and extent of stratification in society helps explain the dispute between such compromise and a decision of law (or norm) enforcement that determines one party as right and the other as wrong (i.e., the “winner takes all”). According to Chambliss and Seidman (1971),

As societies grow more complex technologically, then for a wide variety of reasons – greater aggressiveness or competence of individuals, territorial conquests, accidental control of significant resources, and no doubt others – significant economic differences between members tend to arise. [...] The more economically stratified a society becomes, the more it becomes necessary for the dominant groups in the society to enforce through coercion the norms of conduct which guarantee their supremacy (p. 33).

In essence, with the progression and advancement of society there is a shift from the underlying processes involving compromise towards one that supports the “enforcement of the rule by imposition of a sanction” (Chambliss and Seidman, 1971, p. 34).⁴⁶ The passing of any legislation or enforcement of the rule in this sense relies heavily on interest group activity, because it is one of the decisive factors in shaping the “content of legislation” (Chambliss and Seidman, 1971, p. 73). Thus,

Whatever the interest groups may strive to achieve, of course the stance taken will be invariably be to defend the legislation in terms of its intrinsic beneficent consequences for “all” of society. But “all” of society never really includes everyone but

⁴⁵ This is most frequently seen with the relatively leniency and alleged infrequency of white-collar crime; although they too are governed by the same laws and are subject to apprehension and punishment. Examples of white-collar crime include Martha Stewart for insider trading and Bernie Maddoff for an investment scandal. Although quite serious, these types of crimes are not as contentious as violent youth crime.

⁴⁶ According to Habermas (1975), legitimate laws have several features. One of these features is based on the premise that laws must be enforceable and coercible upon the public.

necessarily excludes that groups whose behaviour the law is intended to control (Chambliss and Seidman, 1971, p. 72).⁴⁷

Generally, this literature suggests there is very little room for diverse interest groups to negotiate compromise in support of their respective views that goes against the ideology expressed by the most powerful groups. Although it may be that the state is relatively autonomous, at times it does act on behalf of the dominant group whereby legislation supports these interests. Thus, the law can support other interests in an attempt to reduce conflict and maintain legitimacy when necessary (Miliband, 2009).⁴⁸ According to this view, the degree with which this occurs is not nearly as frequent as the former scenario.

Overall, research in the area of rule creating and rule creators (moral entrepreneurs), indicates that moral crusades are necessarily related to the conflict of interests on small and large-scale community and societal levels. This *may* further specify the assumptions of conflict theory, since moral crusades play a role in the likelihood of conflict between legal authorities and subject (particularly by defining certain behaviours as problematic), although not all moral entrepreneurs are organized as part of a group. Nonetheless, the moral entrepreneur contributes to the preservation and maintenance of power within the dominant groups. The presence of power differentials amongst groups also inevitably leads to the preservation and further amassing of power in the midst of those in the most dominant positions within society. Thus, those groups designated as less powerful within the greater social structure are inextricably destined to be vulnerable to attacks based on varying conflicts of interest.

⁴⁷ In this case, the behaviour of potentially violent, potential “career criminal” youth.

⁴⁸ For a more detailed discussion on the pressures from subordinate groups on the government which may influence the process of policy-making, see Miliband, 2009, particularly pp. 86-105.

3.2 Media Constructions of Crime

In modern democratic societies, it is improbable that interest groups are the only ones who can exercise power within the legislative process. Because modern societies allow the public to participate in the formal decision-making process of policies and legislation, the public has the ability to provide input on matters that will ultimately govern them (Habermas, 1985, 2006). But where does public knowledge of such matters come from? Research suggests that the ways in which the public acquires information on crime in Canada stems mainly from the media (Dowler, Fleming & Muzzatti, 2006; Sacco, 1995). This is particularly the case for people who rely heavily on media reports and have no additional sources of information on the topic at hand. According to Sacco (1995), there is an association that exists between the media and crime, whereby “the news media are a vital part of the process by which individuals’ private troubles with crime – as victims or offenders – are transformed into public issues” (p. 141). It is through individual experiences with crime that forms the basis upon which the private nature of crime is spearheaded into the public realm as part of a larger social problem (Sacco, 1995). In addition, the media’s involvement in private troubles has the potential to further exacerbate these personal problems if they heighten anxiety and fear for those who are regularly exposed to reports that allude to the “seriousness and pervasiveness of crime problems” (Sacco, 1995, p. 141; see also Doob, 1982; Doob & Macdonald, 1979; Hall et al., 2013). In this sense, the media’s construction of crime seems to involve a multifaceted process that continuously shapes agendas and frame issues, particularly by intensifying the public’s fear and anxiety about the pervasiveness and/or seriousness of crime. As a result, the news media “provide an important forum in which private troubles are selectively gathered up, invested within a broader meaning, and made available for public consumption” (Sacco, 1995, p. 142).

Studies show that crime news commonly reports incidences about or the formal processing of personal troubles explicitly in a criminal context (Dowler, 2004; Fleming, 1983, 2006; Graber, 1980; Hall et al., 2013; Sacco, 1995). Much of this news is related to what journalists consider newsworthy, both in terms of what should be reported as problems and how these problems should be addressed.⁴⁹ Moreover, media constructions of crime also lend themselves to the nature and extent of crime problems within the private sphere (Sacco, 1995). According to previous research (Best, 1989a, 1989b; Fishman, 1978; Orcutt & Turner, 1993; Sacco, 1995), patterns of news gathering and reporting on crime indicate a tendency to over represent official sources due to a number of factors. First, there appear to be constraints that are imposed upon journalists which dictate both the types and the ways in which stories may be covered. Second, many reporters are unfamiliar with the intricacies associated with the matter being covered and therefore exaggerate its prominence. Third, the story itself must qualify as being important enough to be considered over other rival issues, adding to its importance. Fourth, journalists sometimes systematize crime stories around a persuasive or gripping news theme, often leading to crime waves that suggest crime is on the up rise (Hall et al., 2013).

The news gathering process, however, is not limited to these findings. There are other influences on the ways in which private troubles associated with victims and offenders are both reported and transformed into public issues. For example, news is often filtered through law enforcement, is put into context by advocacy and governmental assertions, is echoed through

⁴⁹ Habermas (2006) suggests that “those who work in the politically relevant sectors of the media system (i.e., reporters, columnists, editors, directors, producers, and publishers) cannot but exert power, because they select and process politically relevant content and thus intervene in both the formation of public opinions and the distribution of influential interests. The use of media power manifests itself in the choice of information and format, in the shape and style of programs, and in the effects of its diffusions – in agenda setting, or the priming and framing of issues” (Callaghan & Schnell, 2005, cited in Habermas, 2006, p. 419). This, Habermas (2006) suggests, is a source of media power.

culturally defined news themes, and is produced, created and shaped by the principles and requisites of the media (Sacco, 1995). As such, “the social construction of crime problems may be understood as reflecting the types of relationships that link news agencies to their sources, and the organizational constraints that structure the news-gathering process” (Sacco, 1995, p. 141). This suggests that there may be other factors involved in the news gathering process that remain outside the interests produced by elite bias or persistent pressures inflicted by interest groups.⁵⁰

Regardless of how the media is structured, it is evident that when the media constructs a private problem as a social concern, the solution inevitably rests on the shoulders of the criminal justice system or the state. Ultimately, it is the system’s responsibility to correct the existing problem, which tends to reinforce conventional law and order responses and positions to effectively address crime (Best, 1991; Hall et al., 2013; Sacco, 1995). This is partially due to the fact that “the frame of reference offered by a government bureaucracy or other recognized authority with respect to crime problems may only infrequently be called into question and, as a consequence, competing perspectives may become marginalized” (Sacco, 1995, p. 146). However, it is an erroneous assumption to propose that the media only propagate or advance claims-making regarding crime issues advocated by government agencies, politicians (or other political contenders) or interest groups because “any such claims must be transformed to meet the requirements of the medium in question” (Sacco, 1995, p. 146). This suggests a degree of complexity in the construction of crime news that ranges from the news gathering process to

⁵⁰ Habermas (2006) suggests that politicians and political parties are the primary sources of new or information to the media in that “they hold a strong position as regards negotiating privileged access to the media” (p. 419). Similarly, it is acknowledged that “even governments usually have no control over how the media then present and interpret their messages, over how political elites or wider publics receive them, or over how they respond to them” (Jarren & Donges, cited in Habermas, 2006, p. 419).

the ways in which crime problems are publicly portrayed and by whom. Nonetheless, it is asserted that the media tends to symbolically reproduce the views and the opinions of the dominant groups (or dominant ideology) by reinforcing the structural power that exists within society's institutional systems (Becker, 1963; Habermas, 1985; Hall et al., 2013).

While claims must be reconstructed in a fashion that meets the prerequisites of the media, there is a large body of research that asserts that interest groups use the media as a tool to convey underlying social and political issues to systematically create misperceptions about crime (including youth crime) that eventually elicits a response in favour of their cause (Ericson, Baranek, & Chan, 1987, 1991; Humphries, 1981). Since the media explicitly constructs images and generalized meanings of crime, studies show that particular interest groups use the media in a manner which proactively advance practicable solutions to the misconstrued problems (DeKeseredy, 2011). As such, interests groups that effectively broadcast their own explanations and opinions through the media have a greater likelihood of being involved in the resolution process. In other words,

The group that is most successful in setting up facts that are recognized in the minds of politicians and the general public as being examples of the problem is going to be the group most likely to have an effect upon the development of the solution (DeKeseredy, 2011:81).

This finding suggests that there is a multifarious interplay between the media and interest groups; however this relationship appears to frequently promote the strengthening of laws and the establishment of harsher measures within the criminal justice system (Dowler, Fleming & Muzzatti, 2006). In fact, some (right-wing) interest and victims groups have been very

influential in shaping opinion, law, and the punitive agenda within the public sphere due to their appeal to the public through effective media campaigns and lobbying the government.⁵¹

3.3 Public Views and Attitudes about Youth Crime and the Youth Justice System

Images of deviance and youth crime portrayed through the media predominately instigated by interests groups are fairly instrumental in fueling the fear of crime amongst the public. Thus, public opinion regarding the need for a tough law and order approach is often based on fragments of information pertaining to the event(s) in question (Fleming, 2006; Muzzatti, 2004; Ratner & McMullan, 1985). Research suggests that media coverage of criminal sentencing for both adults and young offenders provide the public with reason to believe harsher sentencing practices are necessary (Campbell, 2000; Canadian Sentencing Commission, 1988; Doob, 1985; Doyle, 2006; Ericson, Baranek, & Chan, 1991; Hall et al., 2013; Roberts, 2001; Roberts & Doob, 1990; Sprott, 1996; Sprott & Doob, 2008). Given that most people obtain their information regarding sentencing and the justice system from the media, the literature in this area reports that there is an overrepresentation of crimes of violence and sentencing in the news in both Canada and the United States (Ericson, Baranek, & Chan, 1991; Sprott, 1996).

A content analysis of stories about youth crime in Toronto newspapers illustrates exactly how overrepresented these incidents are in Canada. According to one study, 94% of these stories regarding youth crime involved cases of violence (Sprott, 1996). Ironically, when

⁵¹ A good example of a group with prominent power and influence towards a more law and order approach is Mothers Against Drunk Driving (MADD) that established “the public conviction that impaired driving is unacceptable and criminal, in order to promote public policies, programs and personal responsibility” (Mothers Against Drunk Driving, 2014). In this case, an argument can be made that MADD has effectively promoted their agenda through media campaigns such as television, but also through many other news outlets and agencies which include government organizations. Disseminating their message through the media assists in constructing public images of what is considered to be important societal values.

this figure was compared with youth court statistics, research found that not even 25% of the youth court cases presented in Ontario involved violence offences (Sprott, 1996). Moreover, the press “focused largely on the crime, the charge laid against the young person, and the impact of the crime on the victims,” while in contrast, official documentation of youth court dispositions “focused more on characteristics of the youth” (Sprott, 1996, p. 271). In fact, recent studies suggest that overrepresentation of youth crime in the media results in Canadians feeling more fearful of crime than their American counterparts, in spite of the fact that Canadians actually experience lower crime and victimization rates (Chesney-Lind, 2007; Dowler, 2004).

Similarly, a study of Toronto residents indicates that most Torontonians are of the opinion that youth court dispositions are too relaxed, particularly in relation to serious violent repeat offenders, even though newspapers almost never offer data about youth court dispositions (Sprott, 1996). Of those found to hold beliefs that youth court sentences are too permissive, there appears to be a tendency to favour harsher sentences, as well as a “prevailing sense of opposition to having a separate youth justice system to deal with youth crime” (Sprott, 1996, pp. 282-283). These figures were also reflected in a Gallup Poll conducted in April of 2000. When questioned as to whether, “overall, the legislation goes too far, not far enough, or is about right in dealing with youths who commit crime”, 48% of Canadians claimed that “it does not go far enough”. Additionally, 94% were in support of creating “a new category for repeat violent young offenders, who would be subject to adult penalties”. Three quarters of the respondents were very much for the development of such a provision, but 5% disapproved. Finally, 74% of Canadians were in strong agreement with a provision that supports the sentencing of youth 14 years of age and older as adults. In addition, there was “considerable

support for allowing the publication of names of youth sentenced for serious crimes”. On the whole, 80% of those surveyed were in favour of this provision, with 64% indicating they were strongly in favour (See Gallup Poll, 1999-2000).

These findings suggest that a complex relationship exists between the media and the public, but also amongst political and administrative authorities. Similar to Vold’s (1958) assertion that the notion of social order is not characterized by a consensus amongst varying groups, this research indicates that social order is neither realized nor derived naturally, or manufactured solely through the media. Rather, it is a product of an amalgamation between the citizens themselves, the media, the politicians and other institutional forces (Habermas, 1985; Hall et al., 2013). The findings also demonstrate that any consensus reached about claims regarding the rising rates of youth crime is directly attributed to a lax society that tolerates and supports less punitive sentencing practices. In line with research conducted by Hall et al. (2013), such beliefs about leniency in sentencing contribute to the legitimization of public perception that the youth criminal justice system does not adequately hold youth accountable for their crimes.⁵² In turn, legislation for tougher measures is called upon by both politicians and the public despite the fact that official responses to youth crime are disproportionate to the actual threat.

A troublesome aspect of this general belief for more rigorous legislation appears to stem from a lack of “accurate knowledge of the operation of the youth court in Canada, underestimating the severity of dispositions available to the court under the law” (Sprott, 1996,

⁵² Friedrichs (1980) asserts that polls on public attitudes indicate a decrease in confidence of national institutions (including the criminal justice system). These sentiments are illustrative of a growing dissatisfaction and disrespect for the government, which in turn has resulted in a “public loss of faith in the government” and a “mistrust of political leaders” (p. 542). This is one of the grounds that form a legitimacy crisis.

p. 283).⁵³ In addition, there is an incorrect or misled assumption that youth courts cannot transfer cases to the adult jurisdiction (Spratt, 1996).⁵⁴ In effect, the general beliefs underlying the presumed leniency amongst youth courts are best understood as an interconnection to crime and the youth justice system as opposed to a precise awareness and familiarity of existing evidence both about youth crime and the Canadian youth justice system (Spratt, 1996).

3.3.1 The Interconnection of Public Opinion and Politics

Of great significance to the topic of public opinion on youth crime and the youth justice system is the undeniable influence of public opinion on policy agendas (Campbell, 2000; Doyle, 2006; Doyle & Ericson, 1996; Hall et al., 2013; Roberts, Crutcher, & Vergrugge, 2007; Roberts & Doob, 1990; Spratt, 1996; Spratt & Doob, 2008; Surette, 2007). According to the above literature, the illusive public yearning for more punitive sentences is commonly referred to by legislators as the logic behind challenging action involving reform towards greater leniency. Moreover, the public frequently appears to be intolerant to initiatives or amendments that may produce more permissive or compassionate dispositions (Doob & Roberts, 1988; Hall et al., 2013).

In fact, recent studies contend that even judges are vulnerable to public opinion – or at least the perceived public opinion, and may take these views into consideration when making dispositional decisions. According to Walker and Hough (1988), “there are signs that at a political level, at any rate, greater importance is now being attached to the congruence of public opinion and sentencing practice” (p. 1). However, before sentencing practices within the

⁵³ Habermas (2006) attests to similar findings. He claims that “the literature on ‘public ignorance’ paints a rather sobering portrait of the average citizen as a largely uninformed and disinterested person”, although there is some evidence which suggests that certain aspects of this phenomena are changing with time (p. 420).

⁵⁴ This is more so an artifact of the *YOA* than of the *YCJA*. Only in rare circumstances do youth court cases get transferred to the adult jurisdiction.

courts accommodate the views of the public, it is important to recognize that public views on matters of perceived leniency are generally in response to biased news media accounts of violent youth crimes and sentencing (Hall et al., 2013; Roberts & Doob, 1990).

Other research in this area indicates similar findings in relation to the effects of the media on public opinion. For example, in 1993 the “Liberal political agenda for young offenders appeared in some cases to be informed more by public concerns than by identifiable problems in the way in which adolescents are processed by the youth justice system” (Spratt, 1996, p. 272). This suggests that policy makers fail to realize that public views tend to reflect both the choice and characteristics of the news that the public draws from the media. Policy makers who indiscriminately follow seemingly articulated feedback to polls that suggest a need to increase sentence severity often contribute to the problem at hand. According to Roberts and Doob (1990), “it is the naive, dishonest, or cynical policy maker, then, who recommends increased harshness in overall sentencing policy on the basis of simple assertions about sentencing made in response to simple questions” (p. 466).⁵⁵ Thus, in the event that “politicians are going to base policy reform on public opinion, more accurate information needs to be relayed to the public, most obviously through the media” (Spratt, 1996, p. 288). Taken as a whole, research demonstrates that a large extent of “public dissatisfaction with sentencing is based upon media misinformation about general and specific sentencing” principles and procedures pertaining to youth crime (Roberts & Doob, 1990, p. 466). These findings are similar to those found by Hall et al. (2013) on mugging as a social phenomenon (see *Policing the Crisis: Mugging, the State, and Law and Order*).

⁵⁵ Signs of this were seen in the development and enactment of Bill C-10 (Part 4). Please see Chapter 6.

3.4 Reactions to Youth Crime and the Issue of Hegemony

The reaction to youth crime as a phenomenon originates from a number of different avenues. That is, reactions may be stirred by tensions that exist between youth and the police, youth and the public, youth and the criminal justice system, youth and the media, and youth relative to the crime rates. In order to better understand why reactions to youth crime are as prevalent and as pronounced as they are, it is important to recognize the existence of a micro and macro level relationship within the structure of society itself. In essence, there is a connection between the construction and labeling of these acts as deviant (and thus reactions to these acts), and the “larger role which the legal institutions play, through the control of crime, in the maintenance of the stability and cohesion of the whole social formation from which, under certain conditions, acts defined as infractions of the law develop” (Hall et al., 2013, p. 183, see also Habermas, 1975; 1985). Fundamentally, the social formation of youth crime develops out of a complex relationship between “the police, judiciary, media, the political classes, moral guardians and the state”, which bring together small- and large-scale transactions to define the connection between the law and the law-breaker (Hall et al., 2013, p. x). The ways in which these forces combine to create an extreme reaction (overreaction) to the problem of youth crime, therefore, occur in a social, legal, economic, and political context that is “conceptualised as an ensemble of practices, institutions, forces and contradictions”, but are typically identified and defined by the dominant group (Hall et al., 2013, p. xi).

Harmonizing consensus of the practices, institutions and social forces by the police, media, courts, political authorities, prominent social figures, elite ruling-class, and the public more generally on the problem of youth crime is neither simple nor straightforward. It is more than a concentrated effort of dominant groups or governmental schemes to reproduce dominant ideology through the media. However, research suggests that this consensus frequently

develops from the interests of the dominant groups and is executed through the mechanisms of hegemony (Hall et al., 2013). Hegemony, defined as a “universalisation of class interests” is attained through the state, which is necessary for the construction of alliances (for example, interest groups, partnerships, non-state agency formations, locality-based organizations, and even the public) (Hall et al., 2013, p. 201). It is a concept which refers to how the dominant group exerts influence and power over subordinate groups in a way that promotes dominant political and economic ideology amongst the general public (Gramsci, 1971).⁵⁶ When a crisis of hegemony occurs and all other means of establishing consensus (or consent) are exhausted, the state attempts to achieve consensus by calling on a “central value system” that essentially serves as a source of re-legitimation.⁵⁷ To exert control over others through the process of legitimation or legitimate power, therefore, is directly related to one’s position of power or authority in light of their superior position or status. A legitimation crisis occurs when the governing party still has legitimate authority to govern, but has difficulty substantiating its

⁵⁶ Gramsci (1971) asserts that the practice of hegemony is achieved on “...two major superstructural ‘levels’: the one that can be called ‘civil society’, that is, the ensemble of organisms commonly called ‘private’, and that of ‘political society’ or ‘the state’. These two levels correspond on the one hand to the functions of ‘hegemony’ which the dominant group exercises throughout society and on the other hand to that of ‘direct domination’ or command exercised through the state and ‘juridical’ government. [...] These comprise: 1) The ‘spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is ‘historically’ caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production. 2) The apparatus of state coercive power which ‘legally’ enforces discipline on those groups who do not ‘consent’ either actively or passively. This apparatus is, however, constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed” (p. 145).

⁵⁷ The process of legitimation refers to the act, ideology or process of normalizing or legitimating certain values, rules or norms within a given society. According to Miliband (2009), the primary reason for the process of legitimation is to prevent the notion that “[...] more and more people, particularly in the subordinate classes, should come to think as both possible and desirable an entirely different social order, [...] and dedicated to the elimination of privilege and unequal power; and that ‘the masses’ should also seek to give expression to this belief in terms of political action” (p. 189). One of the main characteristics that are linked with the legitimation crisis has to do with a loss of public confidence, whereby the public loses faith in the government’s ability to act in a productive or competent fashion (Habermas, 1975). For a more detailed discussion of hegemony and the consent of subordinate groups to dominant groups and the state, please refer to Gramsci (1971); Hall et al. (2013); Miliband (2009).

function to fulfill the purpose for which it was established. A trademark of the legitimization crisis is most frequently illustrated by an overreaction of a given issue, such as youth crime, by the government. Hall et al. (2013) assert,

But this centralisation of power through the state is said to be countermanded by the play of public opinion and the independence of a free press. But, without directly absorbing the agencies of opinion formation, it is clear that governments, directly through the decisions they make and the policies they put into effect, through their monopoly of the sources of public knowledge and expertise, and indirectly through the mass media, political communications and other cultural systems, have the most powerful effect in shaping the ‘popular consent’ which they then consult. [...] The suggestion is not that power has been effectively dispersed in modern democratic mass societies but that the vast majority of people are united within a common system of values, goals and beliefs - the so-called ‘central value system’; and it is this consensus on values, rather than formal representation, which provides the cohesion which such complex modern states require. The dominant and powerful interests are therefore ‘democratic’, not because they are directly governed in any sense by the ‘will of the people’, but because they, too, must ultimately refer themselves and be in some way bound by this ‘consensus’ (pp. 211-212).⁵⁸

A crisis of hegemony, therefore, establishes a central value system amongst all members of society as a means of re-legitimizing hegemonic domination in the face of conflict, especially in cases where the public begins losing confidence in the elected governing body.

The process of re-legitimizing necessarily involves the media in order to gain the consent of the subordinate groups or the “silent majority” (Hall et al., 2013, p. 171). Crime, in particular, is used by the dominant group to define the crisis away from the state by deflecting the problem onto issues such as youth, crime, and race. This strategically moves towards a progressively coercive application or use of the state by creating moral panics to which

⁵⁸ Some of these sentiments are also echoed in the works of Habermas (1975, 1985).

different control agencies must collectively respond.⁵⁹ In such instances, there is an augmentation of panic expressed through societal reaction which ultimately questions the very moral fibers of society.⁶⁰ As a result, law and order campaigns are initiated, moral panics are perpetuated, key symbols such as a family, family values, the need for respect, discipline, decency and public protection are invoked, and an increase in state control is witnessed (Hall et al., 2013). When such phenomena occur, the consensus of values about youth crime resurfaces and solidifies to unite various social groups, including those separated by incongruities in values, interests, and beliefs (Hall et al., 2013). In effect, an alignment of values occurs on account of crisis where re-stabilization is necessary. Consequently, there is greater control of the dominant group over the population due to various social order mechanisms that further promote the empowered, manufactured mainly through consensus (spontaneous consent), but can extend to coercion (when consent fails).

3.5 The Crisis over Penal-Welfarism and Shifts in Youth Crime Governance

The crisis of the welfare-capitalist state, and more specifically of penal-welfarism, may be understood in terms of a corollary that is attributed to a world economic crisis beginning in the 1970s. As a consequence of this crisis, much of the Western world witnessed a significant shift in the redistribution of power on account of the changing power relations brought about by the welfare state. In effect, the welfare state went beyond developing a number of social

⁵⁹ A “moral panic” occurs when a “condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests” (Cohen, 1972, p. 9). For more information, see Cohen (1972); Hall, Critcher, Jefferson, Clarke and Roberts (2013).

⁶⁰ This statement is partially related to a legitimacy crises claim that incorporates elements of both the state and society in terms of its structural characteristics. According to Friedrichs (1980), this is based on the “spectacular failures of the modern nation-state, including the alleged failure to protect its population, demonstrated incompetence, pretentious developmental policies and ineffectiveness in promoting and guaranteeing growth” (p. 544).

institutions to address the compromises between labour and capital (i.e., issues that were differentiated on the basis of class structure) as well as other interests that were specifically situated in a historical context. Rather, the welfare state was born out of the ensuing power relations that were characterized by the social structure of that time. The demise of the welfare state however, is directly linked with a period of economic decline and political volatility that disrupted not only the larger social structure but also the systems within.⁶¹ Much of this crisis, therefore, occurred on account of the varying employment patterns of uneducated, low-skilled workers which were largely comprised of inner-city minorities (mainly youth). Coupled with the “increasingly regressive tax structures and declining welfare benefits”, the crisis of the welfare state had a crippling effect on socially, politically and economically disadvantaged minority youth who,

Were systematically excluded from the labour market just as many of their parents had been before them. The consequence was a more sharply stratified labour market, with growing inequalities separating the top and bottom tiers; a diminished sense of shared interests as the power and membership of mass unions declined; greater contrasts in working conditions, lifestyle and residence; and ultimately, fewer ties of solidarity between these groups (Garland, 2001, p. 82).

The crisis of the welfare state, however, did not occur solely on account of a decline in economic and political prosperity. There were many other factors that contributed to the crisis, although the implications of such an outcome resulted in a shift in the ideology of welfarism, changes in the understanding of the structures of “normalization” and discipline,

⁶¹ This discussion has been simplified for the purposes of this dissertation. For more information, please see Garland (2001) and Habermas (1985) who both analyze the changes in social order in modern society, and links them with the family, demography, culture, and mass media. The expansion of the media relative to culture is of particular importance, because during times of crises social media is the medium through which social and governmental agencies and organizations are brought under the public’s scrutiny. The media is responsible for increasing the state’s degree of liability by participating in a process that publicizes their relative successes and failures.

transformations in cultural assumptions, and modifications to socially democratic policies and practices based on reactionary responses to the state itself (Garland, 2001; Habermas, 1985). In other words, the social movements that are associated with the crisis of penal-welfarism are monopolized not only by the state, but are encompassed by a number of differing groups and social mechanisms that lend themselves to various “social structures, class relations, and cultural experiences” (Garland, 2001, p. 55). It is not surprising then that the crisis of the welfare state trickled down to the penal system, ultimately causing a shift in the ways in which it currently governs and views criminality.

Tracing the evolution of the governing legislation and legal principles of youth crime in Canada demonstrates that a redefinition of the problem of youth crime has occurred over the years. To an extent, this is on account of the crisis over (and decline of) penal-welfarism and the altered perception of the problem driving this change. The shift in youth crime governance has led Canada towards new crime control strategies in response to the alleged failure of the penal-welfare state. Since “the crime control field is an institutionalized response to a particular problem of order, growing out of a particular experience”, the modern techniques of crime control that preside over the 21st century (and thus were responsible for the decline of penal-welfarism) is “affected by the emergence of new security problems, new perceptions of social order, and new conceptions of justice, all of which were prompted by the social and economic changes of late twentieth-century modernity” (Garland, 2001, p. 72). A redefinition of such issues, perceptions and attitudes may be seen as a neo-liberal political trend that has been observed in Canada, the United States of America, Australia, New Zealand, and most of Western Europe in the face of deep-seated conflicting interests (Garland, 2001).

Additionally, there is evidence to suggest that both the issues surrounding youth crime and the perception of high crime rates more generally have contributed to the reactionary (or “adaptive”) response against the penal-welfare framework (Garland, 1996). These discernments are not only acknowledged as part of the everyday lived experience, but have become a normalized aspect of social life (Feeley & Simon, 1992; Garland, 1996, 2001; O’Malley, 1999; Wacquant, 2009). According to Garland (1996), this taken for granted notion is directly linked to the “broader social and cultural forces” that contribute to “shaping the ‘problem’ and its ‘perception’”, because it is correlated to “phenomena such as a widespread fear of crime, pervasive media and cultural representations of crime and the politicization of crime control” (p. 446). In effect, a redefinition of the problem of youth crime necessarily shifts the focus in the ways in which youth and youth crime have been viewed historically under the *JDA* and *YOA*, and more recently under the current legislation of the *YCJA*, which progressively appears to result in a lesser degree of adherence and dedication to the penal-welfare model.⁶² Instead, this “new penology”⁶³ has shifted towards a framework that presently gives attention to “dealing with the effects of crime – costs and victims and fearful citizens – rather than its causes” (Garland, 1996, p. 447). Thus, it may be said that reshaping and redefining the problem of youth crime is responsible for inducing a sequence of “transformations in official perceptions of crime, in criminological discourse, in modes of governmental action, and in the structure of criminal justice organizations” which are “linked

⁶² These legal principles are discussed in greater detail in Chapter 4. In addition, this paragraph lends support to Garland’s (1996) “adaptive” techniques, discussed in later chapters of this dissertation, to address the issue of youth crime.

⁶³ Feeley and Simon (1992) refer to the new penology as a “common focus on certain problems and a shared way of framing issues” that resituates the problem of youth crime (and crime in general). The authors note that “this strategic formation of knowledge and power offers managers of the system a more or less coherent picture of the challenges they face and the kinds of solutions that are more likely to work” (p. 452).

to broader reconfigurations of social and political discourse and policy” (Garland, 1996, p. 446).

The collective need to redefine the problem of youth crime and the techniques for overseeing and governing it has led to a shift in the subject and/or target of punitive interventions, specifically for a small-scale group of youth who are responsible for a disproportionate number of offences.⁶⁴ The new practices and policies that have emerged as a result of this changeover are viewed as an assembly of localized (as opposed to generalized) resolutions to urgent problems that confront the public and the state on a continuous basis (Garland, 2001). However, it also demands a certain degree of institutional adaptation where the entire scope and extent of crime control must progressively regulate itself to accommodate new directions, implementations, and orientations (Garland, 2001). In part, this is due to an alignment between neo-liberalism and neo-conservatism on the perceived crisis of the welfare state, which ultimately strengthened this reactionary movement. As Garland (2001) points out,

In terms of that bigger picture, the adjustments that have occurred are structural, and concern the relationship between crime control and social order. Over time, our practices of controlling crime and doing justice have had to adapt to an increasingly insecure economy that marginalizes substantial sections of the population; to a hedonistic consumer culture that combines extensive personal freedoms with relaxed social controls; to a pluralistic moral order that struggles to create trust relations between strangers who have little in common; to a ‘sovereign’ state that is increasingly incapable of regulating society of individualized citizens and differentiated social groups; and to chronically high crime rates that co-exist with lower levels of family cohesion and community solidarity. The risky, insecure character of today’s social and economic relations in the social

⁶⁴ This statement is based on the youth crime statistics outlined in a subsequent section of this chapter, which not only indicate that the overall youth crime rate is declining, but also that only a small proportion of youth are responsible for committing very violent and serious crimes. Please refer to footnote 65 for information on chronic, repeat, and serious offenders.

surface that gives rise to our newly emphatic, overreaching concern with control and to the urgency with which we segregate, fortify, and exclude. It is the background circumstance that prompts our obsessive attempts to monitor risky individuals, to isolate dangerous populations, and to impose situational controls on otherwise open and fluid settings (p. 194).

It is important to note, however, that the ways in which these crime control developments have adjusted to the problem of youth crime not only contributes to the response(s) of such issues, but also plays a role in creating the meaning of these responses in relation to their consequences and social implications. As such, a new direction towards control, order, security, and risk management appears to be a fundamental premise of the current youth justice legislation and policy (Feeley & Simon, 1992; France, 2007; Muncie, 2006).

More specifically, the concept of a new punitive governance strategy has been linked to the management of risk, particularly with regards to selectively enumerating, rendering, and targeting of a high risk group of persistent repeat offenders who have potential to become “career criminals”.⁶⁵ Theoretically, these recently developed strategies coincide with the newly

⁶⁵ “Career criminals” are known as repeat offenders (resulting in a number of arrests and convictions), however the specific qualifying number for each varies from one jurisdiction to the next. It should be noted that there is very little research on delinquent and “career criminals” in Canada. The most recent study was conducted by Carrington, Matarazzo and deSouza (2005) which “presents a descriptive profile of the career criminals from the 12th to the 22nd birthday, as revealed by charges filed in court, of Canadians born in 1979/80” (p. 8). According to their findings, approximately “18 per 100 members of the birth cohort were referred to youth court or provincial criminal court in relation to offences allegedly committed between their 12th and 22nd birthdays. [...] By their 22nd birthday, approximately one in ten members of the cohort had received a court sentence which put them under the supervision of correctional or probation authorities for some period of time” (p. 39). This study indicates that slightly more than half (55%) of the offenders considered in this study were involved in a single criminal incident. Court careers for chronic offenders (comprised of anything above five incidents) accounted for 16% of offenders, but made up 58% of all occurrences comprising “members of this cohort” (p. 39-40). The report also notes that 37% of offenders included in this study had court careers that were limited to offences that occurred prior to the youths 18th birthday. Forty-three percent of offenders indicated signs of a court career that occurred after ones 18th birthday. Persistent court careers were noted in 20% of the cohort, which accounted for offences occurring both prior to and following the youth’s 18th birthday (i.e., those classified as having a delinquent career both during adolescence and adulthood). Throughout their careers, persistent offenders were determined as being more likely to be associated with incidents that involved an offence against the person (62%) (p.40). It should also be noted that the time period for which charge data was collected for this study does not

enacted legislation of Bill C-10 (Part 4), given that it is geared towards violent and repeat offenders. As such, an argument can be made that the Bill has amended the law to better track and identify potentially violent youth and potential “career criminals”, whose behaviour is frequently associated with the least powerful group or the “underclass”.⁶⁶ As explained by Feeley and Simon (1992), this new strategy removes the focus from the individual because “is about identifying and managing unruly groups. It is concerned with the rationality not of individual behavior or even community organization, but of managerial processes. Its goal is not to eliminate crime but to make it tolerable through systematic coordination” (p. 455). For this very reason, it has been asserted that such techniques are employed to control various grades of deviance as opposed to addressing these issues on an individual basis or responding to the social irregularities associated with potentially dangerous youth groups (Feeley & Simon, 1992). In other words, the shift in youth crime governance may be associated with a type of methodical and organized style of efficiency that “seeks to sort and classify, to separate the less from the more dangerous, and to deploy control strategies rationally” (Feeley & Simon, 1992, p. 452). Thus, it is asserted that this new penology reshapes society’s conception and understanding of the purpose of the system itself, the legislation that follows from policy, and the sanction(s) associated with the crime.

One example of this shift in youth crime governance towards a system of management may be witnessed in the ongoing diminution of the significance of recidivism (Feeley & Simon,

surpass March 31, 2003. Therefore, these statistics report incidents occurring before the enactment of the YCJA, which *may* have a bearing on the findings and *may* result in a different conclusion today.

⁶⁶ The term “underclass” is “understood as a permanently marginal population, without literacy, without skills, and without hope; a self-perpetuating and pathological segment of society that is not integratable into the larger whole, even as a reserve labor pool” (Wilson, 1987, cited in Feeley & Simon, 1992, p. 467). Viewed and treated as a high risk group, the “underclass” is seen as a dangerous class that requires surveillance and management for both the protection and greater good of society, from fear of its “collective potential misbehaviour” (Feeley & Simon, 1992, p. 467).

1992). While previously the meaning of recidivism was seen as a measure for failure or success amongst intuitional programs, it is now understood as an integral part of reintegrating offenders back into the community. In essence,

High rates of parolees being returned to prison once indicated program failure; now they are offered as evidence of efficiency and effectiveness of parole as a control apparatus. [...] By emphasizing correctional programs in terms of aggregate control and system management rather than individual success and failure, the new penology lowers one's expectations about the criminal sanction (Feeley & Simon, 1992, p. 455).

This finding suggests that not only is there a redefinition in the way penal programs are viewed as a potential failure (or success), but that the goals and objectives of the penal sanction have also been reshaped so that they are understood in terms of effective control strategies that manage risky/dangerous youth. In turn, there is some evidence to indicate that the transformation in the ways parole and probation are perceived is likely to be recognized as “cost-effective ways of imposing long-term management on the dangerous”, because “the system now treats revocation as a cost-effective way to police and sanction a chronically troublesome population” (Feeley & Simon, 1992, p. 456). However, this shift towards a new penology is neither limited to the penal institutions nor the police, but instead goes beyond the mechanisms of social control. By filtering its way through the courts, “the new penology replaces consideration of fault with predictions of dangerousness and safety management and, in doing so, modifies traditional individual-oriented doctrines of criminal procedure” (Feeley & Simon, 1992, p. 457). This may be witnessed in the legislative amendments of Bill C-10 (Part 4), specifically in reference to Clause 169, where the new provision is more expansive than the previous one and considers pre-sentencing detention of youth in cases “where they

have a history that indicates a pattern of either outstanding charges or findings of guilt” (Library of Parliament, 2011, p. 131).

Another example of the ways in which this new strategy has identified itself in the expansion of more cost-effective, managerial forms of governing can be seen in terms of custody and control therein. While Section 39(1) of the *YCJA* explicitly states that custody is reserved for the most serious offenders, there is evidence to suggest that custody is merely a form of “variable detention depending upon risk assessment” (Feeley & Simon, 1992, p. 457). Although there is a strong emphasis on the rehabilitation of youth and their reintegration back into the community, the notion of incapacitation may be witnessed amongst youth held in custody for very serious offences (this includes youth who also pose a danger to society).⁶⁷ According to Feeley and Simon (1992), “incapacitation promises to reduce the effect of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society. If the prison can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of criminal activity” (p. 458). This point reflects the notion of specific deterrence and is linked to the concept of “underclass” conduct. As such, violent youth who are eligible for custody under section 39(1) of the *YCJA* are necessarily identified as high-risk offenders and require long-term control and management, while in contrast, low-risk offenders are in need of shorter management terms and minimally invasive control (Feeley & Simon, 1992).

Overall, the concept of risk-management can be linked to the development of a consensus which both identifies and recognizes the need to target the high-risk, potentially

⁶⁷ The *YCJA* does not make specific mention of incapacitation in the context of sentencing youth. Incapacitation is typically considered when sentencing adults, and as such, does not apply to youth (Section 50(1)) *unless* an adult sentence is imposed (Section 74(1)). See also Doob and Cesaroni (2004).

violent, prospective “career criminal”, and therefore coincides (at least to a degree) with the enactment of Bill C-10 (Part 4). These youth are not only propagated by the media as a fearful, non-redemptive category,⁶⁸ but are often portrayed as the “underclass” or a marginal population who are most likely to exhibit conduct that directly corresponds with the type of behaviour that is criminalized (i.e., the behaviour of the least powerful).⁶⁹ As discussed above, the growth of the risk-management strategy for addressing youth crime is frequently linked to policy reforms (in this case Bill C-10 (Part 4)), that often enable the tracking and identification of this potentially dangerous group (see Feeley & Simon, 1992, for more information).

Moreover, the shift in youth crime governance towards risk-based management can be observed within the legislative amendments of Bill C-10 (Part 4), although this does not suggest that such aspects were not previously embodied in previous versions of the *YCJA*. Nonetheless, certain elements of surveillance, control and exclusion are manifested in the Bill, particularly in reference to the following clauses: 1) Clause 190 which “*requires* the police force to keep a record of any extrajudicial measures taken to deal with the young person. If that person is convicted of the offence, the police force will then be required to forward the file to the Royal Canadian Mounted Police for the purpose of keeping criminal history files or records of the offenders”, whereby the youth’s record is archived for future scrutiny (Library of Parliament, 2011, p. 134); 2) Clause 172 which “establishes specific deterrence and denunciation as sentencing principles similar to the principles provided in the adult criminal

⁶⁸ The risk management trend is also linked to the neo-conservative view about non-socially redemptive youth, and is associated with the neo-liberal and neo-conservative alignment against the penal welfare system. For more information on the assault on welfarism and the “emphasis on cost-effective, pragmatic, results-based government” (O’Malley, 1999, p. 184) and the states “role as the preserver of order and the governor of the nation” (O’Malley, 1999, p. 186), see O’Malley (1999).

⁶⁹ For more information on the behaviour of the least powerful and how this is socially defined, please refer to Chapter 2.

justice system”, whereby the target of the legislation may be seen as the small group of potential “career criminals” who are apprehended, charged and sentenced as opposed to youth in general (Library of Parliament, 2011, p. 123); 3) Clause 173 which “authorizes the court to impose a prison sentence on a young person who has previously been subject to a number of extrajudicial sanctions”, whereby the court may sentence a youth to custody even in cases where violence is not involved (Library of Parliament, 2011, p. 123); 4) Clauses 176 and 183 which “requires the Crown to consider the possibility of seeking an adult sentence for young offenders 14 to 17 years of age convicted of murder, attempted murder, manslaughter or aggravated sexual assault” whereby the youth receives an adult sentence even though this legislation prohibits this marginal group of youth from being housed in any adult criminal institution (Library of Parliament, 2011, p. 123).

These points demonstrate the ways in which the amendments of Bill C-10 (Part 4) target, penalize and track this high-risk (albeit fairly small) group of youth as a result of legislation that is intended to protect the public from repeat young offenders that have established a pattern of guilty findings or display a history of violence. The building of a consensus between the state and the public on the problem of the high-risk, potentially violent “career criminals” in the making is indicative of a process which yet again reflects a crisis of the perceived illegitimacy of penal-welfare strategies that have been characterized in the field of crime and criminal justice (i.e., as strategies that are no longer deemed to work). This crisis, which has much to do with a shift in the interests and responsiveness to youth crime, gives rise not only to new attitudes and definitions about the problem of high-risk, violent youth, but also about their welfare, their punishments, and the social order that seeks to govern such behaviour. Thus, although there is some indication that a conflicting or “bi-polar perspective on penalty”

can be observed, there is reason to believe that a “heterogeneous allegiance” between neo-liberal and neo-conservative rationalities has taken place to form modern day legislation (O’Malley, 1999, pp. 189-190). What is seen is policy that embodies both the neo-conservative perspective on getting tough-on-crime and the neo-liberal view that aspires to develop individual responsibility and reinforce the role of communities and family (O’Malley, 1999). The term “late modernity”, therefore, refers to the prominence of individual responsibility for undesirable or criminal youth behaviour and is coupled with the de-emphasis of rehabilitation characterizing present times (Muncie, 2006; O’Malley, 1999). Beyond these developments, this shift in youth crime governance has resulted in an imposition of control which is intended to manage “‘dangerous’ offenders and ‘undeserving’ claimants whose conduct leads some to suppose that they are incapable of discharging the responsibilities of the late modern freedom” (Garland, 2001, p. 195).

3.6 The Social Cost of Getting Tough on Crime

There are a number of other costs to enacting tough-on-crime legislation that fall outside the scope of the risk-management strategies discussed above. Research finds that the effects of tough-on-crime policies and legislation have a number of ancillary effects. While some of these findings have to do with the ways in which youth court judges often attempt to circumvent the imposition of a punitive sentence by exercising discretion (Freiberg, 2000; Harris and Jesilow, 2000; Morgan, 2000), the effects of tough-on-crime legislation are most markedly observed in the overrepresentation of certain groups convicted under these provisions. However, Canadian research indicates that discriminatory practices exercised against racial minorities involved in violent crimes most frequently stem from a connection of race with both social and economic deprivation (McMurtry & Curling, 2008; Wortley, 2003;

Wortley et al., 2008). Due to a lack of methodical data and systematic research on the association that exists between one's racial background or ethnicity and youth crime in Canada, there exists an incorrect assumption that the (mis)treatment of minority groups has not been a concern within the Canadian youth justice system (Mosher, 1996; Wortley, 2003). For example, many of the studies that consider the extent of involvement of Aboriginal youth and other visible minorities within the justice system reveal that these groups are routinely overrepresented time and time again (Alvi, 2012; Bala, 1997; LaPrairie & Griffiths, 1984; Morin, 1990).

Further research on the correlation between one's ethnic group and youth crime in Canada is needed given the notable gap in studies conveying a broad range of dependable, trustworthy, and well-founded data (Alvi, 2012; McMurtry & Curling, 2008; Mosher, 1996).⁷⁰ According to Alvi (2012), unlike youth belonging to the dominant social groups in Canada, there is a significantly higher risk for various groups of youth from particular racial and ethnic upbringings to be charged with offences in Canada. For example, in a study conducted by Calverley, Cotter and Halla (2010), only 6% of the youth population in 2006 consisted of Aboriginals, however, they accounted for 24% of youth on probation, 36% of youth that had an imposition of a custodial sentence, and 27% of youth that were detained in custody while awaiting trial or sentencing (Alvi, 2012). In addition, these youth had a higher probability of being charged with serious offences and, when measured against non-Aboriginal youth, were typically detained on remand for three days more (Alvi, 2012). It should be noted that the amount of time for which non-Aboriginal youth carried out their sentence was roughly

⁷⁰ It should be noted that the correlation between punishment and ethnicity in this case is linked to the notion of the "underclass" as a racialized class.

identical to their Aboriginal counterparts (Alvi, 2012; see also Calverley, Cotter and Halla, 2010).

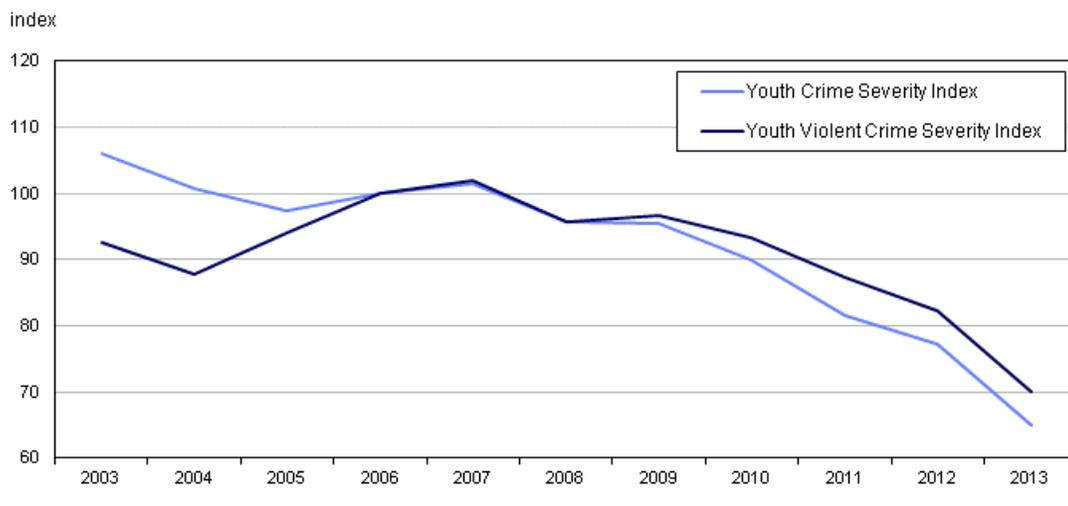
There is some evidence that suggests a similar trend in the United States with regards to the “symbolic racism” that occurs amongst those who advocate for tough-on-crime legislation. According to Green, Staerklé and Sears (2006), symbolic racism differs from blatant racist conduct because this type of behaviour is one where Whites characterize an elevated degree of defiance and contravention of shared social norms to Blacks. In fact, this notion “stems from a blend of anti-Black affect and traditional values” (p. 438), where Whites believe that Blacks are the recipients of too much entitlement based on their ideas of respect for authority, perception on work ethics and being self-sufficient. Similarly, another study administered by Chiricos, Welch and Gertz (2004) conducted national research in the United States in which the results suggested that those who offered the most support for tough-on-crime legislation were Whites. These findings indicate that White respondents are the most likely to embrace attitudes that support highly punitive measures for crime, and are also most likely to believe that crimes are disproportionately committed by Blacks. Overall, the study found that Whites who associate crime with race are ostensibly supportive of harsher crime legislation.

3.7 Was There Really a Need for Change? A Look at Canadian Youth Crime Statistics

Notwithstanding any of the research discussed in this chapter on the social costs of getting tough on crime, it is important to analyze the Canadian crime rates in order to determine whether or not changes to the legislation were necessary from a purely statistical standpoint. According to the Integrated Criminal Court Survey of 2012, the number of completed youth cases in 2011/2012 are at its “lowest point in 20 years”, completing slightly over 48,000 cases (Dauvergne, 2013, p. 3). In fact, research shows that these figures signify a

10% decrease in cases handled within the youth courts from the year before, and represents a third successive annual drop (Dauvergne, 2013). The youth Crime Severity Index (CSI) also decreased from previous years. When compared to statistics from 2012, the volume and the severity of all types of youth crime is 16% lower (Boyce, Cotter & Perreault, 2014). A decline in the severity of violent youth crime can be observed over the last three years, and more importantly, a 39% decrease in the violent youth crime rate has been recorded over the past ten years (Boyce, Cotter & Perreault, 2014). The figures represent a fairly significant decline (see Figure 3.1).

Figure 3.1: Police-Reported Youth Crime Severity Indexes, Canada, 2003 to 2013



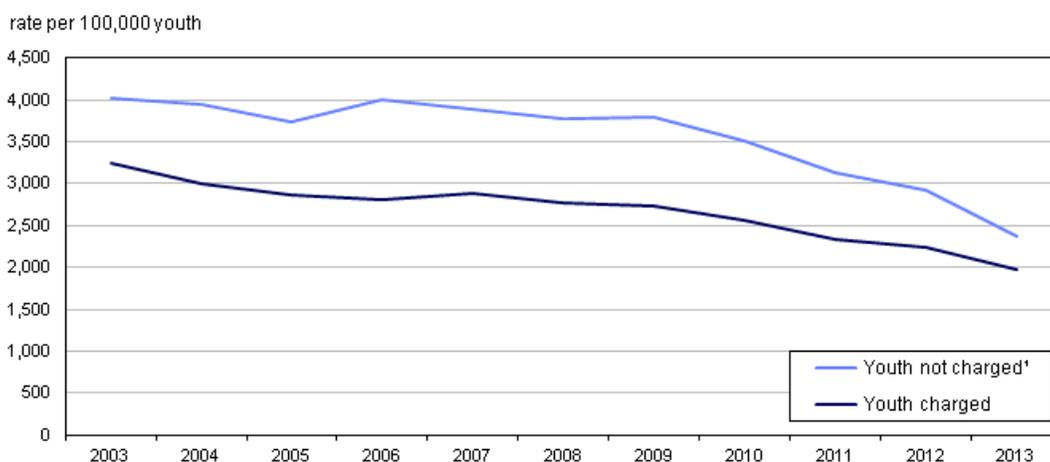
Note: Indexes have been standardized to a base year of 2006 which is equal to 100.

Source: Statistics Canada, 2013. See Boyce, Cotter and Perreault (2014) *Police-Reported Crime Statistics in Canada, 2013*, p. 23.

In 2013, over 104,000 youth aged 12 to 17 years were identified by police as allegedly committing an offence in violation of the *Criminal Code* - about 22,000 less than in 2012 (Boyce, Cotter & Perreault, 2014). The entire grouping of “accused persons” is comprised of two main categories. First, it accounts for the number of youths who were in fact charged by police (or were recommended for charging); and second, it incorporates youth who were

handled in a way that differed from laying a charge (for example, this would include diverting youth away from the courts through the use of cautions, warnings, and referrals to community programs) (Boyce, Cotter & Perreault, 2014). In 2013, 45% of chargeable youth were officially charged; while the residual 55% were diverted (see Figure 3.2).

Figure 3.2: Youth Accused of Crime, by Clearance Status, Canada, 2003 to 2013



Note: Youth not charged includes youth diverted from the formal criminal justice system through the use of warnings, cautions, and referrals to community programs.

Source: Statistics Canada, 2013. See Boyce, Cotter and Perreault (2014) Police-Reported Crime Statistics in Canada, 2013, p. 22.

Of these approximate 104,000 youth, forty of them were accused of homicide in 2013. When compared to the thirty-five youth accused of homicide in 2012, this figure represents a 17% increase. Nonetheless, the author’s state this boost is still lower than the ten year average (Boyce, Cotter & Perreault, 2014). In addition, youth accused for aggravated sexual assault (level 3) also represented a slight increase from 5 youth in 2012, to 15 youth in 2013 (Boyce, Cotter & Perreault, 2014). Despite these minor increases, Boyce, Cotter and Perreault (2014) assert that the rate of more serious violent youth offences make up for less than 1% of all violent youth violations. Further, these author’s emphasize a 13% decline in the “overall rate of youth accused of violent crime” in 2013 (Boyce, Cotter & Perreault, 2014). Declines could

also be observed in the rates of youth accused of common assault – level 1 (-14%) and robbery (-26%) when compared to figures from 2012 (Boyce, Cotter & Perreault, 2014). The most recurrent type of violent offence for which youth are accused is Level 1 assaults. The downturn in the rates for youth accused of robbery, however, represents the largest drop ever recorded (Boyce, Cotter & Perreault, 2014). There is also a notable decline in the rates for which youth are accused of property crime (-19%) in comparison to 2012. Decreases in both the severity of youth crime and violent youth crime in 2013 were found in all provinces and territories but for Yukon (+4%) and Northwest Territories (+21%), respectively. The youth Crime Severity Index was lowest in British Columbia (50.3), followed by Ontario (53.6) and Québec (55.5), but was highest in Saskatchewan (169.9) (Boyce, Cotter & Perreault, 2014).

Under the *Young Offenders Act*, Canadian youth were prone to be formally charged more frequently than to be handled by other means. However, since the *Youth Criminal Justice Act* came into effect on 01 April 2003 this tendency reversed and “the rate of youth dealt with by other means has continued to be higher than the rate of youth formally charged, although the difference has been narrowing slightly since 2009” (Boyce, Cotter & Perreault, 2014, p. 22). This reversal in trends correlates to the *YCJA* legislation which delineates precise parameters for the functioning, purpose and use of extrajudicial measures (i.e., informal sanctions) for youth. The diversion of youth from the justice system corresponds with the principles found in Section 3 of the *YCJA*, but it should be noted that diversion practices are often misinterpreted by the public as a lenient form of accountability. In reality, both these practices differ by type of offence to some extent (e.g., “offences against the administration of justice” such as breach of probation, “failure to appear in court”, “unlawfully at large” or “failure to comply with an

order” or bail condition).⁷¹ On the whole, there is a notable decline in youth court cases compared to previous years. The most significant decreases were in the territories, which demonstrated that between 2010/2011 and 2011/2012, the plummet ranged from -23% to -36%. Across all Canadian provinces, British Columbia registered the most significant reduction in youth court cases (-16%), followed by New Brunswick (-14%) and Ontario (-12%).

Similarly, Dauvergne (2013) reports that in 2011/2012, a finding of guilt had been reached in approximately 6 in 10 (57%) of the cases brought before a court. These figures indicate an overall reduction in the number of cases from previous years, with continuous data showing that “the proportion of cases resulting in a finding of guilt has decreased” (p. 3). The proportion of guilty findings for 2011/2012 varies by offence, where being unlawfully at large made up for 90% of these incidents (Dauvergne, 2013). Since being unlawfully at large is an offence against the administration of justice, this offence has not seen the same degree of decrease as other types of offences. Thus, there is a marked difference between police and youth court statistics in relation to this offence (for example, the police reported statistics state approximately 10% of accused youth were accused in connection with an administration of justice violation), which may be attributed to the possibility of multiple charges and plea bargaining (Carrington & Schulenberg, 2008).

Dauvergne (2013) also notes that only in a minority of youth cases was a custodial sentence received - with 4,144 or about 15% of all guilty cases ending up with a custodial sentence, in comparison to 13,237 or 27% of all guilty cases in 2002/2003. In 2011/2012, approximately three-quarters (3/4) of the cases with a custody and supervision order resulted in

⁷¹ These offences typically involve behaviour that would not be an offence outside of the court order but may justify detention in exceptional circumstances when the management, preservation and renewal of confidence in the administration of justice is at stake (Bala & Anand, 2012).

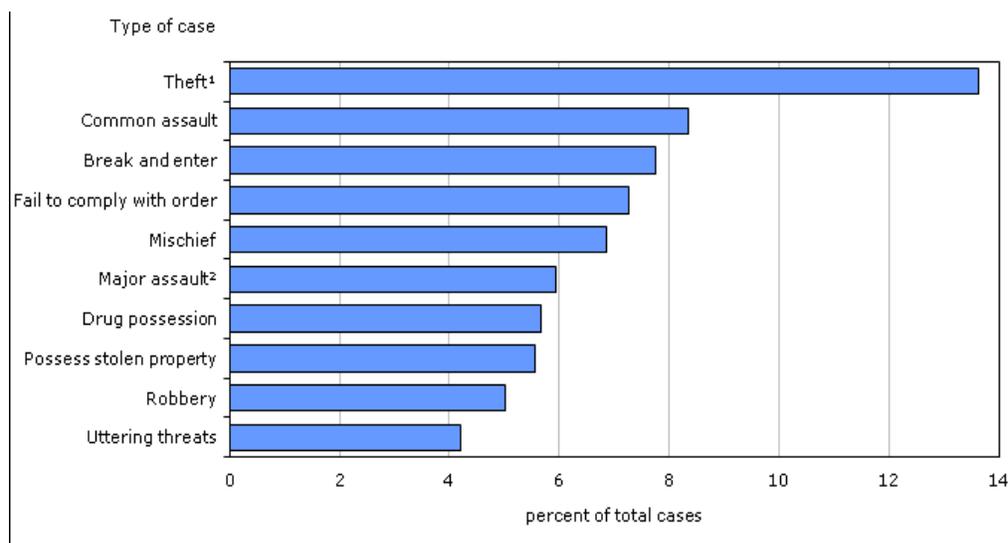
a time frame of three months or less (74%) (Dauvergne, 2013). An additional 18% of custodial sentences resulted in more than three months to six months, 7% exceeded 182 days to 365 days, and less than 2% of custody sentences surpassed the one year mark (Dauvergne, 2013). In 2011/2012, the average duration of a custodial sentence was 39 days, albeit the average sentence for certain crimes such as attempted murder (240 days), sexual assault (176 days) and homicide (730 days) were notably greater (Dauvergne, 2013). Probation, on the other hand, was the most common sentence imposed upon youth, where it was ordered in approximately 6 out of 10 guilty youth cases in 2011/2012 (Dauvergne, 2013).

3.7.1 Characteristics of Crime Allegedly Committed by Youth Appearing in Court

Similar to previous years, Dauvergne (2013) asserts that most of the youth court caseload (70%) consisted of only ten types of offences, the bulk of which related to non-violent offences. The importance of this finding suggests that most youth engage in non-violent offences as opposed to more serious types of crimes. On the basis of this data, this further questions the need for the newly enacted tough-on-crime legislation. The kinds of cases dealt with by youth courts most frequently involved common assault – level 1 (8%), theft (14%), and break and enter (8%) (see Figure 3.3). Cases involving crimes against the administration of justice (-8%), those against the *YCJA* (-5%), and impaired driving (-21%) were less frequent and declined significantly from the year before. Other federal statutes offences, (such as drug related) made up for 8% of all cases in 2011/2012 and were considered an exception to the overall decline in the courts caseload since possession of drugs increased by 7% and other types of drug related crime (e.g. production, trafficking, exporting/importing) spiked by 2% from the year before. Generally speaking, most cases heard in youth courts involve non-violent offences, however “there was one more case of homicide in 2011/2012 than in 2010/2011, and

six more cases involving the combined category of ‘other sexual offences’, such as sexual interference and invitation to sexual touching” (Dauvergne, 2013, p. 6).

Figure 3.3: Ten Most Common Cases Completed in Youth Court, Canada 2011/2012



1. Includes, for example, theft over \$5,000, theft \$5,000 or under, as well as motor vehicle theft.

2. Includes assault with a weapon (level 2) and aggravated assault (level 3).

Note: A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final decision. Cases that involve more than one charge are represented by the most serious offence.

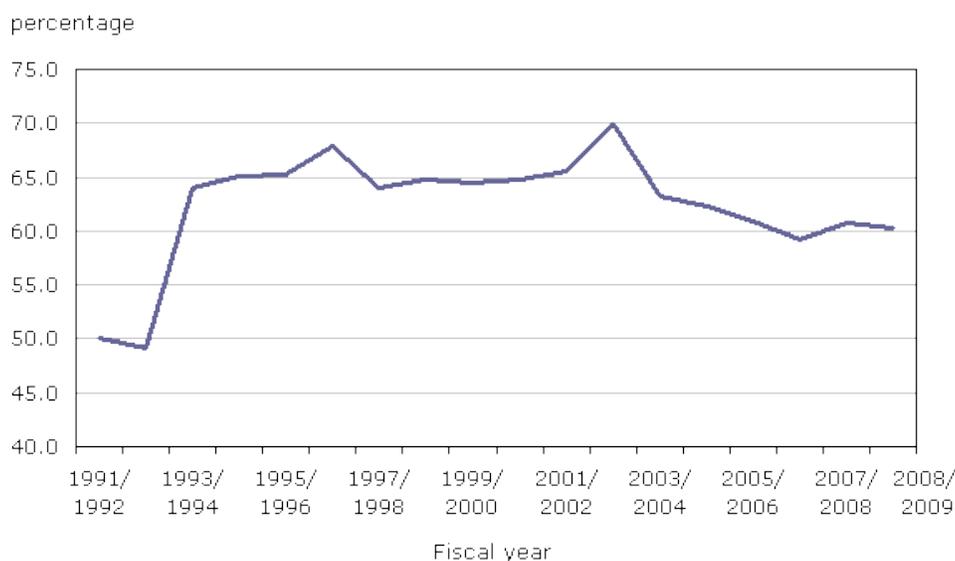
Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey. See Dauvergne (2013) Youth Court Statistics in Canada, 2011/2012, p. 6.

3.7.2 Youth Sentencing Practices

In 2011/2012, probation was ordered in 58% (about 6 in 10) of all guilty cases. This sentence was imposed either on its own or in conjunction with others, advancing it as the most frequently employed sentencing option (Dauvergne, 2013). However, Dauvergne (2013) acknowledges that these figures decreased from 2002/2003, when a probation sentence was handed out in about 70% of all guilty cases. This may be an artefact of the *YOA* where a probation term often followed serving a custodial sentence to assist with post-release supervision and reintegration (Milligan, 2010). Under the *YCJA*, and prior to any legislative changes put forth by Bill C-10 (Part 4), every sentence involving youth custody is followed up

with a period of supervision within the community after the custodial segment of the sentence is complete. This decline in the ratio of guilty youth cases sentenced to probation could be due to an increase in the use of extrajudicial measures under the *YCJA* (Bala, Carrington, & Roberts, 2009) (see Figure 3.4). The statistics on youth sentencing practices are important to consider for two main reasons. First, it provides context on the types of sentences that were imposed on youth prior to enactment of Bill C-10 (Part 4). Second, it sheds light on the types of sentences that are handed out to youth especially since not all youth court cases make case law.

Figure 3.4: Proportion of Guilty Youth Cases Sentenced to Probation has Declined since the Enactment of the *Youth Criminal Justice Act*



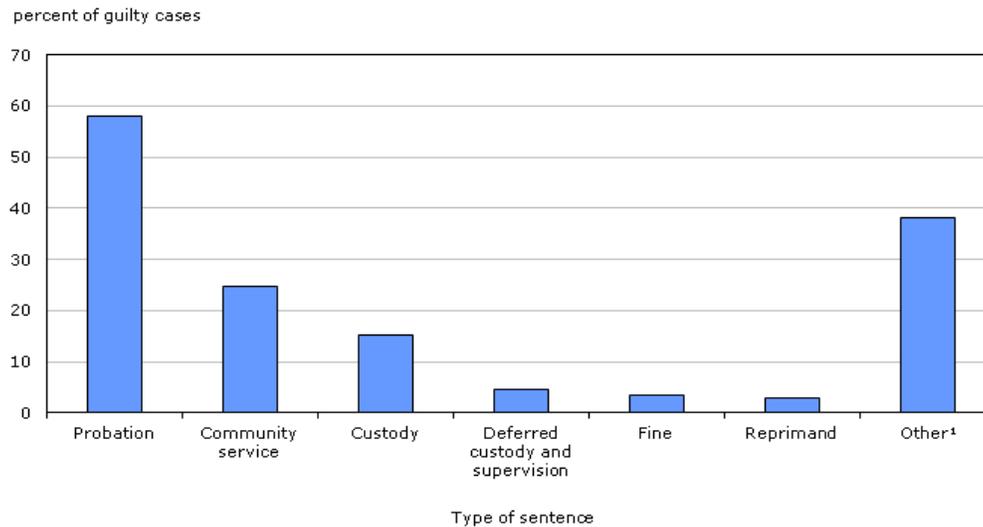
Source: Statistics Canada, Canadian Centre for Justice Statistics, Youth Court Survey. See Milligan (2010) Youth Court Statistics 2008/2009.

Another fairly frequent sentence imposed by youth courts in 2011/2012 is community service orders. As an extrajudicial sanction, approximately one in four (25%) guilty youth court cases led to an order requiring the youth to perform voluntary work in the community. A

community service order, which is frequently held often in conjunction with probation, was regularly “associated with cases involving the category of ‘other drug offences’, namely those for drug trafficking, exportation and importation, and production (39%), and drug possession (33%)” (Dauvergne, 2013, p. 10). The provisions of the *YCJA* currently specify that community service sentences cannot exceed 240 hours and are required to be completed within a year or less from the date of the sentence (see *YCJA*, S.42(2)).

Although custody is not a common sentencing option, Dauvergne (2013) notes that 15% of youth found guilty were sent to custody in 2011/2012. Cases involving attempted murder (75%), being unlawfully at large (67%) and homicide (53%) are most likely to be sentenced to custody. Custodial sentences are seen as the most severe penalty of all available sentencing options. As per Section 39(2) of the *YCJA* and Bill C-10 (Part 4), all practical alternatives to custody should be carefully weighed before the court imposes a custodial sentence. According to the Department of Justice Canada (2012b), “custodial sentences for youth are meant to be used primarily for violent and serious repeat offenders”. Figure 3.5 below provides a breakdown of guilty cases in youth court by disposition.

Figure 3.5: Guilty Cases in Youth Court, by Type of Sentence, Canada, 2011/2012



1. Cases may involve more than one type of sentence, therefore, percentages do not total 100%. A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final disposition.

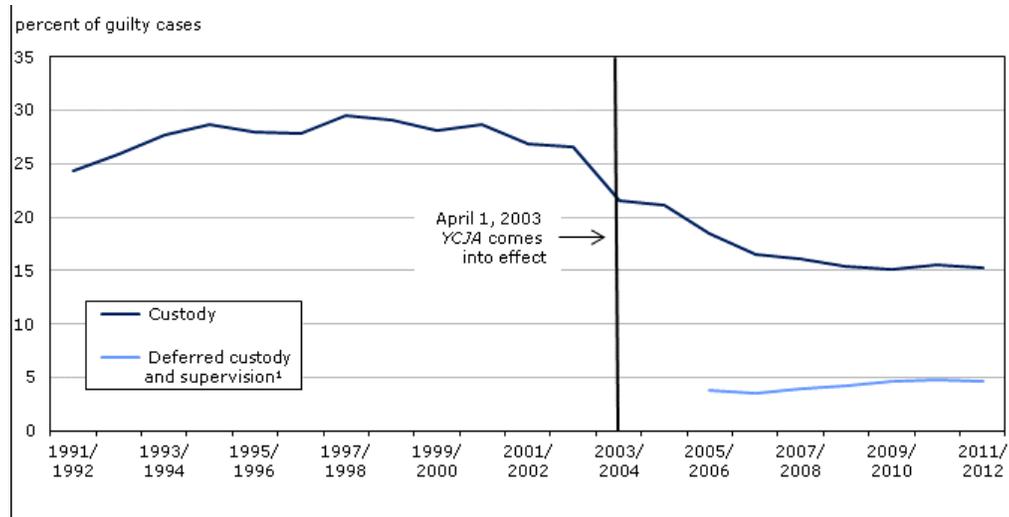
2. Figures for custody include a mandatory period of post-custody supervision.

3. Other sentences include conditional sentences, intensive support and supervision, attend a non-residential program, absolute discharge, restitution, prohibition, seizure, forfeiture, compensation, pay purchaser, essays, apologies, counseling programs and conditional discharge.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey. See Dauvergne (2013) Youth Court Statistics in Canada, 2011/2012, p. 11.

In line with the goals and intentions of the *YCJA*, the imposition of a custodial sentence has notably decreased over the past decade (see Figure 3.6). However, a slight increase may be observed in the use of deferred custody and supervision orders since its introduction in 2003. In lieu of ordering a youth to custody, a deferred custody orders give youth an opportunity to fulfill their sentence in the community under strict rules as opposed to serving their sentence in custody (Dauvergne, 2013). In the event any of the terms are breached, the youth may be ordered to serve the remainder of their sentence in custody (Dauvergne, 2013).

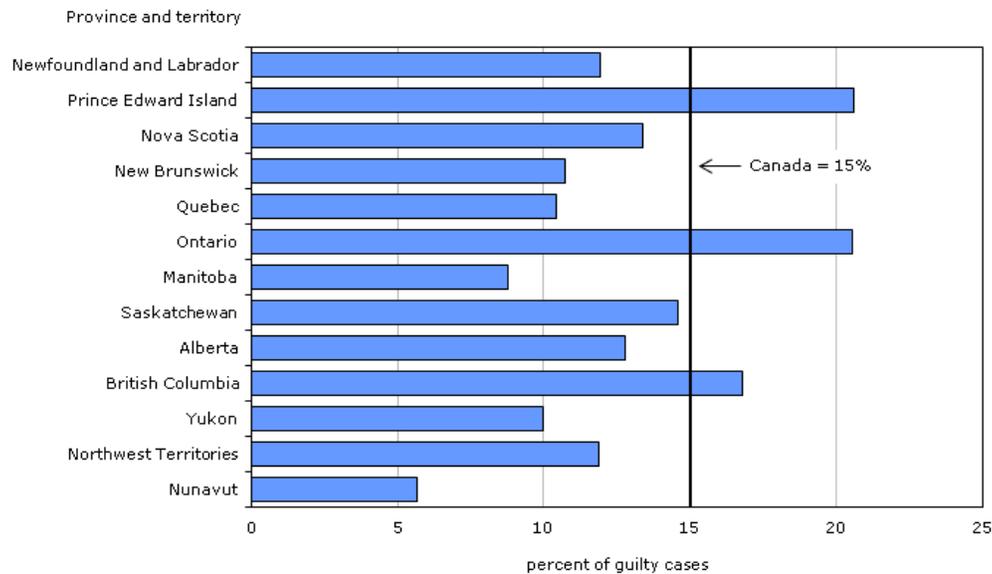
Figure 3.6: Guilty Cases Completed in Youth Court, by Selected Sentence, 1991/1992 to 2011/2012



1. Deferred custody and supervision is a sentence under the *Youth Criminal Justice Act* effective April 1, 2003. Data begin in 2005/2006 when all jurisdictions (with the exception of Saskatchewan) were reporting data. **Note:** A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final disposition. Due to the unavailability of data for certain years, data for Saskatchewan has been removed in order to make comparisons over time. **Source:** Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey. See Dauvergne (2013) *Youth Court Statistics in Canada, 2011/2012*, p. 14.

In terms of the distribution of custodial sentences by province and territory, there is considerable variation. Overall, Ontario (21%) and Prince Edward Island (21%) most frequently use of custody; while Manitoba (9%) and Nunavut (6%) use it the least (refer to Figure 3.7 for a full jurisdictional breakdown). The average duration of such sentences is 39 days. However, it should be noted that the length of a custodial sentence varies according to the type of case, as cases which involve a violent offence typically results in the lengthiest terms (Dauvergne, 2013). More precisely, cases involving homicide result in custodial sentences that require the youth to serve the longest amount of time at 730 days, followed by attempted murder at 240 days, and sexual assault at 176 days (Dauvergne, 2013).

Figure 3.7: Guilty Cases Completed in Youth Court Sentenced to Custody, by Province and Territory, 2011/2012



Note: A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final disposition. There are many factors that may influence variation between jurisdictions such as Crown and police charging practices, offence distributions, and various forms of diversion programs. Jurisdictional differences in the structure and operation of courts may also have an impact on survey results. Therefore, any comparisons between jurisdictions should be made with caution.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey. See Dauvergne (2013) *Youth Court Statistics in Canada, 2011/2012*, p. 13.

3.8 Conclusion

The dynamics of legislative change are illustrated through the works of Becker (1963); Chambliss and Seidman (1971); Cohen (1972); Garland (2001); Habermas (1975, 2006); Hall et al., (2013); and Hills (1971), which shed light on the ways in which laws are created and by whom. Overall, there is a degree of interplay between interests and power that exist between legislators, moral entrepreneurs and the media which shapes new legislation. From this perspective, the creation of new legislation stem from individuals that either are or have access to others in a position of power (e.g., social, political, economic, or media power), which often reflects the dominant ideology (though this is not always the case).

Much of the research on the construction of crime reveals that the public typically acquires their knowledge of crime from the media. There appears to be a complex relationship between the media and crime that emphasizes a connection between private troubles with crime and the morphing of these troubles into public concern. The ways in which crime news is reported has to do with the structure of the media and patterns of news gathering which often reflects the dominant ideology (Hall et al., 2013). Crime news is influenced by a range of constraints that are imposed on the journalist but is driven by the “strategic use of political and social power” to shape and define such issues (Habermas, 2006, p. 415). Aside from the specific dynamics of the media that form the context of crime news, these forces also extend to the involvement of law enforcement agencies, governmental and political authorities, pressures dictated by interest groups, and culturally defined news themes. Studies suggest that the dependence on the justice system to address the problem of crime often results in the media advocating for a law and order approach. Frequently, interest groups use the media to promote their opinions and arguments in fashion that supports their punitive agenda by constructing a seemingly rational solution to the distorted or misinterpreted problem at hand.

There is also a relationship between public views and attitudes about the ways in which the youth justice system operates, the issues pertaining to youth crime more generally, and the role of public opinion in politics (Sprott, 1996). The literature indicates that although public insight and knowledge of youth crime is fairly distorted and incorrect, it has an influence on policy agendas. This is partially due to the fact that politicians use public opinion to legitimate their authority when addressing concerns about youth crime, through the enactment of publicly supported legislation. However, the public’s knowledge of youth crime and the justice system is constructed by many misrepresentations about facts that are disseminated by the media.

The (over) reaction of state authorities on the issue of youth crime has an effect on the re-legitimizing process during a time of hegemonic crisis. The ways in which the state governs and controls the public is not only linked to dominant group ideology, but also to other state apparatuses, the media, and the internal/external allegiances pledged to the dominant group. Together, these fundamental elements converge to create a law and order society that, arguably, represents a movement which has become systematically normalized in today's western culture.

Moreover, these findings indicate that a shift in youth crime governance has occurred over the years, much of which may be attributed to the allegiance between neo-liberalism and neo-conservatism. As a result, Canada has been subject to an assault on the penal-welfare state, bringing about new crime control strategies that seek to identify, target and manage young offenders in a way that separates dangerous youth from the rest of the population and imposes additional controls (Garland, 2001). This shift of the target of punitive interventions can be linked to the problematization of penal-welfarism and the development of this new punitive governance approach that currently influences policy and legislation.

A discussion on the impact and consequences of tough-on-crime legislation is provided in relation to the overrepresentation of certain marginalized groups. The findings suggest that marginalized youth are most likely to be impacted by legislation that supports tougher measures. Views of implementing tough-on-crime legislation is most noticeable amongst individuals that subscribe to traditional values that intersect with the notion of symbolic racism.

Statistics indicate that the need for legislative change was not warranted at this time. The number of youth court cases in 2011/2012 declined for the third year in a row (Dauvergne, 2013). In fact, between the years of 2010/2011, the number of youth court cases in Canada dropped 7% from that of the previous year (58,379 completed cases in youth court, 191,054

involving charges in 2009/2010). In 2010/2011, there were over 52,900 youth court cases, involving over 178,000 charges. Although not a substantial decline in the number of court cases processed between these years, there is nonetheless a decline among virtually all types of offences, as well as a trend favouring a reduction in the overall use of custodial sentences. Further, the 2011/2012 decline subsequently brought about the “lowest number of cases completed in youth courts” since the inception of national data collection more than two decades ago (Dauvergne, 2013).

Prior to the enactment of Bill C-10 (Part 4), the *Youth Criminal Justice Act* appears to have been rather successful in achieving its primary goal, which was to lessen the use of the courts and custody. That is, the emphasis on diversion from court, coupled with the diminution of custody has led to a relatively effective youth justice model (Bala, Carrington, & Roberts, 2009). Nonetheless, the Conservative government has maintained that “Tories don’t use these statistics as an excuse not to get tough on criminals” (Nicholson’s spokesperson, Pamela Stephens [“Crimes rates continue to drop across Canada”, 2011]).

On the whole, the findings presented in this chapter are congruent with the theoretical framework presented in Chapter 2, but more significantly with the assertions put forth by the critical perspective relative to complex interactions that take place between the public, the interest groups, the larger social structure, and the state more generally. This is due to an emphasis on the unequal distribution of power in relation to the reactions of crime by interest groups, as well as the impact of the law on those who are socially, politically and economically underprivileged (subordinate groups). In addition, trends and opinions on youth crime and relative rates add to the critical perspective given the importance it places on addressing the sources of power and influences on law formation.

CHAPTER 4 - THE LEGAL CONTEXT FOR RESPONSES TO YOUTH CRIME

Despite ongoing research indicating a notable decline in youth crime, there appears to be a common trend amongst Western nations that calls upon tough-on-crime legislation. This has been witnessed in both Canada and the United States; although there is evidence to suggest that some states have been subjected to extremely punitive youth crime legislation when compared to other American jurisdictions, as well as Canada more generally.⁷² The youth justice model adopted in Texas is illustrative of similar processes and challenges encountered domestically. Thus, by taking a closer look at the model implemented by the state of Texas, further emphasis can be placed on the fact that the transformations occurring in Canada are not exclusive.

On the basis that Canada and the United States have undergone reasonably analogous shifts in legislation, it is important to consider the ways in which North American discourse on youth justice have advanced. Thus, the first half of this chapter examines the evolution of legal principles in Canada which documents the progression through which these legal transformations have occurred. The second half of the chapter examines the procedural mechanisms currently outlined by the tough-on-crime legislation in the state of Texas. This material is included on two grounds. First, the state of Texas is illustrative of a crime control model that is further down the tough-on-crime continuum, as it is arguably one of the most punitive states in the Western hemisphere.⁷³ Second, given that the enactment of Bill C-10

⁷² Texas is a good example of how the tough-on-crime legislation has moved the state towards harsher sanctions and penalties for youth in conflict with the law.

⁷³ The crime control model is established on conservative views, values and traditions and has infiltrated the justice system since the 1970s (Packer, 1964). This model is illustrative of the conservatism that has dominated political ideology since the decline of the penal-welfare state (Packer, 1964). Packer (1964) suggests that criminal justice policy is formed on the underlying philosophies that guide the political culture of that time. The focus of this model is to manage or control criminal conduct in an attempt to safeguard the public. It typically supports

(Part 4) comprises part of modified model of crime control in Canada, an analysis of the procedures and legislation through which Texas currently operates provides a better understanding of where Canada presently sits on this continuum, relative to one of the most punitive models of crime control for youth justice.⁷⁴ Generally speaking, it may be said that the enactment of Bill C-10 (Part 4) has moved Canada closer towards the tough-on-crime legislation in Texas, although Texas is far more punitive on the whole. Overall, the material discussed in this chapter essentially provides a frame of reference for the analysis of the case law findings that follow in Chapter 7 and Chapter 8. In contrast, those chapters shed light on the ways in which the tough-on-crime legislation is manifested in the case law in both jurisdictions.

4.1 The Current Canadian Perspective on Youth Crime

Notwithstanding any evidence signifying the shortcomings of such legislation, Bill C-10 was passed by the Canadian Senate in March 2012, and received Royal Assent on 13 March 2012. The purpose of Bill C-10 (Part 4) is to amend certain provisions of the *Youth Criminal Justice Act (YCJA)* in order to “help ensure that violent and repeat offenders are held accountable through sentences that are proportionate to the severity of their crimes, and that the protection of society is given due consideration in applying the *Youth Criminal Justice Act*” (Department of Justice Canada, 2012b). In order to better understand how this legislation is meant to function, it is imperative to consider the evolution of legal principles as per the *Juvenile Delinquents Act (JDA)*, the *Young Offenders Act (YOA)* and the *Youth Criminal*

harsher sentences, advocates for expedient delivery of punishments and stresses the importance of deterrence and denunciation. It also encourages the widespread expansion of judicial and prosecutorial powers to accelerate sentencing (Packer, 1964).

⁷⁴ Texas admitted that their punitive model of crime control has little bearing on deterrence or proper rehabilitation. During the Parliamentary debates of Bill C-4, Texas rejected the Canadian Conservative government’s plan to enact tough-on-crime policies on account of its failure. See Chapter 8 for more information.

Justice Act (YCJA), as well as the specific amendments to the *YCJA* as per the provisions put forth by the Bill. The overarching amendments to the *YCJA* can be broken down into seven principal objectives. A detailed analysis of these provisions is provided in Sections 4.1.4 and 4.1.5 below, as they largely constitute newly enacted tough-on-crime responses to youth offending.

While the federal government of Canada is responsible for legislating criminal laws and procedures, the provincial and territorial governments have jurisdiction over the administration of justice which includes policing, courts, and corrections (Department of Justice Canada, 2012a). According to Canada's *Constitution Act 1982* (originally the *Constitution Act 1867*), the federal government is given the responsibility of enacting juvenile justice laws in order for the provinces and territories to implement them with some financial assistance from the federal level. Essentially, juvenile justice policy is an intergovernmental endeavour that requires cooperation from both provincial and federal levels.

4.1.1 The Juvenile Delinquents Act (1908 – 1984)

According to Bala (2002) and PLEA (2012), the *Juvenile Delinquents Act (JDA)* represented an important philosophical transformation for the rehabilitative treatment of juvenile delinquents. Prior to 1908, youth in conflict with the law were dealt with in a manner that resembled adult criminals. For example, youth frequently received fairly punitive sentences for reasonably negligible or minor crimes. Further, young persons were often detained with their adult counterparts, although these practices were in contravention to the provisions outlined in Canada's *Criminal Code (1892)*. As such, these practices frequently led

to the sentencing of youth to adult institutions. In comparison, however, the *JDA* implemented a social welfare approach to address youth crime which was outlined in Section 38 of the *Act*.⁷⁵

The development of the *JDA* occurred shortly after a number of destitute immigrants arrived in Canada from Britain in the early 20th century. According to West (1984), the growing number of newcomers to Canada resulted in an escalation of concerns regarding street crime by youth of the working class. The need for a separate justice system for youth was propelled by the “child savers” (also known as the “Children’s Court Movement”) as well as Protestant and Catholic children’s aid societies whose efforts guided the eventual passage of the *JDA* (Maurutto, 2003, p. 103). The child savers consisted mainly of middle and upper class individuals who supported “institutionalization, industrial schools, refuges, free public education and child protective legislation” and denounced the incarceration of youth in adult facilities and institutions (Carrigan, 1998, p. 63). The overarching goal of this movement was to redefine young offenders by rehabilitating them to become honourable and conscientious members of the community as opposed to punishing them. This association believed that it was necessary to “reshape the moral character of the offending child”, because there appeared to be a “lack of judicious home training” that caused the youth’s “lawless behaviour” (Maurutto, 2003, p. 121). As a result, youth were seen as innocent individuals that required care and guidance through involvement that not only encompassed the child themselves, but also included their parents and family more generally (Maurutto, 2003).

Affiliates of this group hailed from a number of diverse backgrounds such as church goers, church ministers, small business owners, civil servants, and women and students who

⁷⁵ Section 38 of the *JDA* asserts that “the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable, every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child.”

advocated for several agencies and lobbied governments for legislation that accounted for the safety and protection of youth (Carrigan, 1998). Interestingly, the child savers movement was “supported by an elite group of philanthropists who used their influence and gave their money in support of the endeavours” of the group (Carrigan, 1998, p. 63). As such, many powerful individuals came together throughout the country to “use their influence and powers of persuasion to bring about a wide variety of humanitarian developments at both the provincial and federal levels” (Carrigan, 1998, p. 66).

After the 1982 *Charter of Rights and Freedoms* established that the *Juvenile Delinquents Act* failed to consider the legal rights of youth, the *Young Offenders Act* was enacted to replace the *JDA* in 1984 (Bala, 2002; Bala & Anand, 2012). The *Young Offenders Act* represented a movement away from the social welfare approach guiding the *JDA* in that it focused on the responsibilities (i.e., offence accountability) and the rights of youth, the protection of society, and due process⁷⁶ (Bala & Anand, 2012; Carrigan, 1998).

4.1.2 The Young Offenders Act (1984 – 2003)

The *Young Offenders Act (YOA)* replaced the *Juvenile Delinquents Act* in 1984. The *YOA* responded to issues concerning the treatment of children under the *JDA*, as it was criticized for being incongruent with the Canadian human rights legislation. The legislation of the *YOA* concluded the “paternalistic handling of delinquents by providing the same basic rights and freedoms before the law as those enjoyed by adults and as provided for in the *Charter of Rights and Freedoms*” (Carrigan, 1998, p. 243). Section 3 of the *YOA* set guiding

⁷⁶ Due process, and more specifically the due process model, is an approach that is associated with fairly liberal views and values (Packer, 1964). It ensures that all defendants are innocent until proven guilty, and places emphasis on strategies that rehabilitate offenders as opposed to strictly punishing them. Aside from the fact that this model establishes fairness and consistency via procedural rules and upholds rights, individual liberties and freedoms, this model encourages offender reintegration to ensure proper/proactive functioning within the community upon release (Packer, 1964).

principles for its implementation, which included: 1) the accountability of young persons who committed offences, but ordinarily less accountability than for adults; 2) the protection of society from youth who committed crimes, however, where possible, the importance of rehabilitation and crime prevention should be recognized; 3) the legal rights and freedoms of children, which are inclusive of the provisions outlined in the *Canadian Charter of Rights and Freedoms*; 4) the right to notify parents of any and all legal proceedings involving their child; and 5) the use of least possible interference, including diversion from court.

According to Carrigan (1998), Garland (2001), and Hogeveen and Smandych (2001), a number of governments in the Western world began focussing more so on a law and order approach that reflected tough-on-crime measures by emphasizing harsher punishments and more punitive youth justice legislation. There are two reasons given for the transformation from welfarism in the 1970s and the introduction of neo-liberalism in the late 1970s and early 1980s. The first reason had to do with the “social, economic, and cultural changes characteristic of late modernity” which was being experienced in all democratic societies of the Western world (Garland, 2001, p. 75). The second, and more important reason, had to do with “the political realignments and policy initiatives that developed in response to these changes, and in reaction to the perceived crisis of the welfare state” (Garland, 2001, p. 75). The effect of these developments in the larger political context (i.e., the macro political changes) shaped a “new set of class and race relations and a dominant political block that defined itself in opposition to old style ‘welfarism’ and the social and cultural ideals upon which it was based” (Garland, 2001, p. 75). These findings were mirrored in Canada as well as the rest of the Western hemisphere. For example, the House of Commons Standing Committee on Justice and the Solicitor General produced a report (Horner, 1993) that examined crime prevention on a

national level between November 1992 and February 1993.⁷⁷ The report suggested that Canada required a national plan on how to curb the circumstances in which youth engaged in crime, as well as address some of the fundamental issues that contribute to crime (Caputo & Vallée, 2007; Justice Canada, 1993a). Further, the report encouraged the development of a national approach that incorporated a joint venture between the varying levels of government and organizations involved in the youth justice system (Caputo & Vallée, 2007). This alliance of sharing information would also be extended to “special interest groups and non-government organizations” (Justice Canada, 1993a). Essentially, the shift from welfarism towards policies that emphasized a more crime control stance is argued to have occurred in reaction to a deviation in cultural and social interests (Garland, 2001).

There is evidence to suggest that this reactionary shift occurred because of a change in the ways broad social classes viewed policies in support of a welfare approach (Garland, 2001).

According to the Garland (2001),

Changes in demography, in stratification and political-allegiance left important sections of the working and middle classes to change their attitudes towards any of these policies – to see them as being at odds with their actuarial interests and as benefitting groups that were undeserving and increasingly dangerous. In this new political context, welfare policies for the poor were increasingly represented as expensive luxuries that hard working tax-payers could no longer afford. The corollary was that penal-welfare measures for offenders were depicted as absurdly indulgent and self-defeating (p. 76).

This shift can be progressively observed in the number of amendments made to the *YOA* over the course of its implementation. As noted by Bala (2005), the tough-on-crime approach in response to youth crime began developing out of a conservative framework that accompanied

⁷⁷ The official name of this report is “*Crime Prevention in Canada: Towards a National Strategy*”.

Canadian politics. In fact, it was the “law and order” campaign put forth by the Conservative-Reform party that advocated for significant adjustments to the legislation concerning young offenders. Although these measures did achieve the desired results of “renewed discipline and a tightening of controls”, Garland (2001) suggests that the conservative approach which demands for a restoration of “moral discipline and traditional values” is predominately geared towards “poor individuals and marginalized communities” and had very little effect on the bulk of the population (p. 100).

With the increasing criticisms faced by the Canadian federal government regarding youth crime legislation, an attempt to “respond to concerns raised by police and provincial governments about difficulties implementing the *YOA*” was introduced by enacting several amendments to the *YOA* (Bala & Anand, 2012, p. 14). These steps to legislate tougher measures were driven not only by provincial authorities and political parties in opposition of the *Act* as it stood, but also by the public’s general concern for the alleged increase of violent youth crime. The first set of amendments established that the detainment of a young person could be greater than the three year interval if another offence was committed during this time (*An Act to amend the Young Offenders Act and the Criminal Code*, 1986; Bala & Anand, 2012). This sentence could continue once the youth was legally deemed an adult (amended in 1986). The second set of revisions demonstrated that sentence lengths for first or second degree murder carried an imposition for a maximum of 5 years (as opposed to 3 years previously set out in the *Act*) and any transfer of youth to the adult jurisdiction was done so on the basis of the “protection of the public” (amended in 1992) (*An Act to amend the Young Offenders Act and the Criminal Code*, 1992; Bala & Anand, 2012). The third set of amendments to the *Act* occurred in 1995, which was meant to restore credibility with the public by getting tough-on-

crime. These revisions established that sentences for first or second degree murders could not surpass the maximum penalty of ten years, and a presumption that youth who committed serious violent offences would be transferred to the adult jurisdiction if they were at least 16 years of age or older (*An Act to amend the Young Offenders Act and the Criminal Code*, 1995; Bala & Anand, 2012). Despite the efforts to amend the *YOA*, these legislative changes were unsuccessful in rebuilding confidence in both the *Act* and the youth justice system more generally with the public. Moreover, the amendments did not address the high incarceration rates of youth, nor did it attend to the high rate of recidivism amongst violent youth (Bala, Carrington, & Roberts, 2009). Further, there appeared to be a need to “respond more firmly and effectively to the small number of the most serious and violent offenders” (McLellan, 1999), which called for additional measures to toughen of the *Act* (see Leonard & Morris, 2000, for more information).

4.1.3 The Youth Criminal Justice Act (2003 -)

The *Youth Criminal Justice Act (YCJA)* replaced the *Young Offenders Act* on 1 April, 2003. Based on the objectives listed in the Declaration of Principle, the *YCJA* differs from the *YOA* in several ways. As Bala and Anand (2012) note, it first includes preamble about the ways in which the *Act* should be interpreted, so that the long- and short-term needs of the offender and society do not conflict with one another (p. 63). Second, it adds to the extrajudicial measures available not only by “encouraging involvement of victims, parents, and members of the community in the youth court process”, but also encompasses police warning (Bala & Anand, 2012, p. 63). Third, publication of the names of young offenders is permitted for those convicted of serious violent offences (Bala & Anand, 2012, p. 63). Fourth, it allows youth fourteen years of age or older to be sentenced as an adult in circumstances where a serious violent crime has occurred (Bala & Anand, 2012, p. 63). Fifth, it establishes that the primary

sentencing principle is to be fair and make accountability proportionate to the crime (Bala & Anand, 2012, p. 63). Sixth, it recognizes that the youth courts are reserved for more serious offenders, and that diversion from the court process is encouraged. Further, it promotes the use of non-custodial sentences (Bala & Anand, 2012, p. 63). Seventh, it supports the principles of rehabilitation and reintegration by introducing a graduated sentence for youth who receive a custodial sentence to serve the last third of their sentence under community supervision (Bala & Anand, 2012, p. 64; Department of Justice Canada 2012b, *The Youth Criminal Justice Act: Summary and Background*).⁷⁸ Finally, it allows for provinces to have greater control over establishing youth justice policies as opposed to having the courts determine the level of custody (Bala & Anand, 2012, p. 64). The reintroduction of youth justice committees assists in developing community-based solutions to hold youth accountable for their crimes.

Unlike the *YOA*, youth are not officially transferred to adult court under the *YCJA*. Instead, judges are given the authority to enforce adult sentences within the confines of the youth court jurisdiction, although there is a great deal more weight placed on treatment for youth under this *Act* in contrast to the *YOA*. Further, the *YCJA* effectively reduces the age for which a youth may be sentenced as an adult. While the *YOA* included a provision that allowed youth who were 16 years of age or older to be transferred to the adult jurisdiction when charged with a presumptive offence (i.e., murder, attempted murder, manslaughter, or

⁷⁸ The notion of community supervision in both the Canadian and American context is linked to Foucault's (1991) claim that such strategies embed the state's ability to exercise authority and domination through various institutional mechanisms and technologies which are currently used as a self-governing technique. This can be connected to the idea of "late modernity" as well as mass social control in which youth are expected to rehabilitate themselves through available programs to ensure self-imposed discipline (through a concept known as disciplinary normalization) (See Fraser, 2003). In effect, this finding is related to a model of risk assessment (i.e., low risk, medium risk, high risk) which targets intervention of youth offender behaviour and is seen as a strategic response to address any crisis of legitimacy (DeMichele, 2014). Chapter 8 sheds further light on the ways in which rehabilitative programs are aligned with neo-liberal rationalities.

aggravated sexual assault) (Bala & Anand, 2012), the *YCJA* lowers the age of presumption to 14 (*YCJA* S.64(1)). However, it should be noted that each separate province is given the discretion to increase this age to 15 or 16, if they see fit. Currently under the *YCJA*, youth are not permitted to be transferred to the adult jurisdiction.

4.1.4 The Provisions of Bill C-10 (Part 4): What Do They Constitute?

Section 3 of the *Youth Criminal Justice Act* states the overall protection of society is one of the primary objectives of this legislation (Library of Parliament, 2011). Although provisions pertaining to the protection of society are not new, Bill C-10 (Part 4) places a great deal of emphasis on the short-term safekeeping of the community by enforcing the following objectives, as opposed to the long-term protection of society. In addition, Bill C-10 (Part 4) claims these changes enable the simplification of pre-trial detentions rules that are said to aid in guaranteeing that, when required, violent and repeat young offenders are detained while awaiting trial (See S.4 of the *YCJA*) (Library of Parliament, 2011).

Prior to any legislative amendments, there appeared to be some confusion on the provisions in the *Criminal Code* that govern youth in regards to pre-trial detention. This confusion was due to the rules on pre-trial detention leading to inconsistent and insufficient applications of the *Act* (Nunn, 2006). Consequently, even under circumstances where violent youth pose a threat to society, the system had been accused of being unable to hold young offenders in custody. This amendment therefore facilitates and clarifies the pre-trial detention rules to make certain that youth charged with a serious offence (i.e., an “indictable offence for which an adult would be liable for a term of more than two years” and includes “violent offences”, “property offences”, and “offences that could endanger the public”) can be removed from society while awaiting trial (Library of Parliament, 2011, p. 132). Further, detention of

youth during this period will also prevent them from committing another serious offence in the meantime.

Another provision of Bill C-10 (Part 4) involves the strengthening of sentencing provisions and the reduction of barriers to custody, in order to facilitate custody for violent and repeat young offenders when suitable (Library of Parliament, 2011). According to research on public opinion polls, any confidence that Canadians may have in the justice system drops when a sentence is unable to hold violent and repeat offenders accountable (Campbell, 2000; Roberts, 2004; Roberts & Doob, 1990; Sprott, 1996; Sprott & Doob, 2008). This three-fold amendment therefore allows the courts to establish sentences for young offenders that are proportionate to the severity of the crime, and at the same time ensure the protection of society. This is achieved in three ways: 1) By including “specific deterrence and denunciation” to the principles of sentencing in hopes of discouraging a given offender from engaging in other offences, as opposed to the previous sentencing philosophy which did not include these factors in the sentencing process; 2) By adding to the current definition of “violent offence” any behaviour that may jeopardize or put at risk the life or safety of others; and 3) By permitting the courts to impose a custodial sentence on youth found to have a number of previous guilty findings or extrajudicial sanctions (see Library of Parliament, 2011).

“Specific deterrence and denunciation” are sentencing principles that are similar to those found in the adult criminal justice system (see S.7 of the *YCJA*). These principles allow the courts to impose sanctions on youth which are intended to reduce the likelihood of recidivism. Thus, the main objective of these principles is to ensure that the sanctions are severe enough to “denounce unlawful conduct”, and at the same time “deter the young person

from committing offences” (Library of Parliament, 2011). According to case law, the sentencing principle of denunciation,

Mandates that a sentence should communicate society’s condemnation of that particular offender’s conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender’s conduct should be punished for encroaching on our society’s basic code of values as enshrined within our substantive criminal law (*R. v. M.(C.A.)*, 1996, SCR 500 at 81).

It should be noted that the principles of denunciation (which is largely linked to the concept of retribution) and deterrence (be it general or specific) do not have to involve incarceration for these principles to be satisfied. In some circumstances, for example, these conditions can be met whereby the publicity of these cases alone can provide for public humiliation (*R. v. Ewanchuk*, 2002; *R. v. Ambrose*, 2000; *R. v. Kneale*, 1999). The impact of public humiliation, however, is most likely to be effective in cases where identifying information about the youth has been revealed. These principles are subject to the application of one fundamental criterion as articulated in Section 3 of the *YCJA*: The nature of the sentence must be “in proportion to the seriousness of the offence”, and to the “degree of responsibility” of the youth offender for the offence (i.e., the degree of accountability).

From a legal standpoint, the political logics behind deterrence and denunciation appear to be consistent with one another, especially within the adult criminal jurisdiction. According to case law, these sentencing principles are meant to codify the objectives set forth in the *Criminal Code* with the goal of delivering “greater consistency and clarity” to sentencing (*R. v. Nasogaluak*, 2010, SCC 6 at 39). The combination of these two sentencing principles not only account for the imposition of certain sanctions on the offender in an attempt to curb harmful or unwanted conduct, but also considers the role of sentencing which “positively instills the basic

set of values shared by all Canadians as expressed by the Criminal Code” (*R. v. C.A.M.* 1996, SCR 500 at 81). Not surprisingly, it is the courts responsibility to harmoniously balance the law with the sentence in a way that recognizes the existing social values. Therefore, the imposition of a sentence must reflect any changes in these values (*R. v. Stone*, 1999, 134 C.C.C. (5d) 353 citing *R. v. C.A.M.*, 1996, *supra*).

Interestingly, there is some research to suggest that there may be a disjuncture between denunciation and deterrence as sentencing principles, because deterrence may be seen as an artifact of modern punishment which implies that offenders are both rational and opportunistic (Garland, 1996), while denunciation (and public shaming rituals) is considered pre-modern because it lends itself to notions of public humiliation for unwanted behaviour (Pratt, 2000; Simon, 1995). This modern/pre-modern division may be attributed to the ways in which the social framework of punishment in the modern Western world has shifted from welfarism towards a greater emphasis on order and discipline. In other words, these findings are “reflective of the shift in political rationalities from welfarism to neo-liberalism” (Pratt, 2000, p. 146), towards a political stance that has been created from two diverse but overlapping schools of thought (neo-conservatism and neo-liberalism) (O’Malley, 1999); or what Simon (1995) refers to as postmodern (willful) “nostalgia” that suggests most modern penal practices and policy induce the revisiting of images of certain long forgotten virtues of the past, but thrives on “improbability, falseness, or artificiality” (p. 30) as well as on a “misrecognition of the past it evokes” to resurrect the likelihood of a meaningful reform (p. 37). Thus, while concepts such as denunciation are rooted in pre-modern penal mentality, they are better defined as “gestures, to be consumed as nostalgia not only by the public, but also by politicians and correctional administrators” (Simon, 1995, p. 37). Deterrence, on the other hand, is derived

from the notion that “the benefits of crime could be counterbalanced by the threatened loss of a certain quantity of time” which “formed an enduring logic of economic rationality in punishment” (Simon, 1995, p. 37). Together, it may be argued that these principles “share an orientation toward a linear and progressive structure of time as manifested in terms of proportionality and recidivism” (Simon, 1995, p. 37).

According to O’Malley (1999), sentencing principles and policies have been “formed by regimes that amalgamate and combine rather contradictory governing rationalities. Unity between them is possible, as we have seen, because of certain shared values and assumption” (p. 188). The alliance of these two competing rationalities has the potential to explain how pre-modern and modern sentencing principles such as deterrence and denunciation come together in current day. It is asserted that,

On the one hand is the resurrection or revitalization of formerly discredited but venerable penalties and penal orientation (retribution, strict discipline, death penalties, and chain gangs). This is effected through the resurgence of neo-conservatism [...] This neo-conservative nostalgia matches punishment and penal discipline with support for a unified moral order under the governance of state paternalism. On the other hand is the addition to the penological repertory of quite radical and innovatory initiatives, which are largely associated with neo-liberalism [...] Meanwhile, in the center an amalgam of persisting welfare, disciplinary and regulatory sanctions either is left more or less intact, or represents a field where there is considerable overlap between the allied rationalities: as, for example, with the deployment of incarceration as a deterrent (O’Malley, 1999, p. 189).

Overall, these findings indicate that there is a degree of incoherence in policies and sentencing principles that strives to incorporate punishment, discipline and moral order under state governance (O’Malley, 1999). This suggests then that the employment of sentencing principles such as denunciation and deterrence appear to portray elements of the neo-conservative and

neo-liberal (New Right) evolution in the penal framework itself, because it brings together an amount of political unity and shared cultural awareness to the issue at hand.

Prior to the enactment of Bill C-10 (Part 4), the Supreme Court of Canada defined a “violent offence” as “an offence in which the young person causes, attempts to cause or threatens to cause bodily harm” (Library of Parliament, 2011, p. 135). The definition, however, did not account for situations where irresponsible behaviour (even if this behaviour did not result in any injury) posed a risk to others (Library of Parliament, 2011). The expansion of the term “violent offence” now includes offences in which the young offender jeopardizes the life or safety of others by constructing a significant probability that the behaviour will result in bodily harm (e.g. the joyriding/dangerous driving case that prompted the Nunn Commission investigation in Nova Scotia, see *R. v M.T.S., 2006*).

Previously under the *YCJA*, custodial sentences were permitted when a young person was found guilty of committing “an indictable offence for which an adult would be liable to imprisonment for a term of more than two years”, and when the youth had acquired a record indicating a pattern of guilty findings (Library of Parliament, 2011, p. 134). Preceding requirements for demonstrating a history of criminal involvement based on findings of guilt were insufficient given that not all offences were formally handled through the justice system (i.e. extrajudicial measures). Consequently, demonstrating a necessity to sentence the young offender to custody in order to hold them accountable was often unattainable. Bill C-10 (Part 4)’s amendment to the *Act* permits the courts to establish a pattern of criminal involvement in relation to the offender, either through prior guilty adjudications or through an analysis of extrajudicial sanctions (or both). Essentially, the court is now able to consider an offender’s full history in an attempt to propose a suitable sentence (see S.8 of the *YCJA*).

Another amendment to the *YCJA* ensures that adult sentences are contemplated for youth 14 years of age and older for those who commit serious violent offences (see S.11 and S.18 of the *YCJA*) (Library of Parliament, 2011). Previously under the *YCJA*, and when appropriate, a judge may have imposed an adult sentence on youth over the age of 14 if convicted “of an offence for which an adult would be liable to imprisonment for a term of more than two years” (Library of Parliament, 2011, p. 136). However, there was no requirement for the Crown to consider applying for an adult sentence (even in the most serious cases), and frequently such sentences were not sought out. According to Bill C-4: An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts, violent offences are defined as “murder, attempted murder, manslaughter, and aggravated sexual assault” (Casavant & Valiquet, 2011, p. 12).⁷⁹ This amendment operates under the presumption that convicting a violent youth offender will be accompanied by an adult sentence, but may be invalidated if the length of a youth sentence is proven to be sufficient to render the offender accountable. Adult sentences are also imposed when a young offender is found guilty of a third offence in a series of serious violations involving violence (i.e., presumptive offences).⁸⁰

⁷⁹ This definition remained constant throughout the enactment of Bill C-10 (Part 4).

⁸⁰ Presumptive offences and serious violent offences are articulated in the earlier version of the *Youth Criminal Justice Act*. Accordingly, presumptive offences were applicable to youth over the age of 14 and include: “first and second-degree murder, manslaughter, attempted murder, and aggravated sexual assault. In cases where a youth 14 years of age or older is found guilty of a presumptive offence, the imposition of an adult sentence may be determined unless an application for youth sentencing is successfully carried out”. A serious violent offence “is an offence where the young person causes or attempts to cause bodily harm. If a youth over the age of 14 was previously found guilty of two separate serious violent offences, then the third serious violent offence can become a presumptive offence”. Youth found guilty of a presumptive offence were eligible for an adult sentence. As of 2012, the *YCJA* was amended by the government to remove the “presumptive offence scheme” because it was found to be unconstitutional in a Supreme Court ruling (*R. v. D.B.*, 2008), but preserved “Crown applications for adult sentences for youth” (see the *Youth Criminal Justice Act* Summary and Background, 2012, for more information).

The requirement of the courts to remove the publication ban on the names (or other identifying information) of young offenders convicted of a violent offence is a further amendment to *Act* (see S.20 and S.24 of the *YCJA*) (Library of Parliament, 2011). According to Section 110(2)(a) of the *YCJA*, in instances “where the young person has received an adult sentence, the information on the identity of that young person is automatically published”. Similarly, if an

Application has been filed for a young person to be subject to an adult sentence for certain offences (murder attempted murder, manslaughter, aggravated sexual assault or a third serious violent offences) and the court downgrades that application and instead impose a young offender sentence, there is a presumption that information on the young offender’s identity will be published (*YCJA*, S. 75 and 110(2)(b)).

However, it is up the Crown to satisfy the court that publication of identifying information is necessary to uphold public safety.

Another provision of Bill C-10 (Part 4) requires police to retain records when informal measures are imposed in order to facilitate the identification of patterns of reoffending (see S.25 of the *YCJA*) (Library of Parliament, 2011). In the event that extrajudicial measures such as warnings, cautions, or referrals to respond to an alleged offence are imposed, this amendment requires police to keep records of these allowances and forward them to the Crown. The purpose of this change is to aid the retrieval of such documents by both the police and the courts in hopes of a more accurate prior history of offending.

The last amendment to the legislation ensures that all youth 18 years of age and younger serve their custodial sentence in a youth facility as opposed to an adult institution (see S.21 of the *YCJA*) (Library of Parliament, 2011). On the other hand, if a youth is 18 years or older at the time of sentencing, the court has the right to order a sentence of two years less a

day be served in a provincial correctional facility for adults. If a sentence is to be served for two years or more, the young person will be sent to a federal penitentiary for adults. Under the previous legislation of the *Act*, youth who reached the age of 18 could be transferred to an adult facility regardless of the type of sentence imposed upon them (either an adult or youth sentence), when their sentence had not been fully served at that juncture (Library of Parliament, 2011).

4.1.5 Implications of Bill C-10 (Part 4) in Relation to the *YCJA*

According to The Canadian Bar Association (2010), the *YCJA* is successful in constructing a suitable equilibrium between “toughening up” measures to address serious violent offenders, and achieving a more corrective approach by stressing the importance of extrajudicial measures for non-violent offenders (even in cases where extrajudicial measures have been previously imposed). On the whole, the literature on the *YCJA* is supportive of the notion that the overarching goals of the *Act* have largely been achieved in two ways: first, there are fewer cases brought before the courts and thus fewer youth in custody, and second, there is no associated increase in violent youth crime (Bala, Carrington, & Roberts, 2009; Winterdyk & Okita, 2007). These findings therefore question the logic behind the implementation of Bill C-10 (Part 4).

The *Youth Criminal Justice Act* itself was subject to a great deal of scrutiny after its enactment in 2003 (Bala, Carrington, & Roberts, 2009; Barnhorst, 2004; Cesaroni & Bala, 2008; Corrado, Gronsdahl, MacAlister, & Cohen, 2010). Bill C-10 (Part 4) expands the applicable sentencing principles to make them more punitive for violent and repeat offenders and alters the focus of the guiding principles under Section 3 of the *YCJA*. In essence, the amendments to the *YCJA* present very serious consequences for youth offenders. Not only will these changes result in greater numbers of incarcerated youth for longer periods of time, but

one can expect to see very little improvement on the long-term protection of society (Bala 2011; Bala, Carrington, & Roberts, 2009; Cesaroni & Bala, 2008).

Although it has been asserted that the implementation of Bill C-10 (Part 4) is a “significant step backward from the progress that came with the passage of the *YCJA*” (The Canadian Bar Association, 2010, p. 1), it is important to consider two ways in which these provisions may in fact enhance legislation on youth crime. First, the expansion of the definition of “serious violent offence” removes any alleged confusion and uncertainty, leaving less room for interpretation or presumption. Second, according to Bala (2011), prohibiting youth from serving their sentence in adult prisons can be seen as a welcomed addition given that there is little in terms of rehabilitative programming intended for youth in adult institutions (Bala, Carrington, & Roberts, 2009). Youth serving time in adult prisons may also be subjected to the possibility of mistreatment or abuse by other adult inmates. Moreover, the incarceration of persons under the age of 18 in adult prisons is contrary to the stipulations put forth in Article 37 of the *Convention on the Rights of the Child* (see the Unicef Fact Sheet (2012) and the United Nations Convention on the Rights of the Child, 1989).⁸¹ While both these amendments may be viewed as necessary portions of Bill C-10 (Part 4), it should be noted that neither of them actually reflect tough-on-crime measures. One could argue that any positive changes presented by Bill C-10 (Part 4) are not punitive in nature, and are instead merely supportive of the need for further clarity in the law as per the recommendations of the Nunn Commission Report (Nunn, 2006). Further, the Bill recognizes the notion that youth differ from their adult

⁸¹ Article 37 (Detention and punishment) of the *Convention on the Rights of the Child* states that “no one is allowed to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families, and should not be sentenced to death or life imprisonment without possibility of release”. The United States is one of the only countries that did not ratify this agreement.

counterparts, and therefore require separate age-appropriate custodial institutions when under the age of 18. This particular amendment, however, was not articulated in the recommendations suggested by the Nunn Commission Report (Nunn, 2006).

Many of the noteworthy objectives of Bill C-10 (Part 4) appear to be stirred by political ideology and interest that contradict previous research on youth crime and justice policies (Bala, 2011). There are three amendments put forth by Bill C-10 (Part 4) that undermine the guiding principles and provisions of the *YCJA*. These include the short-term versus long-term protection of the public, the addition of deterrence and denunciation, and concerns regarding the publication bans for youth (Bala, 2011). Furthermore, three supplemental changes pertaining directly and/or indirectly to the exercise of professional discretion within the criminal justice system is found in the provisions associated with police record keeping, Crown consideration of adult sentences, and judicial consideration of the publication ban removal (Bala, 2011).

The short-term versus long-term protection of the public presents a shift in the primary principle of the *Youth Criminal Justice Act*. Clause 3 of Bill C-10 (Part 4) amends paragraph 3(1)(a) of the *YCJA*, which now refers to “protecting the public” in short- and long-terms “by holding young persons accountable, promoting their rehabilitation and reintegrating and referring them to programs or agencies in the community to address the circumstances underlying their offending behaviour” (Casavant & Valiquet, 2011, p. 7). According to Bala (2011), advancing short-term methods tend to amplify the long-term risks to society as youth will inevitably return to the community. Research supports the need for the rehabilitation of youth offenders as opposed to long-term incarceration (McMurtry & Curling, 2008).

The inclusion of denunciation and deterrence as sentencing principles embodies a drastic departure from the objectives and goals of the *Youth Criminal Justice Act*. Although politically it may appear to be a fashionable proposition, this can increase the number and length of custodial sentences without enhancing public safety (Bala, 2011). The concept of deterrence contravenes the principle that, due to one's age and limited appreciation for such acts, weight should be placed on rehabilitation and reintegration of young persons into society as opposed to denunciation and deterrence (Bala, 2011; Cesaroni & Bala, 2008). Moreover, the principle of deterrence mainly affects only one group – youth court judges (Cesaroni & Bala, 2008). Incorporating deterrence in the sentencing principles suggests a need for judges to impose longer, harsher sentences. However in most cases youth are unable to anticipate the legal consequences of their actions and therefore deterrence is known to be ineffective on young persons (Bala, 2011; Foglia, 1997; Levitt, 1998; Mauer & Young, 1996; Nagin & Pogarsky, 2001; Schneider & Ervin, 1990; von Hirsch, Bottoms, Burney, & Wikstrom, 1999; Yahya, 2006).

Amending the *YCJA* to specify that “the court shall decide whether it is appropriate to make an order lifting the ban” on the publication of a youth's name if found for guilty of a violent offence raises two concerns (see Library of Parliament, 2011). The issue rests in the notion that the publication of identifying information is possible for a conviction of anything spanning between murder and common assault, and does not demand that this requirement be limited only to repeat or serious violent offenders. Ultimately, the decision to consider publication is left in the hands of the youth court judge, and is directly related to the expansion of publication power given the broad spectrum of the category. Secondly, the fundamental reason for the publication ban is to curtail the degree of stigma while optimizing the

probability for successful reintegration of youth into the community. Studies show that the identification of adolescent offenders in the media inexorably imposes a burden on their families and primarily leads to difficulties in rehabilitation (*R. v D.B.* (2008)). In addition, this provision breaches Article 16 of the *Convention on the Rights of the Child* (see the Unicef Fact Sheet (2012) and the United Nations Convention on the Rights of the Child (1989)).⁸²

The requirement specifying that police should now hold a record of any extrajudicial measures used with young persons implies a shift in the management of such documentation. Although police records of such measures were always kept, they must now be delivered as part of the Crown package. The amendment to S.39(1)(c) of the *YCJA* has been criticized for undermining the integrity and intent of the extrajudicial sanctions in the *Act*, while conveying messages suggestive of a deficiency in the way police services exercise judgment in keeping records of incidents that do not lead to a formal charges (Bala, 2011). Bill C-10 (Part 4) may in fact foster the assumption that police officers have employed these measures too frequently which consequently discourage police from resorting to extrajudicial sanctions (Bala, 2011).

The *Youth Criminal Justice Act* has also been subject to some disputes in relation to adult sentences. In 2006, for example, the Ontario Court of Appeal repealed sections of the *Act* that required some youth to establish that it was inappropriate for an adult sentence to be imposed for their crime, as it was a violation of Section 7 of the *Canadian Charter of Rights and Freedoms*.⁸³ The Court found that the principles outlined in the *YCJA* entail that it is the

⁸² Article 16 (Right to privacy) of the *Convention on the Rights of the Child* states that “children have a right to privacy and that the law should protect them from attacks against their way of life, their good name, their families and their homes”.

⁸³ Section 7 of the *Canadian Charter of Rights and Freedoms* states that citizens “have the right to life, liberty, and the security of the person, and may only be deprived thereof in accordance with the principles of fundamental justice”.

state's responsibility to establish the appropriateness of an adult sentence and not the duty to prove otherwise by the accused.

In the same year, the provincial Governments of both Ontario and Alberta appealed two cases under the premise that general deterrence should have been considered when handing down the sentences, and that harsher sentences should have been imposed (although contrary to the principles outlined in the *YCJA*). Recognizing that the sentencing principles that guide the *Act* for youth is a departure from the principles that govern adults, it was concluded by the Supreme Court that “general deterrence” was not to be used for youth in conflict with the law. In fact, the Supreme Court noted that the importance of rehabilitation and reintegration of youth into society took precedence when considering sentencing options (*R. v. B. W. P.; R. v. B. V. N.*, 2006). As such, the exclusion of general deterrence as a sentencing principle in the *YCJA* was deliberate. However given that the Conservative government has consistently criticized the *YCJA* for not being tough enough on youth crime, the newly enacted Bill C-10 (Part 4) amends this provision of deterrence for serious and repeat offenders to mirror those found in the adult criminal justice system. For example, by adding clause 172 into Section 38(2) of the *YCJA*, two objectives are enveloped in the sentencing principles. First, “to denounce unlawful conduct”, and second “to deter the young person from committing offences” (Library of Parliament, 2011). It should, however, be noted that the deterrence principles included in this legislation are more general than those found in the adult framework, “since the punishment may be used to deter the adult from committing a new offence and the public from committing this type of offence (specific deterrence vs. general deterrence)” (Library of Parliament, 2011). This is a radical departure from the sentencing principles established in the *YOA*, since deterrence had to be considered under that legislation (Library of Parliament, 2011).

Further, the consideration of adult sentences by the Crown in cases where a serious violent offence has occurred is a provision that also undermines the authority and integrity of the Crown Counsel. According to Bala (2011), this provision is problematic in that it cultivates notions of disregard and doubt in the Crown Counsel by questioning their ability to appropriately exercise their judgement in violent cases. Thus, this amendment may direct youth court judges to make inquiries of the Crown as to the specific reasons for their decision, which may impinge on constitutionally protected prosecutorial discretion (see *Krieger v Law Society of Alberta*, 2002). This provision suggests skepticism of the judiciary. Previously, both the Crown and the youth court justice would consider this option in appropriate cases pertaining to the most serious and violent offences (*YCJA* S.110).

4.1.6 Applying Adult Sentences to Young Persons

A great deal of dialogue on youth justice in Canada currently targets proportionality and the role it plays in sentencing (Bala, 2011; Bala & Anand, 2012; Roberts, 2004; Roberts & Bala, 2003). That is, any “sentence imposed on a youth must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence” (*YCJA*, S. 38(2)(c)). Section 718.1 of the *Criminal Code* identifies proportionality as a primary principle for sentencing adults; however the sentencing of juveniles under this principle brings about a different set of issues for the courts to take into account. Notwithstanding the difference between convictions at the adult and youth levels, the reformation of youth court sentencing through the enactment of Bill C-10 (Part 4) appears to correspond with one another’s guiding principles. Research in this area generally supports the notion that the primary principles governing adult and juvenile sentences may correspond to one another, however the imposition of adult level penalties on juvenile offenders is not favoured. This

approach, therefore, is not deemed to be effective (Roberts, 2004; Roberts & Bala, 2003; Webster & Doob, 2011).

Adult sentences for juvenile offenders are not newly enacted by the provisions of Bill C-10 (Part 4). Young offenders were subject to adult sentences under the *Young Offenders Act* via a transfer to the adult jurisdiction, and under the *Youth Criminal Justice Act* through an order for an adult sentence (based on judicial discretion) in youth court. In fact, the transfer of youths to adult court emerged as a possibility in Canada since the *Juvenile Delinquents Act* was enacted in 1908 (Library of Parliament, 2011).

There appears to be a gap in knowledge on justifications for sentencing youth as an adult, regardless of whether it follows transfer to adult court (*YOA*) or takes place in youth court (*YCJA*) (Roberts, 2004). In comparison, studies in America provide a list of factors that determine whether a youth case will be heard in criminal court, including the young person's age and the seriousness of their offence, to a juvenile's history of criminal involvement, and their likelihood of rehabilitation. These studies suggest that the variables are interconnected in that older youth (particularly males) have a greater probability of committing serious crimes, are more likely to have amassed a wide-ranging record of past criminal behaviours, and are seen as having a reduced or limited potential for rehabilitation (von Hirsch, 2000).

According to von Hirsch (2000), the principle grounds for sentencing a youth as an adult are typically based on one's seriousness of crime, prior criminal history, and amenability to treatment. However, these grounds do not nullify the justifications for enforcing such measures (von Hirsch, 2000). Utilizing the severity of crime and prior convictions as a basis for prescribing an adult sentence is said to better reflect the public's desire to penalize offenders instead of rehabilitating them. In fact, Duff (2002) suggests that preserving the

sentencing range available for youth is greatest for more serious crimes. This is largely attributed to the fact that, unlike adults, youth are only marginally capable of comprehending the real extent and ramifications of these acts (and subsequently have a diminished moral blameworthiness), even if they are able to appreciate the repercussions of minor forms of offending. Thus, the validation for sentencing youth as an adult in response to youth crime seems suspect.

As an alternative to imposing adult sentences on youth, research indicates a greater need for an order of custody and supervision or the order of intensive rehabilitative custody and supervision created by the *Youth Criminal Justice Act* (Doob & Cesaroni, 2004; Roberts & Bala, 2003). An order of custody and supervision refers to serving time in a young offender centre or community. It is also based on the availability of a residential facility, and is followed by an order of supervision in the community. As per Section 42(2) of the *YCJA*, “the period of community supervision must be one-half as long as the period of custody”, and the length of the sentence is dictated by the judge. On the other hand, an order of intensive rehabilitative custody is “the most serious youth sentencing option available under the *YCJA*” (S.42(7)) (Department of Justice, 2012). This sentencing option was introduced in 2003 for young persons affected by mental health issues who are guilty of the most serious violent offences. According to the Department of Justice Canada (2012b), “it is estimated that at least 20% to 25% of the roughly 500 most serious violent youth offenders each year may suffer from various mental health issues that must be addressed if they are to be rehabilitated and safely reintegrated into the community”.

4.2 The Crime Control Model: Juvenile Justice in Texas

Determining how Texas both oversees and responds to youth offenders⁸⁴ through its procedural mechanisms provides an illustration of the ways in which the state currently operates under laws that are consistent with a model of crime control. While both Canada and Texas have been subject to comparable (albeit not identical) processes and transformations of tough-on-crime measures, the legal systems within each jurisdiction differ. For example, Texas (and the United States more generally) and Canada have been largely influenced by the English Common Law, although traditionally Canada has been particularly influenced by the Civil Law system dominant in continental Europe. This suggests there is variation in the ways each jurisdiction views and shapes law, although there are also distinctions between social, economic, and political contexts. Nonetheless, much of the shifts in the youth crime legislation have occurred on similar grounds and for related reasons.

This section of the chapter attempts to highlight Texas' philosophy of justice as a counterpoint to the philosophy and youth justice model developed in Canada. The procedural mechanisms through which the tough-on-crime legislation is implemented are exemplified by laws that are consistent with a punitive crime control model. The following subsections do not consider the processes through which the current legislation in Texas has come to be. In other words, it does not examine the processes associated with the state's ability to exercise legitimate power, because it does not trace the genealogy of youth crime legislation through its various transitions. Instead, this section focuses on the point that it is currently at, relative to

⁸⁴ Young/youth offenders in the United States are often referred to as juvenile delinquents. *Delinquency* entails "an act committed by a youth that also would be a crime if committed by an adult. Delinquents may be adjudicated as youth within the juvenile justice system, or they may be waived to criminal court for processing as adults" (Walker, 2001).

the enacted tough-on-crime legislation that has been implemented for almost twenty years. Although there have been a number of changes to the tough-on-crime legislation during this time, the following analysis considers the existing legislation as illustrative of a crime control model embodying the tough-on-crime approach to youth justice, which in many ways falls on the extreme end of the spectrum.

4.2.1 The Development of a Separate Juvenile Justice System in the United States

According to Caputo and Vallée (2007), the development of a separate justice system for juveniles was propelled by “the American positivist movement [...] during the latter part of the nineteenth and early twentieth centuries”, with Illinois leading this faction (“Youth Justice in the United States”; see also Krisberg (2006) and Snyder (2002)). Those in favour of separate justice systems desired to safeguard young offenders from their adult counterparts, while adopting a philosophy that appeared to established the youth court as an assertive but sympathetic authoritarian when one’s family was unsuccessful at doing so. In 1899, Cook County, Illinois established the first American youth court, whose main goal was to rehabilitate rather than punish young offenders. Consistent with their pseudo-parental responsibility, juvenile courts shifted their emphasis towards the best interests of the youth by applying sympathetic, adaptive and informal (through diversion) measures to cases whereby the courts were required to follow limited procedural rules. As a result, youth cases were seen as civil (non-criminal) actions, with the paramount goal of ushering a young offender towards a life encompassing responsibility as a respectable citizen. The juvenile courts were in their authoritative right, however, to remove youth from their residents and order them to a juvenile reformatory as an integral component of rehabilitation. This movement towards a separate justice system in the United States which emphasized the need for rehabilitation is illustrative of similar processes that occurred in Canada.

There is evidence to suggest that juvenile justice policy in the United States has undergone a radical transformation over the last hundred years (Caputo & Vallée, 2007, “Youth Justice in the United States”; see also Bishop & Decker, 2006). Particularly since the 1960s, these authors assert juvenile justice policies have shifted in a number of ways that have both reorganized the system and disputed its founding philosophies (Caputo & Vallée, 2007, “Youth Justice in the United States”; Bishop & Decker, 2006). More precisely, during the 1960s and 1970s the United States Supreme Court was presented with a number of cases that drastically altered proceedings in the youth courts (especially in reference to the potential rehabilitation of youth) (Caputo & Vallée, 2007, “Youth Justice in the United States”). For example, the case of *Kent v. United States*, 383 U.S. 541 (1966),⁸⁵ established that the youth court judge had the power to waive the case to the adult jurisdiction for Kent to be tried as an adult without a hearing (see Pound, cited in Krisberg, 2006). While the waiver was opposed based on the grounds of seeking rehabilitation for Kent, the youth court jurisdiction did not address or dispute the youth’s removal from one court to the other.

Similarly, in 1967 the case of 15 year old Gerald Gault⁸⁶ resulted in a significant departure from the methods with which youth were processed by the courts (see Pound, cited in Krisberg, 2006). For example, neither the youth nor his guardians received notice of the charges laid before the hearing. In addition, the individual who launched the complaint about

⁸⁵ According to the *In re Gault* case, “at the age of sixteen the appellant, Morris Kent, was accused of committing several robberies and rapes. He was waived by the juvenile court and indicted on three counts of housebreaking, three counts of robbery, and two counts of rape. A jury returned a verdict of guilty on the housebreaking and robbery counts and not guilty by reason of insanity on the rape counts. The district court sentenced him to thirty to ninety years, with credit for the time spent in Saint Elizabeth’s Hospital pursuant to D.C.Code § 24-301(d)”.

⁸⁶ According to Gault’s case summary, “Gault was a 15 year-old accused of making an obscene telephone call to a neighbor, Mrs. Cook, on June 8, 1964. After Mrs. Cook filed a complaint, Gault and a friend, Ronald Lewis, were arrested and taken to the Children’s Detention Home. Gault was on probation when he was arrested, after being in the company of another boy who had stolen a wallet from a woman’s purse”.

Gault was not even present at the hearing. Despite these discrepancies, the court ordered Gault to an industrial school in the state of Arizona until he turned 21 years of age, but was given the opportunity to be discharged in advance by due process of law. Consequently, an application for a petition for release was carried out under the pretense that the youth had been denied due process of the law⁸⁷ and that his right to a lawful and fair trial had been breached (see Pound, cited in Krisberg, 2006). Gault's case was heard in the Supreme Court which ruled in favour of Gault in the *Application of Gault* (1967). With its decision in the *Application of Gault*, the U.S. Supreme Court expanded several of the rights associated with due process to youth involved in juvenile court proceedings. Krisberg (2006) asserts that "the conception of a benign Children's Court that always acted in the best interests of the child was replaced with new attention to the legal rights of minors" (p. 7). Essentially, the transformations that occurred throughout this phase initiated a movement to minimize the gap between the youth justice system and the inimical justice system governing adults (Caputo & Vallée, 2007).

Presently, there is no national youth justice system in the United States of America. The juvenile justice systems within each state significantly differ from one another, even though

⁸⁷ According to Section 1 of the Fourteenth Amendment, due process of law entails that any individual who engaged in a legal matter or proceeding has the right to certain securities that "afford equal protection of the law". The Bill of Rights in the U.S. Constitution determines and specifies many due process rights, and includes: The Fifth Amendment, which ensures that a) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, [...] nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law". The Sixth Amendment's right wherein "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence". The Seventh Amendment's "[...] right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law" (i.e., right to trial by jury in most civil (noncriminal) cases). The Eighth Amendment's right whereby "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (The U.S. Bill of Rights, 1789 (2013)).

federal policies, legislation, and the U.S. Constitution cogently generate universal characteristics (Caputo & Vallée, 2007; Snyder, 2002). The ways in which the youth courts function vary from one county to another and even from one municipality to the next within the same state. Controlled by state legislation, these detached systems differ from each other in terms of their scope, mission, and procedure (Snyder, 2002). Thus, each state's law governs the structure of their respective courts as well as the correctional institutions available within it. In addition, "these inherent variations provide many opportunities to test different approaches and new programs and to learn from others, but they make it difficult to describe succinctly the delivery of juvenile justice in the United States" (Snyder, 2002, p. 43). This differs considerably from the youth justice system in Canada, since all provinces are governed by the same legislation. The ways in which the courts in Canada operate, however, vary to some degree from one province to the next.

In practice, an ongoing tension between the social welfare model and the model of crime control in the United States has progressively surfaced over time. While these tensions have fluctuated and have varied significantly from jurisdiction to jurisdiction, the focus on the needs of the child as opposed to an emphasis on punishment, incapacitation and the protection of society from young offenders is widely disputed. In reaction to the augmentation in violent crime (stemming mainly from the 1980s and 1990s), a number of state-wide reformations in youth justice have taken place (Torbet & Szymanski, 1998). For example, this legal remodeling predominately shifts its focus on accountability, concern for public safety, and punishment while discarding long-established principles of rehabilitation and diversion in favour of a "get tough" approach to youth crime and retribution (Torbet & Szymanski, 1998). This is particularly the case for states such as Texas that deal with very serious offences. This

transition from the importance of focusing on rehabilitating the individual to punishing the youth for the offence is illustrated by a number of states (17) that restructured the purpose clause of their youth courts to highlight the safety of the public, demonstrate the sureness of penalties, and augment the responsibilities of the offender (Torbet & Szymanski, 1998). Intrinsic to this altered purpose is the public's underlying belief that the youth justice system, like that of Canada's, is too passive and forgiving of youth in conflict with the law, and that youth are essentially viewed as having the potential to be nearly as threatening to the public's general safety as their adult criminal counterparts.⁸⁸

Pursuing procedural changes in practice pose a challenge, not only due to the variations in the constitution of the youth justice system between the states, but also because the data acquired about the ways in which cases are processed and about imprisoned youth contrast from one state to the next. That is, there may be a lack of consistency in the methods used to collect such statistics (Abbott, 1926). These factors are in addition to the issue of limited national data. Although some states both accumulate and circulate copious degrees of information on an assortment of elements about the youth justice system, the data are not immediately obtainable in most states. While national data are gathered about the processing of youth court cases, there is no legal obligation to distribute data or make it publicly known. As a result, nationally acquired youth court statistics are adopted from courts that comprise approximately 67% of the total youth population (Stahl, Sickmund, Finnegan, Snyder, Poole, & Tierny, 1999). Moreover, unlike the youth court statistics found in Canada, there is minimally available countrywide data on the number of youth found guilty by offence, the number of youth imprisoned by offence, the length of each sentence, the amount of time served

⁸⁸ This discussion has to do with similarities in the way juvenile offenders are viewed within these jurisdictions.

in detention, or the time served on parole (Langan & Farrington, 1998). Yet, these figures are available for adults sentenced to prison and jail. Although most states have confidentiality provisions⁸⁹ relating to young offenders, specific information is relatively impossible to locate.

Some juvenile justice systems, however, were established well before the first official separate juvenile court in Illinois and go as far back as the mid-1800s (Texas Youth Commission, 2009). In Texas, the juvenile justice system developed on the basis of legislation that excused youth from certain criminal situations as a means of emphasizing the importance of rehabilitation (as opposed to punishment) (Texas Youth Commission, 2009). With this legislation came the formation of the Texas Youth Commission, whose purpose was essentially to act as a council to develop strategies to rehabilitate youth within the community, but always administered such treatments under the confines of the law (Texas Youth Commission, 2009). The council itself was subject to a number of different transitions between the 1960s and 1970s, and like the findings from Canada, the legal principles guiding the legislation underwent a variety of changes. Thus, while the earlier stages of the council stressed an institutionalized approach, it later acknowledged the importance of community-based treatment on account of the ensuing welfare model (Texas Youth Commission, 2009). However, with the issue of “late modernity”, such as the rising youth crime rates, the political and economic instabilities, and the reactionary crisis that plagued the 1980s and 1990s, the council shifted back towards an

⁸⁹ According to the National Criminal Justice Reference Service (NCJRS) (2012), “the legislature reaffirmed its belief that juvenile court records, in general, should be confidential” in 1995. However, in Texas, “they did provide for a limited exception to juvenile court record confidentiality to promote more effective communication among juvenile courts, law enforcement agencies, and schools to ensure rehabilitation of juvenile offenders as well as to lessen the potential for drug use, violence, and other forms of delinquency” (S.58, *Texas Family Code*). Another section of the legislation pertains to “disclosure to schools of juvenile court records involving serious acts of violence” (Chapter 552, S.411.135(a)(1) of the *Texas Government Code*). These provisions include “an open hearing, release of name, release of court records, fingerprinting, photographing, offender registration, statewide repository, and seal/expunge records prohibited”.

institutional correction approach as a primary means of addressing youth crime in Texas (Texas Youth Commission, 2009).⁹⁰ This transformation encompassed “zero-tolerance” policies which are still largely realized through the current tough-on-crime legislation (Texas Youth Commission, 2009). As a result, the number of commitments to the Texas Youth Commission increased during those years and continued to rise well into the 2000s (Texas Youth Commission, 2009).⁹¹ On the whole, these findings indicate that the United States (but more specifically Texas) has undergone a similar transformative experience to that of Canada, given that a number of legislative changes have resulted in laws that are consistent with a crime control model of youth justice.⁹² These models stress the governmental powers and abilities of minimizing the importance of individual freedoms and liberties while advocating public safety.

As a result of the promises made to the public, Texas made changes to their juvenile justice laws to reflect 1) modifications in sentencing structures, 2) alterations to (or the complete removal of) traditional confidentiality provisions, 3) changes regarding the rights of victims of juvenile crimes, 4) changes in the minimum and maximum ages of jurisdiction, and 5) adjustments to correctional programming (Snyder & Sickmund, 1999; Torbet & Szymanski,

⁹⁰ Similar to the findings from Canadian youth crime statistics, American research shows that serious violent youth crimes hit its peak between the years of 1989 and 1994 across the United States. According to Krisberg (2006), serious violent crime had increased by more than 30% in a period of four years. During this phase, both the American media and politicians alike produced fear in the public by creating a “moral panic” about youth crime and violence that ultimately resulted in the legislation of tougher responses to violent youth crime in most states (Krisberg, 2006, p. 11, see also Caputo & Vallée, 2007). Similar to the transformations and the philosophical shifts witnessed in Canada, the legislative responses to youth crime were subject to the same processes and challenges on account of public and political perceptions which alleged problems with the youth justice system.

⁹¹ These findings are similar to the Canadian statistics which indicate a significant increase in the number of youth incarcerated under the *YOA*.

⁹² Similar to the philosophical shifts witnessed in Canada youth justice laws, the legislative responses to youth crime were subject to the same processes and challenges on account of the public and political perceptions which alleged numerous problems with the youth justice system. Much like the ways in which the Canadian government depends on the public to legitimate their authority via elections, so too does the American political system.

1998).⁹³ Similarly, studies find that more than forty states introduced tougher legislation during 1992 and 1997 while simultaneously facilitating transfers of youth to adult courts (Torbet, Gable, Hurst, Montgomery, Szymanski, & Thomas, 1996). However, research reveals that the proportion of serious violent offences committed by youth on a national level decreased considerably after 1993, but prior to the enactment of any tough-on-crime legislation. In light of the tough-on-crime policies that were enacted in Texas, the following subsections discuss the current legislation and procedural mechanisms that have been implemented by virtue of the prevailing crime control model.

4.2.2 Minimum and Maximum Ages of Jurisdiction

The tough-on-crime legislation has resulted in a number of changes with regards to the minimum and maximum ages of jurisdiction within each state. Not all states in America have specified a minimum age for youth, although a limited number of youth under the age of 10 appear before the juvenile court for delinquency charges. Due to a reactionary crisis and public outcry in the 1990s, Texas lowered its minimum age of responsibility for a youth to 10 years of age. The maximum age of criminal responsibility as a juvenile in Texas is 16 years of age (up until a youth's 17th birthday), while states such as New York and North Carolina define the upper age of jurisdiction as 15 years of age. According to the Office of Juvenile Justice and Delinquency Prevention (2013), "the upper age of jurisdiction is the oldest age at which a juvenile court has jurisdiction over an individual for law violating behavior. State statutes define which youth are under the original jurisdiction of the juvenile court. These definitions are based primarily on age criteria". In most states, the youth court has authority over all youth

⁹³ This list is not arranged in a particular/chronological order.

under the age of 17 that are charged with a criminal law violation (Bartollas, 2003). In contrast, Canada's minimum age of jurisdiction is 12 years of age, and its maximum is 17 years of age.

Juvenile courts do not necessarily lose jurisdiction over young offenders once they are legally deemed adults. In some instances, protracted jurisdiction may be limited to specific offences or youth, such as violent offences, repeat offenders, and juveniles committed to institutions for treatment/rehabilitation (Champion, Merlo & Benekos, 2012, see also Fabelo, 1997). As such, the extended age of juvenile court jurisdiction in Texas is 19 years of age. Moreover, in Texas, the youth court may in fact order an adult sentence for specific adjudicated delinquents that surpass the "term of confinement well beyond the upper age of juvenile jurisdiction"⁹⁴ (National Criminal Justice Reference Service, 2012). Similarly, Canadian youth under the age of 18 facing an adult sentence are sentenced under the youth court's jurisdiction in order to benefit from the rehabilitative services offered in youth facilities.

4.2.3 Detentions and Informal Dispositions in the State of Texas

The onus of the initial decision to detain a youth temporarily in the state of Texas is placed on either the police officer or another court intake employee (Bishop, Frazier and Henretta, 1999). Lengthier detentions most frequently occur where there is immediate danger to the public, where there is risk of flight prior to any scheduled court hearings, when the youth has committed a serious violent offence (such as homicide, rape or armed robbery), or when the accused may be in physical danger of the public (Feld, 2003). These findings are similar to

⁹⁴ These sentences are included in the bundle of dispositional options known as blended sentencing (i.e., juvenile blended sentencing in Texas).

the procedures used in Canada to detain youth prior to trial and are reflective of the enacted tough-on-crime legislation.

Alongside these decisions, the prosecutor's office in Texas is typically responsible for deciding whether to dismiss a given case, handle it formally, or file a petition to formally request an adjudicatory hearing⁹⁵ or waiver hearing⁹⁶ (Lawrence & Hemmens, 2008; Sanborn, 2003). However, similar to the findings in Canada, research on the ways in which cases generally flow for delinquents across all states including Texas illustrates that a fairly large percentage of youth are funneled out of the system prior to being formally processed.⁹⁷ Filing a petition on behalf of a youth in Texas most frequently occurs in cases that involve youth who have committed a serious violent offence, have parents who cannot or have not exercised control over the youth, or who appear as repeat offenders. However, like Canada, there are a number of options available to the courts for those cases that do not go beyond the intake stage.⁹⁸

⁹⁵ An adjudicatory hearing occurs when the parties involved in the case cannot reach an agreement to settle. As a result of a filed petition, the court plans for an adjudication hearing (described as the "fact-finding hearing" or "jurisdictional hearing"). The reasoning behind an adjudication hearing is to allow the courts to establish whether the prosecutor has adequate ground or evidence (via testimony of witnesses, experts, caseworkers, or police) to prove the allegations in the petition.

⁹⁶ A waiver hearing occurs once a petition requesting the case be transferred to adult court is filed. A waiver hearing effectively determines whether the court should waive its jurisdiction over the young offender, ceding its authority to adult criminal court. During this hearing the court considers a wide range of criteria in making this decision.

⁹⁷ According to The State of Juvenile Probation Activity in Texas (Texas Juvenile Justice Department, 2013c), 98,805 juvenile arrests were made in 2011. Of these youth, "45,151 were warned and released, processed in justice and municipal courts, or diverted, and 53,654 were referred to juvenile probation departments." The statistical report suggests that "schools, probation departments, municipal courts and the state referred another 21,062 cases, for a total of 74,716 referrals to juvenile probation departments in the year". Approximately 79,130 dispositions were made in 2011 on account of the "action taken by the juvenile department, the juvenile prosecutor or the juvenile court". Of these dispositions, the probation departments were able to rid themselves of 31,331 cases by dismissing or withdrawing 4,208 of these, by handing out a sanction of supervisory caution in 15,724 cases, and by deferring prosecution in 11,399 of these cases (Texas Juvenile Justice Department, 2013c).

⁹⁸ These sanctions include informal probation or community supervision to address minor or first time offenders (i.e., shoplifters) where events do not involve crimes against persons, or diversion. According to Schwartz (1989), diversion programs emerged from the federal government's *Juvenile Justice and Delinquency Prevention Act* of

4.2.4 Adjudicatory Hearings

The adjudicatory process for delinquents in Texas is outlined by two distinct aspects. The first, according to Feld (2003) and Patenaude (2003) is the diversion of less serious offenders from being formally processed, which removes the majority of minor offenders from the court. This finding is similar to the ways in which the *YCJA* effectively diverts youth away from courts and custodial sentences (Bala, Carrington & Roberts, 2009). On the other hand, there is evidence to suggest that the more serious offenders are increasingly being transferred to adult criminal courts on account of the tough-on-crime measures (Torbet & Szymanski, 1998). The combination of these developments suggest that the perimeters of the youth justice system are blurry, and that youth who remain in the system are those that are most likely to become chronic offenders. Given Texas' bifurcated approach to juvenile justice, the youth justice system is able to concentrate on youth who have the potential for becoming repeat offenders, but who are still capable of benefiting from rehabilitation. However, these are not necessarily the youth whom are targeted by harsher legislative controls.

There is significant variation in the way hearings take place across the United States (Champion, Merlo & Benekos, 2012; Torbet & Szymanski, 1998). In Texas, much like in many other states, there is a strong emphasis of concern placed on the child. Thus, it would appear that many hearings are less formal than their adult court hearing counterparts (Champion, Merlo & Benekos, 2012; Texas Juvenile Justice Department, 2013b). However, on account of the tough-on-crime measures and the range of dispositions available, delinquency hearings in Texas can be interpreted as significantly more adversarial than in the past. Both these findings are similar to those reported by Caputo and Vallée (2007) in relation to the

1974.⁹⁸ While some scholars believe the effects of diversion to be satisfactory, others are critical of their goals (Patenaude, 2003; Schwartz, 1989).

“patterns observed in Canada” and “in other Western nations” (“Executive Summary”). These shifts in formality suggest that juvenile courts operate under a due process model, mirroring adult criminal court proceedings (Champion, Merlo & Benekos, 2012). As such, there exists the ongoing quandary about the court’s guiding philosophy and whether or not it follows the principles of rehabilitation or due process (Caputo and Vallée, 2007). However, like Canada, the juvenile justice system in Texas is one that branches off and can, as Lindsey (1914) and Weisheit and Alexander (1988) suggest, uphold the principles of due process in an adjudicatory hearing and rehabilitation in a dispositional hearing.

The logic behind the due process model in the youth courts stem from the notion that fairness should be exercised and that the youth’s constitutional rights should prevail in a court of law. Theoretically, the due process model provides support for rehabilitation as it is in direct contrast with the crime control model. The tough-on-crime legislation, however, eases and assists the transfers of youth to the adult jurisdiction, subsequently illustrating how the justice system has expanded the powers of the court by calling on a crime control model when necessary.

4.2.5 Dispositional Alternatives

Generally, juvenile court judges in Texas have a number of options when deciding on the appropriate type of punishment for youth who have been found guilty of delinquency (Champion, Merlo & Benekos, 2012). The National Advisory Committee on Criminal Justice Standards and Goals (1976) place these alternatives into four categories: a) nominal;⁹⁹ b)

⁹⁹ A nominal disposition is typically a judicial court outcome which involves a verbal reprimand or warning by the judge, but may or may not include control and supervision over adjudicated delinquents. Thus, this approach is predominately considered an apathetic or relatively lenient form of probation for cases involving relatively minor offences (Institute of Judicial Administration and the American Bar Association [IJA-ABA], 1979).

conditional;¹⁰⁰ c) suspended;¹⁰¹ and d) custodial dispositions (see Gardner, 2009 for additional information). While the first three types of dispositional alternatives are used to respond to relatively minor offences, Snyder and Sickmund (2006) suggest custodial dispositions involve short- or long-term incarceration and are seen as last resort by juvenile court judges (see Table 4.1 for a for a full breakdown of the correctional aspect of the youth justice system). This is particularly noteworthy given the court's widespread rehabilitation philosophy which encourages the use of other alternatives to incarceration first. These findings are mirrored in the Canadian justice system as well.

Ruddell and Thomas (2009) suggest there are a number of different correctional facilities available for incarcerated youth. In Texas, these environments encompass minimum-security facilities that are operated at the local level. In many instances, these facilities are modeled after college dormitories. In other cases, the state has implemented training schools that are relatively similar to adult correctional facilities. The statutes in Texas dictate the amount of time youth are to spend in confinement; however it should be noted that Texas

¹⁰⁰A conditional disposition, on the other hand, is comprised of a type of community supervision that carries with it various "conditions" or orders in order to maintain this favourable status (IJA-ABA, 1979; Snyder & Sickmund, 2006). Due to the fundamental function of probation in the juvenile justice system, conditional dispositions are the most common type of sentence imposed on youth by juvenile court judges (IJA-ABA, 1979; Snyder and Sickmund, 2006). Conditional dispositions may include a) financial sanctions (such as fines and restitution); b) community service (most often imposed in relatively minor offences, but also requires the presence of supervision by a probation officer); c) remedial services (such as personal or family counseling, treatment for substance abuse, and therapy for various educational deficiencies); and d) alternative residential placement (includes foster or group homes, shelters, halfway houses, psychiatric facilities, residential treatment centers, or boot camps) (IJA-ABA, 1979; Rogers & Mays, 1987; Snyder & Sickmund, 2006). A youth's compliance with the stipulations put forth by the conditional disposition is overseen by a probation officer. If it is reported that the youth has violated the terms of the conditional sentence, the imposition of probation may be lifted and substituted with a custodial sentence instead (IJA-ABA, 1979; Rogers & Mays, 1987; Snyder & Sickmund, 2006).

¹⁰¹ Suspended dispositions are similar to nominal dispositions in that they involve cautions or warnings in a court, but can be followed with more serious court action if unwanted behaviour continues. These types of dispositions are most often used for first time offenders and minor property offences, where judges may be agreeable to forego formal adjudication in cases where the youth shows signs of remorse, indicates a willingness to behave as a law abiding citizen, or ceases their delinquent behaviour (Snyder & Sickmund, 2006; IJA-ABA, 1979).

functions both under an indeterminate sentencing model and under determinate sentencing procedures.¹⁰² In the first occurrence, youth are sent to a correctional facility for a specific amount of time determined by a judge, where they are able to benefit from various rehabilitative services.¹⁰³ As a result, a juvenile's release date is set upon such time as a judge believes rehabilitation has been achieved. Thus, open-ended sentences can range from weeks to months to years, or when the juvenile court loses jurisdiction over the youth. In the latter instance where youth are sentenced determinately, a fixed amount of time is imposed upon an incarcerated youth. This procedure has little bearing on whether the youth has been rehabilitated and is demonstrative of a model of crime control that is more in line with adult offenders.

4.2.6 Transfer Laws and Mechanisms

The ability to waive jurisdiction to the adult criminal court by youth court judges by means of certification in Texas has been available since the origin of a separate youth court.¹⁰⁴ While the *YOA* included provisions for transferring youth to the adult jurisdiction, the *YCJA* currently governing youth justice prohibits it. In effect, this automatically places Texas further along the tough-on-crime continuum, since it allows youth into the adult criminal jurisdiction and thus adult facilities.

¹⁰² See Mears (2002) for more information on the shift in sentencing procedures in various states.

¹⁰³ Note that in Texas, a disposition (i.e., a sentence) can be indeterminate or determinate. While the majority of young offenders are committed to the Texas Juvenile Justice Department (TJJD) for indeterminate sentences where the TJJD dictates the amount of time to be spent in the facility, serious and violent offenders typically receive a determinate sentence. Of the 34,107 cases that were referred to youth court to be dealt with by a judge or prosecutor, 954 juveniles were committed to the Texas Youth Commission (now the TJJD); with 841 youth receiving an indeterminate sentence and 113 receiving a determinate sentence. See "The State of Juvenile Probation Activity in Texas" (Texas Juvenile Justice Department, 2013c).

¹⁰⁴ This statement applies to all American states; however most states do not refer to the process of waiving jurisdiction as "certification".

The general criteria used in Texas for assessing suitability for waiving youth to adult court most likely fit into three case types: a) serious offences; b) extensive youth records; or c) youth nearing the age limit of the court's jurisdiction (Zimring, 1998).¹⁰⁵ The first situation suggests that the disciplinary actions available to the youth court are not sufficient enough to hold the youth accountable for the type of crime committed (Zimring, 1998). Generally these types of cases involve serious felonies¹⁰⁶ and violent crimes, but most frequently homicide. The second instance, on the other hand, gravitates around youth with extensive arrest histories (i.e., "a pattern of guilty findings" similar to those outlined in Bill C-10 (Part 4)) and various disciplinary measures (such as probation or a range of miscellaneous dispositions) (Zimring, 1998). Extensive arrest histories suggest youth are no longer capable of profiting from the merits of the dispositional alternatives or rehabilitative programs. In the third occasion, the youth is nearing the upper age of jurisdiction of the youth court (Zimring, 1998). As a result, these cases tend to be waived since the youth court's jurisdiction over the juvenile cannot be sustained for an adequate amount of time, or because of the youth's age, the youth is more eligible for sentencing under the adult jurisdiction (Zimring, 1998).

According to Torbet and Szymanski (1998), all states are allotted the necessary means for treating youth as adults, provided that certain criteria or conditions are met. The criteria used in Texas to determine how and when cases are transferred to adult court are governed by

¹⁰⁵ Of the 34,107 cases referred to youth court in 2011, 175 youth were certified and transferred to adult court (Texas Juvenile Justice Department, 2013c). Overall, only two percent of youth who received a sentence were certified as adults or committed to the Texas Youth Commission (Texas Juvenile Justice Department, 2013c). Thus, it is a fairly infrequent sentencing practice.

¹⁰⁶ A felony is defined as a serious crime and is roughly equated to an indictable offence in Canada. A misdemeanour, on the other hand, is a minor offence and roughly corresponds with a summary conviction in Canada.

state law.¹⁰⁷ The state law in Texas only allows for judicial (discretionary) waivers/certification to transfer youth to an adult court, although there are other possibilities and methods available in other states.¹⁰⁸ As such, the decision to transfer a youth to an adult court in Texas rests on the sole discretion of the juvenile youth court judge, but typically after a full investigation has taken place. Over the last 20 years, Texas, like all other states, has facilitated the transfer of juveniles to adult court despite the fact that other transfer mechanisms are not permitted (Torbet & Szymanski, 1998). Generally speaking, Texas has amended their state law by including offences that allow or stipulate transfer to criminal court and lowering the age at which certain youth could be tried in criminal court.

Griffin, Torbet and Szymanski (1998), Champion, Merlo and Benekos (2012) and Torbet and Szymanski (1998) assert that judicial waiver proceedings have a number of diverse formats. In Texas, discretionary waivers are permitted in order to allow the juvenile court judge the power and discretion to settle on whether a matter will be tried in youth court or adult criminal court. While age and offence criteria are common components of judicial waiver provisions, other factors appear to come into play as well. For example, Texas' statutes limit judicial waivers to youth who are seen as incapable of benefitting from treatment, but the precise factors that establish whether or not a youth is amenable varies. Most frequently, these factors normally take into account the youth's offending history as well as previous dispositions. Cases that fall under discretionary waivers in Texas require the court to consider whether public safety is dependent upon it, whether the youth is able to take advantage of

¹⁰⁷ Please refer to Chapter 8 for more information on state law.

¹⁰⁸ Torbet and Szymanski (1998) suggest that it is possible to use one or more of the following methods to transfer a youth into an adult court, depending on the laws of the state: a) judicial (discretionary) waiver; b) prosecutorial direct file; and c) statutory exclusion.

additional services (including rehabilitation if the youth is willing) through the youth justice system, and whether turning over jurisdictions serves in the interest of the youth (Griffin, Torbet and Szymanski, 1998; Champion, Merlo & Benekos, 2012). Once a youth has been transferred to the adult criminal court, the “once an adult, always an adult” provision applies (Griffin, Torbet, & Szymanski, 1998; Torbet & Szymanski, 1998). As part of the tough-on-crime legislation enacted in 1995/1996, Texas created this special transfer category to provide the state with a statute that supports the notion that once a youth has been transferred to the adult criminal court, all ensuing offences require criminal prosecution (Juvenile Justice, Geography, Policy, Practice and Statistics, 2012).¹⁰⁹ According to Johnson (2010), this provision was enacted in order to accelerate the procedural methods used by the courts to transfer such cases, as well as “increase judicial economy” (p. 15).

The transfer of youth to the adult jurisdiction characterizes an important field where human rights principles apply to youth justice. Specifically, Article 40 (3) of the *Convention on the Rights of the Child* states that “states shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.” Article 40 (3)(a) & (b) and 40 (4) also declare that the youth justice system ought to create a minimum age below which youth are to be presumed not to have the mental competence to contravene the penal law (minimum jurisdictional age), that, where possible, the system itself should develop a means for dealing with youth informally, and that the scope of dispositional options and/or alternatives need to be

¹⁰⁹ This only applies to cases that do not require a detailed investigation to take place in discretionary waivers scenarios. There is exception to cases where the youth was acquitted or had the conviction reversed on a final appeal.

established in order to ensure that youth are dealt with in a manner that both considers their situation and holds them accountable.

Rule 2(3) of the Minimum Standard Rules for the Administration of Juvenile Justice (United Nations, 1985) equally articulates the need for the states to construct a separate youth justice system to pass judgement over youth criminal offences, while taking into account the basic needs of youth in conflict with the law. These provisions implicitly specify the need for a different youth justice system than the one available for adults (Amnesty International, 1998; Hodgkin & Newell, 1998). In reference to these latter provisions, it appears that the circumstances under which Texas both processes and incarcerates youth as adults contradicts the principles outlined in the United Nations Convention. However, it should also be noted that the United States was one of the only countries that did not ratify this document, while Canada did. This finding might help explain why Canadian youth who receive an imposition of an adult sentence under the age of 18 are not permitted to serve their sentences in an adult facility (YCJA S. 76(2)).

The transfer of youth to the adult jurisdiction statistically represents approximately 1-2% of cases presented before the courts in Texas. Although these figures are indicative of the relative infrequency in which cases are certified, Johnson (2010) suggests that the hearings associated with these referrals have a significant bearing on the potential outcome for the youth. Transfers to the adult criminal courts entail a loss in “the juvenile protection and safeguards which have been mandated in Texas law since the *Gault* decision”, whereby the

legislation governing the youth's well-being is substituted for laws and provisions designed for their adult counterparts (Johnson, 2010, p. 16).¹¹⁰

4.2.7 Sentence Structure and Blended Sentences

Prior to any legislative amendments that occurred in the last couple of decades, the adopted welfare approach in Texas required the courts to give consideration to the well-being and needs of the youth when imposing a sentence. During this time, youth court judges possessed a great deal of power and discretion in dispositional decision-making, and frequently considered the role of rehabilitation in sanctioning (Champion, Merlo & Benekos, 2012). Preceding the implementation of determinate sentencing provisions, indeterminate disciplinary measures ensured that the youth courts could supervise youth until such time as they reached the maximum age of jurisdiction. However, with the ongoing statewide legislative amendments in Texas, the juvenile justice system has become more emblematic of a model that upholds individual responsibility and punishment as opposed to adhering to principles of rehabilitation (Muncie & Goldson 2006; Snyder, 2002). This transition has not only resulted in a shift in sentencing principles by placing emphasis on deterrence and retribution instead, but also shifts its focus from the offender to offence itself (Torbet & Szymanski, 1998). According to Torbet and Szymanski (1998), the use of “mandatory minimum sentences”, “extended jurisdictions”, and “blended sentences” are techniques used for imposing sanctions on youth for dispositions that are considered “offence-based”. In contrast, there are no mandatory minimum sentences for youth in Canada.

The use and application of blended sentences vary by state, but intend to unite both youth and adult criminal sanctions (Champion, Merlo & Benekos, 2012; Torbet & Szymanski,

¹¹⁰ This statement is illustrative of the crime control model used in Texas.

1998).¹¹¹ According to Griffin (2011), “juvenile blended sentencing schemes empower juvenile courts to impose adult criminal sanctions on certain categories of serious juvenile offenders” (p. 1). In Texas, the juvenile or the adult court may impose a sentence to be served in the youth corrections system but may be subsequently followed by a sentence in an adult institution.¹¹²

Advocates of blended sentences tend to view them as a less stringent option than transferring youth directly to criminal court. According to Dawson (2004), juvenile blended sentences that give juveniles a suspended criminal sentence only when they violate the terms of their disposition give youth the prospect of avoiding serious criminal sanctions. Those against blended approaches, however, argue that these types of sentences not only represent a degree

¹¹¹ In Texas, legislatures call their blended sentence laws “determinate sentencing”. In these instances, the youth’s sentence is imposed for a given number of years as opposed to ordering a youth to supervision by the court for an “indeterminate” amount of time, up until the point where the youth reaches the maximum limit of the court’s jurisdiction. “Determinate sentencing” refers to a sentence of imprisonment in which a convicted offender is given a fixed term of punishment for a criminal offence. “Indeterminate sentencing”, on the other hand, is a prison term imposed after conviction of a crime but does not specifically state how long the offender will be incarcerated or when they are entitled to be released. The purpose of “indeterminate sentencing” is to prevent the offender from further committing violent offences. It is a sentence which places the decision to release the offender outside the guidance of the courts and under supervision of another authority such as a parole board. A distinguishing feature of the “indeterminate sentence” is that the offender has no guarantee of ever being released from custody, and is therefore subject to what is called a “life sentence”. (see Cole & Smith, 2007). In Texas, dispositions can be either indeterminate or determinate, pending on the offence. In 2007, Texas law was amended to ensure that sentenced offenders be discharged from Texas Juvenile Justice Department supervision by their 19th birthday. However, youth who have not completed their sentence prior to their 19th birthday or have not been transferred to the Texas Department of Criminal Justice by their 19th birthday are transferred to adult parole supervision in order to complete the remainder of their sentence (Texas Juvenile Justice Department, 2013b). Most sentences in Canada that includes incarceration for young offenders are for a fixed term of punishment and do not require that the young person remain in custody for the entire length of the sentence. Rather, they may be granted a discretionary release at various eligibility dates during their sentence. If they are still in custody at two-thirds of their sentence, they are typically released to serve the final one-third under supervision in the community.

¹¹² Blended sentencing provisions in Texas allow a serious offender to receive a sentence “up to 40 years for a capital felony, first degree felony, or aggravated controlled substance felony”, a portion of which is spent in confinement at the Texas Juvenile Justice Department followed by a transfer to adult parole or prison. Blended sentences for youth who commit a second degree felony may receive “a sentence up to 20 years, and up to 10 years for a third degree felony”. Commitments are initially made to the TJJD, however if the sentence is incomplete and the youth’s behaviour suggests that the wellbeing of the community necessitates it, the Texas Youth Commission may recommend that the youth be transferred to the Texas Department of Criminal Justice at any time until the youths 20th birthday (see The Texas Juvenile Justice Department (2013b) “Overview of Juvenile Justice System.”).

of harmony between the adult and youth courts, but also amalgamate the way both courts are procedurally carried out. On this note, Feld (1997) suggests there is no real need for a separate youth court if the systems resemble too closely in their sentences and procedures.¹¹³

To help understand how Texas may be used as an illustration of a more severe crime control model, the following table summarizes some of the major similarities and differences between the Canadian and Texan juvenile justice systems. Table 4.1 offers a more comprehensive understanding of where Canada sits on this tough-on-crime continuum, but also provides a frame of reference for a more complete analysis of the tough-on-crime legislation witnessed in the case law in Chapter 8. These findings demonstrate the variations in sentencing practices associated with (or in contradiction to) the tough-on-crime legislation that can be used to help inform Canadians about the development of youth criminal justice policies.

¹¹³ It is difficult to make any veritable claims with regards to how many juveniles are affected by blended sentences given that there are no national data, albeit there are some records at the state level which suggests that blended sentencing may have the ability to produce sentences that are longer than anticipated. The findings in accordance with the Texas Youth Commission purport that the changes to Texas' legislation had an effect on sentencing practices which resulted in an increase in the number of youth commitments in adult state prisons. However, this does not suggest that all youth who are certified as adults necessarily serve time in adult prisons. Blended sentences merely enable youth to commence their sentence in a youth facility and later serve the remainder of their sentence in an adult correctional facility.

Table 4.1: Illustrative Summary of Youth Justice Systems and Mechanisms in Canada and Texas

Characteristic	Canada	Texas
Purpose of system outlined in the governing legislation	<p>The Declaration of Principle outlined in the <i>YCJA</i> states that the protection of the public by the youth criminal justice system involves:</p> <ul style="list-style-type: none"> • Holding youth accountable for their actions with responses proportionate to the seriousness of the offence and degree of responsibility. • Promoting the rehabilitation and reintegration. • Supporting crime prevention with referrals to community-based programs and agencies that address the root causes of the criminal behaviour. 	<p>The emphasis in the Legislative Guide is on “community protection, offender accountability, crime reduction through deterrence, or punishment”.</p>
Minimum and maximum age of jurisdiction	<ul style="list-style-type: none"> • Minimum: 12 years of age • Maximum: 17 years of age 	<ul style="list-style-type: none"> • Minimum: 10 years of age • Maximum: 16 years of age
Transfer laws & mechanisms	<p><i>YCJA</i> does not allow for youth to be transferred to the adult court jurisdiction.</p>	<ul style="list-style-type: none"> • Discretionary (traditional/judicial) waivers • “Once and adult, always an adult” • Juvenile blended (determinate) sentencing
Pre-trial detention	<ul style="list-style-type: none"> • Allowed if youth poses a risk to themselves or to the public, is likely to reoffend if released, is likely to fail to appear in court, has 	<ul style="list-style-type: none"> • Detained on the same grounds as youth in Canada. • Can be held in an adult facility only if separated by sight and sound, although this is not always the case.

	involvement with the justice system or faces other charges.	• If a waiver proceeding is granted, separation by sound and sight is not required.
	• Must be detained in separate facilities from adults.	
Adjudication process	<ul style="list-style-type: none"> • No preliminary inquiry. • No right to trial by jury except in rare situations where youth is facing the possibility of an adult sentence for more than 5 years. 	All adjudication hearings are held before a jury unless the youth waives their right to a jury, but in cases regarding determinate sentencing of violent or habitual offenders, youth have a right to a grand jury.
How and when adult sentences are applied	Based on judicial discretion, even though Crown can apply for adult sentence for youth over the age of 14 for presumptive offences.	<ul style="list-style-type: none"> • Based on prosecutorial discretion. • In cases where a discretionary waiver is used, the prosecutor asks the court to waive its jurisdiction over the youth. Certification of youth as adults is available for any felony and non-violent crimes for sentences up to 99 years for youth 14 years of age or older. • Determinate sentencing is available for the most serious and violent offenders, and is determined by a juvenile judge. Includes sentences up to 40 years.
Placement of youth sentenced as an adult	<ul style="list-style-type: none"> • If the youth is under the age of 18 at the time of the sentence, the youth must serve their sentence in a youth custody facility. • If the youth is over the age of 18 at the time of the sentence, “the youth may serve their sentence in a provincial correctional facility for adults or, if the sentence is 2 years or more, in a federal penitentiary for adults”. 	<ul style="list-style-type: none"> • If certified and transferred to the adult jurisdiction, the youth is placed in a secure adult facility. • Determinate sentences start in the TJJD with a possible transfer to the adult prison after 19 years of age if youth is not rehabilitated.

4.2.8 The Effects of Getting Tough-on-Crime Almost Twenty Years Later

Although budgetary cuts in 2009 have forced Texas legislators to re-evaluate major structural components of the juvenile justice system, changes towards a more community-based rehabilitative model are still in the works. While conservative members in Texas have indicated that tougher sentencing practices are both costly and ineffective at curbing youth crime, research indicates that a substantial number of youth who commit serious violent offences as well as other types of crimes are still transferred to the adult jurisdiction each year in Texas. The process, whereby a youth court judge waives jurisdiction, entails that eligible youth are subject to receiving almost the whole scope of disciplinary penalties set out for adult offenders under the *Penal Code*.¹¹⁴ As such, Texas housed 156 youth under the age of 18 in adult facilities in 2009 – the 6th highest state in America to sentence youth to adult jails and prisons after Florida, Connecticut, North Carolina, New York, and Arizona (Arya, 2011).¹¹⁵ Research suggests that youth in contact with the adult justice system are deprived of rehabilitative or instructional services that incorporate educative elements needed for successful development, given that the adult justice system is far more punitive and far less inclined to treat amenable youth (Deitch, 2009a, 2009b).

Overall, the effectiveness of tough-on-crime laws and policies enacted in Texas and the United States more generally remains somewhat bewildering. Tonry and Doob (2004)

¹¹⁴ There are two exceptions for certified youth: First, youth “cannot receive the death penalty”, as outlined in the United States Supreme Court decision in *Roper v. Simmons* (2005); and second, “they are no longer eligible for a life without parole sentence for a capital offence” (See *Texas Penal Code*, Chapter 12: Punishments, S.12.31(a)(1) for more information). Youth who are ordered to a life sentence are “eligible for parole consideration after serving 40 years of their sentence” (Texas Criminal Justice Coalition, 2012). At that juncture there is no requirement stipulating their release, but they are entitled to a case review by the Parole Board. Thus, youth “tried as adults can receive sentences ranging from probation to up to 99 years or life, depending on the felony” (*Texas Penal Code*, Chapter 12: Punishments, S.12.31(a)(1).

¹¹⁵ There were no youth under the age of 18 in adult prisons in 2009 in Maine, New Hampshire, North Dakota, Kentucky, West Virginia, California and Idaho.

suggest that unnecessarily clamping down on youth crime has led to divergent paths. In some cases these policies have excelled in thrusting revolutionary improvements by constructing ground-breaking measures to address and respond to youth whom have had contact with the justice system. In other instances, legislation is fashioned to support more punitive and prohibitive practices, especially with regards to transferring youth to the adult jurisdiction. As reported by the Task Force on Community Preventive Services (2007), the effectiveness of policies and legislation that aid the transfer of youth to the adult jurisdiction has a minimal deterrent effect on either preventing or reducing violence. In fact, studies show that transfers to adult courts increase future violence rates and is an inimical technique for deterring any ensuing violence (see the Task Force on Community Preventive Services, 2007). On a similar note, Snyder (2002) explains that disconnections between the adult and youth court jurisdictions create complexities for legislators and professionals in the area of youth justice, because there is confusion around the model to be followed (i.e., a model that supports the welfare of the youth or a model such as the youth justice system that favours punishment and retribution). Subsequently, 64% of America (or thirty-two states) has developed legislation that not only takes into account prevention, diversion and treatment, but also emphasizes the role of punishment as part of their purpose (Snyder, 2002).

4.3 An Illustration of Similar Processes

The tough-on-crime legislation in Canada and Texas is demonstrative of a number of universal trends that illustrate the same processes underlying its enactment. These findings are best explained by Caputo & Vallée (2007) on the similarities amongst most Western nations. Both Canada and Texas have observed a notable spike in the number of youth charged for crimes in the late 1980s and early 1990s, although this finding has been noted in other

jurisdictions as well (Caputo & Vallée, 2007; Prior, 2005; Tonry & Doob, 2004). This increase consequently compelled the public to demand that greater emphasis be placed on controlling crime and establishing harsher sanctions. Accordingly, these jurisdictions have either initiated and launched new youth justice legislation or have presented amendments to current youth justice laws (Caputo & Vallée, 2007). Preoccupation with the public's attitude towards and understanding of the nature and extent of youth crime is also prevalent in other areas of authority. Recent comparative studies on youth crime reveal that most jurisdictions have in fact experienced an unjustified increase in their perception of the rates of crime as well as the types of youth crime (such as violent crime) (Caputo & Vallée, 2007). That is, it is believed that youth crime is more prevalent than is the case. In both Canada and Texas, this is a phenomenon which appears to be unfounded by statistical evidence, although these jurisdictions (and U.S.A. more generally) have been equally impacted by tough-on-crime legislation (see Caputo & Vallée, 2007).

According to Caputo & Vallée (2007), a growing concern for children's rights is illustrative of the profound consequences on the processes in which judgements are made within these justice systems. The emergence of separate youth justice systems highlights the connections that exist within welfarism and the crime control model that most typically guides and oversees youth justice policy not only in Canada and Texas, but amongst most Western nations (Caputo & Vallée, 2007; Prior, 2005; Tonry & Doob, 2004). Prominent shifts in the social/cultural, political, or economic environments in Canada and Texas are subsequently interrelated with these oppositional approaches to youth justice. Therefore, the significance of youth justice between both archetypes is necessarily dictated by various structural factors (Caputo & Vallée, 2007; Garland, 2001; McMurtry & Roy, 2008).

As noted earlier, both Canada and Texas are indicative of a progressive movement “towards a more adversarial, criminal court approach”, and away from those that traditionally encompass practices in favour of child welfare (Caputo & Vallée, 2007, “Executive Summary”). Studies find that the push for more punitive approaches stems from an overall consensus in response to the ongoing issues surrounding youth violence (Caputo & Vallée, 2007; Garland, 2001; McMurtry & Roy, 2008; Prior, 2005; Tonry & Doob, 2004). Consequently, Canada has witnessed the emergence of “longer sentences and presumptive offences for serious and repeat offenders” in light of the *YCJA* legislation (Caputo & Vallée, 2007, “Executive Summary”). Yet, much research on sentencing practices in the United States and Texas recognizes that the implementation of harsher sentences (such as deterrence) has failed to produce and achieve the sorts of positive results that were originally anticipated (Caputo & Vallée, 2007; McMurtry & Roy, 2008; Prior, 2005; Tonry & Doob, 2004). Consequently, there is some evidence to suggest that the United States (including Texas) is currently in support of implementing more extensive strategies to address youth crime which incorporates “community-based treatment, rehabilitation, and reintegration” as opposed to systematically addressing these issues with tough-on-crime measures (Caputo & Vallée, 2007, “Executive Summary”; see also Bishop & Decker, 2006; Snyder, 2002). It can be said that this paradigmatic shift in dealing with youth crime is partially attributed to the fact that Texas been governed by tougher sentencing practices for a longer period of time, and is therefore better positioned to comment on the successes and failures of these tactics. Overall, however, these findings are linked to the allegiance of the neo-liberal and neo-conservative rationalities that have attacked penal-welfarism in unison amongst almost all Western countries.

The “politicization” of youth justice in Canada and the United States (but more specifically Texas) is illustrative of one of the most significant developments over the last few decades (Caputo & Vallée, 2007; Tonry & Doob, 2004). This “politicization” is a by-product of “public concerns over perceived increases in youth crime and youth violence and to sensationalized media accounts of tragic but isolated incidents” (Caputo & Vallée, 2007, “Executive Summary”; see also Garland, 2001). Although both jurisdictions report a relative infrequency of crimes that are serious or violent, Caputo and Vallée (2007) suggest that events such as various school shootings¹¹⁶ are illustrative of the ways in which remote occurrences are capable of influencing tough-on-crime measures to enhance legislation against youth crime. In relation to the resurgence of fear of the perceived increase in youth crime, it is the interaction between the public, the press, the so-called failed legislation, and the politicians that simultaneously produce a demand for tougher sentencing practices. The history of the ideas and cycle of youth justice suggest that the perception of an increase in juvenile crime has little basis. Nonetheless, perception disguised as knowledge calls for stricter legislation whether youth crime genuinely increases or not.

Despite the ways in which youth are defined by age within Canada and Texas and the transfer mechanisms used to waive youth to the adult jurisdiction, it is evident that both areas of authority have increasingly experienced political involvement in the debate about youth offending in order to advance tough-on-crime agendas. Youth crime in these jurisdictions has

¹¹⁶ Texas has the second highest rate of school shootings across all of the United States, next to California. Since 1992, there have been 29 school shootings, resulting in 17 deaths. Seventy-six percent of all victims involved in these shootings fall between the ages of 10 and 19. Similarly, 70% of the shooters are from the same age group (StopTheShootings.org, 2014). Examples of school shootings in Canada are Centennial Secondary School Shooting (15 victims), 1975, which led to tougher guns laws in Canada – prior to this incident, anyone could walk into a store and purchase a firearm; W. R. Myers High School Shooting, 1999 (1 victim); C.W. Jeffries Collegiate Institute Shooting, 2007 (1 victim).

created a lasting impression that conveys the ongoing need to address adolescent criminality due to perceptions on its nature and prevalence. Thus, employing tough-on-crime legislation is intended to be a preventative measure from fear of further decline in values and behaviour, which falls in line with the neo-conservative perspective. This is reported by literature from Western nations which indicate that a “get tough” stance on out-of-control youth is simply a political allegory for the discomforts associated with such hot button issues (Bishop & Decker, 2006; Feeley & Simon, 1992; Garland, 2001; Krisberg, 2006; O’Malley, 1999). Similarly, the United States Surgeon General (2001) acknowledged that tough-on-crime legislation serves political interests as opposed to the best interests of young people or community health.

In a sense, the commonalities amongst both the American and Canadian jurisdictions suggest that, symbolically, juvenile offending holds a similar meaning. In both national contexts, there is a strong emphasis on the negative aspects of “norm violating behaviours” that contradict the values upheld by society (Tanner, 2010, p. 4). In response to the problematic behaviours exhibited by youth that go against the ascribed grain, tough-on-crime legislation embodies a political response to this issue by devising policies that publicly demonstrate that something is being done to correct the growing quandary. This is witnessed not only in Texas, but also in Canada where the tendency to focus on disciplinary measures through legislation is rooted in crime control policies that originated in the United States (Muncie & Goldson, 2006). Further, it has been asserted that the ways in which juvenile offending is viewed in Canada (and both the reactions and responses to these behaviours) “are heightened because of Canada’s proximity to the United States. To some extent, and largely through the cross-border influence of American media outlets, we have imported American law-and-order fears into Canada” (Tanner, 2010, p. 270). These findings help justify the inclusion of Texas in this

dissertation as an illustration of how both jurisdictions have undergone similar youth justice transformations.

Although the ways in which each jurisdiction oversees and responds to youth crime varies, research in this area reveals that all tough-on-crime policies assert a greater need for public safety while simultaneously advocating for reductions in government spending for health, education, and social services (e.g., the Canadian Conservative government cut funding from youth rehabilitation programs by 20% in April 2013). For this reason, tough-on-crime strategies do not benefit at-risk youth or serious repeat offenders in any jurisdiction, especially given that studies urge a need for better preventative and rehabilitative measures. It is imperative to note that most jurisdictions that have adopted tough-on-crime legislation stem from fairly conservative governments that are far more concerned with strengthening or enacting harsh sanctions for youth as opposed to fostering adequate social and rehabilitative programs. Thus, it comes as no surprise that jurisdictions such as Texas that are far stauncher than Canada are experiencing or have previously experienced comparable issues as a result of harsher legislation.

Overall, the findings presented in this chapter are indicative of the ways in which tough-on-crime legislation is a result of similar transformative processes in relation to youth justice. Shifts in the legislation and guiding principles in Canada are illustrative of the changing perceptions and treatment of youth and more specifically of young offenders. This transition from a focus on rehabilitation towards more punitive legislation demonstrates how definitions of young offenders have changed over time. More specifically, there is a strong emphasis on the ways in which some youth, particularly those who represent a dangerous class of offenders, are perceived by the public as youth in need of control. References to the larger

political context that escorted this movement towards harsher sanctions provide a basis to similar phenomena that have been observed in Texas, indicating that these processes are not exclusive to Canada. The macro political changes that have occurred over the last century in Canada are perceived as transformations that are fueled by politicians, the media and the public, which ultimately gave rise to a neo-liberalist state that focuses on a differing set of interests. In the Canadian context, these changes are witnessed in the legislative amendments that accompanied the *YOA*, but in the end required a more nuanced piece of legislation to address youth crime. As such, the current approach to youth justice in Canada under the *YCJA* blends together certain aspects of its preceding legislation, which emphasizes the role of the young offender (*JDA*) and the offence itself (*YOA*). These findings are mirrored in the legislation currently governing youth in the state of Texas, although the role of rehabilitation is secondary to the offence when youth are transferred to the adult criminal jurisdiction. As a result, this jurisdiction is illustrative of a crime control model that upholds a more tough-on-crime philosophy than its Canadian counterpart.

4.4 Areas Identified in the Literature for Future Review

Based on the literature reviewed in the last two chapters, there is a fair amount of research pertaining to the ways in which the state exercises legitimate power on account of gaining and maintaining legitimacy, as well as on the creation of laws and the shaping of them by a consensus of interests and values by interest groups and those in a position of power. This literature is highly interconnected with the sensationalism of youth crime through the media, the way media constructs public opinion about youth crime, and the various responses to youth crime in relation to tougher sentencing practices. Moreover, prior research indicates that the ways in which the tough-on-crime legislation has developed in Canada is not exclusive and

thus extends to other jurisdictions in the Western Hemisphere. As such, a synopsis of the ways in which Texas respond to youth crime was considered, as it serves as an illustration of a crime control model which exemplifies a tough-on-crime approach to youth justice. Nonetheless, there still remain a number of questions which are not adequately addressed in a Canadian context. Table 4.2 outlines identified issues requiring further research that this dissertation will address. On the basis of these, this dissertation investigates six research questions that are formed on three central issues. These are: 1) The processes through which Bill C-10 (Part 4) was developed and legislated; 2) The ways in which tough-on-crime legislation been implemented in youth courts; and 3) The ways in which Texas differs in their policies and legislation in response to youth crime, relative to their crime control model and placement on the tough-on-crime spectrum.

Table 4.2: Areas Identified in the Literature for Future Research

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1. There is virtually no research which specifically addresses the processes through which Bill C-10 (Part 4) was developed and legislated.
 2. There does not appear to be any research that investigates how Bill C-10 (Part 4) has been implemented within the youth courts. In part, this is because Bill C-10 (Part 4) is still too new and therefore renders it difficult to assess if and how this has occurred.
 3. There does not appear to be a great deal of literature pertaining to the justification for the imposition of adult sentences to youth in the Canadian context, as well as the impacts of adult sentences to youth as a deterrent.¹¹⁷ However there seems to be an abundance of literature on this matter from the United States.
 4. There is very little research in terms of where the newly enacted legislation places Canada on the tough-on-crime continuum, relative to other jurisdictions such as Texas which have enacted similar measures more than two decades ago.
 5. There is very little research on how a youth's characteristics (i.e., as part of the "underclass") are linked to an escalating proportional disadvantage which may lead youth towards a path of violence or a differential response to criminal behaviour in Canada.
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¹¹⁷ One of the main criticisms against exercising such practices in Canada is related to the youth's limited mental maturity, which essentially diminishes the effects of a longer sentence due to a lack appreciation for the nature and consequences of the crime. The concept of diminished moral blameworthiness is explicitly outlined in the provisions of the *YCJA*.

4.5 Research Questions

This dissertation research will investigate three central research questions:

- (1) What are the processes through which Bill C-10 (Part 4) was developed and legislated?
- (2) In what way(s) has tough-on-crime legislation been implemented in youth courts?
- (3) How does Texas differ in their policies and legislation in response to youth crime, relative to their crime control model and placement on the tough-on-crime spectrum?

Given what is known about the enactment of Bill C-10 (Part 4) (and tough-on-crime legislation more generally), the following research questions form the basis for this dissertation and are developed from what still remains unanswered or unexplored by previous studies. Each research question is linked to a gap(s) in knowledge that currently requires investigation. The theoretical framework presented in Chapter 2 informs the development of the research questions to investigate whether these theories can provide an explanation for the process(es) of enacting this piece of legislation.

Issue 1: What are the processes through which Bill C-10 (Part 4) developed and was legislated? Despite research indicating that tough-on-crime measures will have no effect on youth crime rates, why has the Canadian Government legislated Bill C-10 (Part 4) as a viable response?

Research Question #1: Whose values and interests are embodied in the Bill C-10 (Part 4) legislation? From the perspective of the respondents, whose values should be embodied in Bill C-10 (Part 4) in order to better address youth crime in Canada?

Research Question #2: Whose conceptions of what society ought to be like influenced the enactment of Bill C-10 (Part 4)?

Areas in the Research: 1 and 3

Issue 2: In what ways has tough-on-crime legislation been implemented within youth courts in Canada?

Research Question #3: Have youth in conflict with the law been impacted by the tough-on-crime policy, either negatively or positively? If so, in what ways? (i.e., sentencing practices, deterrence).

Areas in the Research: 2 and 3

Issue 3: How does Texas differ in their policies and legislation in response to youth crime, relative to their crime control model and placement on the tough-on-crime spectrum?

Research Question #4: How does Texas oversee and respond to youth crime in relation to their tough-on-crime legislation, and how has this legislation been implemented within youth courts in Texas?

Research Question #5: How do policies and legislation in response to youth crime in Texas differ from those of Canada?

Research Question #6: What can we learn from the way Texas responds to youth crime in terms of their policies and legislation? In what ways can these differences help inform the future development of Canadian youth criminal justice policy?

Areas in the Research: 4 and 5

CHAPTER 5 - METHODS

In order to examine the micro and macro processes involved in the development of the tough-on-crime legislation, one needs to uncover the processes, rationale and the impact of sentencing practices associated with the enactment of Bill C-10 (Part 4). The research questions outlined in Chapter 4 demand different types of data that require the use of three analytical techniques. Consequently, a qualitative approach is adopted that not only analyzes interview data, but also analyzes case studies from Canada, and allows for a legal analysis of both current legislation and case law from Texas as well. Thus, the description and explanation of the data derived from this research is presented through a constructivist lens, which shows a) the processes associated with the tough-on-crime approach in Canada and the processes through which Bill C-10 (Part 4) was developed, legislated and implemented within the courts; and b) the ways in which the tough-on-crime legislation is implemented within the youth courts in Texas.

Texas was chosen for analysis for two main reasons. First, it was chosen on the basis of its diversity from Canada, especially in terms of its legal norms, rules, customs, policies, and legislation. Although Texas and Canada share in some commonalities, the first rationale behind choosing Texas was based on the notion that, overall, it appears to be more harsh and disciplinary. The state of Texas is well known as being one of the most punitive in the Western world. In essence, Texas is further along the tough-on-crime continuum, and therefore stands to serve as an illustration of a crime control model that upholds laws consistent with this philosophy of justice. Second, conservative experts from the state of Texas spoke against the legislative amendments of Bill C-10 (or Bill C-4) in hopes of curbing the Canadian government from implementing them. This was not only due to the costs associated with more punitive measures, but that rehabilitative and community-based approaches have been found to

be far more successful. The inclusion of data from Texas essentially creates a means for using this material as illustrative of a model that acts as a counterpoint to the philosophy in Canada.

This chapter provides an overview of the data collection and analytical techniques used in this study. First, the overall approach to research is reviewed with a discussion on the appropriateness to address the research questions. Second, the research methods are introduced and considered in relation to the research objective. Third, various sources of qualitative data are reviewed. Fourth, the methods pertaining to both the data collection and subsequent analysis are discussed. Fifth, a summary of the ethical considerations are outlined in addition to the potential risks and benefits associated with the study. Finally, a brief synopsis of the various sources of data, collection methods, and analytic procedures is provided.

5.1 Qualitative Approach to Research

According to Creswell (2003), a qualitative approach is best used in research where an “inquirer often makes claims based primarily on constructivist perspectives (i.e., the multiple meanings of individual experiences, meanings socially and historically constructed, with an intent of developing a theory or pattern) or advocacy/participatory perspectives (i.e., political, issue-oriented, collaborative or change oriented) or both” (p. 18). Given the theoretical perspectives and research questions, an emergent research design is appropriate in order to examine the micro and macro processes of the newly enacted tough-on-crime approach in Canada. Thus, strategies of inquiry such as legal analyses, interviews, and case studies are employed to enable the collection of open-ended and emerging data.

Qualitative research is based on the underlying premise that the existence of multiple realities stem from a process of interpretation whereby individuals negotiate meanings and understandings. Qualitative inquiries therefore enable investigations into the ways in which

individuals perceive their personal environment through day-to-day processes. Since the research questions pertain to various perspectives on values, interests, policy-making and implementation, as well as the perceptions of effectiveness in Canada by various stakeholders, this study requires the use of an analytical methodology that is characterized as inductive.

Constructionist ontology views social phenomena as produced by the perceptions and ensuing actions of social actors. Thus, both the social phenomena and their meanings are defined and redefined by the actors and are in a constant state of flux (Creswell, 2013). Crotty (1998) defines constructivism as,

the view that all knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context. (p. 42)

Interpretivism is an epistemological perspective that promotes the need for researchers to both understand and develop familiarity with the differences between humans in their role as social actors (Creswell, 2013). This perspective requires a researcher to assume an empathetic position that challenges them to immerse themselves into the world of their research subjects in order to develop an awareness of the world from their perspective (Creswell, 2013). Given that participants in this study have varying opinions on youth crime and how to best respond to it, as well as differing perceptions of effectiveness, this paradigm is most suitable for this type of research.

The objective of interpretivist research is to understand and make sense of human behaviour based on meanings and actions from the actor's perspective, as opposed to making generalized inferences that forecast causes and effects. Interpretivist researchers note the significance of understanding intentions, meanings, reasons, rationales and other subjective

experiences which are constrained both by time and context (Hudson & Ozanne, 1988). According to Hudson and Ozanne (1988), interpretivist researchers enter the field with some knowledge about the research topic, but assume that there is sufficient awareness of the topic in order to develop a fixed research design (albeit challenging due to the multifaceted and erratic disposition of what is understood as being reality).

5.2 Reliability and Validity

The concepts of reliability and validity in qualitative studies bring forth a great deal of challenges, both in terms of their definitions and in the ways in which they can be tested or applied within the design of the qualitative research. According to Joppe (2000), reliability is defined as,

The extent to which results are consistent over time and an accurate representation of the total population under study is referred to as reliability and if the results of a study can be reproduced under a similar methodology, then the research instrument is considered to be reliable (p. 1).

Reliability is centered on the notion of whether the results or observations can be repeated. Reliability in quantitative research is composed of three categories, which primarily describe 1) “the degree to which a measurement, given repeatedly remains the same”; 2) “the stability of a measurement over time”; and 3) “the similarity of measurements within a given time period” (Kirk & Miller, 1986, pp. 41-42). Thus, according to Charles (1995), the use of the test-retest method over time can determine stability by testing items that are frequently answered in a comparable fashion. Likewise, this technique can be applied in instances where one’s individual scores remain reasonably similar from one test to the next. Therefore, one can argue that the more stable a measure is, the more similar the results should be.

Eisner (1991) asserts that a valuable qualitative study can assist one to “understand a situation that would otherwise be enigmatic or confusing” (p. 58). Awareness regarding satisfactory and competent research is embodied in the notion of quality, particularly where reliability is used as a means to assess value in the inquiry itself in hopes of “generating understanding” (Stenbacka, 2001, p. 551). It is also argued that researchers must be concerned with the reliability and validity of their own research design by both interpreting and analyzing results, and determining the quality of the study. Healy and Perry (2000) emphasize the importance of quality in a study by noting that each concept (or paradigm) should be assessed according to its own paradigm’s terms. In qualitative studies, the essential criteria for quality should be founded on notions such as credibility (internal validity),¹¹⁸ impartiality or confirmability (objectivity),¹¹⁹ uniformity or stability (reliability)¹²⁰ and relevance (generalizability, external validity)¹²¹ (Lincoln & Guba, 1985). Thus, in order to ensure quality and consistency in qualitative research, a demonstration of “trustworthiness” and authenticity is essential (Seale, 1999).

¹¹⁸ In order to gauge for credibility, it is necessary to determine “that the results of qualitative research are credible or believable from the perspective of the participant in the research. Since from this perspective, the purpose of qualitative research is to describe or understand the phenomena of interest from the participant's eyes, the participants are the only ones who can legitimately judge the credibility of the results” (Research Methods Knowledge Base, 2006). In order to ensure that credibility will be achieved, participants will receive a copy of an executive summary and the dissertation if it was requested at the time of consent.

¹¹⁹ Confirmability appertains “to the degree to which the results could be confirmed or corroborated by others” (Research Methods Knowledge Base, 2006).

¹²⁰ The conventional quantitative perspective “of reliability is based on the assumption of replicability or repeatability” (Research Methods Knowledge Base, 2006). Dependability focuses on “the need for the researcher to account for the ever-changing context within which research occurs” (Research Methods Knowledge Base, 2006). In other words, it is up to the study to provide the reader with any contextual changes that may have taken place during the research process, and explain how these changes may have affected the research at hand (Research Methods Knowledge Base, 2006).

¹²¹ Transferability has to do with “the degree to which the results of qualitative research can be generalized or transferred to other contexts or settings. From a qualitative perspective, transferability is primarily the responsibility of the one doing the generalizing. The qualitative researcher can enhance transferability by doing a thorough job of describing the research context and the assumptions that were central to the research” (Research Methods Knowledge Base, 2006).

The concept of validity is neither static nor one-dimensional, but “rather a contingent construct, inescapably grounded in the processes and intentions of particular research methodologies and projects” (Winter, 2000, p. 1). The long-established measures for validity originate from concepts found in positivism and thus quantitative research. As Joppe (2000) suggests,

Validity determines whether the research truly measures that which it was intended to measure or how truthful the research results are. In other words, does the research instrument allow you to hit “the bull’s eye” of your research object? Researchers generally determine validity by asking a series of questions, and will often look for the answers in the research of others (p. 1).

Creswell and Miller (2000) propose that a researcher’s perception of validity within the study not only influences the validity of the research itself, but also shapes the choice of paradigm assumption (qualitative vs. quantitative). Subsequently, a number of researchers have advanced a personalized concept of validity by producing and implementing more suitable terminology like “quality”, “rigor” and “trustworthiness” (Creswell & Miller, 2000; Davies & Dodd, 2002; Lincoln & Guba, 1985; Mishler, 2000; Seale, 1999; Stenbacka, 2001). One way of effectively establishing the credibility of a study is the specific perspective of the researcher (Creswell & Miller, 2000). This lens enables a researcher to establish an appropriate amount of time to spend in the field, whether or not the data are saturated enough to create acceptable categories or themes, and the ways in which the analysis of the material may develop into a convincing account or description. This technique of credibility involves an ongoing process whereby qualitative researchers revisit their data “over and over again to see if the constructs, categories, explanations, and interpretations make sense” (Patton, 1980, p. 339).

A second way of establishing validity through a qualitative lens is directly through the participants in the study (Creswell & Miller, 2000). Creswell and Miller argue, “The

qualitative paradigm assumes that reality is socially constructed and it is what participants perceive it to be” (p. 125). Essentially, this lens advocates the significance of scrutinizing the accuracy of how the participants’ realities have been illustrated or characterized in the final report. In instances where analysts employ this technique (e.g., member checking, probing), the active involvement of the participants is sought out as a means of assessing whether the researcher’s interpretations accurately represent their views. In order to ensure that respondents in this study had an opportunity to actively participate, a range of questions in relation to their views, beliefs and perceptions were prepared. At the end of the interview, respondents were asked whether or not they wished to contribute any additional information that was not covered by the interview questions. This process allows one to gather data or information in areas that may have previously been unknown by the researcher, but adds to the overall understanding of how participants view and construct their own reality.

Self-disclosing hypotheses, philosophies, and preconceptions on the part of the researcher is another validity procedure that was employed throughout this research (Creswell, 2013; Creswell & Miller, 2000). This process entails the researcher to “report on personal beliefs, values and biases that may shape their inquiry”¹²² (Creswell & Miller, 2000 p. 127). This procedure of establishing validity relies on the researcher’s perspective “but is clearly positioned within the critical paradigm where individuals reflect on various social, cultural and historical forces that shape their interpretation” (Creswell & Miller, 2000 p. 127). In essence, researchers must acknowledge their entering beliefs and biases prior to conducting research so

¹²² This is also referred to as reflexivity which involved the researcher acknowledging how the research process has affected the researcher and the steps that were taken as a result when interpreting the findings (or during data collection). As such, the impact of ascribed and achieved status characteristics should be considered when conducting interviews.

as to suspend these beliefs during data collecting and analysis. Having read the literature, one can argue that the need for harsher legislation is unnecessary and ineffective. However, these personal beliefs were withheld during the interviewing process, and individual biases such as these are neither reflected nor reported in the findings.

According to Miles and Huberman (1994), a search by researchers for “disconfirming” or “negative evidence” is one whereby the social scientist first develops exploratory themes or categories in the research, but then subsequently combs through the material for data that either supports or invalidates the themes. The purpose of disconfirming evidence is to search for rival explanations while providing support for credibility through diverse and multiple meanings of reality. This procedure depends on investigating the varying viewpoints of a theme or category through a constructivist approach, and therefore relies on the researchers own lens in order to rule out alternative explanations for negative evidence.

5.3 Research Methods

In light of the framework guiding the qualitative approach, the research methods that were employed in this research consist of 1) in-depth interviews; 2) specific case law studies from Canada and Texas; and 3) legal analyses of legislation in both Canada and Texas. While each choice of method is inherently associated with various limitations and challenges, it is important to consider the advantages of each method in relation to the research questions.

5.3.1 In-Depth Interviews

Interviews are appropriate when research requires historical information on a given topic of interest. Interviews are said to provide substantiated, rich descriptions of processes occurring in their local contexts - such as investigating one’s experiences and developing fruitful explanations of phenomena that are often difficult to investigate with quantitative data (Miles & Huberman, 1994; Strauss & Corbin, 1990). In these instances, researchers are able to

control the line of questioning by making use of open-ended, semi-structured or structured questions. In doing so, interviewees and interviewers may find themselves in favourable circumstances that encourage the development of a relationship based on trust and rapport. This method of data collection promotes the extraction of essential points, facts, and narratives that are otherwise a challenge to capture.

The in-depth interviews were particularly appropriate for addressing Research Questions #1 and #2 given that they required some degree of familiarity with the legislation of Bill C-10 (Part 4).¹²³ Moreover, the majority of interview participants had knowledge of the *YCJA* both pre- and post-enactment which enabled them to provide educated, well-informed responses to the interview questions. Since many participants had been actively involved in the area of youth justice for a number of years, conducting in-depth interviews was most suitable for addressing Issue 1 of this study. In addition, given that some youth court judges agreed to participate in the interviews, insight was provided on Research Question # 3 with regards to whether or not youth in conflict with the law have been affected by the tough-on-crime legislation. The information gained from these individuals would have otherwise been unattainable through the case law studies due to administrative delays in the legal system. Finally, the interviews also shed light on Research Question #6 by providing insight on whether or not the Canadian government considered how other jurisdictions respond to youth crime, prior to enacting Bill C-10 (Part 4), in an effort to assess which strategies are perceived as effective or ineffective from the participants' viewpoint (see Question #14 on the Interview Schedule, Appendix A).

¹²³ Please refer to pages 170-171 for a full list of the research questions.

5.3.2 Case Law Studies

The use of documentation from a qualitative lens enables researchers to better understand how specific words and language about the research problem are understood by various stakeholders (Creswell, 2013). Case law studies or legal analyses, for example, provide a great deal of insight on the how the law is applied by allowing researchers the opportunity to draw comparisons or use the material as a means of illustrating a similar point. Contrasting present day cases with those from previous years enhances one's ability to observe changes in the interpretation of laws and/or language, as well as the implementation of any amendments.

Case law studies were most appropriate for addressing Research Questions #3 and #4, and to a lesser extent Research Questions #5 and #6. Since the objective of Research Question #3 was to identify whether or not Canadian youth in conflict with the law have been impacted or affected by the tough-on-crime policy, either negatively or positively, case law studies provided a means through which it was possible to determine if and how the Bill C-10 (Part 4) legislation has been implemented within youth courts. Research Question #4 asked in what ways the tough-on-crime legislation in Texas has been implemented in the courts. As such, a qualitative case study methodology was employed in order to determine how tough-on-crime legislation in Texas is both implemented and applied to youth in conflict with the law. Similarly, Research Question #5 relied on the case law studies collected from Canada and Texas in order to compare tough-on-crime legislation between the two. This analysis provided a frame of reference for where Canada currently sits on the tough-on-crime continuum. Finally, case law studies were also appropriate for addressing Research Question #6 given that it provided insight into what can be learned from the ways in which legislation and procedures in Texas respond to youth crime, and how differences can be beneficial to Canadians.

A qualitative case study methodology provides researchers with the instruments needed to examine multifaceted phenomena within a given setting or environment. According to Yin (2009), case study designs are best used when 1) the study attempts to answer “how” and “why” enquiries; 2) it is not possible or feasible to shape, handle, manage or form the behaviour of the research participants; 3) the inclusion of circumstantial settings and environments and are considered crucial to the study because they are thought to be integral to the phenomenon being researched; or 4) there is a lack of a precise delineation between the what is being observed and the conditions or environment in which it is being studied. Given the nature of this study and the questions associated with this research, a case study was highly relevant particularly in relation to the focus of the study (i.e., the “how” and “why” questions and the contextual conditions, for example, binding decisions made by a supreme court). In the Canadian context, this was especially important since Research Question #3 addresses whether or not cases were handled differently after the passing of Bill C-10 (Part 4) when compared to previous years. Further, a qualitative case study methodology was most appropriate to determine if there were differences in sentencing practices pre- and post-enactment, and if so, in what ways this had occurred.

According to Yin (2009), the overall purpose of the research leads to the selection of a particular type of case study design. Yin (2009) categorizes case studies as “explanatory”, “exploratory”, “descriptive”, or “multiple case studies” based on whether the research attempts to explain a case, investigate a case, or distinguish between cases. As part of this research, both an “exploratory” and a “multiple case study” was employed from as far back as 2003, when the *Youth Criminal Justice Act* came into force. In addition, this time frame allowed for an analysis

of Canadian case law pre-and post-Bill C-10 (Part 4), and provided a means to compare cases from the onset of the *YCJA* to the present day.

An exploratory method is employed when investigating various settings where the matter under consideration does not have predetermined or distinct results (Yin, 2009). This is particularly the case with violent and repeat youth offenders since each case is uniquely different based on a number of varying factors. On the other hand, a multiple case study method allows the investigator to examine differences contained within a case, as well as study any specific characteristics or disparities between cases (Creswell, 2013). The objective of this technique is to reproduce findings across cases, since the case law analyzed typically indicates that many young, violent offenders convicted of the same crime receive similar sanctions. Since comparisons were drawn, cases were selected conscientiously in order to ensure that the investigator was attuned to comparable findings from one case to the next, or was able to foresee contrasting results based on existing legislation.

According to Creswell (2013), multiple case studies are often purposefully selected in order to show different perspectives on the same issue or to carry out a comparative approach (or in this case, potentially different outcomes for violent and repeat youth offenders by country and type of offender). Yin (2009) suggests that the multiple case study design is dependent on the concept of reproduction, in that the researcher repeats the same procedures for each and every subsequent case. However, Yin (2009) asserts that one of the underlying beliefs follows from the fact that qualitative researchers tend to be unenthusiastic about making any sweeping assumptions from one case to next (i.e., as Creswell (2013) explains, “generalizing beyond the case” p. 101). This is largely due to the fact that the context between cases may in fact differ significantly from one another. In response to this reluctance, the

researcher must include “representative cases” (i.e., influential cases) in the qualitative study in order to make any broad generalizations. A detailed discussion of cases that were both included and excluded during data collection can be found below.

5.3.3 Legal Analysis

A legal analysis of documents supplies researchers with information pertaining to either a single jurisdiction, or multiple jurisdictions that may or may not employ similar practices. This method of collecting data is derived from an unobtrusive source of information. The varying ways in which a case may be viewed or understood is known as a legal analysis (Romantz & Vinson, 2009). This includes any relevance of one case to another, such as how it pertains and responds to youth in conflict with the law. For example, cases involving violent and repeat offenders need to be considered in a context that is relative to the legislation. In order to understand laws and policies in other jurisdictions, it is important to consider the language and processes that both determine and define the role of precedent in a court of law. Essentially, a legal analysis is an examination of the process whereby the application of law is appropriate for one’s case. The foundations of legal analyses are the set of principles that are used to analyze the law, devise legal arguments, and predict legal outcomes. Thus, the fundamental key to understanding legal analysis revolves around the ways in which lawmakers (typically legislatures) make and change the law which are then applied in a court of law (i.e., via statutes and case law).

A legal analysis was most appropriate for addressing Research Questions #3, #4, #5 and #6 since all four questions are linked to the tough-on-crime legislation in either Canada or Texas (or draws on examples, explanations or comparisons between the two jurisdictions). Research Questions #3 and #4 particularly rely on a legal analysis since both questions deal with case law studies. In other words, case law can only be analyzed in light of the existing

policy and legislation that governs and dictates how youth in conflict with the law should be addressed. Research Question #5 also required a legal analysis since it asks how tough-on-crime legislation in response to youth crime in Texas differs from those of Canada. Finally, in order to address Research Question #6, a legal analysis was necessary to determine what can be learned from the ways Texas responds to youth crime in terms of their legislation and their current stance on the tough-on-crime continuum, and how these differences in legislation can inform Canadians of youth criminal justice policies.

According to Romantz and Vinson (2009), a legal analysis is comprised of a number of different steps. The first step involves identifying the issue or legal question to be analyzed. In this case, the issue to be analyzed pertains to youth offenders in Texas and the ways in which their legislation and judicial system responds to youth crime. Evidence suggests that Texas responds in accordance with a crime control model that is further along the tough-on-crime spectrum in contrast to Canada. Specific time parameters for the legal analysis were contingent upon when first evidence of the tough-on-crime legislation appeared in Texas (discussed below). The second step involves identifying the rule, statute or law that is associated with the issue at hand. A rule is a legal principle established by an authoritative body that proscribes or governs conduct, and includes law enacted by legislative bodies such as statutes, treaties, ordinances, regulations, constitutions, and laws derived from judicial opinions. Enacted law,¹²⁴

¹²⁴ Enacted laws are known as “rules established by an authoritative act of a legislative body” (Romantz and Vinson, 2009, p. 22). In the United States, for example, it is up to “both state and federal constitutions” to determine and oversee how “the legislative branch makes law” (Romantz and Vinson, 2009, p. 22). Enacted laws may only be declared by a lawfully commissioned legislative body. As such, the courts and other judicial tribunals are not authorized to enact law or bind law. Once enacted, the law can neither be amended nor modified by the court (Romantz and Vinson, 2009).

case law,¹²⁵ common law,¹²⁶ or a mixture of these is required to accurately examine (and later analyze) the cases (this includes precedent and *stare decisis*).¹²⁷ Collectively, the laws offer as a more methodical and comprehensive appreciation of what specifically pertains to the case at hand.

The third step in conducting a legal analysis entails the analysis itself. This stage requires the researcher to determine how the law in each jurisdiction applies to the legal subject or inquiry (or in this case, how the law applies to cases involving the tough-on-crime approach). One crucial step of the analysis involves dissecting the essential features or aspects of the rule of law. Following this stage, these legal components can be applied to the facts of a chosen case in order to determine whether there is any relation between the two. According to Romantz and Vinson (2009), legal analysis may involve one of two modes of analysis: 1) analogical reasoning; or 2) rule-based reasoning. Analogical reasoning “identifies the determinative facts from a body of cases and then compares those facts to a case to induce a conclusion” (p. 101). Rule-based reasoning, on the other hand, “structures the analysis around a rule and then applies the facts of a case to the rule to deduce a conclusion” (Romantz &

¹²⁵ A case is explained as a “judicial proceeding between parties” (Romantz and Vinson, 2009, p. 23). A case that has been published is essentially a recorded declaration by a court that both indicates and describes how a decision was reached. A judicial opinion on this matter consists of “the procedural history of the case, the factual circumstances surrounding the case, the issue(s) in contest, the holding of the court, the rules employed by the court to decide the matter, the court’s reasons to support its holding, and the court’s disposition of the case” (Romantz & Vinson, 2009, p. 23).

¹²⁶ In the absence of enacted law, common law prevails. In such instances, common law steps in place of an enacted law in order to provide case law (Romantz and Vinson, 2009). As indicated above, under federal and state constitutions in the United States, only the legislature has the power to create law. Thus, the courts are given the ability to create laws in situations where there are gaps left by the legislature. The common law is derived from the collection of judicial opinions on similar matters (Romantz & Vinson, 2009).

¹²⁷ According to the Canadian Encyclopedia (2006), *Stare decisis* (Latin for “those things which have been so often adjudged ought to rest in peace” or “let the decision stand”) is in reference “to the doctrine of precedent, according to which the rules formulated by judges in earlier decisions are to be similarly applied in later cases”. The underlying assumption of the *stare decisis* principle is to ensure that all courts “follow precedent when deciding similar cases” (Romantz & Vinson, 2009, p. 9).

Vinson, 2009, p. 101). However, beyond these modes, legal analysis may also involve policy-based reasoning. Policy, as is the case with the *YCJA* or Bill C-10 (Part 4) or for example, the transfer provisions in Texas, is the reasoning following the rule, and provides the rationale as to why courts or legislators formulated law. Thus, this study employed policy-based reasoning for analysis purposes.

According to Romantz and Vinson (2009), the underpinnings of a policy have a two-fold function. First, it identifies the ways in which the law has an effect on society. Second, it indicates the ways in which the law plays a role in the overall welfare of the general public. Since it is alleged that rules are typically created for the “betterment” of society (often through the influence of interest groups or the demands placed on the government by the public), it can be argued that policy reflects society’s most dominant values and ideology.¹²⁸ In reality, however, this may be seen as an oversimplification of the complexities involved in policy-making.¹²⁹ There is evidence to suggest that governing authorities of present day are subjected to a predicament that places them in a precarious position (Garland, 2001). For example, Garland (2001) suggests that all political theories or models are built upon this concept of sovereignty, which by today’s standards no longer exists. Sovereignty is described as a “complex” and “contested notion” that “refers to the competence of a state legislature to make or unmake laws without challenge by other law-making authorities” (p. 109). In a more generalized sense, the term “relates to the sovereign state’s claimed capacity to rule a territory in the face of competition and resistance from external and internal enemies” (p. 109). Thus, while it would appear that both efficient crime control and the protection of society shape part

¹²⁸ This discussion coincides with the theoretical framework in Chapter 2 that guides this dissertation.

¹²⁹ This may be argued as one of the reasons for conducting this research.

of the political platform put forth by politicians, this notion of state sovereignty is untenable in most cases (Garland, 2001). As Garland explains,

In crime control, as in other spheres, the limitations of the state's capacity to govern social life in all its details have become ever more apparent, particularly in the late modern era. [...] the late modern era is now faced with its own inability to deliver the expected levels of control over crime and criminal conduct. Like all myths, the myth of the penal sovereign and its 'law and order' powers is too deeply inscribed, too long-standing, and too politically potent to be easily dismantled by rational critique and administrative reform [...] But what has changed in the last decade or so, is that the myth has itself become problematic. [...] In consequence, it no longer forms the taken-for-granted frame of policy and practice in the field of crime control (p. 110).

What this suggests then, is that ramifications associated with this predicament result in policy development that can reflect erratic and contradictory elements in hopes of prevailing over any preceding policy initiative (Garland, 2001), but is still predominately shaped by those who belong to the most dominant and powerful groups in society. This assertion coincides with the works of Chambliss and Seidman (1971), which acknowledges that some laws or policies are developed in order to pacify other groups that are in conflict with the dominant one, but does not necessarily occur on a regular basis.

To complement this finding, it has been asserted that policy implications extend to the courtroom in that judges too are "no more value-neutral than the legislatures" (Chambliss & Seidman, 1971, p. 75). In effect, it has been noted that "the courts necessarily take sides in the constant war between antagonistic interest groups in society" (Chambliss & Seidman, 1971, p. 75). This assertion *may* have an impact on the ways in which the legislative amendments are interpreted since, for example, Bill C-10 (Part 4) places a strong emphasis on both the short and long-term protection of society. According to Edwards (1996), policy-based reasoning "reaches an answer by analyzing which answer would be the best for the society at large. It

asserts, ‘X is the answer because that answer will encourage desirable results for our society and discourage undesirable results’ (p. 5). This research carries out a legal analysis of laws in Texas in order to determine how they oversee and respond to youth crime in a legal context. It also examines how the tough-on-crime legislation differs in terms of a philosophy of justice that acts as a counterpoint to the philosophy currently seen observed in Canada. On this basis, this analysis is conducted through policy-based reasoning.

Policy prevails in both case law and enacted law but have few parameters (i.e., boundaries and limitations). In case law, the underlying policy backing a rule is carefully considered when a decision on a case needs to be reached. The nature of precedent (an earlier ruling that is regarded as an example or guide to be considered in subsequent similar circumstances), is such that judicial decision-making affects both current and future cases. For example, precedent on decisions reached by judges in similar cases directly affect youth in conflict with the law. However, precedent also affects future judicial decision-making. Thus, any decisions put forth by a court of law should, in theory, promote the policy behind the law involved in that case. This especially holds true since this mode of reasoning appeals to future consequences that follow from adopting a certain rule. Huhn (2002) argues that in establishing policy-based reasoning, the court first predicts the ramifications that will progress from interpreting the law in a certain way. Following this stage, the court then “decides which set of consequences is more consistent with the underlying values of law” (p. 60).

When identifying policy in case law throughout this legal analysis, reasons as to why the court reached its decisions were considered. For example, if an opinion specifically refers to policy, any justification pertaining to the outcome of the case should directly relate to that policy. It is anticipated that any outcome based on policy may explain how the decision

advances the underlying purpose of the law or how the purpose safeguards the public as perceived by a youth court judge. However, if a youth court opinion does not point to the underlying policy supporting its decision, reviewing prior cases that consider like issues may expose the purpose behind the rule. In such circumstances, a review of cited prior cases was conducted in order to better understand how Texas responds to youth crime in light of their crime control model.

5.3.4 Limitations of the Research Methods

Despite the many benefits of employing qualitative methods to conduct an investigation, this approach has limitations. Interviews, for example, are restricted to the information that is filtered through the views of the participants. This is particularly problematic for those conducting interviews in a political sphere given that membership within a political party generally necessitates adopting the perspectives of its leader. In addition, there is a constant possibility that an investigator's presence may bias responses to form answers that are known as politically correct or socially desirable. More generally speaking, however, interviews are accused of its selectivity in reporting results (that is, it lacks in its ability to be quantitatively generalized to a larger population), and its failure to provide alternative perspectives that enhance the credibility of the findings. Nonetheless, interviewing various members of the academic community, members of impartial non-profit organizations, Ontario Court judges, legal counsel, former Members of Parliament and former Members of Provincial Parliament, members of Justice for Children and Youth, members of the Office of the Provincial Advocate for Children and Youth, employees of the Roy McMurtry Youth Centre, and employees of the Boys and Girls Club of Durham supplied this research with in-depth information to address the research questions.

On the other hand, the use of documents in data analysis may be hindered by protected information that is inaccessible to the researcher. Furthermore, collected materials may either be incomplete, inaccurate or outdated which could ultimately result in gaps in the research. Such outcomes may produce fragmented or disjointed research which may generate an imprecise understanding of the whole picture. One of the well-known drawbacks connected with case study methodology is that there is a high likelihood for investigators to endeavour responding to a research question that is too extensive or address an issue that simply incorporates an overabundance of goals for a single study. In an attempt to bypass this concern, several researchers including Yin (2009) and Stake (1995) recommend “binding a case” by establishing limitations. Binding a case may be accomplished by including boundaries that account for 1) time and location (Creswell, 2003); 2) time and activity (Stake, 1995); and 3) definition and situational context (Miles & Huberman, 1994). As such, binding cases made certain that the scope of the study remained plausible. In light of these suggestions, case studies that were carried out as part of this research pertain only to serious and/or violent young offenders. Moreover, the theoretical framework outlined in Chapter 2 and the issues highlighted as part of the research questions in Chapter 4 guided the research process, as well as increased the likelihood that feasible limits on the scope of this study were attained.

According to Stake (1995), “issues are not simple and clean, but intricately wired to political, social, historical, and especially personal contexts. All these meanings are important in studying cases” (p. 17). Notwithstanding these limitations, the main benefit of conducting case studies was gained from the particular details and general understanding of sentencing practices from the perspective of a specific case(s). Pre- and post-Bill C-10 (Part 4) cases allowed for a comparative analysis of how sentences were and currently are imposed, and in

what ways sentencing practices may have evolved over time. It should be noted that the Canadian case law was conducted last so as to ensure an adequate amount of time had passed since the enactment of the legislation.

Legal analyses also exhibit limitations. This predominately involves the examination of a set of judicial opinions to determine whether courts have applied legal norms consistently, fairly, and logically. Legal analysis depends on value judgements about what constitutes effective and fair law, and policy. Policy-based reasoning in particular argues that the meaning of a rule should conform to the underlying values and interests that the rule is designed to serve (Huhn, 2008). This perceived short-sightedness and subjectivity of legal analysis is coupled with the underlying presumption that judges may simply be cloaked legislators. Posner (2008), who studies the connection between a judge's decision making ability and their judicial experience, finds that many judicial decisions are heavily affected or persuaded by a judge's political partiality or by other factors, such as the judge's individual attributes. That is, a judge's personal and professional experience plays a role in shaping one's political preferences (Posner, 2008). As a result, a judge's decision may reflect his affiliation to (or preference towards) a political party or political ideologies which might be "liberal" or "conservative" and thus correlate with either of these political platforms. Given this aspect of judicial discretion, it is difficult to empirically assess cases due to possible judicial inconsistencies based on varying approaches to statutory interpretations of text, context and purpose of legislation (Posner, 2008).

In addition, the enactment of new legislation has the potential to lead to further complications for the analysis with regards to a lack of precedent. Routine cases, for example, rely on conventional legal material (i.e., case law, common law, or statutes) which enables the

judge to determine the real facts of the case and subsequently apply very specific pre-established legal rules to them (Posner, 2008). In non-routine cases that lack precedent in case law, however, conventional materials are no longer available. This deficiency may cause a judge to rely solely on their own personal experiences that are influenced by their mental state and instincts because there is no evidence that the newly enacted legislation works. In such instances, judges may seek advice from police, social workers, victims or other stakeholders in order to determine whether or not the legislation is reasonable.¹³⁰ Consequently, it can be argued that judges may, at times, take on a role as an occasional legislator. This role, however, is restricted by any internal and external pressures that may exist (e.g., professional ethics, assessments made by associates, re-evaluations of judicial decisions by higher courts, and restrictions dictated by other areas of government on one's ability to exercise discretion) (Posner, 2008).

5.4 Sampling Technique and Sample Size

The majority of the data pertaining to the specific enactment of Bill C-10 (Part 4) was collected by conducting interviews with stakeholders from the following streams: Members of the academic community, members of non-profit organizations such as the John Howard Society of Canada (who served as a federal civil servant at the time of the parliamentary debates), Ontario Court judges, legal counsel (both defence and Crown Attorneys, some of whom were involved in the parliamentary debates), former Members of Parliament and former Members of Provincial Parliament (some of whom were involved in the legislation process as consultants), members of Justice for Children and Youth, members of the Office of the

¹³⁰ Please note that it is the Supreme Court of Canada that is the decision-making body. Youth court judges interpret and apply the law.

Provincial Advocate for Children and Youth, employees of the Roy McMurtry Youth Centre, and employees of the Boys and Girls Club of Durham.¹³¹ In order to fully capture the processes upon which Bill C-10 (Part 4) was developed and legislated, the diversity of the sample of participants ensured a broad range of responses and perspectives on the topic at hand.

It was expected that the aforementioned participants would have sufficient knowledge of Bill C-10 (Part 4) given their occupational positions. The *Safe Streets and Communities Act* (Bill C-10) which consists of nine different Bills in one and includes *An Act to Amend the Youth Criminal Justice Act and to Make Consequential and Related Amendments to Other Acts* (Bill C-10, Part 4) was passed in March 2012 by 154 Conservative Party members. In contrast, 129 members from various political parties (such as the New Democratic Party, the Liberal Party, the Bloc Party and the Green Party) voted against Bill C-10. Given that 283 members cast a vote either for or against Bill C-10, it was hoped that this study would elicit responses from both members from the federal and provincial level of government given that they would be best able to provide information on the legislation of Bill C-10 (Part 4), regardless of their political alignment. However despite one's political party association, not a single active politician was willing to participate in this research. In essence, the perspective of various active participants from diverse political parties was not included in this study, although it was anticipated that members from different political parties would add to the depth and breadth of this study by providing multiple outlooks on both the enactment of the Bill itself as well as the perceptions of effectiveness on current responses to youth crime. Potential participants were approached with a recruitment letter via email, as attempts were made to contact various

¹³¹ Some of these respondents were directly involved in drafting and shepherding the legislation, but are not identified for confidentiality reasons.

members of the Canadian Senate as well as Members of Parliament directly involved with the youth justice committees. However all of these individuals were either unwilling or not allowed to comment.

Acknowledging the various complexities in securing interviews with vital stakeholders, this research began with a review of *Hansard* made available to the public online.¹³² *Hansard* is known as the official published verbatim report of the proceedings of a parliamentary body. These printed transcripts of the parliamentary debates ranged from the end of the 39th session to the end of the 41st. This ensured that all matters pertaining to Bill C-25, Bill C-4, and Bill C-10 (Part 4) was covered since Bill C-10 (Part 4) was preceded by two others proposals that were not passed. Parliamentary sessions from the 40th Parliament were the most valuable to this research given the lengthy deliberations on Bill C-4. Conducting a parliamentary debate review in order to examine the committee proceedings to identify influential Members of Parliament and others who provided evidence during the process of legislative enactment provided a roster of names for initial interviewees. Where possible, these individuals were contacted via email for a prospective interview. These documents were also used to examine any additional processes involved in the development of the legislation that may have been left out by the participants. In addition, the inclusion of data found in *Hansard* had a two-fold function: first, it allowed for the perspective of politicians, legislators and other individuals that were unable or unwilling to directly participate in the research by providing an interview. This assisted with filling in some of the gaps that were created by the respondent sample (i.e., no active politicians, and no participants that supported the legislative amendments). Second, it

¹³² *Hansard* can be found at:
<http://www.parl.gc.ca/HouseChamberBusiness/ChamberSittings.aspx?View=H&Parl=39&Ses=2&Language=E&Mode=1>

added to the trustworthiness of the data gathered from the interviews, because much of the material derived from the interviews could be confirmed by the parliamentary debates and committee evidence.

This study relied on a two-stage sampling strategy. First, the concept of purposive sampling was used to select interview participants in this study. Purposive sampling is employed when the researcher feels certain individuals (in this case federal civil servants, members of the academic community, members of interest groups, legal counsel, etc.) should be selected for study given that “they can purposefully inform” and communicate “an understanding of the research problem” based on researcher knowledge (Creswell, 2012, p. 156). Since these individuals were expected to have insight into the research topic in relation to their knowledge of Bill C-10 (Part 4), the preliminary sample of suitable candidates for interviews was derived from the roster of names initially gathered from the parliamentary debates. However, due to the general reluctance of individual participation, this study predominately reports the findings of perspectives that are against the enactment of Bill C-10 (Part 4). As such, capturing the perspectives of those in favour of the Bill (outside of *Hansard*) is excluded.

Approximately 17 individuals from the Parliamentary debates (*Hansard*) were contacted via email for an interview. More than half of these individuals did not reply to the email, although two replied to confirm their non-participation. The remaining five individuals from the *Hansard* roster who were willing to participate in this research were contacted to set up an interview. This not only included academics that were invited to present their case during the parliamentary debates, but also federal civil servants and legal counsel). At the conclusion of the interview, each of these interviewees were asked to provide additional names of

individuals that may, from their perspective, be identified as knowledgeable on the specific processes of the enactment of the Bill. This process allowed for the adoption of respondent driven sampling whereby all participants were presented with the same question that solicited the names and contact information of other potential subsequent interviewees that were thought to have enough knowledge to be able to respond to the interview questions. The respondent driven sampling resulted in a total of 38 individuals, which were all contacted for an interview.

The combination of both the purposive and respondent driven sampling led to a total sample size of 22 in-depth interviews. Seventeen of these participants were derived from the respondent driven sampling, while the other five were derived from purposive sampling. In keeping with the overall goal in this dissertation of providing a comprehensive account, individuals were recruited from varying backgrounds across Canada within the youth justice realm as they were most familiar and knowledgeable about Bill C-10 (Part 4).

Of the approximate 55 individuals that were contacted for a potential interview, more than half declined to participate. Of those who were willing to participate, most participants represented a voice from Eastern Canada (with the exception of Québec). No participants from Western Canada were willing to participate in this research, regardless of their occupation. Of those who did participate, slightly less than half were members of the academic community (N=8). The remaining participants were comprised of individuals that represented the voice of the provincial youth justice advocates (N=1), one was from Justice for Children and Youth (N=1), one was a former federal civil servant (N=1), some were well known and established Ontario Court judges (N=4), one was a retired politician (N=1), a few were managers, directors or researchers in various youth related fields (N=2), some were Crown attorneys (N=2), and finally, one was involved with the pre- and post-charge extrajudicial sanctions

(community based) (N=1), while the other was involved with youth in pre-trial detention or custody (N=1). One third of the interview sample was, in many cases, unable to comment on the specific processes involved in the legislative amendments of Bill C-10 (Part 4), mainly due to the degree of technicality involved. In other words, some of the questions required an in-depth familiarity with both the provisions of the *YCJA* and the legislative process of Bill C-10 (Part 4) that some interview participants did not possess.

5.4.1 Case Law

The compilation of Canadian case law data from LexisNexis accounts for case law found between April 2003 and June 2013. Collecting case law from as far back as April 2003 allowed for a comprehensive analysis of cases as they pertained to the provisions of the newly enacted *YCJA* (as opposed to the preceding *YOA*), as well as similarities between offences committed, mitigating factors, and potential changes in sentencing trends over the years. While the new legislative amendments of Bill C-10 (Part 4) was not passed until March 2012 and did not come into effect until October 2012, the rationale behind collecting Canadian cases that ranged over the span of a decade was based on developing an understanding of whether or not cases were handled differently after the passing of Bill C-10 (Part 4) when compared to previous years.

As such, a total of nine hundred and forty-one Canadian cases were collected from LexisNexis. To ensure adequate coverage, the search term “*YCJA*” was used to amass a list of all cases which included either a reference to the *Act*, or supplied specific provisions of the *Act* itself. In almost all cases, the search term found cases that expressly addressed a case involving a youth(s) either charged or convicted of a given offence(s). Of these nine hundred and forty-one cases, forty-four cases were from 2003 (April to December), eighty cases were from 2004, ninety-six cases were from 2005, ninety-seven cases were from 2006, seventy-one cases were

from 2007, one hundred and five cases were from 2008, one hundred and ten cases were from 2009, ninety-six cases were collected 2010, one hundred and thirteen cases were from 2011, seventy-four cases were from 2012, and finally fifty-four cases were collected 2013 (ending June 2013).¹³³

The compilation of American case law data from LexisNexis was collected from the first evidence of the tough-on-crime mandate. In Texas, the tough-on-crime legislation began in 1996. The enactment of harsher legislation in Texas created the time parameters through which an online search was conducted. As such, case law was collected from 01 January 1996 until May 2013. Given that Research Question #4 did not ask how Texas responds or responded to youth crime both pre- and post-tough-on-crime legislation, a comparison in sentencing practices over the years was not conducted. Thus, organizing Texas case law by year was unnecessary.

An advanced search was conducted using various terms applicable to Texas. Search terms were derived from the youth crime legislation reviewed for the state. The search terms used to generate case law for Texas consisted of “*Juvenile Justice Code*”, “juvenile delinquent”, “violent juvenile”, “juvenile court”, “delinquent adjudication”, “determinate sentencing”, “discretionary transfers to criminal court” and “sentenced as adult”. Using these search terms, the total number of case laws generated was 552. Of these five hundred and fifty-two cases, two were from “sentenced as an adult”, one hundred and eighty-three were from “*Juvenile Justice Code*”, one hundred and twenty-four were from “juvenile delinquent”, fourteen were from “violent juvenile”, one hundred and ten were from “delinquency adjudication”, ninety-

¹³³ Some Canadian case law exclusions were made. Please refer to Section 5.6 (Data Collection: Canadian Case Law) for more information.

one were from “determinate sentencing”, and twenty-eight were from “discretionary transfer to criminal court”.¹³⁴

5.5 Data Collection: Interviews

All participants were personally contacted via email with a Recruitment Letter from information that was either gathered online from occupational websites or from contact information volunteered by other participants (see Appendix B). Once respondents agreed to take part in the research, a Letter of Information and an Informed Consent (see Appendix C) form to participate in the interview was provided to each individual. This letter explained the purpose of the study, listed the key research questions, the procedures involved in the research, the potential harms, risks or discomforts associated with participation, and matters pertaining to anonymous confidentiality. Participants were also informed that they had the absolute and sole discretion of deciding which questions they wanted to answer, and had the right to withdraw from the interview at any time without any negative consequences. If the letter did not generate a response within a reasonable time (approximately 3-4 weeks), a follow-up email was sent to the potential participant as a further attempt to establish communication with hopes of receiving a reply. A spreadsheet was created in order to track the names of those already contacted (by date), those whom were willing to participate (and the date on which they did), those who declined to take part in the research, and those who received or required a follow-up email given their lack of response. A copy of the Letter of Information, Informed Consent, and a detailed interview schedule can be found in the appendices at the end of this dissertation.

In the introductory letter, participants were given the option of agreeing to an interview that would either take place face-to-face, remotely by telephone or via Skype. Conducting

¹³⁴ Any duplicates of case law were removed and are not reflected in the numbers above.

interviews remotely not only allowed for the inclusion of participants from regions outside of the greater Toronto area, but also those residing in other provinces. Respondents were free to remain in the comfort of their own environment which facilitated the process for many who were retired or no longer in political office. In cases where participants were located elsewhere, most preferred interviews over the telephone as opposed to Skype. Regardless of location and method, interviews lasted no longer than 30-60 minutes, and were held on a day, time, and place convenient for each participant. Of the twenty-two interviews, two were conducted via Skype and were only audio (not video) recorded, seven were conducted in person, and thirteen were conducted via telephone. Interviews of all types (face-to-face, telephone and Skype) involved note taking, and were audio recorded with permission to ensure the accuracy of information and to facilitate analysis. All interviews were transferred from the audio recorder to a text document by the researcher. Prior to data analysis, recurring themes that appeared to be commonplace across the interviews were noted so as to assist in the subsequent coding process.

A Thank You letter (see Appendix D) was sent to each participant once the interview was complete. This provided an opportunity to acknowledge appreciation for their voluntary participation and to emphasize the importance of their perspective on understanding the specific processes involved in the enactment of Bill C-10 (Part 4) and the perceptions of youth crime from the perspective of the stakeholders across Canada. In essence, this letter allowed respondents to be recognized for what was considered cooperation for data that would have otherwise been unattainable. For those wishing for a copy of the dissertation, a subsequent email will be sent once this research is publicly available.

5.5.1 Interview Questions and Procedures

One of the most fundamental aspects of interview design has to do with creating effective interview questions for the interview process. Turner (2010) suggests that researchers should construct questions that “allow the examiner to dig deep into the experiences and/or knowledge of the participants, in order to gain maximum data from the interviews (p. 757). In order to effectively address the research questions, the wording of the interview questions were open-ended so that respondents were able to speak freely by choosing their own terms to respond to questions (see Appendix A). Questions were also as objective as possible. This ensured that questions avoided words that may have influence answers (i.e., evocative or judgmental wording). Further, the questions were worded clearly and included the use of any terms particular to the respondents’ culture (i.e., policy-making, Bill C-10 (Part 4), other political terminology in relation to laws and legislation) without asking questions pertaining to “why”.

The success of an interview highly depends on the ways in which the interview is implemented. To ensure the implementation stage of the interview process is conducted in an appropriate manner, the following steps were taken when meeting with respondents. McNamara (2009) suggests the first stage should always begin by occasionally verifying the audio recorder is working during the interview. This was monitored from time to time to ensure interviews were being recorded. Second, researchers should ask only one question at a time in order to avoid confusion. The interview questions were designed in a manner that only focuses on one issue per question. Third, the researcher should attempt to remain as neutral as possible. This was accomplished by refraining from exhibiting emotional reactions to respondent responses. Fourth, the interviewer should and did encourage responses with occasional nods of the head and by using words that promote continuation of the interview.

Fifth, caution was exercised during the note taking process. Interviewers are advised not to take notes in an abrupt fashion since it may appear as though the researcher is surprised or very pleased about an answer. As a result, these reactions may influence a respondent's answer to future questions. Sixth, the researcher provided transition between major topics. This consisted of a sentence such as, "we've been talking about (some topic) and now I'd like to move on to (another topic)". Finally, caution was exercised in order to ensure respondents did not stray from the topic at hand. According to McNamara (2009), straying to another topic is most likely to occur when respondents attempt to avoid answering a question, take too long to answer a question, or start interviewing the researcher instead.

A semi-structured interview was developed after a review of the literature on the enactment of Bill C-10 (Part 4), and the perceptions of effectiveness on the tough-on-crime legislation in Canada. The issues and research questions introduced various concepts that are not addressed in the literature, particularly in reference to the need for more austere sanctions given that research explicitly contravenes overly punitive measures. Thus, the underlying purpose for conducting the interviews was to collect data not only on the ambiguous rationale behind this Bill, but also on the specific processes involved in its development and legislation.

5.5.2 Interview Schedule

Data pertaining to the motivations and justification for legislating Bill C-10 (Part 4) was provided by two-thirds of the interview participants.¹³⁵ The interview schedule had specific questions that were directed towards those who engaged in the political process of the legislation or who had intimate knowledge of the processes involved in the passing of the Bill.

¹³⁵ This excludes one-third of the individuals who neither followed the parliamentary debates nor took part in the political process of the Bill (N=14).

Questions 1 through 3 asked respondents to provide background information on their involvement with politics (if applicable), and as such were tailored to each individual in terms of their occupation. Questions 4-16 address the Bill C-10 (Part 4) legislation in detail. Respondents were asked to provide their input on the development of this Bill. The next set of questions (questions 17-22) asked respondents to share insight on the effectiveness of harsher sanctions, as well as the role the media plays in informing the public of crime rates, trends and the need for harsher legislation. These questions allowed respondents to provide their own opinions as to how perceptions affect legislation and to what degree. Finally, questions 23-26 asked respondents to comment on the effectiveness of Bill C-10 (Part 4), to discuss whether or not they believed the enactment of the Bill has produced positive results, and to provide remarks on the effectiveness of Bill C-10 (Part 4) to adequately respond to youth crime. After all questions were asked, participants were asked a small set of reflection questions which essentially allowed respondents to add any additional information that may have not been addressed during the interview. The overall purpose of the interview questions was to better understand the processes through which the Bill developed and was legislated from the perspective of stakeholders, whether or not it was required, the ways in which the evidence for and against it had been fully considered, where the tough-on-crime ideas had come from, how individual perceptions of youth crime are shaped, and whether respondents felt the Bill has fulfilled its goal.

Prompts, probes and encouragement were used throughout the interviews when needed. A prompt or probe may be used when the interviewer needs to remind the respondent about something, or when the respondent offers few details on a specific aspect of a question which requires more detail. Prompts may be a question in the form of “You haven’t mentioned X:

How do you feel about that/what do you think about that?” Probes, on the other hand, may consist of the following questions: 1) “When did this happen?” 2) “Who else was involved?” 3) “What was your involvement in that situation?” 4) “How did that come about?” 5) “Where did that happen?” 6) “How did/do you feel about that?” 7) “Would you elaborate on that?” 8) “That’s interesting. Could you please provide me with detail?” 10) “I think I understand, but do you have any examples?” 11) “You mention that X was a “success”. What do you mean by the term “success”?”¹³⁶ 12) “This point is very important. I want to make sure I’m clear about it. Would you mind giving me some additional information?” In addition to these prompts and probes, verbal and non-verbal cues to continue were used. This consisted of nodding, smiling, maintaining eye contact, and using words such as “uh huh” or “I see” in an encouraging way. Where interviews were conducted via telephone, only verbal cues were used.

5.6 Data Collection: Canadian Case Law

One notable characteristic of case study research is the ability to incorporate numerous sources of data, which is also seen as a technique that strengthens the credibility of one’s data (Patton, 1990; Yin, 2009). Prospective data sources may consist of such things as physical artifacts, direct observations, participant-observation, documentation, archival records, and interviews. For the purposes of this research, the case study analyzes documentation and archival records of case law. Case law studies may be reviewed repeatedly and are exact in terms of their content, names, references, details of an event, and judicial decisions. Both Canadian and American cases were easily retrieved through LexisNexis Academic as it offers full-text court decisions, legislation, legal commentary and analysis, and current and archived

¹³⁶ The term “success” is an example of a word that may be used during the interview; however it may be substituted for another term more suitable to the context of the question.

news. Access to the exclusive content on this database required membership that was provided through the University of Waterloo.

Canadian case law were recorded and organized in a spreadsheet by year, name, type of charge or conviction, and in some instances the mitigating factors involved. Where convictions were made, the reasoning behind the sentence (including degree of culpability and accountability; and prior convictions, charges or sentences) was recorded. The sentence itself was of particular importance in relation to the governing *Act (YCJA)* and was also noted. This was done for all cases found both pre- and post-the Bill C-10 (Part 4) amendments. The majority of cases included fairly serious convictions and/or charges such as 1st degree murder, 2nd degree murder, 3rd degree murder, attempted murder, robbery with use of firearm, assault, aggravated assault, assault causing bodily harm, and break and enter. While not all cases involved “serious bodily harm” or were considered “violent” by definition, all cases were considered for inclusion and subsequent analysis.

Multiple cases were carefully chosen after they were reviewed for their content. Cases that were most likely to illuminate the research questions guiding this dissertation were chosen for analysis. Selections of these cases were based on the following criteria: a) cases that had occurred between April 2003 and June 2013; b) cases that involved youth offenders; c) cases that involved various violent offenders; d) cases that involved various repeat offenders; e) cases that involved “serious bodily harm”; f) cases that involved “presumptive offences”; g) cases that involved “pretrial detention”; h) cases that involved “custody and supervision orders” for various young offenders who may serve their sentence in either closed (secure) or open custody with a portion served in the community, “intensive support and supervision orders” for those youth who require better and more secure supervision and additional support not offered

by a simple probation order, “intensive rehabilitative custody and supervision orders” for serious violent offenders, and “deferred custody and supervision orders” for those youth who have not caused or attempted to cause serious bodily harm and can otherwise serve their sentence in the community with conditions.

The collection process of Canadian data also involved the exclusion of approximately three hundred and nine cases based on their applicability (i.e., cases that did not particularly pertain to sentencing). For example, cases involving questions pertaining to the *Charter* whereby hearings were not held in a timely fashion (i.e., violations of right to trial within a reasonable time allowed) were removed from consideration. Other cases that were exempt include those where the *YCJA* was determined to not apply (i.e., where the *Education Act* was more applicable for issues of truancy, or where breaches of probation were covered under the *Provincial Offences Act*); those which addressed cases pertaining to adults that have had previous records under the *YCJA*; those that were outside the scope of sentences, detention, release and questioned the authority to suspend sentences (see, for example, *R v K.P.A. (2005)*); cases that commented on the consideration of mandatory review that remained unchanged (see, for example, *R v J.S. (2005)*); cases that addressed committals for trial or discharge (i.e., considerations on procedural grounds); cases pertaining to DNA samples and unwarranted intrusions on young people’s liberty; cases that discussed court orders pertaining to disclosure of youth records and whether youth court judges have exclusive jurisdiction; cases involving the rights of the accused regarding the legal profession and practice by unauthorized persons; cases that included applications for trial to proceed in the absence of the accused (see, for example, *R v D.D.B. (2006)*); cases regarding state-funded counsel (see, for example, *R v L.S. (2006)*); cases that were dismissed or the person was acquitted; cases involving the Human

Rights Commission (see, for example, *K.F. v Peel Police Service Board*); cases arguing for or against the (in)admissibility of statements and statements not made voluntarily; and cases found only in French (mainly Québec jurisdiction).¹³⁷

5.7 Data Collection: Legal Analyses of Texas Case Law

Legal analyses were carried out by accessing documentation on cases from Texas. The retrieval of this information was through LexisNexis, given that it is a legal database that provides information and documentation on other jurisdictions and grants access to all of the American legal publications. LexisNexis was chosen as a suitable database due to its distinguishing features. Unlike HeinOnline, for example, LexisNexis offers a much more comprehensive range of resources which include a fair amount of administrative material, federal and state case law, journal articles and newspaper reports. LexisNexis is comprised of two separate companies merged together. Lexis.com is composed of an abundance of up-to-date American statutes and laws as well as a myriad of published case opinions dating as far back as the 1770s. In addition, the site houses some unpublished cases from 1980 onward. Approximately fourteen years ago, Lexis organized their database to include statutes as well as briefs, motions, case judgements, law reviews, journal articles and opinions for other countries which include France, Canada, Australia, the United Kingdom, Hong Kong and South Africa. Nexis.com, on the other hand, provides data from a large variety of international news, business, biographical and public sources, but more importantly supplies users with legal material which include (but are not limited to) legislative and regulatory filings.

¹³⁷ The final sample size after these exclusions was 632 Canadian cases. In 2003 fifteen cases were excluded. In almost every year between 2004 and December 2011, approximately 30 cases (rounded to the nearest 10th) were excluded for consideration each year. Thirty-five cases were excluded for 2012. Nineteen cases were excluded for the first six months of 2013. Cases that were excluded not analyzed in this dissertation.

The legal analyses were performed in a two-fold fashion. Because a legal analysis is essentially an assessment of the processes whereby a law may be applied to and appropriate for a given case, the first part of this data collection came from gathering state-specific documents on the law and legislation related to youth in conflict with the law. Texas has a different set of governing rules, laws and language, and thus responds to youth crime differently than its Canadian counterpart. Naturally, these differences were observable in the cases as Texas applied the rules in a manner that upheld their philosophical principles. Fundamentally then, the set of principles that guide legal analyses allow one to formulate a legal argument, and assist in predicting a legal outcome. Laws pertaining to juvenile delinquency in Texas are found in the *Texas Family Code* (Title 3, Chapter 51). This document was retrieved in order to better understand how the applicable laws were referred to in the findings when appropriate.

The second aspect of conducting a legal analysis entailed the acquisition of state-specific case law. Unlike the case law required for the Canadian component of this research, Texas case law was not retrieved on a year by year basis, nor was there a specific numerical target in mind. Texas case law was recorded and organized in a spreadsheet by name, year, type of charge or conviction, and in some instances the mitigating factors involved. In cases involving convictions, the reasoning behind the sentence was recorded. The sentence itself was noted in relation to the *Texas Family Code*. This was done for all case law found post-enactment of the tough-on-crime legislation from 1996.

While the Canadian case law search encompassed only one search term (“YCJA”), multiple search terms were used to retrieve Texas case law. This was done for two reasons: First, a basic search using a term such as “*Texas Family Code*” retrieved over 3000 cases but did not necessarily apply to individual cases of youth in conflict with the law. Second, this

particular search term was so broad that it was unable to capture specific case law that reflected the tough-on-crime legislation. Thus, very specific terminology was necessary in order to collect sufficient data for analysis and filter through the sheer volume of available case law.

Case law from Texas frequently cited examples of other cases that had previously dealt with similar (if not the same) legal question or issues at hand (e.g. determinate sentencing for a similar offence). Case law citing precedent effectively widened the search by referring to specific rulings and laws within the established time frame and in ways the basic search terms could not. Given that this data was used as a means to better understand the law by way of its applicability in Texas, exemplars were used to support the various ways in which responses to youth crime in Texas is addressed.

5.8 Data Analysis: Interview Data

The approach to the analysis of the qualitative data is predominately inductive but is also deductively derived from the theoretical perspectives discussed in Chapter 2. The theoretical framework essentially provided the lens through which the findings were interpreted. This process assisted in contextualizing the findings and give meaning to them. The analysis itself required the reduction of large amounts of interview and *Hansard* data to organize, summarize and categorize it, and identify and link patterns and themes within it. These three steps were accomplished with the assistance of a software program (NVivo) that allowed for the data management of qualitative interviews and *Hansard*.

The process of identifying codes (or categories) and themes is based on the frequency with which a particular aspect occurs (Miles & Huberman, 1994). The analysis of the textual interview data and *Hansard* was coded for recurring salient themes or issues that presented themselves, in a chronological manner or otherwise, throughout the interviews or text (i.e.,

thematically for perspectives held by subjects, process, activity, strategy, legislative, or government codes). Themes are known as “broad units of information that consist of several codes aggregated to form a common idea” (Creswell, 2013, p. 188). Units of information include, but are not limited to, processes, interactions, cultural themes, political themes, or issues of power. Thus, the coding process involved the analysis of each theme which was then labelled according to applicable categories. For example, the theme “Government” arose across all interviews, but given that it was far too broad a theme and did not extend itself to the specific aspects of the government, data coded under this title were further divided into categories or sub-categories that accounted for respondents’ views or definition of the term (for example, “minority”, “majority”, “influential persons within the government”, “Liberal”, “Conservative”, or “democracy”). A similar process was employed for the analysis of data gathered from *Hansard*, however fewer themes were present. This was largely due to the extent and nature of the questions found in the interview schedule which covered a broader spectrum of topics. Subsequently, this process enabled a more thorough interpretation of the data in order to capture the essence of what has been learned from the perspective of the respondents, and was substantiated with the data provided through *Hansard*.

While some researchers develop their codes prior to conducting data analysis (prefigured from a theoretical model or the literature), the findings from this dissertation reflected a great deal of emerging data. In other words, the use of prefigured codes would have not only limited the analysis to these particular codes, but would have restricted an exact representation of the views and perceptions of the participants. Thus, code labels in some cases emerged from the exact words used by participants (in vivo codes), or through labels the researcher composed that seemed to best describe the interview data. In addition, codes also

accommodated for data that represented information that both were and were not anticipated to be found by the researcher prior to the study's commencement, and for data that appeared to be conceptually fascinating, unexpected, or atypical to the researcher, such as no noticeable changes amongst those working with pre- and post- charged youth (extrajudicial sanctions) (see Creswell, 2003, 2013).

The analysis and interpretation of the findings involve making sense of the data in an attempt to better understand the "lessons learned" (Lincoln & Guba, 1985). Interpretation of data in this study involved conceptualizing outside of the various codes and themes to the broader context of the data. Interpretations are based on a number of different factors such as acuity and awareness, general perceptions of effectiveness from stakeholders, and social constructs put forth by both the respondents and the reviewed literature. Thus, the interpretation of the findings is linked to the larger body of research literature developed by others that, overall, refutes the need for harsher legislation and is not in support of the Canadian government's decisions.

While interviews were not conducted through a typical narrative research design, a narrative research analysis was applied to the questions 4 through 16 given that respondents discussed their perspectives and recollection of certain politically factual events in a chronological order (i.e., Bill C-25 followed by Bill C-4 followed by Bill C-10 (Part 4)). The data collected as part of a narrative study were analyzed for a chronology of developments, unfolding events, critical junctures or revelations in the enactment of Bill C-10 (Part 4). Narrative analyses need not describe an individual's story, but rather can describe an objective set of experiences placed in a chronology. Within the broad sketch of this type of analysis, a chronological approach (Denzin, 1989) assisted in furthering our understanding of the specific

processes involved in the passing of Bill C-10 (Part 4), particularly in relation to how the legislation came to fruition despite opposition. Given that some of the interview questions pertained to events or considerations prior to the enactment of Bill C-10 (Part 4), a narrative research analysis supports a process that involved analyzing text data for elements of plot structure, such as the political characters, the political settings, the problems (political or otherwise), the actions, and the final resolutions or outcomes (Yussen & Ozcan, 1997). In other words, this type of data analysis and representation enable one to interpret the larger meaning of the story, event, or experiences from the perspective of the participants.

5.9 Data Analysis: Canadian Case Law

A legal analysis of case law pertaining to youth crime in Canada over the last decade assisted in developing a more comprehensive understanding of whether youth in conflict with the law have been impacted or affected by the tough-on-crime mandate within the Canadian youth justice system. Specifically, this research took into account various sentencing practices as per the provisions of the *YCJA* (commencing from April 2003), and compared them across similar youth crime cases that were adjudicated both prior to and directly after the enactment of Bill C-10 (Part 4) (ending at June 2013). A comparative analysis between prior and recent youth crime cases identified the ways in which youth court judges currently exercise judicial discretion, and whether these practices evolved given the new legislation.

Case study analysis involves a description and a within-case analysis which includes the identification of themes, (legal) issues, or specific situations to study in each case. In terms of the Canadian data, cases were organized into a chronology and analyzed across cases (cross-case analysis) for likeness and variation amongst cases, according to offence, some mitigating factors, and sentences received. Given that the enactment of differing sentencing provisions

can be traced within individual cases, a chronological analysis was best to provide any evidence of an evolutionary shift in sentencing practices over time by year.

Using a cross-case synthesis as an analytical technique generally involves the creation of a Microsoft Word table that presents data from each case according to a standardized framework (similarities) (Yin, 2009). In this way, the technique relied on aggregating findings across a series of singular studies which later linked cases to one another according to similarities (for example, findings regarding different sentences for similar offences). Additional Word tables were then used in order to reflect other processes and outcomes of interest (i.e., exceptional cases that resulted in an unexpected sentence were noted, mitigating factors were recorded, and citations to other similar cases were distinguished). According to Yin (2009), additional Word tables exceed the unitary aspects of a case and offer a multiple set of features on a case-by-case basis. Various features of a case allow the analysis to investigate whether different groups of cases appeared to share commonalities and warranted being included as an example of the corresponding type of general case (or qualified for the same offence category, especially in cases where youth were convicted of multiple offences).

Once cases were organized chronologically, according to offence type, by sentence, and by factors that may have affected the sentencing decision, cases were then organized into three-year intervals (with the exception of 2003 and 2013, given that neither year represented a full year of case law). This procedure not only assisted in condensing the material at hand, but allowed for a more accurate illustration of how changes in sentencing practices might have occurred for a similar offence with the progression of time. Three-year intervals were chosen in order to divide the material equally across the remaining nine years, after 2003 and 2013 were organized on an individual (annual) basis. Case law between October, 23 2012 (when the

YCJA amendments first came into effect) and December 31, 2012 was not considered as post-Bill C-10 (Part 4) case law because these amendments could not be applied to cases retroactively. All thirteen cases heard within this time frame pertained to youth who committed crimes prior to the enactment of the new legislation. Given these findings, all case law from October 23, 2012 to December 31, 2012 was treated as pre-enactment cases since none of them could consider the newly enacted provisions of Bill C-10 (Part 4).

According to Yin (2009), it is imperative to return to the theoretical perspectives that direct or actuate the research during the analysis phase of a case study. Due to the abundance of case law reviewed, the theoretical perspectives and Research Question #3 were both revisited on numerous occasions. This was necessary for a number of reasons. First, this procedure assisting in guiding the researcher towards a more focused analysis that fit within the objective of the research. Second, investigating conflicting or opposing theoretical understandings may be seen as an attempt to provide a different account of the studied phenomenon. Third, by undertaking this repetitive process the trustworthiness of the results was enhanced as the theoretical perspectives were addressed and discussed. This attended to the most significant aspect of the case study. Cross-case synthesis greatly builds on “argumentative interpretation” as opposed to other methods of analysis that employs “numeric tallies” (Yin, 2009, p. 160). Under these circumstances, these case studies provided data that support “strong, plausible, and fair arguments” pertaining to sentencing decisions and outcomes for youth crime (Yin, 2009, p. 160).

5.10 Data Analysis: Texas Legislation and Case Law

An analysis of laws in Texas was conducted in a manner similar to that of a content analysis. By analyzing the enacted statutes and legislation for its content, a better

understanding was developed as to a) how Texas responds to youth crime via their laws; b) how the legislation or purpose(s) underlying the law is expressed within the courts (in relation to a given case); and c) how the tough-on-crime legislation in Texas differs from that of Canada. As such, the laws and legislation pertaining to juveniles in Texas was thoroughly examined from as far back as 1996 in order to capture the first evidence of the tough-on-crime mandate. Specific legislation was then analyzed in relation to any notable changes within the law, but more particularly to illuminate the ways in which legislation and the related legal provisions were reflected within the courts through various sentencing practices.

The inclusion of Texas case law assisted in illustrating the ways in which laws were applied and imposed upon youth in conflict with the law. In this sense, some case law that interpreted statutes were considered in order to attain a grasp of the legislature's intent when it enacted the law. These cases allowed for a broader analysis of the legislation by explaining the contents of the law and applying it to an individual. Typically, policy in case law was identified by analyzing the rationale provided by the judge. In some cases where the court's opinion did not refer to the underlying policy in support of its decision, a review of prior cases that considered the issue were examined in hopes that it may reveal the purpose behind the rule.

The cross-case analysis and interpretation of youth crime cases from Texas was conducted in a manner similar to those of Canadian court cases (see cross-case synthesis above). Texas cases were recorded by year, by offence, and by sentence type. Cases were coded according to categories and later reduced into themes that corresponded with similarities and differences across all cases chosen within the context of the appropriate legislation. Given that Texas legislation has not drastically changed since the enactment of the tough-on-crime legislation (although any substantial change is noted in Chapter 8), analyzing and comparing

cases on an individual basis by year was not essential. In other words, there were no signs that indicated these cases required consideration of pre- and post-enactment of a given Bill, since all cases considered for this research were post-tough-on-crime legislation in Texas.

5.11 Ethical Considerations

The main ethical considerations associated with this research were to ensure voluntary participation, anonymity and confidentiality of all participants' answers to the interview questions. In a Recruitment Letter (see Appendix A), all participants were informed of the research, data analysis, data storage procedures, and the type of information that was requested throughout the interview. Permission was requested to audio record each interview. Face-to-face interview participants were informed that they may turn off the recorder at any time during the interview, while those who participated by telephone or Skype were notified that they could go off-record at any time. They were also made aware that they were under no obligation to answer any of the questions, and that they had the right to terminate the interview or withdraw their consent to participate at any time for any reason. To ensure participants were in control of their interview, face-to-face participants were given control of the digital audio recorder throughout the entire interview process. In the case of Skype or telephone interviews, participants would have had to notify the researcher to turn off the digital recorder as they could not be given control of the device. Should a participant have wished to withdraw from the study, their interview data would have been destroyed immediately.

Confidentiality was of the utmost importance to this research. Maintaining confidentiality of information collected from research participants implies that only the researcher has the ability to identify the responses of the participants. However, it also entails that the investigator has taken the necessary steps to ensure that no one outside of the research

is able to link individual responses to the participants. Offering participants anonymity of any information collected suggest one of two possibilities. First, it implies that the research is unconcerned with collecting any information that may identify the participants (i.e., name, address, email address, etc.). Second, it suggests that the research is unable to link specific responses to participants' identities. Given that many of the respondents were and are public figures, it was impossible to refrain from collecting identifying information. Any material taken from the interviews and used in the research was not linked to any person or location. This was communicated both in writing and verbally prior to the commencement of any interview. In addition, no information used in the research can directly identify the participants. This is especially important in light of their occupational positions.

Respondents in this study were notified that each recorded interview would only be identified with a study code (i.e., an interview number), and that all other identifying information (i.e., names from transcripts) would be removed. Making use of interview numbers is an efficient strategy for protecting the confidentiality of research participants. Interview numbers are used in lieu of any identifying information during the data collection process, not only to safeguard stored (or out in the open) data, but to protect the participants' responses. This upholds confidentiality even under the most unusual circumstances where data is stolen or lost, and ensures that the participant's identity remains undisclosed.

All interview data collected remains anonymous and all identifying material (i.e., Informed Consent form) is secured in a location separate from paper and electronic interview data and is kept safely in storage. All paper copies of interview related data is kept in a locked filing cabinet in the researcher's home. All electronic versions of the interview data are stored on a password protected computer and in encrypted format on an external memory stick. All

paper and electronic data (saved on an encrypted USB key) and identifying information will be kept in secure locked storage for ten years after completion of the study and will then be destroyed.

5.11.1 Anticipated Risks and Benefits

There were no anticipated physical or psychological risks with participation in this study. While the interview questions directly asked about personal opinions, controversial topics, and decisions or situations that have previously been dealt with in legislative assembly, the interviews were concerned with the varying perceptions of each participant regarding the newly enacted legislation that affect both youth and society as a whole. In addition, they strived to uncover the underlying processes through which Bill C-10 (Part 4) was developed and legislated. Given the public nature of policy implementation, these questions did not pose risks, harms or discomforts to respondents taking part in this study. Further, the information collected and the identity of participants will continue to remain confidential due to various sensitivities associated with occupational positions.

Upon request, participants will be provided with an executive summary. The results from this study are of direct benefit to academics, law enforcement, social workers, at-risk youth oriented community groups, government officials, and policy experts, as the findings better inform these individuals about policies and legislation that may address the prevention and treatment of youth crime while tending to the various needs of at-risk youth or youth in conflict with the law. By participating in this project, participants have the ability to promptly access the findings that pertain to the perceived effectiveness of various responses to youth crime, particularly in relation to responses that work best when dealing with youth crime. The results generated from this study are of benefit to the aforementioned individuals by contributing to the collective search for the most effective and appropriate ways to respond to

youth crime based on data collected from Canada as well as other jurisdictions such as Texas that have previously implemented tough-on-crime mandates. It is hoped that this study adds to the overall understanding of youth crime in Canada, predominantly with regards to the micro and macro processes associated with tough-on-crime legislation. It is anticipated that this research will foster dialogue between various social welfare agencies and encourage a collaborative approach to addressing youth crime in the near future.

5.12 Conclusion

The most appropriate research design to investigate the micro and macro processes associated with the tough-on-crime legislation in Canada and the ways in which Texas responds to youth crime is a qualitative research design that adheres to the constructivist paradigm. The analysis of the findings ranged from reporting varied perceptions held by interviewees (and *Hansard*) to an analysis of legal policies and legislation, to conducting case law studies (via cross-case synthesis) that either illustrated whether the tough-on-crime mandate has had an effect on youth in conflict with the law (Canadian cases) or the ways in which responses to youth crime are illustrative of a crime control model that is consistent with the enacted tough-on-crime legislation (Texas cases). Overall, these analyses allowed for the provision of expanding and building on the emerging data that support the theoretical lens chosen for this research. Table 5.1 lists the research questions that were outlined in Chapter 4 by the data source that was used, in order of priority. All research questions used a qualitative data type.¹³⁸

¹³⁸ Please refer to pages 170-171 for a full list of the research questions.

Table 5.1: Research Questions and Data Sources

	<u>Data Source</u>
<u>Issue 1:</u>	
Research Question #1	Interviews, <i>Hansard</i>
Research Question #2	Interviews, <i>Hansard</i>
<u>Issue 2:</u>	
Research Question #3	Case Law Studies, Legal Analysis
<u>Issue 3:</u>	
Research Question #4	Case Law Studies, Legal Analysis
Research Question #5	Legal Analysis, Case Law Studies
Research Question #6	Legal Analysis, Case Law Studies, Interviews

CHAPTER 6 - THE CANADIAN CONTEXT FOR TOUGH-ON-CRIME LEGISLATION

The context and ways in which the tough-on-crime legislation developed in Canada is addressed in this chapter by responding to the research questions in Issue 1, as outlined in Chapter 4.¹³⁹ Given the research reviewed in Chapters 3 and 4 on what is known about the tough-on-crime mandate and the vast number of issues associated with this type of legislation, the findings in this chapter shed light on a variety of aspects of Bill C-10 (Part 4) that remained largely unexplained or previously undetermined. While the reviewed studies show that tough-on-crime laws do not generally have a deterrent effect on youth crime or ameliorate conditions for youth in need of rehabilitation, Canadian legislation has designated Bill C-10 (Part 4) as a component of the response to dealing with youth crime.¹⁴⁰ In order to address Research Questions #1 and #2, the analysis in this chapter relies on the findings from the qualitative interview data that reflect the perspectives of stakeholders with regards to this legislation.

6.1 Processes Associated With the Bill C-10 (Part 4) Legislation

Research indicates that enacting tough-on-crime legislation has minimal effects on the rate of youth crime in Canada. Despite these findings, the Canadian Government has legislated Bill C-10 (Part 4) as part of a viable response to youth crime. Thus, Issue 1 examines the processes through which the legislative amendments of Bill C-10 (Part 4) developed and is enacted as a constituent of the current youth justice legislation. More specifically, Research Question #1 asks whose values and interests are embodied in the Bill C-10 (Part 4) legislation. In other words, it questions whose ethical ideals and central beliefs about youth crime (and

¹³⁹ Please refer to pages 170-171 for a full list of the Research Questions.

¹⁴⁰ Please note that the aim of Bill C-10 (Part 4) is to specially deter those in high risk groups. It is not meant to serve as a general deterrent to all youth.

thus the responses to youth crime) are pursued in relation to the tough-on-crime legislation.

The second portion of Research Question #1 asks whose values should be embodied in Bill C-10 (Part 4), from the perspective of the respondents, in order to better address youth crime in Canada. The works of Habermas (1985) and other critical theorists suggest that one of the dangers associated with Western democratic societies is that, at times, those belonging to less powerful segments of society (such as the “underclass” or minority groups) are not free to pursue their own interests during the legislative process. Other theories and research discussed in Chapters 2 and 3 extend beyond the confines of propagating self-interests within a political context, by postulating that each powerful segment is able to transform their particular interests into public policy by manipulating policies to reflect genuine interests held by those of the dominant segments (Chambliss & Seidman, 1971; Hall et al., 2013).

From the perspective of the respondents, the findings below illustrate in what ways these theoretical explanations are supported. These findings, however, are best explained when traced through the legislative process that led to enactment of this Bill. In doing so, the historical framework from which Bill C-10 (Part 4) was born creates a context in which one can better understand the processes behind whose values and interests are really embodied in the Bill. While the development and adoption of the Bill C-10 (Part 4) legislation has been covered by a few published sources (Bala & Anand, 2012; Davis-Barron, 2009; Tustin & Lutes, 2013), the findings from these interviews are important and add to what is currently known by making use of insider knowledge to shed light on the political and legislative processes.

6.1.1 Chronological Development of Tough-on-Crime Measures

The majority of respondents agreed that the deliberations leading up to the final passing of Bill C-10 (Part 4) took considerable time. In fact, respondents note that Bill C-10 (Part 4) is widely known to have been preceded by two other Bills while the Conservative Party was in

power. However, neither was passed given that the Conservatives held a minority government during that time. As far back as 2007, the Conservative Party platform encompassed a proposal for amending the *YCJA* with Bill C-25.¹⁴¹ Interestingly, as respondents suggested, the introduction of Bill C-25 occurred *prior* to a scheduled undertaking of a detailed cross-national review of the *Act*, which was to be conducted in order to assess the *Act's* strengths and weaknesses. Bill C-25 specifically aimed to address the amendments concerning sentencing principles of the *YCJA* to include “deterrence and denunciation” and to facilitate pre-trial detention of youth charged with offences endangering public safety.

Respondents alleged that in 2008, the Conservative Party’s election campaign reinforced its position on fortifying Canada’s youth justice laws by guaranteeing the enactment of a policy that reflected a modified but fair approach. The Conservative Party’s policy proposal on youth crime extended well beyond the narrow amendments advanced by Bill C-25 to include deterrence and denunciation as sentencing principles, to provide that deterrence was to be overtly applied as a primary objective of youth sentencing. Other aspects of the election platform included proposals regarding the provisions for “enhanced youth sentences” that would entail “automatic, stiffer sentences for persons 14 and older convicted of serious and violent crimes such as murder and manslaughter,” as well as the disclosure of names of youth fourteen years and older who committed such crimes (see *Balancing rehabilitation and responsibility*, 2008).

¹⁴¹ Bill C-25, also known as “An Act to Amend the *Youth Criminal Justice Act*” was “introduced by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson, and received first reading in the House of Commons on 19 November 2007” (Bill C-25: An Act to Amend the Youth Criminal Justice Act, 2007). The overarching goal of the bill is to enhance the provisions of the *Youth Criminal Justice Act* on pre-trial detention and sentencing. In particular, it: “broadens the possibility of pre-trial detention for a young person who represents a danger to the public or has previously failed to comply with conditions of release; and adds the denunciation and the deterrence of unlawful conduct to the *Act's* principles of sentencing” (Bill C-25: An Act to Amend the Youth Criminal Justice Act, 2007).

Respondents suggested these amendments were allegedly sparked on the basis of the findings put forth by the Nunn Commission Report.¹⁴² While this is partially true, *Hansard* indicates that the Conservative Party knowingly proposed legislation that fell outside the scope of the report's recommendations.¹⁴³ In a speech made by the Honourable Member Rob Nicholson, it was stated that,

I always tell the members of the Liberal Party to not look for excuses and to not look for ways to not support what are very reasonable measures. We have to update the law. We have the royal commission report of Justice Nunn, who pointed out a number of areas within the Youth Criminal Justice Act that have to be updated [...] I appreciate that nobody wants to see increases with respect to violent crime among young people. However, quite apart from this fact, these are changes that must be made. In part, some of them were recommended in the Nunn report but, as members can see, we have gone [...] considerably beyond that (*House of Commons Debate*, 19 March, 2010, at 1020).

Given this finding, there may be reason to believe that there were other undisclosed factors at play when Bill C-25 (and all subsequent versions of the bill) was proposed in parliament. The Conservative Party neither specified nor justified where these additional propositions to amend the legislation emanated from. However, the Conservative Party's decision to propose legislative amendments that extended well beyond the confines of the report suggests that the tough-on-crime agenda was triggered for reasons that, in part, have nothing to do with Justice Nunn's recommendations.

¹⁴² The provincial government of Nova Scotia appointed Justice Merlin Nunn on June 29, 2005, "to head a public inquiry into the circumstances surrounding the release of a young offender who was convicted under the *YCJA* of a fatal car crash" (The Nunn Commission, 2013). The Nunn Commission report was submitted on December 5, 2006, which contained 34 recommendations to be taken into account (The Nunn Commission, 2013). The Nunn Commission report suggested that the *YCJA* required some tweaking, such as facilitating judicial discretion and better enforcement of the dispositions of the courts, but was not intended to result in the changes put forth by Bill C-10 (Part 4).

¹⁴³ These findings are mirrored in every stage of the proposed legislation and can be observed in all three Bills.

The re-election of the Conservatives with a minority government in 2008 allowed the party to continue promoting their tough-on-crime agenda. For example, the provincial and territorial roundtable discussions on youth justice took place during this time. Knowledgeable or involved respondents indicated that the research team entrusted with this responsibility consisted of “academics, police chiefs, and researchers from many provinces” and were specifically selected by the Minister of Justice’s office. As noted by one participant, “the idea was that he handpicked people that he would consult with. But it was a pretty, in my view a pretty weighted kind of consultation in that these people were handpicked by the political part of his office, not the bureaucratic”.¹⁴⁴ The underlying purpose of this team was essentially to analyze the tough-on-crime Bill that was being proposed, in order to determine whether or not the provinces were in support of the changes.

From the perspective of some of the respondents, the report addressing the findings from the cross-national roundtable discussions indicates fairly clearly whose values and interests were *not* taken into consideration while drafting any subsequent proposals or legislation. One respondent noted, “The report that I wrote, it never ever saw light. In fact, my friends that are the bureaucrats and in the youth policy, they always refer to it as a (whispering) ‘dusting’ report because it was never to be seen because it didn’t say what (he) wanted it to say.” Overwhelmingly, the report demonstrated that almost every province and territory believed that the *YCJA* worked well as is.¹⁴⁵ In fact, the provinces believed that the implementation was the issue.

¹⁴⁴ From the perspective of the respondent, bureaucratic in this sense is synonymous with the term “administrative”.

¹⁴⁵ Alberta was the only exception to the general consensus suggesting that the *YCJA* worked well, partially due to the fact that a day before their roundtable discussion took place, a taxi driver was murdered by a young offender.

On December 9, 2010, a Member of Parliament addressed the Honourable Rob Nicholson by reading an excerpt from this report to which no counterstatement was made. It asserted,

Little support for changes to the YCJA at this time: Legislation cannot prevent crime, reduce crime or protect the public. Changing legislation will not change behaviour. The YCJA should not be changed just for the sake of change. There was an overwhelming consensus that the perceived flaws are not in the legislation; the flaws are in the system. The development of the YCJA was described as a long and thoughtful process that came from evidence based research. A sensible and defensible Act based on intelligent principles. Any changes should be evidence-based and made following the same thoughtful process. It was noted that the YCJA [...] needs “time to take root”. The effectiveness has to be communicated to the public, who, to this point, have not been very well informed. In recognizing that the YCJA is complex legislation that deals with complex issues, the message was clear it should not be amended based on individual cases or stories. [...] The YCJA itself is not the challenge; it is the dialogue that happens in the public. The public perception of public safety, whether real or perceived, will not change with amendments to the YCJA. Changing the YCJA will not change behaviour. If changes must be made to the YCJA, they should only be made slowly and as a result of a more comprehensive review (Serge Menard, Standing Committee on Justice and Human Rights, 9 December, 2010, at 1550).

In the words of one respondent, “the lack of resources or the need for additional resources to implement all of the pieces of the *Act*” was at the heart of improving it. Thus, prior to the introduction of the proposed amendments in subsequent Bills, the Minister of Justice was aware of the need for more programs or supporting programs for young people in need. One respondent explains,

Basically, the general response from those that work in the youth justice field, that advocate for youth, who were being consulted was more resources are needed for kids in trouble outside of the

According to one participant who was actively involved, this incident allegedly steered the direction of the discussion.

youth justice system. The kids, you know, who are in the child welfare system, kids who have mental health issues, kids who have learning disabilities, all that range of at risk youth. There was a sense that there needs to be more supporting programs and not less for these kids. So I think it came as a bit of a surprise to those people who were consulted that the response was essentially to increase the custodial component which will certainly make fewer resources available for the things that were thought to be a higher priority.

Despite the various revelations outlined in the report, respondents suggest that its presence was removed from the political sphere from fear that it was unsupportive of the proposed amendments in Bill C-4. This finding is a good example of the ways in which the government eradicates evidence which may pose a threat to their underlying interests or to the dominant ideology. These findings are also echoed in the works of Hall et al. (2013) relative to the tough-on-crime policy that developed in the United Kingdom on similar grounds, and lend support to Garland's (1996) discussion on "denial" as part of the state's response to reaffirm its ability to deliver protection to certain social groups.

In March 2010, the government presented Bill C-4 (*Sébastien's Law*) which also proposed amendments to the *YCJA* on the basis that "Our government believes that the law must uphold the rights of victims and ensure the safety of our communities. If in any way our justice system fails to do so, we must take action" (Hon. Rob Nicholson, *House of Commons Debate*, 19 March, 2010, at 1010; see also *House of Commons Debate*, 6 March, 2012). It was also noted by another Conservative member that, "What that means to me as a legislator is that this is an urgent problem that can't wait and that we need to take action. Something like Bill C-4, which is targeted at violent repeat offenders, is a highly necessary step, even if it's not the whole way" (Stephen Woodworth, *House of Commons Debate*, 23 March, 2011, at 1625). These findings coincide with Garland's (2001) assessment of the general thrust towards

punitive penal policy that redefines the problem of youth crime (specifically high-risk, potentially violent youth groups) as a pressing issue requiring immediate attention. This movement can be seen as a result of a shift in penal intervention strategies (Feeley & Simon, 1992; O'Malley, 1999), although it also corresponds with Garland's (1996) analysis of the boundaries of the state and the "adaptive" governmental and agency responses to the problem of youth crime. This also suggests that as the issues about youth crime are re-evaluated, society's cultural rules and norms about violent behaviour and repeat offenders are brought to the forefront. To this end, there appears to be some support for the theoretical perspective asserted by Habermas (1975, 1985) which claims that the conflict of cultural rules and norms are often dictated by dominant ideology which is reproduced in society to reflect the views of those in society's most dominant positions. It is through communication and public debate within the political sphere that such ideologies are claimed to be weakened over time (Habermas, 1985).

Bill C-4 was subject to a great deal of scrutiny by Committee Hearings and received opposition from various youth justice professionals that represented the voices of the less powerful segments of society, such as average citizens and offenders, youth, Aboriginal, marginalized peoples, persons with a mental illness, and *some* victims whose stories would support the government's cause. It was during the public deliberation of Bill C-4 that "people in the academic community, people in the youth justice system, youth advocates and some defence counsel expressed concern about the thrust of these changes". These voices predominately opposed the changes of the Bill on the basis that "people who work with young people, people who are actually doing research in the area are aware of the fact that in general, a more punitive approach, sending more young people into custody for longer periods of time

is not going to result in a safer society”. The inclusion of the public as well as various youth justice experts supports Habermas’ (1975, 1985) view that considers the use of public inquiries and the consultation processes during the deliberation of proposed legislation.

Respondents noted that instead of enacting legislation that better represented the needs of youth in conflict with the law, the Minister of Justice pushed for legislation that went in the complete opposite direction. This finding lends support to Hall et al.’s (2013) work which demonstrated that similar law and order techniques were implemented in the United Kingdom. It is also congruent with the analyses provided by Feeley and Simon (1992), Garland (1996, 2001) and O’Malley (1999) on the assault on welfarism, which, as a result moves the state (and thus policies and governing legislation) towards a more responsive and reactionary bureaucracy most often coinciding with the neo-conservative stance. To some degree, this finding provides support for Habermas’ (1985) view of the declining welfare-state, as he is also cognizant of the attacks against this concept of government.

An examination of *Hansard* corroborates the above finding in that, upon questioning the Minister of Justice about his decision to enact tough-on-crime legislation, he was unable to produce a substantiated response. As one Member of Parliament inquired,

Why, even though I know you don’t like it, did you not model it (the Bill) on the situation in Québec, which has had phenomenal success, as we can see throughout the report, in rehabilitating young offenders? Why tear something down that is working so well? Everyone is asking you not to touch this Act. Give it time to mature. Five years is too short. The judges are the ones telling you this, Minister (Marc Lemay, Standing Committee on Justice and Human Rights, 9 December, 2010, at 1615).

While all of the participants believed that the *YCJA* was a good piece of legislation that simply needed better implementation of varying aspects of the *Act*, most respondents recognized that

such decisions involving amendments of this nature result in significant costs instead of producing the desirable effects the Bill was allegedly meant to achieve.

Alongside the numerous individuals or segments of society voicing concern over Bill C-4 were some interest groups such as the John Howard Society of Canada, the Canadian Bar Association, the Office of the Provincial Advocate for Children and Youth, and Justice for Children and Youth. According to the qualitative analysis of the interview data, these groups strongly considered the well-being of youth in conflict with the law, (i.e., marginalized youth who typically represent less powerful segments of society) and therefore argued against the amendments to the *YCJA* for a variety of reasons. While these groups are considered to have a significant amount of political influence, the concerns presented by these groups had a minimal effect on the legislation of the Bill because it represented concerns for individuals on the opposite spectrum (i.e., the out-of-control offenders that typically fall victim to a number of risk factors, such as poverty, on account of their social condition).

This finding lends some support to the conflict and Marxists/critical perspectives by demonstrating that groups of people with similar interests and values are in a constant state of conflict that are ultimately defined by ongoing competition and collective action in modern capitalist society. While in this case, those opposing the legislation were unable to realize their desires through collective action (Vold, 1958); those on the other side of the coin successfully advanced their agenda. Aside from what is known about tough-on-crime laws and their inability to curb crime, there was no social science evidence that would substantiate that the changes being proposed would achieve the government's stated policy objective of protecting society. This in particular lends support to Garland's (1996) argument about "denial" and the

ways in which the state deliberately disregards “evidence that crime does not readily responds to severe sentences” (p. 460).

Further, there were a number of issues that appeared to be inconsistent with the rights of a young person such as the relaxation of the “privacy principle” (*YCJA* S.3(1)(3)(b)(iii) and S.38). Respondents felt that the ability to publish the names of young offenders led to long-term stigma and labelling and is therefore likely to lead to more criminal offending by the person than if they were able to retain some measure of privacy. Much of these issues lend support to the findings of Feeley and Simon (1992), Garland (1996, 2001) and O’Malley (1999) on new (current) crime control strategies that reflect conflicting (or “bi-polar”) rationalities, relative to the “innovative” sanctions that bring forth a number of disciplinary measures to a system of sanctions that maintain a welfare approach.

In light of these findings, the abundance of individuals who presented data against the legislation of Bill C-4 coupled with the fact that the Conservative’s held a minority government contributed to the proposed Bill not being passed. However, after the Conservatives won a majority government in 2011, the *Omnibus Crime Bill* (Bill C-10: *Safe Streets and Communities Act*) was introduced as a single proposal but essentially launched much of their criminal law agenda from previous Bills into one (mostly addressing adult offenders but included the amendments for the *YCJA*). Some of the interview participants who were personally involved in the political realm of these Bills (House of Commons Committees, Senate Committees, etc.), acknowledged that the Bill C-10 hearings were particularly abbreviated when it came to the amendments pertaining to youth (Part 4). While the Bill C-4 hearings were quite detailed and were addressed for a rather lengthy period of time, the Bill C-10 (Part 4) hearings were reported by many participants as being somewhat a matter of

formality that appeared to simply uphold the mark of democracy. In other words, the hearings were held out of necessity for the sake of keeping in line with a democratic government that encourages the free and equal practice of all eligible citizens to participate in the proposal, development and creation of the Bill. This finding can be understood through Habermas' (1975, 1985) theory of communicative action during the deliberative process in the political sphere in which the public is expected and encouraged to participate. It can also be asserted then that this process established the legitimacy of the Bill as reflecting public opinion from public debate, which again falls in line with the works of Habermas (1975, 1985).

Interestingly, some respondents noted that it was during this time that the roundtable report was made public to politicians and other individuals participating in the hearings. While respondents suggested that the findings in the report remained untouched, the public release of the document highlighted "one or two little negatives that were in there" that fueled the government's cause of supporting the interests of society's powerful groups reflecting dominant ideology. In essence, the majority of the findings indicated that any discussion on the ways in which the youth justice system could be improved on a provincial level was dismissed by the Conservative Party (see the statement made by Marc Lemay above).

Politically speaking, 95% of the participants in this research believed that the purpose of Bill C-10 (Part 4) was to appear as though they were getting tough-on-crime in response to an allegedly growing need to appease public concern. In fact, this is mirrored in numerous speeches made by politicians during the parliamentary debates. For example, Stephen Woodworth (Member of Parliament for Kitchener Centre) argued in 2011 that "This is what Canadians expect of their youth justice system, and it is an important priority for our government" (Woodworth, 2011). In addition, many respondents strongly believed that the

tough-on-crime agenda was a ploy initially designed to increase votes amongst the general public, since “such approaches get a party elected.” This strategy is a prime example of how politicians gain consensus by shifting the focus onto the public, which in turn furthers a tough-on-crime agenda (Garland, 1996, 2001; Hall et al., 2013).

More specifically, the public may be understood as a mechanism to forward crime policy. In this regard then, the values and interests embodied within Bill C-10 (Part 4) had very little to do with the best interests of youth in conflict with the law.¹⁴⁶ In fact, almost all respondents (politically involved or not) claimed that the mere notion that the Conservatives won a majority government effectively led to enactment of the legislation since the tough-on-crime campaign was part of an agenda which fulfilled a Conservative election promise.¹⁴⁷ From the perspective of the respondents, the majority government ensured that “there wasn’t going to be much of a change or real debate about the Bill this time around.” According to 95% of the participants, gaining a majority government officially established that any and all opposition would have little chance to dispute the numerous provisions of the Bill. This viewpoint and interpretation of the legislative process is not surprising since parties with a majority in the House of Commons can pass their legislation.

Given that none of the participants in this study were active politicians, it was difficult for many to specifically address whose values and interests are embodied in the Bill C-10 (Part

¹⁴⁶ This finding may illustrate the ways in which the legitimation process occurred. Given that there appeared to be a loss of public confidence in the youth criminal justice system, and more importantly, the legislation itself, it may be asserted that the Conservative government’s emphasis on public safety and protection served as a means to re-legitimize their position in the face of crisis. This finding lends support to the government’s call on society’s central value system, discussed on pages 79-81.

¹⁴⁷ Winning a majority government is only one aspect of legitimation. According to Habermas (1973), “the state can avoid legitimation problems to the extent that it can manage to make the administrative system independent of the formation of legitimating will. [...] Well known strategies of this sort are: the personalizing of objective issues, the symbolic use of inquiries, expert opinions, legal incantations, etc.” (p. 657). All of these strategies were used in the process of developing and enacting Bill C-10 (Part 4).

4) legislation. Outside of the three key influential people whose names were constantly mentioned, respondents had a hard time providing the researcher with additional references outside of the “Conservative Party” blanket statement. While all respondents noted that the values and interests embodied in the Bill are *not* those of the youth committing these crimes (i.e., those who represent the less powerful segments of society), distinguishing where and how the values and interests encompassed in the Bill were from was challenging for most. In numerous instances a common response was “you better ask the government that,” although the majority of interviewees suggested that the many values and interests represented in this Bill are those of the politicians and lawmakers. However, it is unknown as to who specifically informs the politicians and lawmakers (or whether they are even informed at all), where their ethical ideals and central beliefs may come from, and how many other individuals or groups are actively involved in the process of creating and enacting legislation. In a sense, this finding coincides with the view of the modern state as the systematic agent of a united group, although it may be argued that such legislation was enacted as a result of the state’s need to maintain and preserve legitimacy given that the state has interests of its own (Habermas, 1975, 1985).

What is known is that beyond the evidence provided by experts at the Standing Committees or the parliamentary debates, the Minister of Justice admitted to having “other input into legislation” but specifics as to what these additional contributions are or where they came from were not shared with the public (Standing Committee on Justice and Human Rights, 2010). According to respondents, the processes through which Bill C-10 (Part 4) developed and became legislated were done so on the basis of no social or empirical evidence, did not address the underlying issues, had “nothing to do with interesting crime policy”, and has “to do more with politics than about anything to do with strategies about keeping Canada safe.” This

finding may lend support to Habermas' (1973) discussion on the state's reliance on certain images (in this case society's safety) as a means of emotionally appealing to the public. Emotional appeals are said to stimulate "unconscious motives, occupy certain contents positively, and devalue others" (Habermas, 1973, p. 657). As one Member of Parliament stated,

As for incarcerating our youth, we are seeing in the Conservatives' attempt in the youth justice bill, which is waiting before the justice committee right now to be reviewed, this attitude that more penalties and harsher penalties will cure all of society's evils, contrary to all the evidence. [...] it is clear especially for youth that if a treatment modality is used, versus an incarceration modality, the treatment modality has a success rate that is four and five times that of the incarceration modality rate. We have the knowledge. We have the ability, from a social science standpoint, to treat. We just do not have the resources (Joe Comartin, *House of Commons Debate*, 15 April, 2008, at 1555).

Further, when participants were asked to comment on how the tough-on-crime legislation was rationalized particularly when Statistics Canada reported an overall decline in the rates of youth crime, almost all interviewees had similar responses: "I don't think they cared", "It doesn't matter when you have a majority government", "They didn't make an attempt to rationalize it", "They claimed the stats are wrong and they don't rely on numbers to make these decisions", "They simply ignored and rejected it" and finally, "They used the public justification that this is going to make you safer". These findings are consistent with the arguments of Feeley and Simon (1992), Garland (1996, 2001) and O'Malley (1999) that the neo-political trend and "late modernity" that has developed in much of the Western world, whereby there is a complete disregard for or "denial" of statistics and other evidence on account of the recent developments in state governance. Part of this may be explained by the crisis of the illegitimacy of the penal-welfare state, specifically with regards to the limits of the effectiveness of criminal justice and the "adaptive" and "non-adaptive" responses of the state

in light of the perceived “normalcy of high crime rates” that have “become an organizing principle of everyday life, an integral part of social organization” (Garland, 2001, p. 106).

Denial, as explained by Garland (1996), is a symbolic exercise whereby the state enacts punitive policies to counter the problem of youth crime. Despite evidence suggesting that such strategies are ineffective, the act of “denial” reinforces the states sovereign position therefore contradicting other “adaptive” responses to the “predicament of crime control” (Garland, 1996, p. 446). On the one hand, the state acknowledges its limitations of effectively managing crime. On the other hand, it reverts back to its original stance which claims absolute authority and power (i.e., “state sovereignty”) over “providing security, law and order, and crime control within its territorial boundaries” (Garland, 1996, p. 448).

The concept of “denial” makes clear why some participants believed that from the view of the politicians, “kids are still doing bad things even though the numbers are going down. The fact that it’s declining is good, but in their view it’s simple, we’ll toughen things up and it will get better.” All respondents noted that the government placed a strong emphasis on the protection of the public as a justification for the need to better respond to youth crime through harsher measures, as opposed to making allowances for the general decline in the youth crime statistics. In many instances, participants referred to this act as “fear mongering” that essentially strengthened the Conservative’s position on the need for tougher legislation in support of the underlying interests. These findings coincide with the process of legitimation, but even more so with the analysis of the media, whereby the government instilled fear in the public through the media to construct problems with youth crime, and subsequently proposed legislation to attend to these issues (such as an increase in the amount of violent youth crime). This is also confounded by a redefinition of the problem and the subject of penal interventions,

which aim to target a specific group of youth (i.e., violent and repeat offenders) that pose a danger to society.

The lack of consideration for declining youth crime rates, as noted by the respondents, provide some evidence to suggest that the interests embodied in the Bill C-10 (Part 4) legislation are those of the politicians, lawmakers, and powerful interest groups. It has been reported by interviewees that the influential persons involved in the enactment of the legislation have commented on not being overly interested in the statistics and therefore do not govern by them, however interviewees overwhelmingly believed that the government deliberately deflected what the statistics showed to be true. This finding lends support to Garland's (2001) argument about the ways in which the state focuses on penal controls in response to "public outrage", "middle-class fear and mass media news values" as opposed to considering the "statistical frequency of such events" (p. 173). One participant explains,

Every time someone would say 'but crime rates are dropping' the minister responsible for the legislation or the other ministers say 'no we don't agree'. It was the most obvious example of just anti-statistic decision making and rejection of evidence that I've seen in a very long time. So what it demonstrates, and I guess I've always known this to be true, that if you just say loudly enough and often enough 'I don't agree with that, I think it is wrong', a strong governing party can get what they want, especially a majority. And remember, in the midst of that they were devaluing Stats Canada and the Census and other data at the same time basically [...]

While it is clear that the government chose to dismiss (or perhaps deny) the statistics at hand, there was no mention as to what evidence was in fact used to support their decision to enact the legislation.

In line with this perspective, a statement made by Member of Parliament Stephen Woodworth explains,

When we talk about evidence-based decision-making, it sometimes comes down to a question of what evidence we want to accept and what evidence we don't want to accept. But as a legislator, I can't simply ignore the evidence of the 47 witnesses whom Justice Nunn heard when he came to his recommendations, nor can I ignore the evidence of Canadians across the country who see repeated problems in the implementation of our youth criminal justice system. Therefore, when we come to what are focused and targeted procedural improvements proposed in Bill C-4, I need to rely on that evidence (Standing Committee on Justice and Human Rights, 2011, at 1625).¹⁴⁸

Aside from the findings presented in the Nunn Report (2006), this statement suggests that public opinion was specifically used as evidence for the ways in which the *YCJA* (and the youth criminal justice system more generally) required improvements to legislation that appeared inadequate to Canadians. Not only does this imply that public opinion is a proxy for consent, but that politicians take an active interest in enacting legislation that appears to be supported by the public, even if the public is misinformed. This finding strongly supports the works of Garland (2001), Habermas (1975, 1985), and Hall et al. (2013), because it suggests that the public may be conceptually understood as an abstraction that is mobilized to make phenomena governable. That is, the public is used a vehicle to advance crime policy.¹⁴⁹ Interestingly, while the statement above indicates a need for the “focused and targeted procedural improvements proposed in Bill C-4”, it fails to acknowledge that many of the

¹⁴⁸ The “evidence-based decision making” referred to in this statement solely reflects the findings of the Nunn Report (Nunn, 2006), although there is mention of Canadian public opinion on the efficacy (or lack thereof) of the youth criminal justice system as “evidence” of a problem. Nowhere does Stephen Woodworth refer to other specific studies or findings that suggest that any other “evidence” was considered (or even exists) outside of Nunn’s recommendations. More importantly, this raises a general question about what can accurately be claimed to be evidence, since there appears to be a lack of a) consensus on what constitutes legitimate evidence, and b) whether certain types of evidence are considered as more valid than others (Young, 2013). For additional information on the complexities of evidence-based decision making and how public opinion (“the selective use of evidence” or “the untested views of individuals or groups, often inspired by ideological standpoints, prejudices, or speculative conjecture”) is incorporated into policy, see Young, 2013, pp. 4-5.

¹⁴⁹ This statement can be linked to Habermas’ (1973) conception of the public as “engineered for purposes of legitimation” which, “primarily has the function of structuring attention by means of areas of themes and thereby of pushing uncomfortable themes, problems, and arguments below the threshold of attention” (p. 657).

provisions proposed in the Bill had little to do with the “repeated problems in the implementation” of the governing legislation (Standing Committee on Justice and Human Rights, 2011, at 1625). In essence, the provisions outlined in Bill C-4 did not propose improved or enhanced implementation techniques.

While the Conservatives claimed that the central reason for not governing by statistics was due to the fact that the numbers are often flawed and inaccurate (based on the fact that not enough people report crimes committed against them), most participants purported that the issues pertaining to these numerical discrepancies are rarely properly addressed by those proposing tough-on-crime legislation. According to most respondents, those in support of the enactment of Bill C-10 (Part 4) “did not tackle these issues head-on” simply because it was not in their best interest to do so. Although it may be true that crime statistics do not reflect actual crime rates, the other side of coin suggests that there is no evidence that shows there has been a change in these rates over time. In other words, participants note that there are many unreported crimes; however it is likely that there are as many unreported crimes now as there were a few years ago. For this reason, some interviewees acknowledge that while the statistics may not be entirely accurate, they certainly are reliable especially from a short-term perspective since much has not changed. As one respondent explained, “The longer you go over time, the bigger change you’ve had in police reporting practices so the less reliable stats are”. Thus, many participants attested to the Bill C-10 (Part 4) legislation as a law that was put into practice on the basis of “smoke without fire”.

Overall, the results indicate that the processes upon which Bill C-10 (Part 4) is legislated developed more so on the basis of an ideological philosophy rather than

substantiated grounds.¹⁵⁰ This finding corresponds with the views of 90% of the participants as well as previous research which discusses the Bill in terms of a legislation that is more symbolic than intended to produce substantial change (Bala & Anand, 2012; Hall et al., 2013). In the opinion of one respondent, “I was not and I am not supportive of it, but I also as I say view this as a fairly astute move by the government in terms of maximizing the political bang and minimizing the actual impact.” Others suggest it as a “theological exercise” which at its core is “symbolic to make the public believe that this is the government that protects victims and is hard on criminals, particularly those violent young offenders, but unfortunately it’s very damaging.” Whether the legislative amendments are genuinely meant to be more symbolic as opposed to effecting significant change remains unknown. However, it does appear as though Canadians are “living through a potentially expensive social experiment and we’re going to see what happens”.

Symbolic or not, these findings suggest that the values and interests embodied in Bill C-10 (Part 4) are based on a combination of those found amongst the public that are in support of the dominant ideology, as well as those in the more powerful segments of society. This is particularly the case amongst those within the political sphere who were staunch advocates for tough-on-crime measures, whom have successfully transformed their interests into public policy by legitimating the claim through the public. This finding is based on evidence

¹⁵⁰ Habermas (1996) notes that there are groups in society that are less driven on account of economic reason, but are instead more interested in ideological objectives. He classifies these individuals as “suppliers”, and describes them as “associations, and organizations, that before parliaments and through the courts, give voice to social problems, make broad demands, articulate public interests or needs, and thus attempt to influence the political process more from normative points of view than from the standpoint of political interests”. These groups include “organizations representing clearly defined group interests”; organization with “goals recognizably defined by party politics”; “cultural establishments” (i.e., “writers’ associations”, “academics” and “radical professional”); “public interest groups” which include, but are not limited to “churches or charitable organizations” or human rights groups (pp. 26-29).

established through the views, statements and themes in the interview data, although there are signs of this in *Hansard* as well.

In the event the legislation has little impact on the overall youth crime statistics, the enactment of the legislation would have been nothing more than a political strategy to accumulate votes disguised as a tactic to convince the general public that getting tough on crime is in Canada's best interest. This approach is highly supportive of Garland's (2001) argument about "the populist current in contemporary crime policy" which exemplifies "a political posture or tactic, adopted for short-term electoral advantage" (p. 172). Under this circumstance, the Bill effectively subscribed to the dominant ideology expressed in the views of the public and represents the values and interests of those in the more powerful segments of society. If the legislation produces a significant effect on the youth crime statistics, the enactment of Bill C-10 (Part 4) again supports the same critical theoretical view. These results are echoed in Hall et al.'s (2013) findings on youth crime (mugging) as a social phenomena in the United Kingdom, which in a sense illustrate the ways in which the state mobilizes dominant ideology and ideological apparatuses to appeal to the masses. In essence, this finding lends strong support to the notion of gaining and maintaining legitimacy, but also to the development of an "authoritarian consensus" (Hall et al., 2013, p. 2).

6.1.2 "Underclass" and "Power" Constructs

The constructs of the "least powerful" and "powerful" segments of society touch on the complexities of how structural inequalities are produced and reproduced through laws and policies. Much of this distinction is developed on the basis that the conditions that are present in one's life have a great deal of influence on their values and internalized norms. Extending beyond this for the "least powerful" segments or groups of society is the notion that the

broader structural forces (such as political, social and economic inequality and poverty) align, and consequently form groups of what is known as “underclass” or “truly disadvantaged” youth (Blau & Blau, 1982; DeKeseredy, 2011; Hall et al., 2013; Wilson, 1987). These groups or segments have the highest risk of committing very violent crimes (DeKeseredy, 2011).

According to Feeley and Simon (1992), the term “underclass”,

Is used today to characterize a segment of society that is viewed as permanently excluded from social mobility and economic integration. The term is used to refer to a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from the suburban locus of mainstream social and economic life in America (p. 467).

It should be noted, however, that the notion of “underclass” involvement in crime is more prevalent in the statistics on youth crime in the United States than in Canada. This is due to the ways in which youth crime statistics in the United States are gathered. Whereas America publishes information on youth crime according to race, Canada does not. The developing visibility of the correlation between race and crime (particularly in the United States) has the potential to “reinforce the sense that crime is the product of a pathological subpopulation that cannot be integrated into the society at large, as well as the perception that the penal system can do no better than maintain custody over a large segment of this population” (Feeley & Simon, 1992, p. 467). Thus, the argument is that society’s structural barriers strengthen the general assumption in which the conditions that perpetuate the existing circumstances of the “underclass” are not only imminent, but are immune to any intervention advanced via social policy (Feeley & Simon, 1992). Despite the notable difference between Canadian and

American statistical information on race and crime, such notions of underclass are common in Canada as well (DeKeseredy, 2011).¹⁵¹

According to Chambliss and Seidman (1971), “the probability of a group’s having its particular normative system embodied in law is not distributed equally among the social groups but, rather is closely related to the group’s political and economic position” (p. 474). This statement supports the assertion that there is a greater likelihood that the groups or segments that hold the highest political or economic positions have the greatest probability that “its views will be reflected in the laws” (Chambliss and Seidman, 1971, p. 474). Although this view is a stepping stone in the development of Marxist theories of law relative to the state, this view is too simple, general and abstract in light of this research data. It may be that youth that belong to segments of society that broadcast aspects of disadvantage or marginalization are least likely to be in a position of power (Hall et al., 2013), while those who belong to the most prominent economic, social and political groups have the greatest likelihood of forming the “powerful” segments of society. However, there is no guarantee that segments that hold the highest positions within the economic or political sphere will undoubtedly pass laws in their favour (Kasinitz, 1983).

Instead, it may be more accurate to suggest that law is driven by the development of political class struggle, which at times enacts legislation in favour of more powerful groups in society, but is not always obliged to do so (Hall et al., 2013). Yet, threats to the superstructure call upon a “normative system” which has a tendency to reinforce the bourgeois social

¹⁵¹ There is limited statistical evidence that points to chronic offending (“career criminals”) or high-risk youth groups in Canada. The “high-risk” group referred to above is difficult to track with the statistics currently available, because much of one’s life conditions that contribute to such circumstances are not accounted for in the data. Please see Carrington, Matarazzo and deSouza (2005) for information on “court careers”.

relations that underlie the modern capitalist state.¹⁵² Thus, the reproduction of the dominant ideology can be observed in laws and policies that advance tough-on-crime legislation, because it is geared towards “persistent offenders” and “career criminals” that are not representative of these “powerful” groups (Garland, 2001). To complicate matters further, it appears there is evidence to support the notion of building a consensus on the perceived problem (of high-risk, potentially violent “career criminals” in the making), which reflects a process of crisis on the perceived illegitimacy of the penal-welfare strategies. In such cases, the public is used as a tool to win and maintain the consent of the public for the states intervention in crime control by supporting legislation that responds to seemingly problematic youth (Garland, 2001; Hall et al., 2013).

These findings are not surprising given that most respondents felt that the legislation addresses very little of the needs and interests of youth in conflict with the law. For example, some segments of society that were highly specialized in their interests who were generally known to have some political influence were unable to pursue the interests of those in less powerful segments within the political realm. As one respondent explains, “I always thought that some members of The Canadian Bar Association had a say in some of the policy, but it appears not because they were really very vocal about the changes in the *YCJA* and they couldn’t get through.” Although groups such as the Canadian Bar Association, the John Howard Society, and the Office of the Provincial Advocate for Children and Youth have influenced policy in the past, it appears that those segments of society that possess a more dominant or authoritative position *and* express a view that corresponds with the dominant ideology are most successful in pursuing their self-interests within the legislative process,

¹⁵² The “normative system” or structure here refers to views, interests, values and attitudes.

regardless of opposition, because they are in a more powerful position to do so.¹⁵³ This provides support for research conducted by Hall et al. (2013) on the hegemonic domination of more powerful groups over subordinate groups given the existing structural inequalities in Canada. In addition, it lends support to research on the structured preference given to some interest groups over others (Hall et al., 2013), and confirms the ways in which interest groups play a role in legislative decisions as part of the deliberation and negotiation process within the political sphere (Chambliss & Seidman, 1971; Habermas, 2006).

6.1.2 Values That Should Be Embodied In Bill C-10 (Part 4)

The second part of Research Question #1 asks whose values should be embodied in Bill C-10 (Part 4) to better address youth crime in Canada. Undoubtedly, respondents recognized that youth crime is not merely an affair that solely affects young people. In fact, many respondents noted that youth crime is a social phenomenon that broadly affects society in a highly complex sense. In essence, the values embodied in any piece of youth justice legislation should take into account both the needs of the general public as well as the youth in order to implement a balanced approach that works best for all parties involved. Yet, of the twenty-two participants recruited for interviews, not one believed that the amendments put forth by Bill C-10 (Part 4) would effectively address youth crime. This finding suggests that the values embodied within the Bill itself, from the perspective of respondents, do not encompass values or legislation that attend to the best interests of the youth or augment the safety of the public. More notably however, all respondents believed that while the youth justice system has a role,

¹⁵³ By no means does this dissertation suggest that The Canadian Bar Association, the John Howard Society, or the Office of the Provincial Advocate for Children and Youth represent the least powerful groups or segments of society. It is merely asserted that these groups voiced their concerns about the legislative amendments *on behalf of* youth that fall within this “least powerful” category. In reality, these associations do have political influence. In the case of Bill C-10 (Part 4) however, their degree of influence appeared minimal based on the views of the respondents.

the provisions of better community and mental health services for youth, changes within the educational system, and increasing youth employment have a stronger impact on youth crime than changes in legislation.

While many of the participants believed that some of the provisions outlined in the amendments to the *YCJA* “makes things clearer”, particularly with regards to bail provisions that were “previously a confusing mess”, all participants accept that a rehabilitative approach to responding to youth crime may better address the needs of both the youth and society as a whole. This consists of education, greater resources, better developed organizations and programs to assist at-risk youth, and tools and skills needed to build confidence. More specifically, when participants were asked what types of responses they believed would have meaningful consequences for youth, the most common terms used were: expediency (immediate responses), fairness, proportionality, comprehensiveness, compassion, understanding, firmness, and coordination on the supportive responses. However, many respondents exhibited difficulty in answering a question of this nature given that meaningful consequences tend to vary on the disposition of the offence as well as the young person. Overall however, these findings support a type of welfare state that appears to have dwindled by virtue of the neo-liberal and neo-conservative alignment and the substitution of “late modernity” (Feeley & Simon, 1992; Garland, 1996, 2001; Hall et al., 2013; Muncie, 2006; O’Malley, 1999).

In many cases, interviewees suggested that legislation placing a greater emphasis on the swiftness of responses would better address youth crime in order to link the crime with the sanction. For example, many participants noted a distinction between the severity of one’s response with the swiftness of one’s response. To a degree, this finding lends support to

Bentham's (2008) philosophy of punishment, whereby a sentence is more effective when it is promptly imposed. The severity of a punishment, therefore, could be less if it is delivered swiftly because it acts as a deterrent in itself.¹⁵⁴ Interestingly, respondents suggested there is a general degree of confusion between the two concepts, because on the one hand "we sit there are talk about lengthening sentences, we're toughening things or making the presumptions different, etc., all of which is, you know, about the severity of response." On the other hand, some participants suggested that what is really needed is "certainty and speed of response - and that's something that we're not doing as a society." As one respondent states,

I do think that the speed with which you can respond makes a big difference. And that's one of the problems especially with younger people who are in the system. You can't make the system go any faster than a sort of speed and the police have a huge influence on how quickly things happen because you're waiting for their information [...] A lot of things can muck up the system. And so you're really looking at least six months until you're getting down to something responsive and that's a long time in a teenager's life in terms of what you did and getting a sanction or a response to it.

In this regard, many respondents commend Québec and acknowledge that "we have a lot of lessons to learn" when it comes to addressing youth crime in a more expedient fashion.

Legislation that embodies an educative function is of utmost importance from the perspective of the respondents. In order for youth to comprehend the nature of their behaviour in relation to the consequence(s) for their offence, participants believe that legislation may benefit from provisions that alert youth to the broader context of their behaviour. One respondent notes,

¹⁵⁴ Garland (2001) argues that the new style of governance and the new penology has led to a change in the way the offender is presently viewed. This view "seem at first to be a puzzling return to the naive criminology of Jeremy Bentham and his utilitarian followers" (p. 189). However, Garland (2001) continues to say that "this revision appears less puzzling in light of the institutional forces that now pull in that direction" (p. 189).

I don't think they really get the nature of consequences in their behaviour. I think they act spontaneously and without much regards for what the consequences in their behaviour would be [...] So I think some measure of restorative justice, some measure of explaining what the consequences of their behaviour had for others or what the consequences of their behaviour may have for themselves or their family, I think is always extremely helpful.

In other words, legislation that offers solutions that enable youth to understand the impact of their offence may better address youth crime as opposed to the provisions of Bill C-10 (Part 4).

Another participant adds,

I think approaches that involve the youth understanding the impact of their behaviour and being involved in some active way to undo the harm or to compensate for the harm is best. There is clear evidence that that's much more effective than incarceration or removal from the community [...] and in the long run, it's much cheaper and more effective than these traditional criminal responses.

While it may be asserted that the need to formalize so many aspects of youth crime diminishes one's understanding of their consequences, legislation embodying values that connect the behaviour to the consequence (even through community shaming or dealing with the victim face-to-face) may have a more immediate effect resulting in a more significant response to youth crime.

Respondents also agree that providing youth with tools (i.e., education, self-confidence, and anger management skills)¹⁵⁵ as part of a rehabilitative scheme that is encompassed within the legislation would be useful in order to give youth "some options besides criminal behaviour

¹⁵⁵ It should be noted that anger management as a skill falls outside the scope of a traditional technique of social redemption (rehabilitation). According to Foucault (2009) there were three distinct apparatuses that distinguished the prison structure during the 19th century. These consisted of "refamilialization", whereby the family brokered the successful correction of their loved one; "labour", whereby the offender was subjected to meaningful work as a means of punishment and effective correctional method; and "self-punishment", whereby the offender actively participates in constructing programs from which they are meant to be rehabilitated (pp. 15-16). Anger management as a skill set may be seen as a more modern take on rehabilitation.

in the future”. Many interviewees assert youth require these skills to manage similar future occurrences as a means to deal with the associated emotions and related conduct, like those that initially prompted the criminal behaviour. Thus, enacting legislation that supports such rehabilitation provisions may help eliminate the need for responding to future youth crime, while also promoting pro-social development into adulthood.

Frequently cited by participants was the notion that the amendments put forth by Bill C-10 (Part 4) poorly address youth crime because it does not appear to demonstrate a constrained use of the criminal law. For example, interviewees note that the decision to treat an incident as criminal should not only be restrained as per the *YCJA*, but be accompanied by the utmost protection of youth’s rights. While the discussion of youth rights modestly presented itself during the interview process, the majority of participants commented on the proportionality of sentences for youth in relation to the legislation, especially in cases where youth are convicted as adults. All participants note that prior to any legislative amendments, the *YCJA* was “on the right track”. One respondent states “It certainly could be that it (the *YCJA*) could be improved, but the idea of responding with restraint, using custody with restraint, seeing sentencing as being an issue of proportionality more than for the kind of child welfare purposes of the kid [...] it was a pretty good start. But I think this Bill could be pretty destructive.” In essence, the tough-on-crime values embodied in Bill C-10 (Part 4) have created concern for some in relation to the sentencing principles for youth, most notably with regards to the potential for producing a gateway towards incarcerating more youth, particular because the true effects of the Bill remain undetermined as it is still too new.

Respondents recognized that there are many factors that contribute to youth being at risk of criminal involvement. Given the multitude of circumstances and situations that may

make some youth more prone to criminal behaviour, participants suggest that legislation should be more understanding of the various systemic, inter-generational, racial, relational and risk factors that are interwoven into both the legal system and society more generally. Most respondents believe that legislation which implements a tough-on-crime approach represents a certain political ideology that upholds the values of some lawmakers at the cost of the underprivileged, “underclass”, or at-risk youth. The findings put forth by Hall et al. (2013) reported similar results. As one participant states,

So you bring in these policies, they’re extensively colour-blind, they’re extensively neutral, they’re suppose to accomplish things, but if you look at how they actually have an impact, it’s often disproportionate in certain groups and extremely expansive, right. So I think that’s really where it stems from and there’s a lot of truth to that. Bill C-10 (Part 4) is sort of a blunt tool for all potential people who come before the justice system, that doesn’t take properly into account individual differences and in particular doesn’t recognize sort of the plight of many minority groups and whatnot who are vastly overrepresented in the prison system.

Such notions can also be linked to the neo-conservative risk-management trend outlined by Feeley and Simon (1992), Garland (1996, 2001) and O’Malley (1999) whereby the legislation is used to penalize, target and track certain youth that are either high-risk offenders or part of a (racialized) minority group. While it is acknowledged that the legislation of any youth criminal justice Bill is likely to be limited in its mindfulness of these factors, interviewees maintain that such creative and conscientious legislation is only part of the equation.

From the perspective of the respondents, the other side of the coin involves crime prevention strategies and programs that better assist youth more generally, and not just young offenders. Participants often discussed a greater need for services for youth, especially those between the ages of 10 and 14 who are “vulnerable,” “uninvolved with their families,” and

“who come from difficult circumstances that are partly responsible for bringing them in contact with the criminal justice system.” Many questioned the availability of services for youth in this age bracket within the province of Ontario, and claim that preventative measures are far better than enacting crime legislation as a means of effectively addressing issues related to youth crime.

Better community programs were regarded as one of the most crucial components of crime prevention and crime control. While many respondents were torn between whether or not the province of Ontario has adequate resources available when responding to youth crime, implementing harsher sentences and penalties were not advocated for by a single participant. Some interviewees vehemently argued that Ontario does in fact have adequate resources to respond to youth crime, but that they are financially mismanaged by either the province itself or the program administrators. In addition, community programs, prevention programs, diversion programs and social skills programs that do exist are rarely evaluated to determine the strengths and weaknesses. These findings suggest respondents believed youth could benefit more from a welfare state as opposed to the new crime control strategies that underlie the current legislation. In effect, the views expressed by the respondents lend support to the conclusions made by Garland (2001) and Hall et al. (2013) about the futile attempts of enacting law-and-order policies.

For many, the real issue is to what extent legislation can actually affect the prevalence and seriousness of certain types of youth crime. As such, a good portion of interviewees suggested that the education system in Canada could better address crime prevention in schools by instilling values all the way through, with the help of the neighbourhood and various support systems within the community. One interviewee purports,

So the best way in my view, is to focus on long-term rehabilitation for offenders, but really the criminal justice system is just the last cog in the machine right along the way. What should be being dealt with before then is that there are proper support systems in place to help minimize that this can happen. And by that I mean, you know, an education system that truly reaches everybody, social services that are there, acknowledging that, you know, when these family systems break down, something has to help fill the void.

Respondents also noted that keeping youth in school longer may help prevent crime in the long run. As asserted by one participant, “part of the awful problem with overrepresentation with some minority groups or native people is very few of them get through high school. We’ve got to just keep improving that somehow.” In lieu of developing tough-on-crime legislation, interviewees proposed that early intervention and long-term prevention programs are more valuable for youth than stricter penalties.

In addition to the development of long-term prevention strategies and social support systems, most respondents advocate for community based sentencing, where appropriate, for youth already involved with the criminal justice system. Participants believed accountability is paramount in the rehabilitative process, however most did not consider getting tough on crime a viable solution to raising the standard of accountability. Although it is recognized that “in some cases a certain degree of punitive measures may be necessary just to drive home the message to some youth and also to hold them accountable for what they’ve done,” most participants agreed that less serious offenders (even second and third time offenders) are fairly suitable for “restorative justice, community based sentencing, and circle sentencing” which are “invaluable and do hold young people accountable.” This not only suggests that these types of sanctions are appropriate for these types of offenders, but it also coincides with Garland’s (1996) analysis of the many “adaptive” responses of the state.

“Defining deviance down”, as Garland (1996) refers to it, encourages the widespread use of community sentences, although this is partially attributed to a strategy which essentially redefines the public’s perception of the various achievements (and malfunctions) of the criminal justice system and the state. As one participants stated,

We should deal with them by responding but responding effectively, generally in a way that accepts they have a diminished understanding and responsibility and deals with it that way and inventively, almost always in the community, usually by trying to reinforce the environment that they’re in in a way that works, whether that’s the family environment, an alternative family environment, or programs and resources that are available within the community. It’s a serious mistake to write off kids, especially to do so too early. There is no evidence that incarceration or removal from the community is terribly effective. I think we need to take the deviant behaviour that happens in our community as something the community has to deal with and should be well resourced to do so.

It should be noted, however, that participants also acknowledged a “decreased value” in continuously handing out community-based sentences, particularly for youth who “take a long time to figure out what’s going on” or those who have learning disabilities. In the first instance, some youth simply do not respond to sentences unless they are more punitive. In the second, some youth with learning disabilities are unable to comprehend the full scope of their offence and as such may not be amenable to community based sentencing or rehabilitation in general.

In cases where society legitimately places youth in custody as per the legislation, all participants agreed there exists a need for improved long-term rehabilitation programs that better attend to youth in conflict with the law. As one respondent explains, “Some of our custody programs in Canada are actually pretty good. I mean, good, there’s always a problem of peer-to-peer violence and that kind of stuff. But, you know, custody can be for some young people a positive experience. And so we have to work on what we’re doing in custody as well.”

A re-evaluation of custody programs was reported as necessary, not only to ensure that the system is “doing all that it can to rehabilitate youth”, but also because an overuse of custody “can have a backwards effect.” Given that “teenagers are obsessed with fairness more than anything else,” participants believed that rehabilitative programs in custody should be designed in a manner that maximizes the positive effects on youth.

Overall, these findings support the critical view which purports that within the legislative process, socially, economically, and politically underprivileged groups are more likely to be burdened and impacted by the consequences associated with laws that do not represent their interests. These findings also correspond with previous research on the ways in which the law encompasses dominant ideology which appears to have a universal quality, but instead merely conceals the interests of the more powerful groups (i.e., the ruling class/dominant capitalist groups/economic elite) as presented in their legal facets. From the perspective of the participants, it is evident that the enactment of Bill C-10 (Part 4) neither promotes the best interests nor well-being of those belonging to minority or underprivileged groups. Instead of placing emphasis on legislation that embodies values more in favour of groups that tend to be more at risk, the interview data suggests that the current legislation strategically situates many underprivileged groups on a path that not only endorses crime for some of these youth, but also advances the Conservative position that advocates for law and order via tough-on-crime policies.

This also supports the critical criminological perspective discussed by Alvi (2012), DeKeseredy (2011), and Garland (1996). In essence, tough-on-crime legislation facilitates the processing of those with less economic, social and political power (as opposed to those with more) mainly because there is less likelihood of adversity from those in less powerful positions.

Thus, these findings lend support to the position of the Birmingham School (Hall et al., 2013), but also to the works of Feeley & Simon (1992), Garland (1996, 2001) and O'Malley (1999) which examine a multitude of layers of the subordinate groups in relation to the extreme sanctions and strict enforcement actions on youth in light of the state's reaction to crime in a developing law and order society. Moreover, much of these findings correspond with the conflicting rationalities that underlie "late modernity", particularly with regards to the use of incarceration as a means of specific deterrence.

Consistent with the *YCJA* prior to the amendments, the interview findings suggest that legislation which bears a greater degree of interpersonal responses in conjunction with rehabilitation serves as a far better alternative to implementing harsher and longer sanctions for youth. On the other hand, recognizing that legislation only goes so far in terms of effectively addressing youth crime is a finding in and of itself. From this perspective, the values that should be embodied in the legislation theoretically ought to reflect those of underprivileged groups in need of assistance but have little means, resources, and access to address some of the social and economic conditions that accentuate their marginalization. These findings are similar to previous literature that makes clear that marginalized or disadvantaged youth "do not receive the same treatment [...] as the well-to-do or middle class. This differential treatment is systematic and complete" (Chambliss & Seidman, 1971, p. 475; see also Alvi, 2012; Garland, 2001; Hall et. al, 2013). In reality, these values need not only be mirrored in the legislation that addresses youth crime in Canada, but also within the broader social structure that responds to underprivileged youth and their respective communities.

6.2 Power, Ability and Influence in the Process of Legislative Change

In the political realm, it would appear that most policy ideas leading to legislative change originate from various perspectives and ideals of what society ought to look like from a given standpoint. It may be argued that the views from which policies are derived represent the overall beliefs and perspectives of the general population, especially when considering democratic societies. This occurs on the basis of consensus as a result of the (re)legitimation process, which in democratic societies is expressed through the electoral system by the public (Habermas, 1975, 1985; Hall et al., 2013). On the flip side, even within democracy it may be said that some policies are initiated and shaped by voices that represent the dominant ideology within a given society, but are not necessarily those held by the public (Hall et al., 2013). Even when these views are held by the public on the basis of consensus, there is evidence to suggest that governments, through the use of their power, resources and knowledge, have the greatest influence on the shaping of public consent. This consent often calls on the “central value system” which advances dominant ideology and interests (Hall et al., 2013, discussed in Chapter 3). Research Question #2 asks whose conception of what society ought to be like influenced the enactment of Bill C-10 (Part 4). When considering the legislative amendments of Bill C-10 (Part 4), the interviews suggest that almost all interview participants believed that a few major players influenced policy changes.

All twenty-two interview participants were asked where they thought some of the most influential policy ideas had come from with regards to the tough-on-crime legislation, particularly in relation to the most influential actors. While some interview participants were unsure of the names of specific individuals involved in the legislative process, all respondents believed that the most influential actors were certain members of the Conservative Party. Some respondents identified a number of the provincial Ministers of Justice as proponents of the

legislative change, although it was reported that many of these individuals began changing their minds after analyzing the provincial cost. Those who followed politics closely or were directly engaged with the political process reported three key political figures from the Conservative Party whose influence within the legislative process was pronounced.¹⁵⁶ A great number of respondents credited these political figures as having an enormously strong voice in support of the legislation. However, in line with the findings of Feeley and Simon (1992), Garland (1996, 2001) and O'Malley (1999), there is strong evidence to suggest that public opinion on youth crime and youth crime policy is used as a surrogate for consent, as a means for enacting legislation that appears to be reactive to public desire. It can be argued then, that there is an assumption made about the state's authority relative to the citizen's role in the enactment of penal laws (and legislation more generally) that is allegedly representative of each individual member of the public. In terms of the public discourse that occurs on account of the deliberative process, this finding falls in line with Habermas' (1975, 1985) critical social theory. Two participants note,

They (the Conservatives) take a view of this and they seek amendments and changes that they believe are responsive to public opinion [...] But really, in my view anyway, the thrust of it all comes out of the federal Conservative party. That seems to be the one that really pushes this, although there are a few other groups I guess - Interest groups that have their own issues and push for them.

Policy unfortunately in criminal justice seems with this government to be largely driven by the priorities of the Prime Minister's office and the politics that the Prime Minister's office sees rather than coming up from the Department of Justice with a detailed study saying "Okay, there's a problem with this piece of legislation, this needs to be tweaked".

¹⁵⁶ The names of these political figures remain undisclosed to protect anonymity and ensure confidentiality.

Not surprisingly, some interviewees found it difficult to accurately respond to the question at hand, predominately due to the fact that a lot of discussion about legislation comes out of Privy Council.¹⁵⁷ In that sense, knowing exactly where the most influential policy ideas comes from were challenging to determine simply because the legislative process itself does not entirely allow for public inclusion. This finding suggests that the deliberative process is not one that is transparent, although Habermas (1985) makes this very argument in relation to the need for ongoing public discourse. One participant explains,

I always thought (Influential Person #3) was a major player. It's hard to know. The legislation comes out of the government of the day. So who are the people most influential in any government at the time legislation is passed? Who has input to those people? You know, if you're Prime Minister, the Minister of Justice, or, you know, the head of the Privy Council or whoever the most powerful, you know, Deputy Prime Minister – If you're one of the top cabinet people, my guess is you probably have more influence than the average Canadian. I'm being facetious. Of course they do!

Effectively knowing where some of the most influential policy ideas have come from necessarily entailed participants to be politically involved.¹⁵⁸ However, some of those who were in fact allowed to partake in the committee hearings were still unclear as to where specifically influential ideas were derived from.

From the view of some respondents, the Conservative Party's position to exercise and exert both power and influence over the legislative amendments of Bill C-10 (Part 4) was

¹⁵⁷ The Privy Council Office (PCO) provides “non-partisan, public service support to the Prime Minister and Cabinet and its decision-making structures”. The PCO has three functions: “Advisor to the Prime Minister”, in which it provides “policy advice and information to support the Prime Minister” and Cabinet; acts as a “secretary to the Cabinet”, in which it “facilitates the smooth, efficient and effective functioning of Cabinet and the Government of Canada on a day-to-day basis”; and ensures “public service leadership”, whereby their goal is to make certain that “Canada and Canadians are served by a quality public service” (Privy Council Office, 2013).

¹⁵⁸ Please note none of the participants were active members in Parliament during this time. The participants who were involved in the legislative process served as experts who testified during the Parliamentary debates, as drafters of the legislation, or as consultants to the Minister of Justice.

essentially two-fold. First, the Conservative Party had acquired a majority government which legitimated their having total control of the Bill that went in and came out of Parliament (starting with Bill C-25, and ending with Bill C-10). Second, some participants believed that there was minimal opposition from other political parties. While all respondents noted that there was some degree of general opposition, many suggested that the political opposition simply was not strong enough to curb the content of the legislation or force the Conservative Party to forgo the legislation altogether.

Take, for example, a statement made on 08 December 2010 by a Conservative Member of Parliament which said,

Yesterday, the Liberal member for Winnipeg South Centre stood in this place and said, “If the government wants to be tough on crime, then it should call an inquiry”. Despite what the Liberals say, calling an inquiry is not what it means to be tough on crime. Research is not action. Unlike the member for Winnipeg South Centre, our Conservative government does not just talk the talk and call an inquiry, we actually walk the walk (Shelly Glover, *House of Commons Debate*, 8 December, 2010, at 1415).

Although some interviewees attributed this to the fact that few really spoke against these amendments at the provincial level from fear of appearing “soft on crime”, others alleged it had to do with the “muted voice of Québec” though, politically speaking, Québec was more so against the Bill than any other province. According to one participant, “when the Conservatives lost most of their seats in Québec and it became primarily NDP, when the cabinet table no longer had strong Québec voices around it” the voices from “more to the west of the country that were more law-and-order-ish and tied to the right or centre perspectives in terms of politics became much louder and stronger than they were in the past”.

These results support the argument put forth by Bala and Anand (2012) that discuss the support of the West and the opposition of Québec (and the remaining Eastern provinces more

generally). Thus, on a macro level these findings suggest that the legislation of Bill C-10 (Part 4) was influenced by the orientation of the Federal government around at the time. In other words, the enactment of the Bill was propelled by the Conservative Party and through the dominant ideology, but was not avidly countered by opposing political parties because no political party wanted to appear as though they were “for crime” as opposed to being against it.

Further, an argument can be made that these findings coincide with Habermas’ (1975) work on the state’s ability to exercise legitimate power. The enactment of Bill C-10 (Part 4) may be seen as part of an ideological movement (and discourse) of the current government. This is reflected in the perspectives of respondents. In effect, legislating the Bill demonstrates the way in which the law is used as an instrument of power and legitimacy, especially on account of the majority government. Thus, the state is understood in terms of a mediator of its complex interests, resulting in outputs (e.g., decisions to enact tough-on-crime legislation) that are legitimated by their authority.

In some instances, participants claimed that the most influential policy ideas pertaining to the tough-on-crime legislation were not loosely derived from the various members of parliament. While it was noted that some of the major players promoting the campaign may have been in parliament at the time, the ideas themselves originated from the Americans and, more notably, the Reform Party (predecessor to the Conservative Party of Canada). One participant in particular who was previously very actively involved in politics asserts that much of the influence that came from the Reform Party was comprised of “rural based sort of Evangelical people, who, many of whom have a view that, once you’re a criminal you’re

always a criminal and that people can't be rehabilitated, even young people. And they view it, they view them as sinners. So it (the legislation) comes from those kinds of roots".¹⁵⁹

Although the degree of the Reform Party's involvement in the Bill C-10 (Part 4) legislation did not appear to be known to the majority of participants, the general values associated with this political party *may* have in fact had some influence on the conceptions of what society ought to be like. Moreover, there is evidence to suggest that such perspectives about non-socially redemptive youth comprise much of the neo-conservative rhetoric, as discussed in the works of Feeley and Simon (1992), Garland (1996, 2001) and O'Malley (1999). Neo-conservative rationalities affirm that "the law may not only control and contract the crime, but may also regulate family relationships, personal morality and so on. And the state must possess severe and ultimate sanction and may utilise retributive punishment and social controls" (Hayes, 1994, p. 122, as cited in Feeley & Simon, 1992, p. 186). In other words, this perspective is congruent with "punishment and penal discipline with support for a unified moral order under the governance of state paternalism", and focuses less on the possibility of redemption through other mechanisms outlined by neo-liberalism (O'Malley, 1999, p. 189).

¹⁵⁹ The concept of the "sinner" in this context is what Garland (2001) refers to as the criminal "other" (pp. 135-138). The criminal "other" is a type of "reductionist account" of high profile crimes that are often sensationalized by the media and is a focus for public concern and political discussion. According to Garland (2001), sometimes "the problem is traced to the wanton, amoral behaviour of dangerous offenders, who typically belong to racial and cultural groups bearing little resemblance to 'us'". (p. 135). The criminal "other" is frequently selected on the basis of "its usefulness as a 'suitable enemy' – usefulness not just for the criminal justice state in its sovereign mode but also for a conservative social politics that stressed the need for authority, family values, and the resurrection of traditional morality" (p. 136). To some degree, this concept can be linked to the "underclass", in which youth are perpetually subject to poverty, suffer from diminished moral values, are involved with drugs, lack in work skills, turn to crime, and are often young minority males. For additional information, see Feeley and Simon (1992).

In addition to the main political parties and figures that influenced the enactment of Bill C-10 (Part 4), perhaps one of the most notable findings from the interviews emphasize the role of victims' groups. In line with the works of Becker (1963), almost all respondents familiar with the specific processes involved in the enactment of the Bill reported that the victims' movement had a very strong voice in support of the legislation. Given that by definition the victims' movement is a very legitimate concern about protecting and responding to the needs of victims, interviewees suggest that these groups are best at promoting a tough-on-crime approach in response to youth crime. In fact, Influential Person #3 was named on several occasions as one who articulated this position on behalf of the victims' groups and "got a lot of mileage out of it". According to one respondent,

Victims' groups are huge! Victims' groups have the ear of politicians and everybody else. Everybody who wants victims issues to be address. And this is the one area where both side come together. Everybody would say "I wish there were no victims and if there was a victim, you know, I hope they're treated with kindness, compassion, understanding, full information and support, all those things". Both sides would say yes to that. But then how they use that position is quite different. The hardliner would say, "You know, I want to support victims, therefore we need to get tough on crime". Well, why would you do that? Would you think that if a kid went to custody society would be better off after he came out? Well, if that's what you actually believe, then yes, I can see that, but we don't have that debate.

For those respondents who developed an intimate familiarity with both the Bill and the ways in which the Conservative Party used the victims' groups to support their position on the Bill, it is reported that the legislation is predominately based on very specific, individual cases of youth crime and does not take into account the prevalence of youth crime more generally. Many participants acknowledged that the Conservative Party accurately pulled out various people in order to use them as examples of why new youth crime legislation was needed.

These consisted of individuals that were a) victims themselves; b) the families of victims; and c) witnesses to crimes. Upon closer examination of *Hansard*, virtually all of the invited speakers had suffered the loss of a loved one on account of youth crime.

In addition, these incidents were sensationalized by the media and had received an abundance of attention, frequently citing things like “her story made national and international headlines”, and “my family was in the news”. In many cases, the victims of these youth crimes were described as “model citizens” and “heroes to their siblings”. These findings are congruent with previous research on youth crime and the role of the media and the ways in which it construes crime stories that heighten concern and anxiety (Becker, 1963; Hall et al., 2013; Garland, 2001; Sacco, 1995). Essentially, the enactment of Bill C-10 (Part 4) is alleged to have been implemented into policy because of “one person’s situation”. One respondent recalls,

In this particular case I remember seeing (Influential Person #2) talk at a luncheon, and his speech, it was interesting because you could almost predict it. He mentioned, “Well, John Smith wouldn’t agree with that”. You know, “John Smith whose son was killed by blah blah blah would not agree with that” and he’d do these little one-offs on things. So I think the victims in this particular case did a lot of lobbying [...].

In many other instances, participants recall the involvement of Line Lacasse in the committee hearings, whose son Sébastien (after whom Bill C-4 was named) was killed by a group of young people and whose case became an exemplar. Lacasse, who was White, was stabbed to death by about ten Black teens after singing a rap song that was offensive to Black people (“Family damaged by slaying”, 2006). Some of the teens involved in the death of Lacasse were adults at the time, while others were minors. This case became highly sensationalized by the media which provided further evidence that the *YCJA* needed “toughening up”.

In fact, on one occasion a Member of Parliament (Serge Menard) asked the Minister of Justice (Rob Nicholson) why Bill C-4 was specifically named *Sébastien's Law*. The minister's response was simply that "It was a decision of the government to call it *Sébastien's Law* in recognition of this young victim" (Rob Nicholson, Standing Committee on Justice and Human Rights, 2010, at 1625). The act of naming laws after victims is explained by Garland (2001) who purports,

The new political imperative is that victims must be protected; their voices must be heard, their memory honoured, their anger expressed, their fears addressed. The naming of criminal laws and penal measures for crime victims [...] purports to honour them in this way, though there is undoubtedly an element of exploitation here too, as the individual's name is used to fend off objections to measures that are often nothing more than retaliatory legislation passed for public display and political advantage. This sanctification of victims also tends to nullify concern for offenders. [...] As a consequence of these usages, the symbolic figure of the victim has taken a life of its own, and plays a key role in political debate and policy argument (p. 143).

The arguments put forth by Garland (2001) helps explain and contextualize the findings obtained from the participants on this matter. The findings also support the assertions put forth by Habermas (1975, 1985) and Hall et al. (2013) regarding the discourse of the current government and the ideological movements that follow to ensure that such activities become everyone's interests. This is done by personifying the victim through legislation because it adds to the seriousness and prevalence of youth crime, and further contributes to the public's general perception that such crimes "can happen to anyone".

Interviewees believed Lacasse's presence represented a face behind which those attending the hearing could genuinely sympathize with a grieving mother. While most noted her right to attend, they questioned the real need for her participation given the difficulty and emotionality associated with her son's case. Almost all accounts of Lacasse's involvement

were reported as being contrived by the Conservative Party to further their position in relation to the legislation. One participant notes,

First of all, what on earth could one say to her or how could one meaningfully engage in a discussion with her? [...] The reality was, her son was killed by another young person, but the perpetrator received an adult sentence, and you know, he's serving life in prison. And that kind of case would actually NOT in any way been affected by this legislation so I found it very manipulative to bring somebody – and I realize there is a place for victims, not only in individual cases of course to tell the court how the crime has impacted them but also in law reform. But you know, I thought it was very manipulative because not only was it pretty clear that she hadn't read anything in the Bill, but nothing in the Bill would have pertained to her case.

This sentiment regarding Lacasse's involvement was in fact shared by many participants who acknowledged the role of individual victims as well as victims' groups in the legislative process. Another respondent noted that “the Conservatives have rounded up, you know, in a lot of their press conferences you will notice, those victims who are really, really still in pain to talk”.

Undoubtedly the role of victims played a substantial role in the enactment of the Bill C-10 (Part 4) legislation; however it is inaccurate to claim that all victims had an *equal* role in this legislative process. In particular, victims who avidly received media attention were often used to support the need for crime legislation, as they “tend to be pretty vengeful and have had a difficult experience as a victim or victims and aren't over their victimization.” Overall, these findings supports the works of Habermas (2006), Hall et al. (2013), Garland (1996, 2001), Sacco (1995), and Wortley et al. (2008) who all discuss the complex nature of the relationship between the state, the victims, the media, the offenders, and the public, and the mechanisms through which these diverse groups influence legislation.

Hansard and committee statements provide evidence to support the perspectives put forth by the participants with regards to how specific witnesses were used to influence the legislative process. On 23 March 2011, a couple was invited to share their experience as crime victims with others. While it is noted in her speech that the legislation should address the issues underlying youth crime (which is not done by the amendments), she also emphasizes the need for harsher legislation. Suman Virk states,

As victims of crime, we have found that there has not been enough emphasis on the crimes that are being committed by these young people and the impact on the general public. A lot of children were looking up to the two individuals who took our daughter's life. They have glorified violence by the video games and rap music, so we have to get to what is causing our children to be losing control. Definitely, I think if we have legislation that addresses this problem, maybe our children will think twice about harming one another. I think we have to speak up, because that's what causes kids to bully. It's because everybody keeps their secret. So definitely I think if a child commits a serious crime, society has the right to know who they are so they can protect themselves. Keeping their identity hidden is not helping the child or anyone else. I think that should be mandatory for all youth who commit serious crimes. What we've learned is that most of these children don't change. What they do as teenagers they continue through the rest of their lives, so definitely early intervention is the key, starting with programs for youth counselling. We see more and more people with depression and other mental health issues. That should also be addressed for our youth, not just locking them up somewhere, but also giving them the mental help and attention they need. There's a big spectrum here, but since we're discussing the legal system, I think we do need harsher penalties. If I had it my way, I'd have the legal system go a lot faster, too, because, as my husband said, we have to go through three different trials for one crime. To us that makes no sense, so I hope that can also be addressed (*House of Commons Debate*, 23 March, 2011, at 1720).

This statement was also complemented by Mr. Manjit Virk's testimony, which purports,

But we are glad that now the government is thinking of giving some attention to the victims as well, not only to the offenders, and I share my sentiments with Bruno that the law has to treat

them like adults. If they are doing adult crimes, they have to be treated like adults. Also, when their names are published, people will know who they are so these young people cannot hide behind the law, because their slate will be clean no more (*House of Commons Debate*, 23 March, 2011, at 1720).

Another victim of a serious crime notes,

I support Bill C-4 because I think we need to do a better job of controlling young offenders so we don't have tragedies like mine happening again. It is imperative to protect the public from repeat young offenders with a history of violent behaviour. This bill would serve as a useful tool for judges and police officers. It would make it possible to apply extrajudicial measures, which would give society the ability to check up on individuals whose records showed a progression towards violent behaviour. Furthermore, placing a young person whose behaviour had endangered others in detention would be a good thing and, in my view, a deterrent. Youth who commit serious crimes, such as murder, attempted murder, manslaughter and sexual assault, should be sentenced as adults. Releasing their names to the public would be another way to protect society [...] I do not think the status quo is the answer. We have to give prosecutors, judges and police officers tools to ensure that young offenders receive sentences commensurate with the severity of their crimes, not just a slap on the wrist. We have to send a clear message. We have to protect society against youth who are violent repeat offenders (Bruno Serre (Board Member and Group Leader of family meetings, Association of Families of Persons Assassinated or Disappeared) (*House of Commons Debate*, 23 March, 2011, at 1715).¹⁶⁰

The emergent role of crime victims in policy formation suggests that victims have become a “favoured constituency” (Garland, 2001, p. 121), not only as a corollary of a shift in governing strategies, but also because their experiences are instrumental in developing “a source of

¹⁶⁰ Interestingly, Brigitte Serre, who was 17 years old (and the daughter of Bruno Serre above) was stabbed 72 times and killed by two youth who were *over* the age of 18 at the time of the murder. The involvement of Bruno Serre in the Bill C-4 debates can be seen as an example of how the government handpicked victims to share their stories of their loss to further propagate their agenda. For more information, see “Man admits to stabbing teen to death in robbery” (Montgomery, 2007) and “Man gets life for brutal murder of gas bar attendant” (Banerjee, 2007).

support and legitimacy” in the face of achieving consensus (Garland, 2001, p. 143). The underlying argument of each of these victims’ statements suggests an ongoing public desire not only for the amendments to control and manage youth committing such crimes, but for a legislation that specifically disciplines, targets and tracks a group of high-risk (potentially violent/potential “career criminals”) youth whose particular type of conduct *is* the behaviour being criminalized.

These excerpts illustrate how public consensus develops in two ways. First, the consensus is built on a redefinition of the problem that singles out a small group of youth responsible for a disproportionate number of offences, despite declining youth crime rates. The accord is formed on the basis of public protection, with the ability to inspect or closely observe youth exhibit patterns of violent behaviour. Second, the process of consent can be understood in terms of a perceived crisis of the seemingly illegitimate penal-welfare strategies that progressively call upon the need for further reformation. Together, these factors contribute to the complexities of building such a consensus in light of this binary, whereby the notion of risk-management for repeat offenders is confounded by the problematization of the penal-welfare tactics that have advanced a new punitive and “adaptive” governance strategy. As a consequence of the shift in youth crime governance, the subject of punitive interventions becomes this high-risk group of chronic offenders as potential “career criminals” that are often viewed as the “underclass”, whose behaviour corresponds with that of the least powerful group. Much of this discussion supports the theory asserted by Habermas (1975, 1985) which focuses on the ways in which the involvement of the public through discourse ensures and maintains the state’s position of authority and legitimacy, and guarantees that the public participates in the formation of laws that are reflective of their alleged desires.

The concept of the symbolic victim is also raised here, whereby the “the interests and feelings of victims – actual victims, victims’ families, potential victim, the projected figure of ‘the victim’ – are now routinely invoked in support of measures of punitive segregation” (Garland, 2001, p. 11). According to Garland (2001), the presence of the symbolic victim is “a new and significant social fact”, given that “the symbolic figure of the victim has taken on a life of its own” (p. 11). The involvement of victims (or victim’s families) in the development of the tough-on-crime legislation collectively represents a degree of cohesion for a common cause. As Garland (2001) asserts,

The victim is no longer an unfortunate citizen who has been on the receiving end of a criminal harm, and whose concerns are subsumed within the ‘public interest’ that guides the prosecution and penal decision of the state. The victim is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical. Whoever speaks on behalf of victims speaks on behalf of us all – or so declared the new political wisdom of high crime societies. Publicized images of actual victims serve as the personalized, real-life, it could be you metonym for a problem of security that has become a defining feature of contemporary culture” (p. 11).

What can be taken from this is that a complex relationship exists not only between the symbolic victim and the individual victim, but also between the political spheres which dictate, shape, control, and define criminal justice and the institutions through which crime is controlled and managed (Garland, 2001; Hall et al., 2013).

The specific involvement of victim’s groups in the development of this legislation raises an interesting point. It can be asserted that, typically, victims are from the most privileged backgrounds whose deaths or injuries often become political tools for forward, right-wing, law and order agendas. The other side of the coin argues that generally, a great deal of crime victims are also the most marginalized in society. That is, they frequently share the

same structural (race and class) backgrounds as offenders.¹⁶¹ Further, marginalized victims do not always enjoy the privilege of having a voice, let alone a prominent one in the legislative process. An analysis of *Hansard* on *some* of the cases presented at the House of Commons by the victims (or witnesses of the victims) suggests that the victims came from varying backgrounds and race.¹⁶² While some victims came from marginalized groups, others did not.

The same can be said, although to a lesser degree, for the young offenders. A number of offenders discussed in *Hansard* were Black or Aboriginal, although White youth were included as well.¹⁶³ In some instances there were racial undertones that partially compelled certain crimes, while in others there was no evidence to confirm these notions. In a number of cases included in *Hansard*, the victims that suffered a death or a serious injury occurred on account of teenage group crime. On the whole, the findings from *Hansard* indicated that victims who came from more privileged backgrounds were no more or less likely to be used as a political instrument in the legislative process. Thus, these results can substantiate the data provided by the participants who asserted that victims were hand-picked on the basis of their case to support the passing of the tough-on-crime legislation. In a sense, this may be understood in terms of a politicized class (or racial) conflict in the modern capitalist state which is disguised in another form of crisis (Garland, 2001; Habermas, 1975; Hall et al., 2013).

¹⁶¹ To a degree, this assertion conflicts with previous statistical research on victims and youth crime, and the ways in which this is linked to race/ethnicity and class. However, it is likely that the findings in this dissertation are a result of the governments “hand-picked” process to illustrate the generalizability of violent offences amongst all racial and socio-economic categories. This therefore reduced or removes any potential for a reactionary response against racism or classism.

¹⁶² This analysis was cross-referenced with the applicable case law to retrieve the facts (or any identifying information) of the case. Some of the incidents discussed in *Hansard* were included in the case law analysis found in Chapter 7, while others happened well before the date selected for case law analysis (i.e., prior to April 2003). It should also be noted that not all incidents become case law. Thus, aside from what is reported by the media, it is difficult to deduce any real conclusions about whether or not victims are/were comparable in their class/race to offenders, or whether these two groups were similar on other social dimensions.

¹⁶³ This finding coincides with the case law findings discussed in Chapter 7.

That is, the connotations of race and class are cloaked under the general pretense that “individuals like us” are subject to victimization if no action is taken to address the problem.

To a lesser degree, a number of respondents acknowledged the role of enforcers (such as police and Crown attorneys) as influential parties to tough-on-crime policies. According to most participants, police tend to support tougher penalties for young people given they serve as the “front-liners” and are therefore typically the first in contact with apprehended youth. In particular, the Chiefs of Police Associations both provincially and nationally, and a number of policing services were reported as having “a pretty good in to the Minister’s office for sure.” This is supported by a statement made at the committee on 09 December 2010 which explains,

[...] Before becoming a Member of Parliament, I was a police officer, and it was my pleasure to have been chosen by the chief of police in Winnipeg to be one of the trainers for the YCJA when it became legislation. As a result, I was heavily involved with crown attorneys, etc., who were involved in putting forward the Youth Criminal Justice Act in our province. [...] I was pleased to have been consulted on a number of facets of the Youth Criminal Justice Act. I must say that as I trained the police officers of the Winnipeg Police Service, it became very apparent to me that this was a piece of legislation that was going to cause us an enormous number of problems with our youth. We could see from the beginning that our youth were about to fall through the cracks, that the paperwork was going to be horrendous, that our youth were not going to be served, and that they were going to be exploited by adults who saw the Youth Criminal Justice Act as a tool to use our children to commit serious offences for which they themselves would suffer serious penalties [...] knowing very well there were no deterrents, no denunciation, and no penalty. Unfortunately, our predictions came true. I have to say that as a police officer who had to use the Youth Criminal Justice Act, this is probably one of the worst pieces of legislation I had to deal with in my tenure (Shelly Glover, Standing Committee on Justice and Human Rights, 2010, at 1555).

All chiefs of police were included in the cross-national study that was conducted after Bill C-25 was proposed. Correspondingly, Crown prosecutors were identified by many participants as

having an influential voice in support of the legislation because “they basically favour anything that makes convictions easier and sentences longer.” Together, these findings support the Marxist/critical view that asserts that the degree of criminalization is likely to be highest if the behaviour being criminalized is found amongst those who are least likely to support the legislation. More specifically, on the basis in which the construction and labelling of such acts are shaped and defined as deviant by the “primary definers” (i.e., the powerful), there is more likelihood that those affected by such definitions (and thus legislation) will be criminalized (Hall et al., 2013). This stems from the fact that “the social and political definitions of those in dominant positions tend to become objectified in the major institutional orders”, which in turn strengthens the role of first-level enforcers relative to the rates of criminality (Hall et al., 2013, p. 62).

Outside of these influential parties, it can be argued that the public played a significant role in the legislative process. Since the Conservative Party was democratically elected with a majority of parliamentary seats, the legislation of Bill C-10 (Part 4) could potentially be seen as a reflection of the public’s interest. Given that individuals themselves cannot shape laws, the political process requires that the public elect a party that most closely resembles and represents their values, beliefs, and interests (and is based on the notion of consensus discussed in Chapter 3). These findings entirely lend support to the works of Habermas (1975, 1985), particularly with regards to the ways in which the modern state gains legitimacy on account of public elections. However, according to Chambliss and Seidman (1971) it is also important to note that public interests are held insofar as they correspond with the interests of the dominant group(s).

Through the works of Habermas (1975, 1985, 1996), then, it can be said that the tough-on-crime legislation developed (to a degree) on the basis of public interest, desire, and consent as opposed to solely reflecting the interests of the Conservative Party as well as other interest groups. This statement, in part, cannot be argued given the ways in which the democratic laws in Canada are upheld. However, as noted above, the public's desire to toughen responses to youth crime is based on a variety of misconceptions about the ways in which the youth criminal justice system operates (see Sprott, 1996, for a more detailed explanation). In fact, as Garland (2001, p. 146) notes,

The claim tends to be that tough-on-crime policies do not originate in any groundswell of public demand; that the public are truly not committed to these policies; and that such commitment as does exist has been artificially aroused and excited by media images and campaign that misrepresent both crime and public sentiment. Public support for enhanced 'law and order' is, on this account, the fabricated result of manipulative political rhetoric and rabble-rousing popular press. [...] It is also true that public attitudes about crime and punishment are conditioned by information, and may sometimes be changed by educative means.

Thus, the claim that the Conservative Party legislated Bill C-10 (Part 4) in response to the public's interest may hold some ground, however in the larger context, the ways in which the public's desire in and construction of tough-on-crime measures needs to be considered in order to gain a better understanding of the public's influence on the legislative process.

In general, these findings build on the ways in which public interest is used to promote agendas that support dominant ideology, as well as the (re-)legitimizing process where a hegemonic crisis has occurred. Further, they demonstrate the ways in which the public's desire is used to develop a consensus of the need to target the high-risk potentially violent, potential "career criminals" (a depiction transmitted in the media as a group to be feared), and to the

policy reforms that enable the identification and tracking of this potential group on the basis of managing risk. More specifically, these findings suggest that this process is a reflection of a crisis that emphasizes the perceived illegitimacy of penal-welfare strategies, under the pretense that they are ineffective. On this basis, it supports one of Habermas' (1975) conditions for a legitimation crisis where the public perceives certain policies or legislation as unsuccessful.

To elaborate on the works of Habermas (1975, 1985, 2006), one may see the ways in which the legitimation system fulfills its role by ensuring that the public freely and equally participates in both the formation of government and the laws under which they will be governed. Securing mass loyalty results in decisions made by the state that allegedly advocate the will of the people on the basis of consensus. Part of the argument asserted by Habermas (1985, 2006) stems from the state's obligation to enact laws that uphold the interests of the citizens, however the interests or values held by the public is covertly manipulated by the administrative power yielded by the government so that they may shape, form and control such public consent which they then seek to confer (Chambliss & Seidman, 1971; Hall et al, 2013). This elucidates the delicacy of the state's legitimacy both in terms of the way it is gained and maintained, which in turn requires the continuous process of exercising legitimate power.

The government's dependency on the involvement of those outside of the criminal justice system suggests a "responsibilization strategy" has been employed in the development of this legislation. According to Garland (2001), the main purpose of this "adaptive" response "is to spread responsibility for crime control onto agencies, organizations and individuals that operate outside the criminal justice state and to persuade them to act appropriately" (pp. 124-125). This is done in a number of different ways, but is almost always sparked with campaigns targeting public perception.

The first step in the process begins with identifying “people or organizations which have the competence to reduce criminal opportunities effectively, and [...] to assess both those who have a responsibility to do so and whether this responsibility can be enforced” (Garland, 2001, p. 125). Wide-ranging campaigns that originate with the public are sometimes “conducted through television advertising and the mass leafleting of households and businesses, aim to raise public consciousness, interpolate the citizen as a potential victim, create a sense of duty, connect the population to crime control agencies, and help change the thinking and practices of those involved” (Garland, 2001, p. 125). More notably, this strategy implies that it is not solely the state’s responsibility to prevent and control crime. Rather, the technique implies that governments acknowledge that one of the most crucial processes producing structure, organization, obedience and compliance are conventional or typical social processes, found “within the institutions of civil society, not the uncertain threat of legal sanctions. [...] In this new vision, the state’s task is to augment and support these multiple actors and informal processes, rather than arrogate the crime control task to a single specialist agency” (Garland, 2001, p. 126).

It is suggested, therefore, that the “responsibilization strategy” is a new technique that essentially redefines the ways in which the government exercises control and power in this field. It is, what Garland (2001) calls, “governing-at-a-distance” (p. 127). In reality, it may be seen as a means of redistributing the burden of crime control, an approach that closely resembles what Foucault (2000) describes as “governmentality”. This perspective entails the mobilization and inclusion of others, the formation of new impetus, and the production of modern schemes that incorporate cooperative action (Garland, 2001).

Overall, the findings from the interview data and *Hansard* support the Marxist/critical theoretical perspectives discussed in Chapter 2. Particularly lending support to the works of Habermas (1975, 1985, 2006) regarding the state as a mediator of its complex interests, these findings coincide with the assertions made about the role of the public in the formation of government and legislation. The inclusion of the public in the deliberative process not only provides a means of legitimating power, but also confirms the ways in which the state relies on strategies and techniques (i.e., “resorting to emotional appeals” and the “symbolic use of inquiries”) to guarantee its authoritative power.

These findings also correspond with previous research outlined in Chapter 3. More specifically, the qualitative findings resembled those found in Cohen (1972), Hall et al. (2013) and Garland’s (2001) work on the ways in which the reactions to youth crime are constructed through various mechanisms, leading to definitions of behaviours that go against the ascribed grain. In addition, they lend support to the various concepts of victimization as discussed by Garland (1996, 2001) as a means of reforming legislation to emphasize the needs of the victims as opposed the offender as part of an “adaptive” strategy. As such, various elements of this data pertain to the analysis presented by Feeley and Simon (1992) and Garland (2001) on redefining the problem of high-risk, potentially persistent offenders which are dictated by society’s most dominant groups. In turn, these findings are connected with the assault on penal-welfare strategies by both neo-liberalists and neo-conservatives.

Almost all respondents who were fairly familiar with the processes involved in the legislation of Bill C-10 (Part 4) emphasized the role of various key influential persons within the Conservative Party, specifically stressing the capacity in which a majority government is able to control, shape and enact legislation as they see fit. Interest groups such as enforcers and

victims' groups also carried weight within the legislative process and were far more influential than most others. According to most participants, the involvement of these particular groups strategically augmented the Conservative Party's position through collective action, mainly by attempting to discount all other empirical evidence suggesting that harsher legislation has a minimal deterring effect.

More specifically, the interest taken by victims' groups as perceived by the respondents highly influenced "lawmaking" (in this case the enactment of Bill C-10 (Part 4)) and therefore influenced the rules pertaining to "lawbreaking, victimization", and "reactions to crime" (Wortley et al., 2008, p. 211, see also Becker, 1963). Consistent with prior research, these findings suggest that an intricate exchange between the "individual (micro) and governmental (macro) level of phenomena" occurred during the legislation of the Bill, which not only encompasses "the state", but include "young offenders, victims, and the general public" (Wortley et al., 2008, p. 210, see also Alvi, 2012; Garland, 2001; Hall et al., 2013; and McMurtry and Curling, 2008). There is a multifaceted interaction that took place between the structural forces (such as a majority government) and the social processes involved in the creation of this particular piece of legislation, in relation to the cultural (dominant) ideology thrusting it forward. Thus, there is evidence to suggest that these findings are congruent with those of Feeley and Simon (1992), Garland (2001), Habermas (1975, 1985), Hall et al. (2013), and O'Malley (1999) whereby the state exercises moral and intellectual control by constructing alliances with a number of different social and structural forces in a way that maintains dominant ideology.

6.3 Conclusion

The research questions in Issue 1 examined the process through which Bill C-10 (Part 4) developed and was legislated. Despite previous research indicating that harsher sentencing practices have no effect on youth crime rates, legislation in Canada has now adopted a tough-on-crime stance. The data from the interviews suggest this legislation was both instigated and enforced by the Conservative government with the help of the public, although evidence suggests that such interests support the dominant ideology advanced by society's most powerful groups (see Research Question #1).

While respondents suggested that most evidence presented to the Conservative government challenged the need for tough-on-crime legislation, much of this research was dismissed simply because it was not in line with the Conservative agenda. From this perspective, the analysis of the interview data found that the change in legislation was not established on any social or empirical evidence, but rather was politically driven by various interest groups, the public, and the government in power.¹⁶⁴ In fact, the legislative amendments were only enacted once the Conservative Party won a majority government, because this ensured a lesser degree of opposition from other political parties as well as competing interest groups. These findings suggest that the amendments of Bill C-10 (Part 4) effectively represent the values and interests of those in the more powerful segments of society, although these views are naively supported by the public.

Moreover, the findings from the interviews suggested that the tough-on-crime legislation neither embodies values that address the best interests of youth in conflict with law,

¹⁶⁴ For a more detailed account of how “policy choices are heavily determined by the need to find popular and effective measures that will not be viewed as a signs of weakness or an abandonment of the state’s responsibility to the public”, see Garland, 2001, p. 111.

nor represents legislation that directly improves the safety of the public. There is evidence to suggest that youth crime legislation is better received when it attends to the needs of both the general public and young offenders in a way that is fair, balanced, and incorporates a rehabilitative approach. While the amendments of Bill C-10 (Part 4) do not overtly negate the *YCJA*'s emphasis on the rehabilitation of youth, the tough-on-crime legislation has the *potential* to impose longer and harsher sentences, especially for violent repeat offenders. As such, the interview data implied that tough-on-crime legislation typically results in a shift from a focus on rehabilitation by applying more punitive sanctions that serve to control, manage or track young offenders, although the true effects of this remain to be seen. This shift stemmed from a redefinition of the problem of youth crime (that is, at-risk, potentially violent, potential repeat offenders) and behaviour that goes against the normative set of rules dictated by the most dominant groups within society.

These findings also suggested that legislation which implements a tough-on-crime approach represents a certain political ideology that upholds the values of some lawmakers, political elites, and powerful social groups at the cost of the underprivileged or at-risk youth, and thus supports the views put forth by the Marxist/critical perspective. Further, the respondents indicated that while the youth justice system has a role, the provisions of better community and mental health services for youth, increasing youth employment, providing youth with the necessary skills and tools to build confidence, and changes within the educational system collectively have a stronger impact on youth crime than legislative changes. More specifically, legislation that places a greater emphasis on education by embodying values that connect the behaviour to the consequence (even through community shaming or dealing

with the victim face-to-face) are suggested to have a more immediate effect of reducing youth crime, resulting in a more significant response to youth crime.

On the whole, Bill C-10 (Part 4) was found to represent a dominant political ideology that preserves certain values at the cost of socially, economically, and politically underprivileged youth, which coincides with both the findings of Hall et al. (2013) and the critical perspective more generally. As a result, underprivileged groups are more likely to be burdened and impacted by the consequences associated with laws that do not represent their interests. In actuality, legislation such as Bill C-10 (Part 4) *may* have the effect of further excluding underprivileged youth because their interests are marginally (at best) reflected in the policy.

Further, the analysis of the interview data found that the legislative amendments of Bill C-10 (Part 4) were influenced by a small range of stakeholders, primarily propelled by certain members of the Conservative government (see Research Question #2). These changes originated from various stakeholders' conceptions of what society ought to be like in relation to crime and crime legislation. Not only was the enactment of Bill C-10 (Part 4) fueled by conservative politicians, provincial Ministers of Justice, and some Crown attorneys, but the data suggests that victims' groups played a significant role in influencing the tough-on-crime legislation as well. Since the conceptions of what society ought to look like closely resembled one another, the combined efforts of these five groups gave rise to the Conservative government's position on enacting harsher legislation. The data from the interviews suggest that the most influential group after certain key members of the Conservative Party was that of victims' groups. This provides support for the views advanced by Becker (1963), Chambliss & Seidman (1971), Garland (2001) and to a lesser degree Habermas (2006) and Hall et al. (2013),

since the involvement of particular interest groups amplified and strengthened the Conservative's position. There was also evidence to suggest that the Conservative government manipulated the use of victims' groups by selectively inviting specific individuals to participate in the parliamentary debate. This alludes to the existence of a complicated interaction between individual and governmental levels of phenomena that occurred during the development and legislation of the Bill. It also explains the ways in which mass loyalty and consent is achieved amongst the public, as per Habermas (1975), by "resorting to emotional appeals" and relying on the "use of inquiries" in order to gain legitimacy and to further crime policy. Overall, these findings support the critical perspective which suggests that there is a complex relationship that exists between the public, the state, various interest groups, and the media, which collectively influences "lawmaking, lawbreaking, victimization," and "reactions to crime" (Wortley et al., 2008, p. 211). Elements of the findings from Issue 1 are reflected in the works of Alvi (2012); Becker (1963); Caputo and Vallée (2007); Chambliss and Seidman (1971); DeKeseredy (2011); Feeley and Simon (1992), Garland (1996, 2001), Habermas (1975, 1985, 1996, 2006); Hall et al. (2013), O'Malley (1999), and Wortley et al. (2008).

CHAPTER 7 – INTERPRETATIONS OF YCJA LEGISLATION AND SENTENCING PRACTICES IN CANADA

The reconstruction of the ways in which youth offenders are conceptualized resulted in the enactment of the *YCJA* in 2003. In some ways, this legislation signifies a tougher, more punitive approach to addressing high-risk youth when compared to preceding youth justice philosophies and ideologies, and to an extent coincides with the conservative ideology described by Feeley and Simon (1992), Garland (1996, 2001), Hall et al. (2013), and O'Malley (1999). With the legislative amendments of Bill C-10 (Part 4), the *YCJA* effectively represents a modified model of crime control to further manage specific groups of youth, particularly those who are risky or dangerous.

In order to better understand the ways in which the tough-on-crime legislation is interpreted and applied in a court of law, this chapter focuses on the legal outcomes which have a bearing on the way youth are processed and sentenced across Canada. To address Research Question #3, this chapter provides an analysis of Canadian case law pertaining to violent and repeat youth in conflict with the law. This analysis provides an account of how the *YCJA* is understood to uphold various provisions of the *Act* in conjunction with a range of available sentences. These findings address the ways in which youth in Canada (particularly violent and repeat young offenders) have been and are currently dealt with both before and after the enactment of Bill C-10 (Part 4). This chapter therefore investigates Issue 2 as outlined in Chapter 4.¹⁶⁵

¹⁶⁵ Please refer to pages 170-171 for a full list of the Research Questions.

7.1 The Effects of Tough-on-Crime Policy

An analysis of case law between April 2003 and June 2013 indicates that the sentencing principles, particularly the need for “fair and proportionate” sentences as well as the importance of “rehabilitation and reintegration” outlined in Section 3 of the *YCJA*, are largely adhered to within the courts. Since the enactment of the *YCJA*, it appears that most sentencing judges do in fact consider the alternatives to custody when searching for the least restrictive approach that balances rehabilitation and accountability, despite the amendments of Bill C-10 (Part 4). In a sense, these findings coincide with what Garland (1996) refers to as an “adaptive response” to the state’s failure to effectively control crime. Specifically, adapting to failure can be witnessed through the various responses set forth by both the state and criminal justice agencies by developing new techniques of “system integration and system monitoring” (Garland, 1996, p. 455). In effect, these responses include policy objectives which are geared towards decreasing the use of custody for youth offenders but more precisely signify the limits of the self-governing state (Garland, 1996).

While the legal context for responses to youth crime is discussed in Chapter 4, this section specifically focuses on Research Question #3 and addresses whether or not youth in conflict with the law have been impacted or affected by the tough-on-crime policy, either negatively or positively. If youth have been impacted, in what ways has this occurred? With the exception of years 2003 and 2013, case law analysis is divided up equally in three-year intervals not only to condense material, but also to track any changes in sentencing practices over the years. Although the legislative amendments came into effect on 23 October 2012, there was no case law in the remaining month and a half of 2012 that referred to Bill C-10 (Part 4). This finding may likely be attributed to the fact that the amendments could not be

applied retroactively to youth who had committed an offence prior to this date. Thus, the post-enactment analysis of Bill C-10 (Part 4) case law starts from 01 January 2013.¹⁶⁶

7.2 Case Law Findings From 2003

Findings from the case law between 01 April 2003 and 31 December 2003 suggest that a number of issues stem from the transitional phase between offences that occurred during the *YOA* legislation, but were dealt with after the *YCJA* was enacted.¹⁶⁷ In some instances, the consideration given to each case is unique in the sense that some youth had previously been convicted, charged, and sentenced to custody for an offence under the *YOA*, but were appealing the sentence because they were permitted to gain from any lesser penalties coming into effect between the time of sentencing and the hearing of the appeal. Similarly, some offences that had been committed slightly before the enactment of the *YCJA* were judicially determined to be a serious offence pursuant to the *YCJA*. As such, some cases in 2003 which involved offences that predated the *YCJA*'s proclamation into force were addressed accordingly under the Act, although this did not hold true for all cases.¹⁶⁸

More notably, however, a number of cases subject to this intermediary stage apply the provisions of the *YCJA* in a new light. For instance, sentencing judges as far back as 2003 observe that the *YCJA* did not include the sentencing principles of denunciation or deterrence. Instead, custody is used as a last resort and the focus of each case support the principles of rehabilitation and reintegration. In addition, some youth who had been transferred to the adult jurisdiction for first degree murder were transferred back to the youth court under the

¹⁶⁶ See pages 205-208 for additional information of case law breakdowns.

¹⁶⁷ See, for example, *R v N.A.J.* (2003).

¹⁶⁸ See *R v W.B.* (2003). See, for example, *R v T.M.* (2003) for the opposite ruling given that the youth was subject to a greater punishment under the *YCJA* than he would have been subject to under the *YOA*. Under the *Charter*, the accused had the right to a lesser sentence.

provisions of the *YOA*, but to be sentenced under the provisions of the *YCJA*, in order to benefit from the rehabilitative process outlined in the *Act*.¹⁶⁹

These findings demonstrate that judges almost immediately applied the *YCJA* to each case in an attempt to sentence youth in a manner that upholds the principle of rehabilitation, even in cases where serious violent offenders were involved. Particularly relevant for youth who were first time offenders, efforts were made to impose sentences on youth which included probation, community service, restitution, counselling, and letters of apology. Depending on the mitigating factors, however, youth who were involved in offences such as aggravated assault, assault with a weapon, assault causing bodily harm, manslaughter, first degree murder, or second degree murder were subject to custodial sentences under the provisions of the *YCJA* (S.42(2)).

Overall, case law from 2003 demonstrated a shift from the ways in which youth were previously dealt with under the *YOA*. Because new options were added to encourage the use of non-custodial sentences under the *YCJA*, most case law reflected a varied sentencing approach to ensure rehabilitation and reintegration back into the community. This finding is predominately linked with the provisions of the *YCJA* that reserves custody for only violent or repeat offenders. Given that the *YCJA* was fairly new at the time, it is not unforeseeable that some youth court judges either over- or under-sanctioned youth for their offences; however in most instances steps were taken by the Crown or the defendant in subsequent years to ensure

¹⁶⁹ See *R v N.T.P* (2003). See also *R v T.W.* (2004); *R v M.N.(b)* (2004). See *R v M.N.(b)* (2004) for a case where a comparison is drawn between the available punishments under each of the *YCJA* and *YOA*, where the *YOA* sentencing provisions adequately addressed the dual objectives of public protection and rehabilitation of the young person.

that the correct sentence was imposed.¹⁷⁰ Additionally, the provisions of the *YCJA* specifically determine when custody orders can be applied and when they are inappropriate. As such, sentencing judges are given a more detailed guideline in relation to the use of custody in comparison to the *YOA*, when there was no restriction on the use of custody.¹⁷¹

7.2.1 Case Law Findings Between 2004 and 2006

Between 01 January 2004 and 31 December 2006, case law indicates that sentencing practices largely vary by province and offence, but more importantly consider the numerous mitigating factors (if any) present in each case. Typically, mitigating factors include age; extenuating circumstances; whether or not the youth is a first time offender, whereby recurrent or subsequent offences predominately result in additional sanctions; whether or not the youth suffers from mental illness such as fetal alcohol spectrum disorder, attention deficit hyperactivity disorder, or other mental disabilities (which frequently surfaced); the willingness and ability of the youth participating in rehabilitation or treatment; the acceptance of guilt and the level of moral blameworthiness; whether or not the youth operated independently or was part of a gang; the youth's home situation (i.e., absentee parents or dysfunctional home environments); whether or not the youth had alcohol or substance abuse problems (which appeared regularly in the case law); whether the youth received a negative or positive pre-sentence report; and of course, the seriousness and circumstances of the offence itself. Case law between these years range from issues pertaining to pre-trial detention (particularly in relation to whether or not youth are eligible for release or have committed crimes while on bail)

¹⁷⁰ For more information on a case where a youth court judge severely sanctioned a youth for an offence, see *R v S.L.* (2003), whereby a youth was sentenced to a custodial sentence of 6 months for aggravated assault, but appealed the sentence based on the grounds that the judge did not give sufficient weight to the accountability principles of sentencing set forth in the *YCJA*, especially when other alternatives to custody were available.

¹⁷¹ For more information see the restrictions on custodial sentences and the four gateways into custody, S.39(1) of the *YCJA*.

as well as concerns arising from credit given for time served (or lack thereof), to cases involving the designation of an offence as a serious violent offence; repeat offenders; youth in breach of their probation, undertaking, or recognizance; placement within an adult or youth facility; and, in some instances an appeal of the sentence imposed.¹⁷²

The majority of case law addresses sentences for youth who have either committed or have previously been convicted of numerous offences. The most common offences include breaches of youth sentences such as probation or OIC undertakings, break and enter, robbery, use or possession of prohibited firearms, assault (level 1), assault causing bodily harm (level 2), aggravated assault (level 3), sexual assault (level 3), and presumptive offences (levels 1, 2 and 3) such as aggravated sexual assault, murder, attempted murder and manslaughter.¹⁷³ The vast majority of youth convicted of the aforementioned offences were given a custody and supervision order (CSO), pending on the facts and seriousness of the case and their individual circumstances. The length of time served in custody varies based on the youth and the conditions under which the offence occurs, and frequently takes into account the length of time spent in pre-trial detention. Interestingly, one of the least used sentences was that of the deferred custody and supervision orders (DCSO),¹⁷⁴ wherein 2004 the average in case law appears to identify four DCSO's, four in 2005, and three in 2006. These findings indicate that deferred custody and supervision orders, although not overly popular, are used in instances

¹⁷² For cases involving decisions pertaining to detention/release, see *R. v M.N.* (2004a); *R v P.N.*; *R. v V.A.N.* (2004).

¹⁷³ According to S.2(1)(b) of the *YCJA*, a “serious violent offence” may become a “presumptive offence” if the young person has committed two prior serious violent offences. In addition, if a youth is over the age of 14 an adult sentence is possible.

¹⁷⁴ *YCJA*, S.42(5).

where youth are not typically involved in a serious violent offence, and less so where the Crown failed to make an application for a serious violent offender determination.¹⁷⁵

In some cases, albeit also infrequently, sentences imposed include an intensive rehabilitative custody and supervision (IRCS) order for the most serious (presumptive) offences as an alternative to traditional custody and conditional supervision.¹⁷⁶ In effect, these sentences appear to be ordered rarely given the expense and intrusiveness associated with it. Between 2004 and 2006, the case studies demonstrate that only four IRCS orders were imposed for youth who committed first and second degree murder, as well as manslaughter. Intensive Support and Supervision Orders (ISSO), on the other hand, are imposed as an alternative to custody.¹⁷⁷ Typically served in the community under conditions (similar to probation but provides closer monitoring and support to assist the youth with behaviour modification), approximately six orders were imposed between these years principally for those young offenders guilty of criminal negligence, aggravated assault and assault causing bodily harm. It should however be noted that this sanction is optional for provinces under the *YCJA* (pending on their availability of resources), and is therefore subject to provincial and territorial discretion for implementation (Bala & Anand, 2012).

Sentence length varies for individual cases involving manslaughter, first degree, and second degree murder. In 2004, the findings indicate that approximately three cases involved manslaughter, while in 2005 there were four, and six in 2006. Almost all of these sentences include a youth sentence of custody and supervision, with the exception of two. In the case of

¹⁷⁵ For cases involving DCSO's between these years, see *R v A.T.* (2004); *R v A.W.H.* (2006); *R v C.J.A.* (2005); *R v C.N.B.* (2006); *R v J.J.H.* (2005); *R v K.L.C.* (2004); *R v L.M.* (2004); *R v M.R.B.* (2005); *R v R.C.F.* (2006); *R v R.C.W.M.* (2004); *R v S.J.C.* (2006); and *R v T.S.R.* (2005).

¹⁷⁶ *YCJA*, S.42(7).

¹⁷⁷ *YCJA*, S.157.

R v M.D.C. (2004), for example, the youth was given a sentence of two years supervised probation with conditions, while in *R v C.N.B* (2006) a DCSO of 6 months was imposed given that a custodial sentence was deemed unnecessary to hold the youth accountable. These cases may be seen as exceptions to the rule since the majority of convictions for manslaughter neither result in probation nor a deferred custody and supervision order. These types of rulings, though, entirely depend on the nature of the circumstances and of the offender.

Given that first degree murder is far less common than most other offences, a review of the case law finds that between the years of 2004 and 2006 only about nine cases appeared. Cases involving youth convicted of first degree murder also vary in sentence length, but to a much lesser degree when compared to manslaughter. The majority of these sentences impose life imprisonment on youth without eligibility for parole for a given number of years (typically somewhere between 5 and 10 years).¹⁷⁸ These adult sentences are mainly enforced in situations where youth sentences are inconsistent with the seriousness of the offence. In other words, a youth sentence cannot hold the youth accountable for the offence. Further, a sentence of life imprisonment is generally justified by the sentencing judge in each individual case after ample consideration is given to the sentencing principles outlined in the *YCJA*, the mitigating factors involved, the facts and seriousness of the offence, the youth's likelihood and amenability to treatment/rehabilitation, and the sufficiency of time required to hold the youth accountable for the offence. In some instances youth were simply sentenced to life imprisonment given the severity of their mental condition. In other words, youth suffering from acute mental disorders (i.e., bi-polar mood disorder, schizophrenia, and alcohol related disabilities) are, in some cases,

¹⁷⁸ For youth sentenced as adults for first degree murder, see, for example, *R v Ferriman* (2006); *R v J.M.* (2004); *R v M.M.K.* (2005). See also *R v J.J.M.* (2006) for an example of a dangerous offender designation of a youth who, as a result, received an indeterminate sentence.

ineligible to participate in intensive rehabilitation. As such, these youth may only be maintained by the system as opposed to receiving treatment.¹⁷⁹

A youth sentence was imposed on a minority of youth for first or second degree murder between these years. In *R v J.C.(1)* (2004), for example, the youth entered a guilty plea of second degree murder for killing his father (although he was charged with first degree murder), and was sentenced to a custody and supervision order after receiving six months' credit for the four months he spent in pre-trial detention. He was not placed in an adult facility since the sentencing judge found some mitigating factors which involved severe physical, emotional and psychological abuse to the offender by his father, determined that the youth did not pose a danger to society because the killing was completely out of the ordinary, and operated under the belief that placement outside a youth facility would not assist in the youth's rehabilitation. Some youth were ordered to intensive rehabilitative custody and supervision, while others were simply subject to a youth sentence because it permitted some allowance for mitigating circumstances while the adult sentence did not (albeit in some instances these youth do not receive pre-trial credit for time served in remand).¹⁸⁰

The least common offence between the years of 2004 and 2006 is that of second degree murder, with only four incidents found in the case law. Youth convicted of second degree murder are typically eligible to receive an adult sentence; however, the findings indicate that two youth received a sentence of life imprisonment, while the other two were sentenced as youth.¹⁸¹ In half of these youth sentencing cases, the offender was ordered to intensive

¹⁷⁹ See *R v I.D.B.* (2005).

¹⁸⁰ See *R v C.K.* (2006). In adult matters, the general rule is that credit for pre-trial custody is discretionary. (*Criminal Code*, S.719(3)).

¹⁸¹ For youth sentenced as adults for second degree murder, see, for example, *R v J.K.W.* (2006); *R v J.T.S.* (2005).

rehabilitative custody and supervision program given their diminished moral capacity (unable to comprehend the scope of their crime) and mental limitations.¹⁸² The remaining case required lengthy sentences for the successful rehabilitation of the youth. Of those who received a sentence of life imprisonment, many had already been involved with the justice system and had a number of prior convictions (either violent or otherwise). Some of them appeared to display a pattern of success in highly structured youth programs and declined rapidly upon release into the community. These findings demonstrate that youth community supervision was in fact inadequate for some of these youth and were therefore transferred to adult facilities given their lack of success for rehabilitation in youth custodial environments.¹⁸³

The case studies suggest that issues pertaining to lifting the publication ban appear to arise between 2004 and 2006. Under the *YCJA*, the publication of a youth's name is "permitted if an adult sentence is imposed; or if a youth sentence is imposed for an offence that carries a presumption of adult sentence, unless the judge decides publication is inappropriate" (see Lightstone, n.d.). None of the cases found in 2004 or 2005 removed the publication ban, even in instances where youth were subject to adult sentences. In 2006, three cases removed the publication ban. *R v Ferriman* (2006) involved two youth who were convicted of murder and attempted murder and were subsequently sentenced as adults. In the case of *R v Ritchie* (2006), the youth was charged with a number of offences, including break and enter, assault causing bodily harm, and aggravated assault. Finally, in *R v A.J.O.* (2005) two offenders were sentenced as adults for six counts of robbery. Although the defence requested that a publication

¹⁸² See *R v A.H.* (2006); *R v L.A.B.* (2007).

¹⁸³ See *R v J.K.W.* (2006).

ban be imposed in this instance, the judge refused based on the finding that the publication of the offenders' names would have a minimal effect on their rehabilitation.

Confusion surrounding a lack of clarity with regards to the definition of violent offences appears to surface intermittently throughout these years. Presumptive offences are typically exempt from such concerns, as the majority of these crimes are designated as serious violent offences. Other offences such as break and enter or possession of a weapon for a purpose dangerous to public safety seem to be issues of contention. In the most controversial case of *R v C.D.; R v C.D.K.* (2005), one youth (C.D.) was convicted of carrying “a weapon for a purpose dangerous to the public, arson to property, and a breach of recognizance”, while the other (C.D.K.) was convicted of “dangerous driving” and “possession of stolen property under \$5000.00”. Both youth were sentenced to six months DCSO and probation. The case was appealed based on the grounds that “one of the gateways to a custodial sentence” under the *YCJA* states that youth court cannot commit a person to custody unless a violent offence has been committed (*YCJA*, S.39(1)(a)). The Court of Appeal upheld the decision of sentencing the youth to custody, given that arson and dangerous driving are violent offences. However, an offence is designated as violent if it causes bodily harm or intends to cause bodily harm. As such, the Supreme Court of Canada allowed the appeal and determined that the custodial sentences were to be quashed.

Issues pertaining to the sentencing principles of denunciation and general deterrence also arise on a few occasions throughout these years. All cases consider the role of the sentencing principles outlined in S.38(2)(f) of the *YCJA*, however, some cases have been appealed based on the sentences imposed in relation to denunciation. In *R v C.T.* (2005), for example, a youth was sentenced to a 12 month custody and supervision order for assault with a

weapon, forcible confinement, possession of a firearm and assault. The sentence was appealed given that denunciation is not a sentencing principle under the *YCJA*, and the court did not give consideration to the rehabilitation and reintegration of the youth or look at alternatives to custody. As a result, a new sentence of 15 months supervised probation was substituted for the CSO. More notably, the case of *R v D.B. (2006)* argued that various sections of the *YCJA*, such as placing an onus on the youth to show why he should not be sentenced as an adult, and to justify maintaining a publication ban, violated the presumption of the youth's innocence. Subsequently, the youth court judge imposed a youth sentence and maintained the publication ban.¹⁸⁴

Lastly, cases revolving around pre-trial detention and/or issues pertaining to release are found within this three year interval. Pre-trial detention is most frequently reserved for youth who are eligible to receive a custodial sentence if found guilty; however case law indicates that there appears to be a lack of clarity about its meaning, particularly with regards to whether the presumption against detention can apply in cases where custody is possible under the "exceptional circumstances" provisions of the *YCJA*.¹⁸⁵ There are also concerns about the difficulty in detaining youth who have been charged with a number of non-violent offences, but have not yet been found guilty. The onus is generally placed on the Crown to show cause as to why the youth should be detained. When comparing case law, for instance, there appears to be some variation in Crown practices provincially when it comes to whether youth are to be

¹⁸⁴ In *R v D. B.* it was found that S.62, S.63, S.64(1) and (5), S.70, S.72(1) and (2) and S.73(1) of the *YCJA* violated the respondent's S.7 rights in the *Charter* to the extent that they placed an onus on him to justify a youth sentence rather than an adult sentence, and that S.75 and 110(2) of the *YCJA* violated the respondents Section 7 rights of the *Charter* by imposing a burden on him to justify maintaining the publication ban. See also *R v B.W.P.; R v B.V.N (2006)* for more information on whether general deterrence is a factor to be considered in sentencing youth.

¹⁸⁵ See *YCJA*, S.29 (2)(b)(iii). Also see *R v M.D. (2006)*.

detained or released. Thus, in instances where some provinces may detain the youth, others may release them for a similar offence.

Youth may be detained pending trial when charged with a serious offence, appears to pose a considerable risk of reoffending or not attending court (including fleeing, known as UAL or the offence of Unlawfully at Large), or if there is a remote possibility that youth may intimidate a witness. Where safety concerns for the public can be addressed by strict supervision or house arrest, youth may be eligible for release pending on whether they have a record of previous criminal history, whether they are likely to commit an offence while on bail, or whether they may be released into the care of a responsible adult pending trial. In many cases, the Crown is more inclined to grant release of youth if the youth faces minimal current charges (minor charges), has no previously outstanding charges, and there is no substantial evidence that the youth is abusing either drugs or alcohol.¹⁸⁶

For example, in *R v M.N; R v H.T.* (2004), two youth were jointly charged with robberies at jewelry stores as part of a gang related criminal activity. Both youth had previously been involved with the law, although H.T. did not have a criminal record yet was charged with a number of offences, and neither complied with previous conditions imposed upon them (in H.T.'s case, he was charged with breaching his recognizance condition). Nonetheless, H.T. was released with strict conditions, while M.N. was detained on the basis that it was necessary for the protection of the public. In a similar gang related case, *R v P.N; R v V.A.N.* (2004), two youth were charged with robbery, use of an imitation firearm and disguise with intent. P.N. was also charged with two counts of breaching probation, possession of marijuana, possession of marijuana for the purpose of trafficking, possession of the proceeds.

¹⁸⁶ For more information on Crown decisions, see Moyer and Basic (2005).

P.N. had previously been convicted of assault, assault causing bodily harm and failing to comply with probation and recognizance conditions. V.A.N. was also charged with two counts of failing to comply with a recognizance. V.A.N. had previously been convicted of failing to comply with a recognizance, was subject to a 12-month peace bond, and had five outstanding robbery-related charges. As a result, both youth were denied bail given their extensive pattern of offending behaviour.¹⁸⁷

7.2.2 Case Law Findings Between 2007 and 2009

Between the years of 2007 and 2009, there are some apparent shifts in sentencing practices that are readily observable in the case law. Like preceding years, the most common case law that appears are that of assault (level 1, which is not considered a serious violent offence), assault causing bodily harm, robbery, possession of firearms/weapons, possession of stolen property, break and enters, dangerous driving, breaches of probation or of recognizance, and to a much lesser extent, the presumptive offences. Interestingly, far less case law between these years is devoted to the nature of defining violent offences, although there appears to be an increase in adult sentences imposed upon youth in violation of the law. Additionally, issues pertaining to the publication ban have also visibly declined in contrast to previous years. However, like other years, there is an abundance of case law that illustrates some of the hardships faced by youth, such as substance and alcohol addictions, mental disorders (e.g., fetal alcohol spectrum disorder), gang involvement or membership, coming from dysfunctional families, or having absentee fathers.

¹⁸⁷ YCJA S.29(2)(a) and (b) outline the terms regarding justification for detention in custody. For other cases involving matters of judicial interim release, see *R v A.A.Q.* (2006); *R v C.J.P.* (2005); *R v C.P.* (2006); *R v D.W.* (2006); *R v E.T.* (2006); *R v J.J.O.* (2005); *R v M.T.S.* (2006); *R v T.L.B.* (2005); *R v T.S.* (2006); *R v V.O.E.* (2006).

On average, the number of deferred custody and supervision orders imposed upon youth between 2007 and 2009 are more or less the same as those imposed in the previous three years. For instance, there are six DCSO's imposed in 2007, two in 2008, and four in 2009.¹⁸⁸ In this regard, the imposition of this sentence has neither increased nor decreased, and is still imposed on youth who have not been involved in serious violent offences. Deferred custody and supervision orders have been given to youth found guilty of assault, aggravated assault and robbery, but in most cases these offences do not constitute serious bodily harm. As such, the majority of sentences imposed on youth are custody and supervision orders, again depending on the nature and the extent of the offence, the youth, the principles of rehabilitation and reintegration, proportionality and accountability, and mitigating factors.¹⁸⁹

Like previous years, the imposition of an intensive support and supervision order occurred minimally with only two cases taking place in 2008 as identified by case law. In both instances the youth received this sentence for committing robbery, although one had also committed aggravated assault, and the other was found guilty of six counts of forcible confinement, and five counts of using an imitation firearm.¹⁹⁰ Intensive rehabilitative custody and supervision, on the other hand, was imposed once in 2007, and three times in 2009. In all instances, youth who were convicted of manslaughter, second degree murder, or attempted murder suffered from a range of mental disorders.

In terms of youth convicted of manslaughter between 2007 and 2009, the case law reflects an overall increase in the average number of cases presented than in previous years. In

¹⁸⁸ See *R v A.R.* (2007); *R v J.R.L.* (2007); *R v M.H.* (2007); *R v Z.J.L.* (2007); *YCJA – 0744* (2007).

¹⁸⁹ See, for example, *R v G.S.M.P.* (2007), where the youth had a very promising pre-sentence report and many supportive letters from his family and employers which resulted in a DCSO and an 18-month probation order as opposed to a custodial sentence.

¹⁹⁰ For more information, see *R v G.H.L.* (2008); and *R v O.B.* (2008).

2007, for example, there appears to be one incident, while in 2008 there are approximately five, followed by three cases in 2009. When analyzing sentences imposed, five of the nine cases imposed a youth sentence, while the other four imposed an adult sentence. This finding is consistent with the Supreme Court Ruling of *R v D.B.* (2008) which states that a youth who commits a presumptive offence ought not to automatically invite an adult sentence. In the case of *R v D.B.*, an adult sentence was not imposed given that it would have negated the benefit of the diminished moral culpability present. The four remaining youth that were sentenced as adults appear to have lengthy criminal records of violent offences. As a result, the primary sentencing considerations were denunciation and general deterrence, as well as the protection of the public.¹⁹¹ These sentencing principles are consistent with adult proceedings, but denunciation was contrary to the *YCJA* pre-enactment of the amendments. General deterrence remains inconsistent with the *YCJA* post-enactment of the tough-on-crime legislation.

Youth convicted of first degree murder represent only a small portion of the overall case law found between 2007 and 2009. Of the six cases noted, two of them occurred in 2007, one in 2008, and three in 2009. According to the case law, all but one of these youth received adult sentences.¹⁹² Five youth received a sentence of life imprisonment without eligibility for parole for a number of years (anywhere between 7 and 10). This was imposed either because youth sentences were deemed to be insufficient in the length of time to promote rehabilitation

¹⁹¹ For cases involving youth sentenced as adults for manslaughter, see *R v Bird* (2008); *R v F.M.* (2008); and *R v Kenworthy* (2008).

¹⁹² For cases involving youth sentenced as adults for first degree murder, see *R v Bagshaw* (2009); *R v Casavant* (2009); *R v M.B.W.* (2007); *R v Todorovic* (2009); *R v Williams* (2008). See also *R v Van Buskirk* (2007), where the offender received a youth sentence, but the publication ban was lifted because adult proceedings against the accused for conspiracy to commit murder could not be subject to the ban.

and reintegration into society, or because youth sentences were not seen as adequate in terms of holding the offender accountable for the crime.

In contrast to the average number of case law available between 2004 and 2006 on matters pertaining to youth convicted of second degree murder, there were approximately fifteen cases found between 2007 and 2009. The cases indicate that slightly more youth received adult sentences as opposed to youth sentences; however, there were some mitigating factors present in cases where offenders were sentenced as youth. The majority of youth received a sentence of life imprisonment with eligibility for parole after seven years.¹⁹³ In some instances, youth were sentenced to serve time in an adult penitentiary based on the age of the offender, as well as the youth's amenability to rehabilitation.¹⁹⁴ In a minority of cases, youth were convicted of either attempted murder (one case in 2008 and one in 2009) or of conspiracy to commit mass murder (one case in 2009). The case law indicates that in one instance the youth had an imposition of youth sentence, whereas the other two were sentenced as adults. Two-thirds of these cases were ordered to participate in various rehabilitative programs for mental disorders, and thus required the maximum amount of treatment and supervision to ensure the public's long-term protection. This finding was consistent with the *YCJA* prior to the Bill C-10 (Part 4) legislation. Currently, S.3(1)(a) of the *YCJA* no longer uses the term "long term protection".

¹⁹³ For cases pertaining to youth sentenced as adults for second degree murder, see *R v D.E.* (2008); *R v J.S.R.* (2009); *R v Logan* (2009); *R v Slippery* (2007); *R v Smith* (2009); *R v Turcotte* (2008).

¹⁹⁴ See *R v Estacio* (2008).

Rarely between these years was a youth's name published, unless a youth sentence was imposed for an offence that carried a presumption of an adult sentence.¹⁹⁵ Interestingly, the case law indicates that in eighteen cases the publication ban was removed and subsequently allowed identification of the youth. In some instances, however, youth had committed presumptive offences just days before their 18th birthday, and appeared to be more likely to receive an adult sentence for their crimes even if mitigating factors were involved. In practice, these decisions appear to be made once consideration is given to the youth's moral culpability in relation to the offence, amongst various other factors presented in the case.

While the case law between these years does not demonstrate any significant concerns regarding the definition of violence, and minimally addresses the principles of deterrence and denunciation after the Supreme Court's judgement of *R v D.B.*, cases involving decisions on whether or not to detain or release youth prior to trial still appear to arise. The bulk of these cases typically pertain to applications for judicial interim release and the grounds upon which applications are either granted or dismissed. Detention of youth between these years largely depends on whether or not the youth appears to pose a threat to the public, thus youth who are violent in nature tend to remain in pre-trial detention. In other instances, judicial interim release was denied because youth failed to comply with probation orders or previous youth sentences imposed. These practices largely vary by province, but occasionally assumptions are made about whether the youth is likely to comply with release conditions. Additionally,

¹⁹⁵ See, for example, *R. v Flaten* (2009); *R v James* (2009); *R v Lights* (2007); *R v Pratt* (2007); *R v Quintana* (2008); *R. v Quintana* (2009).

decisions are sometimes made on whether it is necessary or reasonable to detain youth in order to maintain the public's confidence in the administration of justice.¹⁹⁶

7.2.3 Case Law Findings Between 2010 and 2012

Case law between 2010 and 2012 reveals that more youth are sentenced as adults by a youth court judge within this time frame than in the past seven years. In addition, the case law indicates that numerous youth suffer from mental disorders, substance and alcohol abuse, poverty, dysfunctional families, have absentee parents (mainly father), and are associated with gangs. Like previous years, the majority of cases receive sentences of custody and supervision orders followed by a term of probation. However, unlike previous years, a great deal of case law pertains to offences involving robbery (particularly armed robbery), possession of prohibited firearms, discharging firearms with intent to wound, break and enter, break and enter to commit robbery, sexual assault and dangerous driving causing death. Further, there were a number of instances where decisions from previous sentences were being appealed, in some cases by the Crown and in others by the defendant, because sentence lengths were unfitting for the crime.

Case law indicates that deferred custody and supervision orders were imposed approximately fourteen times between these years; with four ordered in 2010, seven in 2011, and three in 2012.¹⁹⁷ Overall, DCSO's are utilized on average about the same in 2010 through 2012 when compared with preceding years. In many instances, DCSO's were imposed on youth who committed robbery, robbery with an imitation weapon, or possession of firearm, but

¹⁹⁶ See YCJA S.29 for more information on the criteria and justification for detention at a judicial interim release hearing.

¹⁹⁷ Note that in the case of *R v. C.L* (2010) the 6 month DSCO imposed for robbery, concealment of identity during the offence, and breach of undertaking was rescinded because the youth committed assault and breached probation orders at a later date. As a result, the remaining time of the DSCO was to be served as a custody and supervision order instead.

the remainder were comprised of youth guilty of theft, uttering threats, assault, dangerous driving causing death and dangerous driving causing bodily harm, and breaches of court orders.¹⁹⁸

Similar to other years, case law reveals that the use of intensive rehabilitative custody and supervision is rare between 2010 and 2012, as are intensive support and supervision orders. In 2010, for example, an IRCS was ordered once, and twice in 2011. No youth were ordered to participate in an intensive support and supervision program during 2011, although one youth judge ordered a youth to attend the program in 2012. In all three cases of those ordered to IRCS, youth suffered from mental disabilities and were guilty of serious violent offences (i.e. aggravated sexual assault, second degree murder and attempted murder, and manslaughter). Youth ordered to participate in intensive support and supervision programs suffered from mental issues including substance and alcohol abuse, and attention deficit hyperactivity disorder but were willing to be treated.

The majority of youth convicted of manslaughter between 2010 and 2012 received youth sentences under the *YCJA*. Case law findings show that there was one incident involving manslaughter in 2010 where the youth received an adult sentence.¹⁹⁹ On the other hand, in 2011 there were four cases with youth convicted of manslaughter but in none of these instances did the Crown seek an adult sentence.²⁰⁰ In 2012, one youth was sentenced as an adult, while

¹⁹⁸ For cases involving youth who received a DCSO, see *LSPJA – 1111* (2011); *R v A.L.* (2011); *R v A.S.D.* (2011); *R v C.D.R.* (2010); *R. v C.G.* (2011); *R v D.W.* (2011); *R v G.B.* (2010); *R v K.D.B.* (2011) (after sentence was appealed); *R v K.T.W.* (2012); *R v M.P.* (2010) (albeit an exceptional case); *R v P.B.* (2011a); *R v R.C.* (2011); *R v R.J.D.* (2011); *R v T.C.* (2012). However, one DCSO order was later converted to a period of secure custody for the remaining portion of the sentence (see *R v P.B.(b)* (2011)).

¹⁹⁹ See *R v J.B.* (2010).

²⁰⁰ See *R v A.D.* (2011); *R v J.D.* (2011); *R v T.R.D.* (2011).

the other was sentenced under the provisions of the *YCJA*.²⁰¹ In a third case, however, two young offenders were given different sentences based on the degree of their progress while on remand (one made significant improvements while the other did not). In the case of *R v R.L.T* (2012), for example, two youth were co-accused of gang related criminal behaviour which ultimately resulted in manslaughter. Both youth were held in custody for a period of three years, came from abusive homes, and suffered from many issues including drugs. While F had a positive pre-sentence report and showed remorse, R.T.L. did not show signs of improvement. R.T.L. was highly violent and threatened suicide frequently. Consequently, the sentencing judge imposed an adult sentence on R.T.L for five years after receiving credit for the three years spent in custody, while F was sentenced to three years less a day in a youth facility, but not credited with time, given that he made large strides to be rehabilitated.

Between the years of 2010 and 2012, case law indicates that nine cases address youth convicted of first degree murder. In each of these years, two youth were sentenced as adults to life imprisonment without parole eligibility from anywhere between five and ten years, and one was sentenced as a youth. In the majority of cases, a youth sentence was deemed to be insufficient to hold the young person accountable for the offence.²⁰² However, youth sentences imposed under the provisions of the *YCJA* were ordered for various reasons. In one case the Crown simply did not seek an adult sentence. In the next case, the youth made progress while in remand (pro-social behavioural changes, complied with orders and kept the peace), and the sentencing judge acknowledged that the youth's best chance of continued improvement was to keep him in the youth system. In addition, the youth had a limited role in the offence. In the

²⁰¹ See *R v A.S.* (2012); *R v Prince* (2012).

²⁰² For cases involving youth sentenced as adults for first degree murder, see *R v D.L.S.* (2012); *R v I.C.* (2010); *R v J.J.T* (2010); *R v M.M.* (2012); *R v Wellwood* (2011).

third instance, an application to be sentenced as a young person under the *YCJA* was made by the defendant and thus allowed by the court, mainly because the youth could be held accountable within the terms of the youth sentence outlined in the *YCJA*.²⁰³

Between 2010 and 2012, there are very few of youth convicted for second degree murder. With approximately five cases addressed throughout these years, the analysis reveals that slightly more youth (3/5) are subject to a sentence under the *YCJA* than that of an adult sentence. In the case of *R v Arrieta* (2010) for example, the youth was not only convicted of second degree murder and discharge of a prohibited firearm, but of two counts of attempted murder as well. Given the seriousness of the offence, the judge determined that an adult sentence would be most appropriate to hold the youth accountable. In the second instance, the Crown made an application for an adult sentence given that the youth had been involved in second degree murder, but also in break and enter and robbery. Further, several risk factors were outlined for recidivism, such as thoughtless behaviour of a youth who failed to understand consequences, exhibited reduced empathy for an adolescent, was highly mature for his age, and surrounded himself with people significantly older than he. As a result, a youth sentence was insufficient.²⁰⁴

The Crown also made applications between these years for youth to be tried as adults in cases where the seriousness of the crime warranted more punitive sanctions. Particularly noticeable amongst cases involving robbery, break and enter, possession of prohibited weapons, and discharging weapons with intent to wound, case law appears to illustrate an increased rate of youth serving adult sentences for these offences in contrast to previous years. In all cases

²⁰³ See *LSJPA -1012* (2010); *R v A.A.* (2011); *R v S.M.* (2012), respectively.

²⁰⁴ See *R v S.L.* (2012).

judges ruled youth sentences as insufficient in the length of time required to either promote the principles of rehabilitation or accountability. Further, much of the case law indicates that many Crown applications were allowed given the apparent gravity of the offence (in the majority of instances the actions were intentional and deliberate), and the high moral culpability of the youth. Excluding presumptive offences for which youth are sentenced to life imprisonment, a minimum of ten cases demonstrate the imposition of an adult sentence throughout these years.²⁰⁵ It should be noted, however, that a significant number of cases involve situations where the Crown sought an application for an adult sentence, but were ultimately dismissed by the judge on a number of grounds.²⁰⁶ A review of the findings also exhibits a stronger emphasis on the Crown seeking adult sentences in both 2011 and 2012, as the case law addresses issues of this nature far more frequently than in 2010 as well as every other preceding year.²⁰⁷

Although the case law does not reveal any substantial issues regarding the publication ban between 2010 and 2012, the findings suggest that one case in 2010 appealed a decision refusing to grant the youth's application for a publication ban. The youth was convicted for manslaughter, aggravated assault and robbery. He agreed to be sentenced as an adult but sought a publication ban of his name under the *YCJA*. The reverse onus provisions of the *Act* were subsequently declared unconstitutional on the basis that the absence of a publication ban was part of a youth sentence and created a more severe sentence so that the onus had to be on

²⁰⁵ For cases involving adult sentences for these various offences, see, for example, *R v C.F.* (2011); *R v C.M.* (2010); *R v D.E.* (2011); *R v Elie* (2012); *R v J.A.G.* (2010); *R v Massaquoi* (2012); *R v M.O.* (2011) (where the youth received some adult sentences and some youth sentences); *R v S.J.A.* (2010).

²⁰⁶ The onus is on the Crown to satisfy the court that an adult sentence is necessary. Should the Crown not satisfy the court that a youth sentence is insufficient for the offence; applications of this nature are dismissed.

²⁰⁷ For cases involving the Crown seeking an adult sentence, but where applications were dismissed, see, for example, *R v A.A.* (2011); *R v D.S.* (2012); *R v I.R.N.* (2011); *R v K.B.P.* (2012).

the Crown to show why a ban should not be granted in each particular case. Based on these facts the appeal was allowed, but only because there was evidence suggesting the youth showed remorse and made a strong effort to change his ways. In this regard, lifting the ban was seen as potentially detrimental to the youth's overall success in terms of rehabilitation and reintegration back into the community.²⁰⁸ In no other cases were there issues pertaining to the publication ban.

While issues pertaining to the definition of violent offences are rare between these years, some concerns regarding the designation of a serious violent offence did occur. Generally, the onus is on the Crown to apply for this designation when appropriate. In the case of *R v K.I.* (2011), for example, the defendant appealed the judge's decision that the offence of robbery was a serious violent offence.²⁰⁹ Although the offence was both serious and violent, no one was injured during the robbery. There was no attempt or intent to cause serious bodily harm, yet the judge made the designation in the absence of the application for the designation from the Crown. Given these findings, the offence in fact did not meet the criteria for a serious violent offence designation. As such, the appeal was granted and the availability of custody as a sanction if the youth reoffended was no longer viable.

Case law findings suggest that the decision-making process for judicial interim release is relatively simple. Despite the fact that throughout each year a small percentage of cases pertain to decisions of pre-trial detention or release, almost all cases give ample justification for the grounds upon which these decisions are reached. In a few instances youth were detained

²⁰⁸ See *R v F.M.* (2010).

²⁰⁹ According to S.2 of the *YCJA*, a "serious violent offence" means an "offence in the commission of which a young person causes or attempts to cause serious bodily harm" (prior to any definitional changes brought forth by the legislative amendments of Bill C-10 (Part 4)).

pending trial in order to maintain confidence in the administration of justice.²¹⁰ In other cases, detention was necessary to ensure the protection and safety of the public. Rarely were youth detained on the primary grounds that consider the unlikelihood of youth appearing in court. If the grounds for detention could not be satisfied, youth were released on bail with strict conditions (i.e., house arrest or into the custody of a responsible person).²¹¹ Even with the legislative changes of Bill C-10 (Part 4), the latter part of 2012 does not display any real change with regards to pre-sentence detention.

7.2.4 Case Law Findings From Early 2013

Case law in the first half of 2013 reflects similar trends to those found in both 2011 and 2012. Overall, the case law responds to comparable offences with the majority pertaining to sexual assault, break and enter, robbery, assault with a weapon, aggravated assault, and various presumptive offences. The bulk of the offences are dealt with by imposing a custody and supervision order, although in a minority of cases an order of probation is imposed. Like findings from case law in the two years prior, the first six months of 2013 displays a significant amount of Crown applications for adult sentences. Of the fifty-four available cases to date, approximately thirty-five of them impose a sentence on youth (both adult and youth sentences combined). The remaining nineteen cases deal with appeals on procedural grounds or the inclusion/exclusion of evidence. When considering sentencing patterns of each of the thirty-five cases, case law suggests that in roughly one-quarter of the cases the Crown makes an application for the youth to be tried as an adult (8.75 cases out of 35 cases). While the decision to allow or deny the application rests solely on judicial discretion, it appears that the majority

²¹⁰ See, for example, *R v J.W.* (2010); *R v W.M.* (2011) (based on the tertiary grounds that the Crown's case was too strong).

²¹¹ See, for example, *R v J.D.G.V.* (2010); *R v J.T.* (2010); *R v R.D.* (2010).

of cases respond to youth crime by imposing a youth sentence (with the exception of first degree murder).

Up to June 2013, three deferred custody and supervision orders were imposed on youth. Two of these cases involve youth convicted of aggravated assault, whereby both sentencing judges determined that remand into custody at this stage neither meets the principles and factors that are to be considered under the *YCJA*, nor is best to promote rehabilitation.²¹² In the third instance, the youth was convicted of possession of cocaine for purposes of trafficking and had already spent approximately a month in remand. In addition, the youth's prior sentence of probation did not encourage rehabilitation of any sort since he recidivated and failed to take the terms of the probation order seriously.²¹³

Intensive rehabilitative custody and supervision are imposed twice to date. In the case of *R v B.T.* (2013) for example, the youth was convicted of manslaughter, theft, and the use of a rifle to commit the offence. Consequently, the youth was sentenced to a three year intensive rehabilitative custody and supervision order (comprised of 20 months in custody, and 16 months under community supervision) without any credit given for remand since the time for rehabilitation was insufficient. The sentencing judge based the decision on meaningful consequences for the youth, the principle of accountability for the offence, and the principles of rehabilitation and reintegration.²¹⁴

An intensive support and supervision order appears to have been imposed once in 2013. Interestingly, in the case of *R v C.M.B.* (2013), three youth were involved in a riot during the Stanley Cup hockey finals, causing damage to vehicles by lighting them on fire, and causing

²¹² See *R v A.D.W.* (2013); *R v M.C.P.* (2013).

²¹³ See *R v B.L.* (2013a).

²¹⁴ See also *R v A.A.Z.* (2013) for another example of a youth receiving an IRCS sentence.

damage to a Canada Post building. While D and M received 18 months of probation, B was sentenced to 18 months intensive support and supervision given that his involvement in the offence was different from the other two. Like previous years, the imposition of an IRCS and an ISSO in the first half of 2013 appears to have occurred infrequently. By looking at previous use of these orders over the last ten years, one may expect both these orders to continue at a minimal rate throughout the remainder of 2013. These findings are not entirely unexpected; however an analysis of case law over the span of a decade suggests that these sanctions are imposed less frequently with time.²¹⁵

Case law addressing youth charged with manslaughter represent four of the thirty-five cases. In all but one instance, youth were sentenced under the provisions of the *YCJA* predominately because a youth sentence was sufficient to hold the youth accountable for the crime, but also because a youth sentence focuses more so on rehabilitation.²¹⁶ In the case of *R v C.M.* (2013), where an adult sentence was imposed, case law states the following:

Counsel agree that the principles that apply in determining this matter are the same regardless of the impact of the recent amendments to Section 72 of the *YCJA* by Bill C-10. C.M. is presumed to have a diminished moral blameworthiness or culpability by reason of his age when this offence was committed. A youth sentence must be imposed unless this Court is satisfied that a youth sentence would not be of sufficient length to hold him accountable for his offending behaviour.

Despite this principle, the court concluded that it was satisfied that the presumption that C.M. had a diminished moral responsibility for the offending behaviour was refuted by the Crown. In other words, the youth's moral blameworthiness and culpability for the manslaughter was

²¹⁵ Case law from 2004 through 2006 appears to indicate a higher rate of IRCS and ISSO sentences when compared to case law from 2007 onward.

²¹⁶ For cases involving youth convicted of manslaughter under the *YCJA*, see, for example, *R v D.W.C.* (2013); *R v P.C.* (2013).

not diminished in any measure by reason of his age, and as such, his moral culpability was high.

Case law findings on youth convicted of first degree murder show an opposite trend from that of manslaughter. In contrast to the results above, three of the four cases imposed an adult sentence of mandatory life imprisonment on youth, while one youth received a sentence under the *YCJA* due to mitigating factors.²¹⁷ Similar to findings involving manslaughter, the amendments of Bill C-10 have little effect on the way sentences are currently delivered, but may have to do with the fact that the specific amendments of Bill C-10 (Part 4) do not apply to cases in which the person was charged before the effective date of the amendment. In *R v M.M.* (2013), for example, the case law notes:

The issue is whether M.M. should be sentenced according to the provisions of the Criminal Code or the provisions of the *YCJA*. The matter is determined according to the considerations set out in Section 72 of the *YCJA*. Section 72 was amended by Bill C-10. That amendment came into force last year [...] In any event the amendment does not drastically change the considerations. It makes clear that the onus is on the Crown to satisfy the court that an adult sentence should be imposed. That is not a change in the law but a clarification. The new provisions require the Crown to show that the presumption of diminished moral blameworthiness or culpability has been rebutted and that a youth sentence imposed in accordance with the purpose and principles of sentencing would not be sufficient to hold the young person accountable for his behaviour. The provisions that were in effect when M.M. was charged in this matter also refer to whether a youth sentence would be of sufficient length to hold the young person accountable. The section sets out a number of considerations in making that determination. They are very likely to be similar to those a court would consider in deciding whether the presumption of moral blameworthiness or culpability has been rebutted.

²¹⁷ For cases involving youth who received an adult sentence for first degree murder, see, for example, *R v C.E.* (2013) and *R v T.A.R.S.* (2013).

Similarly, all other cases involving life imprisonment for youth for first degree murder made comparable observations, citing nearly identical legislation for sentencing decisions made in each individual case in 2013.

Youth convicted of second degree murder in the first half of the year represent a total of four cases in case law. From these four cases, two of them received a youth sentence, while the other two received the imposition of life imprisonment. In both instances where youth were subject to sentences under the *YCJA*, not only was adequate progress made while in custody (pro-social behavioural changes, keeping the peace, showed signs of remorse) but the sentence itself was also the least restrictive sanction available. Moreover, the principles of accountability and rehabilitation could be properly addressed within the parameters of a youth sentence, although credit for time served was granted in one instance, and denied in the other.²¹⁸

As an illustrative example of an occurrence where a youth is subject to the imposition of an adult sentence for first degree murder, the case of *R v D.V.J.S.* (2013) is rather interesting because the Crowns' application for the youth to be sentenced as an adult takes place under the new statutory provisions of the *YCJA* (as per Bill C-10 (Part 4)). The application for the adult sentence was said to be especially warranted since the youth was very violent and had a high risk of reoffending. Further, the youth neither expressed meaningful remorse, nor was found to have the intent and actions of a youth with diminished moral culpability. As such, the Crown claimed,

The *YCJA* provisions governing this proceeding changed within
a week of the guilty plea as part of an omnibus act known as the

²¹⁸ For cases of youth sentenced under the *YCJA* for second degree murder, see *R v B.S.A.* (2013) and *R v M.P.* (2013).

Safe Streets and Communities Act, S.C. 2012, c. 1. Section 195 of that recent legislation makes new wording in *YCJA*, S.72 applicable. While the *YCJA* is intended to operate on the presumption that *D.V.J.S.* is guilty with diminished moral blameworthiness or culpability, the prosecution can rebut that presumption with evidence satisfying the Court that his moral blameworthiness or culpability is undiminished. At the same time, the Court must consider the sentencing principles in *YCJA*, S.38 and whether the prosecution has demonstrated, on the evidence, that the application of those principles would lead to a sentence of insufficient length.

While the case of *R. v D.V.J.S.* specifically refers to the amendments of Bill C-10, the case of *R v Skeete* (2013) addresses the viability of an adult sentence after the youth was convicted of second degree murder in August 2012, but does not refer to the amendments of Bill C-10 (Part 4) because the date of the charge preceded its enactment. It is important to note, however, that much of the discussion on the decision-making process for sentencing within each case applies the provisions of the *YCJA* as well as previous case law for similar circumstances, despite the amendments of Bill C-10 (Part 4). Notwithstanding the legislative changes, both sentencing judges imposed the same sentence even though one case took the amendments into account and the other did not.

Adult sentences are also imposed on some youth convicted of attempted murder. Although case law reveals that few cases address this presumptive offence within the earlier part of 2013, these convictions frequently include other offences such as sexual assault. In *R v Knelsen* (2013), for example, the imposition of a term of imprisonment was necessary to achieve the sentencing principles of general and specific deterrence, denunciation, and rehabilitation for two counts of attempted murder, and one count sexual assault but did not include a discussion on the amendments of Bill C-10 (Part 4). The sentencing principles applied were largely considered based on rulings from other decisions involving youth

sentenced as adults for similar offences in past years (see *R v Knelsen* (2013) for further details).²¹⁹

Other case law in 2013 demonstrates that a minority of youth are also sentenced as adults for offences such as break and enter, sexual assault with a weapon, and robbery with a weapon. In the approximate three cases that received an adult sentence, all youth were determined as having high moral culpability, were at a very high risk for reoffending (thus jeopardizing public safety), and required a secure and structured setting for successful rehabilitation. While some youth made progress while on remand, youth sentences were principally insufficient at holding youth responsible for their crimes because the Crown refuted the presumption of diminished moral blameworthiness.²²⁰ Only one of these cases was dealt with under the new provisions of the *YCJA* but the end result did not differ from the other two.

The issue of lifting the publication ban does appear to be addressed within the case law in the first half of 2013. While a number of cases do remove the publication ban for youth sentenced as adults, a review of case law does not suggest that there is any substantial difference in the way the courts uphold or lift the ban considering the alleged impact of the *YCJA* amendments of Bill C-10 (Part 4). Like previous years, the publication of a youth's identity is permitted if an adult sentence is imposed. However, in terms of the facilitation of publishing the names of young offenders convicted of violent offences has neither surfaced nor appears to be an issue of contention at this juncture.

²¹⁹ For another example of a youth sentenced as an adult for attempted murder and sexual assault, see *R v J.K.* (2013). For an exceptional case where a youth convicted of attempted murder is sentenced under the *YCJA*, see *R v J.C.* (2013).

²²⁰ See *R v B.L.* (2013a); *R v K.H.* (2013); *R v Lucassie* (2013).

Concerns regarding pre-trial detention as well as the principles of denunciation and deterrence also appear to have very little impact in the first half of 2013. Virtually none of the cases specifically address the issue of pre-sentence detention to date. On the other hand, some cases in 2013 do explicitly attend to the principles of denunciation and deterrence, but sentencing practices do not appear to have changed much. In contrast to previous years, youth charged with various offences do not seem to be sentenced harsher in 2013. Thus, while denunciation and deterrence is considered, it seems to be closely tied to the principle of proportionality that effectively ensures a sentence reflects the seriousness of the offence.²²¹ In many cases, the offences occurred prior to the enactment of the amendment, and are therefore subject to former provisions and their interpretation by the courts since the new amendments do not apply retroactively.²²²

Overall, the case law findings with regards to how tough-on-crime legislation has been implemented within the courts provide mixed support for the assertions made by critical theorists on the social structural inequalities and various political marginalizations that exist within society. While youth in conflict with the law do not appear to be largely impacted either negatively or positively by the legislative amendments of Bill C-10 (Part 4), the *YCJA* itself may be seen as more punitive than the *YOA* in certain ways. In essence, the enactment of the *YCJA* was put forth by the government in an effort to “respond more firmly and effectively to the small number of the most serious, violent young offenders”²²³ in ways the *YOA* did not (e.g.

²²¹ See, for example, *R v J.G.C.* (2013).

²²² For cases that take the principles of denunciation and deterrence into account, see, for example, *R v Knelsen* (2013) and *R v Lucassie* (2013).

²²³ Remarks in Ottawa by the federal Justice Minister at that time, Anne McLellan, in Department of Justice press release (12 May 1999), cited in Bala and Anand, 2012, p. 25. See also McLellan, *Hansard*, Senate Committee on Legal and Constitutional Affairs, Hearings on Bill C-7, September 27, 2001.

lowering the age limit for presumption of adult sentences and placing greater emphasis on accountability (see Bala & Anand, 2012)). This may be an indication of a major transformation in political rationale which moves away from the state as victim and places emphasis on the public as the symbolic victim, as discussed in Chapter 6. What this suggests then is that the constitution of the symbolic victim is one that forges an identity between the symbolic victim and the public, whereby the public becomes the symbolic victim, and plays a role in both the political organization of public inquiry and mass public support. It may be said that the enactment of the *YCJA* was implemented on the basis of these grounds, and is illustrative of a shift in youth crime governance from preceding legislation as well as political motives and rationale. This finding provides support for the argument made by Garland (1996, 2001) on the ways in which political ideology has shifted over the years. In essence, this new approach to penology can be explained as an “adaptive” response to compensate for the failures of the state to safeguard the public. Part of the implementation behind Bill C-10 (Part 4) may be explained by Garland’s (1996) discussion of “denial as a reaction to the predicament” of youth crime in modern capitalist society, whereby more punitive legislation is implemented to reaffirm state authority and power (p. 459).

Moreover, there was predominant theme in the case law which demonstrated that youth in conflict with the law tend to be from socially, economically and politically underprivileged groups who are indeed more likely to be burdened and impacted by the consequences associated with laws that do not represent their interests. In numerous instances, youth suffer from poverty, mental disorders, and substance and alcohol abuse, are products of dysfunctional or single-parent families, have absentee parents (particularly fathers), have difficulty attending

school, and are associated with gangs or other peers that do not encourage positive, pro-social behaviour. These factors were consistently acknowledged by youth court judges.

Another common theme found throughout the case law was that many of these youth are either Aboriginal or black, and are afflicted by a complexity of issues by virtue of their backgrounds, culture, and social conditions within modern capitalism. These findings lend support to the findings by Hall et al. (2013) on the intersection between race, class and youth crime. Moreover, previous research suggests that minority groups in particular are victims of systematic discrimination within the judicial system and sometimes subject to different, at times more punitive sanctions than Caucasians (Alvi, 2012; Bala & Anand, 2012; DeKeseredy, 2011). This suggests there is an undeniable link between capitalism and the modern state relative to the nature of youth crime, which not only includes race/ethnicity and class, but also education, gang involvement, single-parent families, and socio-economic status. While post-enactment findings are rare, it may be said that the new law has the potential to magnify problems for youth in conflict with the law, especially for those belonging to minority groups. Although case law itself cannot always attest to systematic discrimination within the context of each case, it certainly acknowledges the relative social conditions for youth. These findings tentatively support the critical perspective because of the evidence in the case law. Given that there is no evidence in the case law that the legislative amendments of Bill C-10 (Part 4) have had any effect on youth to date, it is too early to say with confidence that the key arguments of critical theory are fully supported. The findings from the case law also coincide with the data from the interviews with youth court judges, which asserted that no known or observable changes in sentencing practices had resulted as a corollary of the Bill. This, in part, was due to the fact that the legislation is still too new to see any significant changes or effects, and

partially due to the fact so few cases involving serious and violent offenders come before the courts.

7.3 Conclusion

Issue 2 examined the ways in which Bill C-10 (Part 4) has been implemented within the youth courts. The case law analysis pre-enactment of the Bill indicated that the courts largely adhered to the *YCJA* by placing a great deal of emphasis on fairness, accountability, rehabilitation and reintegration of youth in conflict with the law. A number of recurring themes were found in the case law pre-enactment of Bill C-10 (Part) which included debates about pre-trial detention, concerns regarding lifting the publication ban, matters related to the definition of violent offences, and finally issues addressing deterrence and denunciation as sentencing principles for youth. The analysis of post-enactment case law did not demonstrate sentencing practices that differed from pre-enactment case law (see Research Question #3). As such, there was no evidence to suggest that sentencing practices were influenced by the tough-on-crime legislation; but there was also no evidence to suggest that youth in conflict with the law will be unaffected by the tough-on-crime legislation in the future. These findings reveal that it may be too soon to determine how youth will be impacted by the legislative amendments, and in what ways. Overall, the case law findings provided mixed support for the critical theoretical perspective, but lend some support to a shift in political rationale towards one that emphasizes the conservative stance (Garland, 1996, 2001). On account of the dynamics of the modern capitalist state, this view suggests that those who belong to socially, economically, and politically underprivileged groups are at greater risk of being burdened and impacted by negative consequences associated with laws that do not represent their interests. This was evidenced in the pre-enactment findings, since much of the case law alluded to the various

social conditions that underlie the ways in which a youth's experience may influence or produce criminogenic behaviour. However, because the amendments of Bill C-10 (Part 4) are still too new, it is difficult to assertively conclude that the tough-on-crime legislation will affect the youth of today in ways that extend beyond what is currently known. Thus, the post-enactment findings show no variances in the way youth are affected by the tough-on-crime legislation.

CHAPTER 8 – TOUGH-ON-CRIME LEGISLATION AND RESPONSES TO YOUTH CRIME IN TEXAS

To address the research questions in Issue 3, this chapter examines the tough-on-crime legislation in Texas to assess the ways in which it responds to youth crime.²²⁴ The analysis of case law in Texas not only demonstrates how laws are applied to specific juvenile delinquency cases, but also elucidates the ways in which court decisions reflect a tough-on-crime philosophy. This requires that consideration be given to case law that appears to be most noteworthy, influential or frequently cited in other cases. In turn, this analysis then provides a basis for establishing how the tough-on-crime policies and laws in Texas differ from those of Canada relative to the current models of crime control in each jurisdiction. Finally, it also sheds light on what Canadians can learn from the ways in which a more punitive model responds to youth crime, although there is some evidence to suggest that various ideological and philosophical shifts are taking place in policy formation in the state of Texas.

Drawing on the material discussed in Chapter 4, the examination of policies and laws in Texas is important for two reasons. First, it helps contextualize the tough-on-crime legislation that developed in Canada on the basis of similar processes and transformative movements stemming from an American model. Second, the findings from the case law and policy analysis of Texas demonstrates the ways in which their guiding philosophy of youth justice places the state further along the tough-on-crime continuum, therefore providing a better understanding of where Canada currently sits on this spectrum. This awareness can subsequently assist with better informing Canadians on the future development of youth justice policies more generally.

²²⁴ The state of Texas was chosen for analysis given the highly punitive nature of its laws and underlying youth justice processes and mechanisms. While Canada appears to be more in line with a rehabilitative approach, Texas incorporates a more disciplinary and corrective strategy of crime control. Thus, the guiding principles outlined in the *YCJA* are quite different from those outlined in the *Texas Family Code*.

8.1 Responses to and Management of Youth Crime in Texas

Research Question #4 asks how Texas oversees and responds to youth crime relative to their tough-on-crime legislation, and how this legislation been implemented within youth courts. The ways in which Texas oversees and responds to youth crime predominately revolves around the principles of protection, and to a much lesser degree, rehabilitation. Historically, Texas has proven to have an extremely disciplinary and punitive justice system in comparison to almost all of the other states across America, given their model of severe punishment and deterrence for both youth and adults. According to Texas' Purpose Clause, there is a strong emphasis on "community protection, offender accountability, crime reduction through deterrence, or punishment". Furthermore, there is evidence of a more complex, multifarious purpose clause outlined in the Legislative Guide for Drafting Family and Juvenile Court Acts.²²⁵ The Legislative Guide declares four functions:

(a) to provide for the care, protection, and wholesome mental and physical development of children; (b) to remove from children committing delinquent acts the consequences of criminal behaviour, and to substitute a program of supervision, care, and rehabilitation; (c) to remove a child from the home only when necessary for his rehabilitation; and (d) to assure all parties their constitutional and other legal rights (Sheridan, 1969).²²⁶

In essence, the guiding philosophy of youth justice emphasizes punishment and deterrence, but also considers the welfare of the child and the role of rehabilitation. These findings coincide with a progressive movement towards a system that incorporates both a crime control model of youth justice and, although to a lesser degree, a child welfare approach. This development can be attributed to the economic, social, environmental, cultural and political shifts that have

²²⁵ This is a publication governed by the Children's Bureau in the late 1960s.

²²⁶ S.51.01 of the *Texas Family Code* discusses the purpose of the *Juvenile Justice Code* in similar language.

taken place over the last 19 years in Texas, and corresponds with the arguments of Caputo & Vallée (2007); Garland (2001); Tonry & Doob (2004) regarding such social structural changes that have occurred in the United States more generally.

As Texas is a decentralized state, services for delinquent youth are managed both by the state and counties. Traditionally, the juvenile probation departments administered by the local courts are given the task of performing predisposition investigations as well as organizing probation services, while the Texas Youth Commission was responsible for the “commitment, release, and aftercare of juvenile offenders” (generally restricted to the most serious and violent offenders). However, on 01 December 2011, the 82nd Texas Legislature passed a motion to abolish both the existing state agencies known as Texas Juvenile Probation Commission and the Texas Youth Commission in order to replace it with the Texas Juvenile Justice Department (TJJD) (Texas Juvenile Justice Department, 2013a). As a result of this new enactment, the TJJD has successfully created a comprehensive “state juvenile justice agency that works together with local county governments, the courts, and communities to encourage public safety by providing a full spectrum of effective supports and services to youth, from initial contact through termination of supervision” pursuant to Senate Bill (SB) 653. In addition, it aims to create “a juvenile justice system that produces positive outcomes for youth, families, and communities” (see Senate Bill 653 for further information on the purposes and goals of the TJJD).²²⁷ It has been reported that this legislation focuses on the use of community-based alternatives, which is viewed in terms of a compassionate approach that is also more

²²⁷ The development of the Texas Juvenile Justice Department is a result of the reform efforts put forth by the last three legislative sessions. This is particularly the case after an abuse scandal arose at the Texas Youth Commission facilities in 2007, calling for subsequent investigation. Note that the Texas Youth Commission (TYC) and the Texas Juvenile Probation Commission (TJPC) were both state agencies that addressed juvenile crime. The dismantling of these agencies does not interfere with the juvenile justice system at the local level.

economically worthwhile in comparison to before (Sanborn, Lew, Hazeltine-Shedd, & Kimball, 2013).

Juvenile justice proceedings in the state of Texas are subject to the applicable statutes and court rules governed by Title III of the *Texas Family Code* entitled the “*Juvenile Justice Code*”. While the *Texas Family Code* has been modified in abundance, the most noteworthy revisions to Texas’ youth laws and governing policies occurred in 1995. Consequently, a number of adjustments were made to the youth justice system, many of which explicitly address “violent and habitual” (repeat) youth offenders.²²⁸ The legislation that emerged in January 1996 has typically been characterized as a “get tough, balanced approach that reflects the public’s general attitude of punishing youth in a meaningful way without abandoning rehabilitation as a primary goal for youth” (*Texas Family Code* S.51.03).²²⁹ This suggests that this legislation was established on similar grounds to those in Canada, given that it accounts for the public’s opinion and broad desire to strengthen youth justice laws on the basis that “nothing works”. Thus, it can be argued that public consent was used as a means of establishing and maintaining legitimacy in a comparable fashion, and was the vehicle through which the enactment of such legislation materialized. These findings support the works of Hall et al. (2013) and Habermas (1975, 1985), and illustrate the ways in which the legislation itself

²²⁸ See *Texas Family Code* S.51.031.

²²⁹ The specific provisions outlined by the tough-on-crime approach encompass a number of conditions discussed in Chapter 4. These include the “promotion of the concept of punishment for criminal acts; the lowering of the certification age from 15 to 14 years of age for capital and first degree felonies, and the addition of ‘once an adult, always an adult’; the expansion of determinate sentencing by adding about 25 more offences to the original 5 serious offences (including some 2nd and 3rd degree felonies, some felony drug offenses, and habitual felony conduct); the increase of the range of possible sentences to a maximum of 40 years for first degree felonies, while minimum confinement periods for capital murder is 10 years; and the authorization of prosecutors to request the juvenile court to transfer a sentenced youth after age 16 to adult prison to complete their sentence, and all sentenced youth are required to complete their sentences after the age 19 on adult parole”. Refer to the *Texas Family Code* for more information.

took on a more law-and-order approach to reflect the systematically normalized dominant ideology in Texas. In addition, it lends support to the view that a new style of governance and thus new-fangled “adaptive” crime control strategies were established on account of the decline in the penal-welfare system (Feeley & Simon, 1992; Garland, 1996, 2001; O’Malley, 1999; Wacquant, 2009).

Youth proceedings in the state of Texas are delinquent proceedings as opposed to criminal, unless transferred to adult jurisdiction.²³⁰ The youth Court in Texas has authority over all proceedings involving youth between the ages of 10-17. Presently, youth may come into contact with the justice system in three ways: as “non-offenders”²³¹ (those who have entered the justice system “through the independent actions of third parties, such as parents or guardians”, and most frequently comprise abused or neglected youth); “status offenders”²³² (non-criminal misbehaviours considered unacceptable solely due to age); and “juvenile delinquent offenders”²³³ (youth who have “committed some criminal act that would result in criminal prosecution if committed by an adult”). In other words, delinquent offenders engage in a type of conduct that is in violation of a penal law in the state of Texas or of the United States punishable by a number of potential sentences, including a lengthy determinate sentence.

8.1.1 Intake and Places of Detention for Alleged Juvenile Delinquents

Texas Family Code S.52.01(A) dictates that youth enter the juvenile justice system when a juvenile is found violating a penal law of the state, or there is reason to believe a youth has taken part in “delinquent conduct” or conduct signifying the “need for supervision”

²³⁰ See *Texas Family Code* S.51.04.

²³¹ See *Texas Family Code* S.51.02(8).

²³² See *Texas Family Code* S.51.03(b)(2); S.51.03(b)(3); S.51.03(b)(1); S.51.08(b); S.51.03(b)(5); *Penal Code* S.8.07(a)(4) and (5); *Texas Education Code* S.25.094.

²³³ See *Texas Family Code* S.51.03.

(CINS).²³⁴ Once apprehended, youth are processed at a juvenile processing office with few delays.²³⁵ The laws in Texas allow the courts to detain a youth while awaiting a decision regarding how and in what way to proceed beyond the intake stage. Apprehended youth may be warned and released or referred to a diversion program; however like Canada, these options are generally available to youth in cases where minor violations or infractions have transpired. Alternatively, youth may be brought before an elected representative of the juvenile board.²³⁶

In more severe circumstances where a youth is referred to Juvenile Court instead of being released, youth may be detained in a juvenile detention facility constructed by the juvenile board of the county²³⁷, in a secure adult detention facility, or in a medical facility if the youth suffers from physical or mental illness requiring immediate treatment.²³⁸ Almost every county in Texas uses “secure pre-adjudication detention which is administered by county juvenile probation departments acting under the authority of the juvenile board or a private

²³⁴ Delinquent conduct involves fairly serious violations of the law. This includes “commission of any felony offence or jailable misdemeanour; violation of a lawful court order under circumstances that would constitute contempt of a justice or municipal court; commission of driving or boating while intoxicated, intoxication assault or intoxication manslaughter; or a third (or subsequent) offence of driving under the influence of alcohol” (See S.51.03(a) of the *Texas Family Code*). In very serious felony cases, “the juvenile court may have the options of determinate sentencing or discretionary transfer to adult criminal court” (S.53.045 and S.54.02 of the *Texas Family Code*). Conduct indicating a need for supervision, on the other hand, “is conduct other than traffic offences that involve fine-only offences”. These include “public intoxication, truancy, running away, inhalant abuse, expulsion from school or violation of a ‘child at-risk’ court order” (*Texas Family Code* S.51.03(b)). They are commonly referred to as status offences.

²³⁵ The formation of “processing stations” was administered by the legislature after the case of *Comer v. State* (1989).

²³⁶ A county’s juvenile board designates districts which may include both criminal and juvenile courts, and each county is responsible for creating its own intake system.

²³⁷ Aside from being held in detention pre-adjudication, youth may also be held “pre-disposition and while awaiting placement or commitment, or transport to the Texas Juvenile Justice Department” (National Center for Juvenile Justice, 2012). It is not permitted for youth to be “sentenced to secure detention or severe sanctions for probation violations in detention. However, juveniles may be held in detention pending adjudication for probation violations” (National Center for Juvenile Justice, 2012).

²³⁸ *Texas Family Code* S.51.12(f) states that “all juvenile detention facilities must keep youth separated by sight and sound from adults detained in the same building. Juveniles and adults are separated by sight and sound only if they are unable to see and talk to one another. This separation must extend to all areas of the facility and should be accomplished through architectural design”. See also *Texas Family Code* S.52.02(a)(1)-(5).

vendor acting under contract with the county’s juvenile board” (National Center for Juvenile Justice, 2012). Currently, there are over 50 secure pre-adjudication facilities that are recorded under the Texas Juvenile Justice Department (National Center for Juvenile Justice, 2012).

During a youth’s detention, a preliminary investigation establishes a) if the individual who is being referred to the court falls within the definition of a “child” under the *Texas Family Code*; and b) if there is enough reason to believe that the youth was actually involved in delinquent conduct. Generally speaking, youth must be released unless,

The child is likely to escape or be removed from the jurisdiction of the court; suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person; the child has no parent, guardian, custodian, or other person able to return the child to the court when required; the child may be dangerous to himself or herself or the child may threaten the safety of the public if released; the child has previously been found to be a delinquent child or has previously been convicted of a penal offence punishable by a term in jail or prison and is likely to commit an offence if released; and the youth’s detention is required by law (S.53.02 of the *Texas Family Code*).

Juveniles alleged to have “used, possessed, or exhibited a firearm while engaging in delinquent conduct” are legally prohibited from being released under S.53.02(f) of the *Texas Family Code*. Interestingly, the *Juvenile Justice Code* does not address whether a youth has access to bail. The Court of Appeals note that youth in Texas do not have an absolute constitutional right to bail under the doctrine of *parens patriae*, and as such, reject any arguments that claim the right to bail in Texas is breached when a youth is locked up and bond is denied.²³⁹

²³⁹ See *Ex parte D.W.C.* (1999). A discussion on the informal responses to youth crime in the state of Texas (i.e., dispositions without referral to juvenile court) can be found in Appendix E.

8.1.2 Delinquency Adjudications

Youth ineligible for informal dispositions (similar to extrajudicial measures in Canada) or deferred prosecution (similar to extrajudicial sanctions in Canada) are faced with procedural circumstances involving prosecution after a preliminary investigation has been conducted.²⁴⁰ Once the investigation proves that the youth is a “child” and that there are enough grounds to believe the youth engaged in delinquent conduct, the filing of a petition is authorized.²⁴¹ Petitions of this nature may charge a youth with either one of the two types of unlawful behaviour: “delinquent conduct”, or “conduct indicating a need for supervision”.²⁴²

Within the realm of delinquency proceedings, adjudication hearings and disposition hearings are held separately.²⁴³ Adjudication hearings in the juvenile court are comparable to criminal trials in the district court. As such, all adjudication hearings are held in front of a jury unless the youth “waives that right”.²⁴⁴ In addition, “these hearings are open to the public”, except when the “court determines there is good cause to exclude the public”.²⁴⁵ Youth who are younger than 14 years of age at the time of the hearing are not entitled to open hearings “unless the court finds that the interests of the youth or the public would be better served by opening the hearing to the public”.²⁴⁶

²⁴⁰ For a discussion on deferred prosecution (i.e., an alternative to formal adjudication), please refer to Appendix F.

²⁴¹ See *Texas Family Code* S.53.01(a); S.51.012; and S.53.04.

²⁴² According to the Texas Juvenile Justice Department (2013c), approximately a third of the youth who are referred to youth court are “formally charged with and prosecuted for an offence”.

²⁴³ See *Texas Family Code* S.54.03.

²⁴⁴ See *McKeiver v. Pennsylvania* (1971) for more information regarding trial by jury. See also *In re R.R.* (2012) wherein the right to a jury trial provided in the *Texas Constitution* only applies to adults, and it is S.54.03 of the *Texas Family Code* that creates a statutory right to a jury trial in juvenile proceedings. Thus, the right to a jury in a juvenile case is not a constitutional right. For additional cases refer to *Cain v. State* (1997); *Green v. State.* (2001); *Hall v. State* (1992); *In re C.O.S.*(1999); *Johnson v. State* (2002); and *Texas Constitution.*

²⁴⁵ See *Texas Family Code* S.54.08(a) and S.54.08(c).

²⁴⁶ See *Texas Family Code* S.54.08(a) and S.54.08(c).

Adjudication hearings must determine whether or not the youth is guilty of committing the offence. Youth found not guilty of the alleged crime results in a dismissal of the petition. The “Rules of Evidence” that apply to “adult criminal cases” and “Chapter 38 of the *Code of Criminal Procedure* (dealing with evidence in criminal actions)” are germane to the ways in which the youth court operates.²⁴⁷ Should the state be capable of proving “beyond a reasonable doubt that the youth has engaged in the alleged conduct”, the court is obligated to proceed with a dispositional hearing.²⁴⁸ Case law indicated that youth may be adjudicated delinquent under a number of different circumstances, amongst which a felony offence or a violation of probation for a felony offence has occurred; a third misdemeanor offence or a violation of probation on the second misdemeanor adjudication has taken place; and the youth has been adjudicated for a misdemeanor offence and has previously been adjudicated for any felony offence. Adjudication or disposition orders in the youth court are not considered criminal convictions. Thus, they do not “impose any of the civil disabilities that an adult criminal conviction would impose” (Texas Attorney General, 2012).²⁴⁹ However, a judgement resulting in a guilty verdict for a felony offence that carries with it a commitment to the Texas Juvenile Justice Department is a “final felony conviction for purposes of enhancement in adult criminal court” (Texas Attorney General, 2012).²⁵⁰ That is, prior juvenile adjudications are believed to constitute

²⁴⁷ See *Texas Family Code* S.54.03(d).

²⁴⁸ See *In re F.D.M.* (2012), wherein the evidence was considered sufficient to support the jury’s finding beyond a reasonable doubt that the juvenile committed the offence of aggravated assault with a deadly weapon. See also *Bearnth v. State* (2011); *Brooks v. State* (2010); *Clayton v. State* (2007); *Ervin v. State* (2010); *In re C.J.* (2009); *In re G.A.T.* (2000); *Laster v. State* (2009).

²⁴⁹ “Civil disabilities” refers to “a condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction” (Texas Attorney General, 2012).

²⁵⁰ This statement refers only to felony offences committed after January 01, 1996. Refer to S.51.13(d) of the *Texas Family Code* and S.12.42 of the *Penal Code* for further information. See *Chappel v. State* (2011) where a violation of a penal law is “a misdemeanor punishable by confinement in jail, such evidence of adjudication is admissible if the conduct upon which the adjudication is based occurred on or after January 1, 1996”. See also

felonies for subsequent conduct, thus resulting in an enhancement from a misdemeanour to a felony.²⁵¹

8.1.3 Dispositions

A disposition in the state of Texas incorporates both tough-on-crime legislation and rehabilitation of a young offender. Its main objective is to “protect the public” and stress the importance of deterrence while simultaneously “provide training, treatment and rehabilitation that emphasizes the accountability and responsibility of both the juvenile and the juvenile’s parents for the juvenile’s conduct”.²⁵² This is an illustration of Feeley and Simon (1992), Garland (1996) and O’Malley’s (1999) argument regarding contradictory sentencing principles and rationalities (i.e., “variable detention depending upon risk assessment”, discipline, punishment (including deterrence), incapacitation, and reintegration), particularly with regards to the ways in which the neo-conservative and neo-liberal views coalesce and create incoherencies in logic with regards to their “adaptive” responses (or “postmodern nostalgia” as Feeley and Simon (1992) describe it). This, as Feeley and Simon (1992), Garland (1996), and O’Malley (1999) suggest, is a by-product of the limitations of the sovereign state, a modern approach to political rationality, and most importantly, the development of a progressively dynamic yet unstable archetype of government.

Disposition hearings are not entitled to a jury, except in cases that involve determinate sentencing (see Section 8.1.4 entitled Determinate Sentencing of Violent and Habitual Offenders). Offences involving a CINS violation typically warrant a disposition for an initial

Casel v. State (2012) wherein a plea of true (guilty) to the court’s question about being finally convicted of aggravated assault (i.e., a prior juvenile adjudication) is sufficient to prove conviction for enhancement purposes. For further cases see *Beal v. State* (2002); *Ex parte Rich* (2006); *Menson v. State* (2011); and *Miles v. State* (2011).

²⁵¹ See *In the Matter of J.G.* (2005).

²⁵² See *Texas Family Code* S.51.01.

period of one year that involves varying levels of probation, even though the behaviour is not contrary to the *Penal Code*. Case law illustrated that the conditions of probation are based on “such reasonable and lawful terms as the court may determine”, including “probation at home or with relatives”,²⁵³ “a suitable foster home, a suitable public or private residential treatment institution or agency (non-secure correctional facility)”, or a “suitable public or private post-adjudication secure correctional facility”.²⁵⁴ The findings also indicated that probation may come with various conditions including school attendance, monetary conditions whereby the youth is required to make restitution of loss to the victim of the offence, mandatory community service, and parental community service. Conduct in need of supervision offenders cannot be committed to the Texas Department of Juvenile Justice “for engaging in conduct that would not be considered a crime if committed by an adult”.²⁵⁵

Dispositions regarding youth who were involved in delinquent conduct, on the other hand, may order that the youth be placed on progressive sanctions (usually probation) or be sent to the Texas Department of Juvenile Justice for an indeterminate sentence.²⁵⁶ Typically, this disposition involves some form of mandatory participation in a community-based program but vary from county to county since counties must have a population of at least 335,000 to qualify for such programs. This essentially allows the TJJD to release the youth at any time

²⁵³ See *In re T.N.T.* (2011), where the juvenile was issued a dispositional order of probation wherein the youth was placed on six months intensive probation in the custody of her father and was ordered to undergo counselling and participate in drug treatment.

²⁵⁴ See S.54.04(d) of the *Texas Family Code* for more information. Youth are only “removed from the family home if the juvenile cannot be provided the quality of care and level of support and supervision that is needed to successfully complete probation” (S.54.04(c)). See *In re H.V.* (2012), where the court used its discretion to commit the youth to the Texas Juvenile Justice Department where neither of the juvenile’s parents’ homes could “provide the quality of care and level of support and supervision necessary to meet the conditions of probation”. See also *In re D.P.H.* (2012).

²⁵⁵ See S.54.04(o) of the *Texas Family Code*.

²⁵⁶ See S.54.04 of the *Texas Family Code*.

prior to their 19th birthday.²⁵⁷ The conditions of probation may include “restitution, intensive supervision or electronic monitoring programs; however community service is a mandatory condition of probation subject only to limited exceptions”.²⁵⁸

The terms of probation are typically based on the Progressive Sanctions Model found in Chapter 59 of the *Family Code*. The purpose behind this model, albeit only a guideline, is to ensure that young offenders receive standardized and homogenized sanctions and penalties, in conjunction with balancing the public’s safety and rehabilitation while holding the youth accountable. Essentially, this model creates equilibrium between rehabilitation and the tough-on-crime legislation. It also permits flexibility when harmonizing decisions pertaining to the youth and their circumstances at the time of the offence. As such, the Progressive Sanctions Model is comprised of multiple “sanction levels” which includes a simple supervisory caution to avoid potential CINS or delinquent conduct in the future, deferred prosecution, court-ordered probation, intensive services probation, placement in a secure correctional facility, indeterminate commitment to TJJD, determinate sentencing,²⁵⁹ and discretionary certification to adult court (S.59.004-59.010). Any of these sanctions may be used in response to youth crime.

²⁵⁷ A “juvenile court sentence may extend past an offender’s 18th birthday”, however, if “the jury has previously approved a petition for determinate sentencing” (S.53.045). These sentences are “not to be more than 40 years if the conduct constitutes a capital felony, a felony of the first degree, or an aggravated controlled substance felony; not more than 20 years if the conduct constitutes a felony of the second degree; and not more than 10 years if the conduct constitutes a felony of the third degree” (S.53.045).

²⁵⁸ See *Texas Family Code* S.54.044(a).

²⁵⁹ If a youth is “placed on probation in a determinate sentencing case and transfers supervision on the youth’s 18th birthday to an adult district court for placement on community supervision, the district court must require the payment of any unpaid restitution as a condition of the community supervision. This extends the youth’s (but not the parent’s) responsibility to make restitution after the case is transferred to district court for community supervision” (see S.54.041(h) of the *Texas Family Code*). Pursuant to S.42.12 of the *Texas Family Code* and 2(2) in the *Code of Criminal Procedure*, a community service is defined as “the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period.” In other words, community supervision is the equivalent of adult probation. See *Texas Family Code* S.59.004 through S.59.010 for more information.

8.1.4 Determinate Sentencing of Violent or Habitual Offenders

Texas has implemented a determinate sentencing statute “that allows for significantly longer sentences than are permitted under delinquency laws”.²⁶⁰ Determinate sentences permit youth to remain within the juvenile jurisdiction for reasons which include trial and detention, but also provide a youth court judge with a means for ordering a fairly lengthy punishment on a serious young offender that may inevitably result in a transfer to an adult facility. In Texas, there are two distinct types of determinate sentences as indicated by the case law: determinate sentences with a placement in the Texas Juvenile Justice Department; and “determinate sentence probation”.²⁶¹

Determinate sentencing petitions must be filed in the juvenile court when charges against the youth are filed. Approval of the petition is required to be given by a grand jury,²⁶² as per Chapter 19 of the *Code of Criminal Procedures* and S.53.045(b) of the *Texas Family Code*. Approved petitions for determinate sentencing may be compared to a grand jury indictment in the adult jurisdiction. Thus, if a petition is approved by a grand jury, it automatically “certifies the fact of its approval to the juvenile court” under S.53.045(d) of the *Texas Family Code*.²⁶³

According to *Texas Family Code* S.54.04(q) and the reviewed case law, youth in the determinate sentence probation “may extend beyond the time that they reach adulthood”. At the outset, youth are confined at the county level under the management of a local juvenile

²⁶⁰ See *Texas Family Code* S.54.04(d)(3).

²⁶¹ For more information on determinate sentence probation see *In re J.A.B.* (2010).

²⁶² A grand jury consists of 12 community members or residents which are selected in order to investigate the allegations of a crime and determine whether the facts of the case lead to an indictment. See *In re B.R.H.* (2012) wherein an amended petition was approved by the grand jury for determinate sentencing after the youth’s 18th birthday.

²⁶³ The decision to “refer a petition to the grand jury is at the state’s option. If the State never refers the petition, the trial court has no jurisdiction to order determinate sentencing”. See *Bleys v. State* (2010).

probation department, which can consider the option of placing the youth in the county's post-adjudication facility.²⁶⁴ Upon such time as the youth turns 18 and is no longer under the juvenile court's jurisdiction, probation automatically expires unless a youth is transferred to the supervision of the adult jurisdiction. If transferred to the adult criminal court, case law indicated that the county's adult probation department is typically charged with the responsibility of supervising "a youth for the remainder of the term of probation".²⁶⁵

According to the case law, youth who are ordered to a determinate sentence with a placement in the TJJD are committed to the institution with the possibility of a transfer to the Texas Department of Criminal Justice.²⁶⁶ Generally a youth judge orders a sentence that consists of a specified amount of time which has the ability of extending well beyond adulthood, but is automatically transferred to TDCJ at age 21. Pursuant to S.54.04(d)(3)(A-C) of the *Texas Family Code*, the upper limit of a determinate sentence is "40 years for a capital felony, 1st degree felony, or an aggravated controlled substance felony; 20 years for a 2nd degree felony, and 10 years for a 3rd degree felony". The sentence starts off in the TJJD where

²⁶⁴ See *In re S.D.M.S.* (2010), wherein The Court of Appeals held that the evidence showed that respondent was discharged from his placement prior to the completion of the program; therefore, the youth violated the term and condition of probation which required the juvenile to complete the program. After a hearing on the motion, the trial court modified its previous disposition and ordered that S.D.M.S. be committed to the Texas Youth Commission.

²⁶⁵ See *Texas Family Code* S.54.051. See also *In re T.D.S.* (2011), wherein an order "transferring a juvenile's determinate sentence probation to an adult district court is not an appealable order". See also *In re B.L.C.* (2010); *In re C.M.W.* (2005); *In re J.H.* (2005); and *In the Matter of W.E.H.* (2011).

²⁶⁶ The Texas Department of Criminal Justice (TDCJ, 2013b) "manages offenders in state prisons, state jails and private correctional facilities that contract with TDCJ". See *In re A.M.C.* (2011) where the court had sufficient evidence showing a continuing and increasingly severe pattern of delinquent conduct, therefore resulting in the court's discretion to determine that Texas Youth Commission (now TJJD) was the best place for the youth and was not required to first exhaust the alternatives of probation and outside placement. See also *In re J.A.H.* (2000); *In re N.S.* (2008); *In re J.A.* (2010); *In re J.P.* (2004); *In re J.R.C.* (2007); *In re K.T.* (2003); *In re T.K.E.* (1999); and *In re T.R.* (2011). In addition, see *In re K.Y.* (2012), wherein the trial court "did not abuse its discretion" in ordering the juvenile transferred to the state Department of Criminal Justice for completion of the juvenile's murder sentence. For more information on cases involving discretion in determinate sentence transfer hearings, see *In re D.T.* (2007); and *In re R.G.* (1999).

the youth is eligible to participate in a vast range of available programming, such as rehabilitative programs and educational activities. The goal is to present youth with an opportunity to meaningfully participate in their rehabilitation within the juvenile justice system prior to their release on parole.²⁶⁷ Simultaneously, youth would be held accountable for their crime. Juveniles who do not complete the minimum length of stay by 19 years of age, or who do poorly in the programs may be subject to a transfer to an adult prison. In cases of capital murder where the minimum length of stay is extremely long, it is at the discretion of the TJJD to petition a juvenile court for early parole. Unless the TJJD routinely presents these cases for consideration by the juvenile court before the youth's 19th birthday, there is little hope of release and not being transferred to adult prison. As a result, there is virtually no incentive to take advantage of TJJD's rehabilitative programs. This illustrates just how punitive the crime control model for youth justice in Texas is, given that the system itself is designed in such a way that does not promote the well-being of the youth and does not emphasize or prioritize the importance of rehabilitation, despite their purpose clause.

Texas Family Code S.53.045(a) and case law identified approximately 30 offences in the *Penal Code* that are eligible for determinate sentencing, which encompass each and every

²⁶⁷ The statute simply provides that the specified number of years must be "served" to enable TJJD parole without court approval (a petition). This is unlike the custody and supervisions orders in Canada where 2/3 of the sentence is served in custody while the remaining 1/3 is served under supervision in the community because it is determined on a case by case basis. In the Canadian context, the underlying premise of this sentence represents a shift in penal logic, particularly from a rehabilitative model to an opportunities model (Ekstedt & Griffiths, 1988). An opportunities model is said to transfer responsibility onto offenders to plan and manage their own self-improvement, whereby the correctional system merely supplies the opportunities and programs through which the youth is able to achieve such betterment. This model represents a departure from the traditional rehabilitation/penal welfare model, where corrections bears the responsibility and accountability through recidivism measures in order to transform the conduct of offenders thorough the identification of needs and the implementation of rigorous programs of individualized normalization (i.e., discipline). The opportunities model suggests that one's offending behaviour is relative to personality as opposed to any socio-economic factors. This shift was also noted in Canada in the post 1970s "nothing works" era, and represents a neo-liberalized strategy. Today, elements of the opportunity model surface in risk-management techniques.

one of the most violent crimes and habitual felony conduct.²⁶⁸ The group of offences qualified for determinate sentencing is significantly narrower than the category of offences enabling the certification of a youth as an adult. Any youth ranging from ages 10 to 17 may be charged with a determinate sentence, although the “maximum age can be extended to 18 years of age under certain circumstances”.²⁶⁹ It should be noted that whether youth are certified as an adult or are ordered to serve a determinate sentence, the case law indicated a similarity in ethnicity between the two categories. That is, there is a disproportionate amount of African-Americans and Latinos in both populations. This finding coincides with previous research which states that the degree of disproportionality between youth who receive determinate sentences and certified youth is approximately 40% in both cases (Deitch, 2011). Overall, this finding lends support to the views of new penological techniques that aim to respond to the growing concern of the “underclass” in America, since the term “is used to refer to a largely black and Hispanic population living in concentrated zones of poverty in central cities [...]” (Feeley & Simon, 1992, p. 467)

²⁶⁸ Habitual felony conduct “involves a felony, other than a state jail felony, committed by a juvenile who has at least two previous felony adjudications. The second previous adjudication must be for conduct that occurred after the date the first previous adjudication became final” (see S.51.031 of the *Texas Family Code*). An adjudication “is final if the juvenile is placed on probation or is committed to the Texas Juvenile Justice Department”. See *Vaughns v. State* (2011), wherein the “Court of Appeals reversed and remanded the punishment for a habitual offender, enhanced by two juvenile felony adjudications, because the Texas Legislature did not intend for juvenile adjudications to be final felony convictions in order to enhance a sentence for a habitual offender”. For more information, see Kessler and Levitt (1999) on the use of sentence enhancements.

²⁶⁹ See S.51.02(2) of the *Texas Family Code*. These offences include “murder; capital murder; manslaughter; aggravated kidnapping; sexual assault or aggravated sexual assault; aggravated assault; aggravated robbery; injury to a child, elderly or disabled individual (if the offence is punishable as a felony, other than a state jail felony); felony deadly conduct (by discharging firearm); first degree or aggravated controlled substances felony; criminal solicitation; indecency with a child; criminal solicitation of a minor; criminal attempt (if the offence attempted was murder, capital murder, or an offence listed under S.3g(a)(1), Article 42.12, Code of Criminal Procedure); Arson (if bodily injury or death occurs); or intoxication manslaughter”. See *Penal Code* S.19.02; S.19.03; S.19.04; S.20.04; S.22.001; S.22.021; S.22.02; S.29.03; S.22.04; S.22.05(b); Chapter 481 of the *Health and Safety Code*; *Penal Code* S.15.03; S.22.11(a)(1); S.15.031; S.15.01; S.28.02; S.49.08, respectively.

8.1.5 Discretionary Transfer to Adult Criminal Court

According to S.54.02 of the *Texas Family Code*, the “juvenile court may waive its exclusive original jurisdiction and transfer a youth to the appropriate district court or criminal district court for criminal proceedings via certification.” Case law showed that the age of the youth at the time of the offence has a bearing on whether or not a court will waive its authority over the youth in order to transfer the case to the adult jurisdiction. The findings suggested that the court’s jurisdiction may be waived under the following circumstances: First, “if the juvenile is alleged to have violated a penal law of the grade of felony”; second, if the youth was a) “14 years of age or older at the time alleged to have committed the offence (if the offence is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offence);²⁷⁰ or b) “15 years of age or older at the time the juvenile is alleged to have committed the offence (if the offence is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offence);²⁷¹ and third, “after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the youth before the court committed the offence alleged and that because of the seriousness of the offence alleged or the background of the child the welfare of the community requires criminal proceedings”.²⁷²

Similarly, the same statute allows a youth 18 years of age and older to be certified as an adult and thus transferred to adult criminal court for offences committed while under the age of

²⁷⁰ See S.54.02(a)(2)(A) of the *Texas Family Code*.

²⁷¹ See S.54.02(a)(2)(B) of the *Texas Family Code*.

²⁷² See S.54.02(a)(3) of the *Texas Family Code*. See also *Grant v. State* (2010), where the court held that “in discretionary transfer proceedings, probable cause was established of the juvenile as a party, by acting with the intent to promote or assist the commission of the offence of murder”.

18. Youth, for example, who allegedly “committed murder or capital murder as a juvenile between the ages of 10 and 17”, and youth who allegedly “committed an eligible felony offence between the ages of 14 and 17 may be transferred to adult criminal court under” S.54.02(j)(2) of the *Texas Family Code*. According to the case law, this certification typically occurs in instances where, for reasons that fell outside of the state’s control, it was not feasible to pursue any proceedings before the youth’s 18th birthday. In some cases, proceeding in adult court prior to a youth’s 18th birthday may not have been possible (even under circumstances in which “due diligence” was carried out by the state), because the state “could not establish probable cause to proceed and new evidence was found since the juvenile’s 18th birthday” (S. 54.02(j)-(1)).

Determining whether a youth may be waived to the criminal court is based on a number of considerations in the case law. While it should be noted that courts vary to a great degree in the extent to which these factors are applied (as they are relative to each county in Texas), the general criteria employed to establish whether a case should be waived is taken into account at the hearing. These factors include “whether the alleged offence was against person or property, with greater weight in favour of transfer given to offenses against the person; the sophistication and maturity of the youth; the record and previous history of the juvenile; and the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court”.²⁷³ As with the provisions set forth in several other states, there are exclusions to decisions that pertain to discretionary transfer in the state of Texas. *Texas Family Code* S.54.02(m)(1) stipulates that

²⁷³ For cases involving the use of discretionary transfers, see *Adams v. State* (2005); *Fajardo v. State* (2007); *Macias v. State* (2007); *Melendez v. State* (1999); *Sanchez v. State* (2004).

any youth previously “certified as an adult must subsequently be tried as an adult for any felony” offence, regardless of age. If, however, the previous case was dismissed or was not found guilty, this mandatory legislation does not apply. This statutory provision is an exemplar of the tough-on-crime approach.

Once transferred to the adult jurisdiction, the youth is to be treated as an adult as per the provisions outlined in the *Code of Criminal Procedure*.²⁷⁴ Youth certified as adults who are confined pre-trial are held in adult county jails.²⁷⁵ These findings, however, are in contravention to the UN *Convention of the Rights of the Child*. Once found guilty and sentenced, youth are housed in adult prisons as per the rules outlined in the *Texas Family Code* S.54.02(h). Currently, provisions do not exist under Texas law that allow certified youth to carry out the terms of their sentence in a facility for juveniles either prior to trial or post-conviction. However, it should be noted that the certification of youth as adults in Texas is not a frequently cited in the case law, given that it typically involves only the most serious types of felony offences. Nonetheless, the transferring of youth to the adult jurisdiction implies that the youth is to be held by the same standards as an adult and undermines any assumption of diminished blameworthiness on account of the youth’s mental capacity.

Not surprisingly, the findings from the case law indicated that there are reported problems with sentences following discretionary transfers. Any youth in the state of Texas tried and convicted as an adult following a discretionary transfer is to be sentenced as an adult.

²⁷⁴ While juveniles are exempt from mandatory life sentences without the possibility of parole, “a mandatory life sentence without the option of parole for a juvenile who commits capital murder before September 1, 2009, is constitutional”. The legislature in Texas chose not to “apply the parole eligibility amendment retroactively to juveniles who have been certified to adult court and sentenced for a capital murder” (*Forcey v. State* (2010)). Thus, it would not be appropriate for the Court of Appeals in Texas to judicially amend the statute.

²⁷⁵ See *Texas Family Code* 51.12(h)(1).

Pursuing adult sentences for youth is challenging given that some punishments may violate the Eighth Amendment to the United States Constitution. In the case of *Diamond v. State*, (2012) for example, the youth court waived its jurisdiction to adult court for trial. Diamond was initially found guilty of the unauthorized use of a motor vehicle; however the court deferred proceedings and placed the juvenile on community supervision for five years. At a later date, the court found Diamond guilty of committing aggravated robbery at the age of 15, deferred further proceedings, and placed Diamond on community supervision for ten years with a \$1,000 fine. Subsequently, the state revoked Diamond's unadjudicated community supervision in both cases.

The hearing on the motion to revoke the community supervision also revealed that Diamond was guilty of four violations of the terms of his community supervision, in addition to the first two offences. As a result, the trial court assessed Diamond's punishment at 99 years' confinement for the violation of the conditions pertaining to community supervision and the aggravated robbery. Moreover, the trial court assessed Diamond's punishment at 2 years' confinement for the unauthorized use of a motor vehicle, to run consecutive to the sentence for the aggravated robbery charge. At this juncture, Diamond was 17 years of age.

Diamond appealed the imposition of the state jail sentence on a number of procedural grounds. In particular, he argued that his sentence for aggravated robbery is "disproportionate and constitutes cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution and Article 1.09 of the *Code of Criminal Procedures*" (*Diamond v. State*, 2012).²⁷⁶ The Court of Appeals, however, did not agree. Typically, a sentence that is

²⁷⁶ Article 1.09 of the *Code of Criminal Procedure* refers to "Cruelty Forbidden". It states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." See *Johnson v. State*

“within the range of punishment established by the legislature” is not to be amended on appeal.²⁷⁷ According to the case law, most appellate courts do not reconsider a punishment for an offence within the statutory range for excessive, unconstitutionally cruel, or unusual under either Texas law or the United States Constitution.²⁷⁸ Given that aggravated robbery is a first-degree felony which carried a punishment range of confinement from five to ninety-nine years under S.12.32 of the *Texas Penal Code*, Diamond’s sentence of ninety-nine years is within the statutory range authorized by the legislature for the crime of aggravated robbery. Diamond also failed to prove his sentence as grossly disproportionate to the offence he committed, since there was no evidence in the case law by which reasonable comparisons could be made.

Overall, court rulings and decisions in Texas are reflective of a crime control model that subscribes to a tough-on-crime philosophy. This is not only evidenced in the legislation itself, but in the ways the law is subsequently applied to juvenile delinquency cases. Although there is evidence to suggest that Texas courts uphold provisions that support rehabilitation, the case law findings indicated that there is more of an emphasis on punishment as opposed to rehabilitation. The most noticeable application of the tough-on-crime legislation is witnessed through the transferring of youth to the adult criminal justice jurisdiction, although both statistics and the case law indicate this occurs relatively infrequently. The more punitive nature of the tough-on-crime legislation in Texas not only facilitates the waiving of jurisdiction over youth, but in many ways encourages these transfers because of their objective to deter youth by

(2002) for further information on claims regarding Article 1.09, with reference to its authority establishing that cruel and unusual provisions of the state statute are broader and offer greater protection than the Eight Amendment. See also *Graham v. Florida* (2010) whereby the United States Supreme Court held it unconstitutional to “sentence a juvenile in a non-homicide case to a sentence that could not be discharged in his lifetime”. Additionally, refer to *Roper v. Simmons* (2005), where it is “established that because youth have lessened culpability they are less deserving of the most severe punishments”.

²⁷⁷ See *Jackson v. State* (1984).

²⁷⁸ See *Jackson v. State* (1999) and *Kirk v. State* (1997).

punishment. Even in cases where youth are not transferred, the provisions of determinate sentencing are punitive enough that it allows judges to impose longer sentences within the juvenile justice system. In turn, these findings illustrate that although rehabilitation is considered as a sentencing principle, it is not often lucrative or worthwhile for youth to take advantage of such treatment given the lengthy nature of their sentence. Essentially, the possibility of being transferred to the adult prison system has the ability of limiting any motivation to participate in the rehabilitative process.

In conjunction with these findings, there are profuse amounts of case law that illustrate some of the misfortunes or calamities faced by youth. These factors encompass such things as substance and alcohol addictions, mental disorders such as fetal alcohol spectrum disorder, and emotional and behavioural illnesses. Despite the varying offences for which a youth enters into system and is sentenced, the case law indicated that an abundance of youth are victims of numerous economic perils, come from single parent families, are neglected, have little education, and are frequently made up of minority groups. Similar to case law findings in Canada, not all case law in Texas specified the youth's race/ethnicity. Of the case law that provided such information, only a small amount referred to White youth. In contrast, Hispanic and African-American youth represented the largest amount of case law (particularly youth certified as adults), and most of the youth involved in serious or violent offences were male. In effect, it may be argued that these youth are characteristic of the "underclass". These findings were echoed in Hall et al.'s (2013) analysis of the types of youth (Black, potential muggers and street criminals) that were targeted in the U.K. with the enactment of tough-on-crime legislation.

On the whole, the findings from the case law correspond with the tough-on-crime legislation that, for the most part, adheres to neo-conservative ideology. As a result, there are a number of negative consequences associated with the tough-on-crime mandate that are witnessed through the analysis of Texas case law. These findings suggest that the legislation has had a significant effect on youth who are socially, economically and politically underprivileged and are representative of less powerful groups in society that do not reflect the dominant ideology (Garland, 2001; Hall et al., 2013). More specifically, the findings are highly supportive of the assertions put forth by the critical perspective with regards to the effects of the modern capitalist state and the ways in which class and race relations have manifested themselves in the normative structure and the law more generally (Garland, 2001; Hall et al., 2013). This may be compounded with the current economic downturn in Texas (a financial crisis of sorts which can be linked to Garland's (1996) belief that more punitive policies are allegedly needed to compensate for the failures of the state) and with the up-rise of immigration across the state.

Amongst all American states, Texas has one of the highest numbers of youth living in poverty and is experiencing an astonishingly large amount of growth on account of immigration (Ennis, Rios-Vargas & Albert, 2011). As such, there is "no single ethnicity" that represents the state since approximately two-thirds of their youth are "non-Anglo minorities" (Scharrer, 2011). This suggests that a complex relationship exists between race/ethnicity (including immigration patterns), class, and youth crime in the state of Texas, and that youth from such minority groups have a greater likelihood of being impacted by tough-on-crime legislation in contrast to dominant social groups (Alvi, 2012; Garland, 2001; Hall et al., 2013; Wortley et al., 2008).

8.2 Differing Policies in Response to Youth Crime

In order to adequately determine how policies in response to youth crime in Texas differ from those of Canada (as per Research Question #5), it is imperative to first note the distinctions between the principles and purpose governing the legislation. Canada's *Youth Criminal Justice Act* generally provides for a great deal of emphasis on diversion from the youth court system for a broad range of less serious offences, while encouraging the use of various community-based dispositions in an attempt to restrict the use of custody for youth sentenced by the court. Due to the amendments put forth by the Conservative government in 2012, youth who commit serious violent offences are currently subject to provisions that place greater importance on protection of the public and accountability for the offence. Thus, the youth justice system in Canada is presently two-fold. It not only attempts to rehabilitate youth as well as deter offending, but it also simultaneously establishes meaningful consequences for youth in conflict with the law. This was evidenced in the Canadian case law in Chapter 7.

Like policies set forth in Texas (albeit to a lesser degree), the *Youth Criminal Justice Act* upholds the belief that there should be a lesser degree of accountability for youth, in comparison to their adult counterparts (mainly due to a lack of mental development and lower level of maturity), while stressing provisions related to rehabilitative services. As such, sentences imposed on youth across both jurisdictions are to be proportional to the seriousness of the offence, and should therefore not reflect a more severe sanction than imposed on an adult for the same offence. In addition, both the *Youth Criminal Justice Act* and legislation in Texas equally recognizes the importance of including victims, community members, and parents in the justice process, and similarly maintain that youth are entitled to due process of law (see *YCJA* S.3).

Texas' purpose clause outlined in the *Texas Family Code* and *Juvenile Justice Code* does not reflect an entirely radical departure from the rehabilitative philosophy outlined in the *YCJA*. Texas case law indicates that the state attempts to promote the well being of youth in conjunction with the best interests of the public. Like Canada, Texas tends to frequently employ informal procedures resulting in the diversion of youth from the formal youth justice system for less serious offenders.²⁷⁹ This finding coincides with Garland's (1996) analysis of the "adaptive" strategies of the state to address the problems of youth crime, particularly by developing new policies/techniques to encourage the reduction of custody for young offenders. While Texas promotes the rehabilitation of youth by substituting a program of supervision and care, and includes provisions such as deferred prosecution, Texas law undoubtedly places a greater emphasis on "community protection, offender accountability, crime reduction through deterrence, and punishment" (National Center for Juvenile Justice, 2012).²⁸⁰ Thus, while Canada is more inclined to look for alternatives to incarceration, Texas case law indicated that the state is more likely to penalize youth who have committed non-violent or less serious crimes even though they too have implemented informal dispositions.²⁸¹ This is illustrative of a crime control model that is further along the tough-on-crime continuum relative to Canada.

²⁷⁹ In Canada, the use of diversion and extrajudicial measures are strategies used to increase the use of community-based responses to youth crime. Extrajudicial sanctions in Canada may be seen as a more formal approach to dealing with youth in conflict with the law, and includes community-based responses and programs that may include restitution to a victim, an order to successfully complete community service, or some element of restorative justice. It should be noted that extrajudicial measures include extrajudicial sanctions and police warnings, cautioning, and referrals to community agencies (such as counselling or mentoring programs).

²⁸⁰ The legislative amendment of Bill C-10 (Part 4) added to its objective of youth sentencing by including the denouncement of unlawful conduct and the deterrence of young people from committing offences (specific deterrence).

²⁸¹ This statement can be cross-referenced with various studies conducted on juveniles in the adult criminal justice system in Texas, which find that "about 15% of juveniles transferred to adult court are charged with non-violent felonies, including state jail offences". See Deitch (2011) for further information.

Legislation regarding pre-trial detention in Texas and Canada differ to some extent. In both jurisdictions, a youth may be detained pending trial in cases where a youth is charged with a serious violent offence, poses a substantial risk of reoffending, or is likely to fail to appear in court. According to Moyer and Basic (2005), the decision to detain a youth in Canada is typically dependent on whether the youth has some degree of current involvement with the youth justice system (for example, probation) or is facing other charges. However, while youth are generally detained in separate facilities from adults, the *YCJA* constructs an exemption which allows a youth court judge, under rare circumstances, to allow a young person to be detained with adults if this is necessary for the safety of the youth and for others, or if “no youth detention facility is available within a reasonable distance” (see S.30(3) of the *YCJA*). These provisions are contrary to those enacted in Texas, whereby youth are to be separated from their adult counterparts by sight and sound (although this does not always happen for reasons such as overcrowding). Nonetheless, the majority of the conditions associated with pre-trial detention in both jurisdictions are relatively similar in terms of their legal provisions as well as the varying range of available programs and resources to counties and provinces.²⁸²

Pre-trial detention provisions in Canada are now especially similar to those in Texas given the legislative amendments of Bill C-10 (Part 4), which stipulate that violent and repeat offenders may be detained prior to trial mainly to ensure public safety. The only substantive exception to these similarities is evidenced in the case law and are related to the bail provisions

²⁸² It should be noted that the *YCJA* had little effect on the use of pretrial detention. In fact, pretrial detention (remand custody) has increased to a degree under the *YCJA* mainly due to a lack of clarity.

(or lack thereof) in Texas. This ensures greater management and control over the youth in contrast to the Canadian system.

The denial of a preliminary inquiry and the right to a jury in almost all cases involving youth in conflict with the law is upheld by the provisions in the Canadian *Criminal Code* and the *YCJA*. Essentially most youth proceedings and trials are held by the judge without invoking a jury. In serious cases, however, youth who are facing the possibility of an adult sentence of more than five years may qualify as being an exception to the rule. According to Section 11(f) of the *Charter*, any individual facing a minimum sentence of five years is guaranteed the right to benefit from a trial by jury. Thus, youth facing sentences of this nature (for serious charges that may or may not include murder) are given the right to choose to have a preliminary inquiry as well as a trial by jury. These provisions differ slightly from those outlined in the *Texas Family Code* which state that all adjudication hearings are held before a jury unless the youth waives the right. In Texas, a grand jury is involved in cases regarding determinate sentencing of violent or habitual offenders, although these cases have not been waived to the adult jurisdiction.

While statutory statements of principle in Texas have adopted ideologies that place importance on the protection of the public and accountability of juvenile offenders, the amendments put forth by Bill C-10 (Part 4) in Canada now emphasize similar principles, particularly for more serious and violent offenders. Although the majority of youth from both jurisdictions are treated in a relatively similar manner when minor or first time offences are involved, Bill C-10 (Part 4) has effectively implemented an approach more in line with the model in Texas. In effect, Bill C-10 (Part 4) represents a modified crime control model that brings the Canadian system closer to that of Texas. However, the single most notable

difference between legislation and case law in response to youth crime in Texas and Canada is directly related to the provisions of transferring youth to adult court.

As Texas has enacted laws to make it easier for youth to be dealt with in adult court (particularly those charged with violent offences), a number of provisions are enforced in the United States that are simply not available in Canada. Moreover, the enactment of the *YCJA* in 2003 prohibited the possibility of referring youth to adult courts. Since the onset of the *YCJA* in 2003, all legal proceedings involving youth, ranging from the least serious to the most serious of offences, are handled in youth court without exception. The provisions allowing youth to be transferred to adult court implies that youth are to be treated with the same level of accountability as adults. This was evidenced in the case law from Texas. In Canada, however, it is recognized in case law that in most instances youth sentences are governed by the principle of limited accountability in order to reflect the lesser maturity of young offenders. Thus, the amendments put forth by Bill C-10 (Part 4) specifically articulate the principle of diminished moral blameworthiness or culpability. In Canada it is the youth court judge which may sentence a youth as though an adult.²⁸³ As such, Canada does not have provisions that support waiving jurisdiction to the adult criminal justice system by means of a judicial waiver, presumptive waiver, mandatory waiver, or direct file.

Adult sentences in Canada may only be imposed on youth in the following case: “where a young person aged 14 or older at the time of the offence is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years”. Furthermore, “a Crown prosecutor *may* ask a youth court to impose an adult sentence in cases

²⁸³ To a degree, this is similar to determinate sentencing of violent or habitual offenders in Texas, whereby youth may remain in the juvenile justice system for trial and initial detainment; but also provide judges with a means for imposing longer sentences on serious juvenile offenders.

where the youth is at least 14 years of age at the time of the offence (although the provinces reserve the right to increase the limit to 15 or 16 years of age), and the offence is a presumptive offence (i.e., murder, attempted murder, manslaughter or aggravated sexual assault)” (Library of Parliament, 2011, p. 136). In these instances, the Crown attorney is obligated to establish whether an application of an adult sentence for the youth should be filed (similar to a petition in the United States). In both Texas and Canada, the ultimate decision regarding whether or not a youth will be charged with an adult sentence is a matter of judicial discretion. It should be noted however that the list of crimes for which a youth may be charged with an adult sentence in Canada differs from those crimes listed in Texas, although there is no evidence to suggest that the certification of youth occurs on the basis that such offenders are more violent than those who receive a determinate sentence (Deitch, 2011).²⁸⁴ Additionally, not all youth who are certified are considered violent (Deitch, 2011). While approximately 85% of certified youth have committed a violent offence, the remaining portion is non-violent (Deitch, 2011). This implies that non-violent youth are also subject to being tried and incarcerated as an adult in the state of Texas (Deitch, 2011).

With regards to the principles governing youth sentencing in Canada, Section 38(2) of the *YCJA* explicitly outlines the proportionality of the sentence “to the seriousness of the offence”, and “the degree of responsibility of the young offender for the offence” (Library of Parliament, 2011, p. 129). In addition, it specifies that all existing sanctions other than custody that are logical or sensible in the circumstance should be taken into account for all offenders,

²⁸⁴ According to the Texas Juvenile Probation Commission (2010), the ten most common offences for which a youth is typically certified are: aggravated robbery, sexual assault, homicide, aggravated assault, burglary, other felonies, felony drug offences, robbery, attempted homicide, felony weapons, motor vehicle theft, and felony theft.

and that sentences must be “the least restrictive that is capable” of achieving meaningful consequences for the youth and is most likely to promote successful rehabilitation and reintegration into society (Library of Parliament, 2011, p. 133). These principles are adhered to in almost all Canadian case law. As such, a youth sentence under the *YCJA* must “first consider the many options that do not involve custody”, except in cases of murder (Library of Parliament, 2011, p. 134). Incarceration or custodial sentences specific to youth (committal to custody), as evidenced in the findings, are therefore limited to violent youth or those “who otherwise present a danger” to society at large (Library of Parliament, 2011, p. 134). Under the current provisions of the *YCJA*, incarceration may only be chosen in cases where the youth has,

committed a violent offence; has failed to comply with two or more non-custodial sentences; the case is an exceptional one, where the aggravating circumstances warrant a custodial sentence; the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has several *findings of guilt* under the *YCJA* or *YOA* (Library of Parliament, 2011, p. 134-135; see also S.39(1)).

However, even if one or more of these conditions are met, youth court judges are not obligated to impose a custodial sentence, let alone an adult sentence.²⁸⁵ Given this fact, the maximum sentence that a court may impose on a youth not sentenced as an adult is ten years for first degree murder, with a continuous custodial period of up to six years, followed by a conditional supervision in the community; and a maximum of seven years of custody and supervision in cases of second degree murder, with a custodial period of up to four years, followed by

²⁸⁵ Country-wide data on adult sentencing under the *YCJA* does not exist in Canada; however these cases are typically rare in nature and often involve serious, very brutal offences. The imposition of adult sentences on youth rarely occurs, but does so only when the provisions of the *YCJA* appear to represent an inadequate response to the offence committed. If the maximum sentence under the *YCJA* is incapable of holding a youth accountable for their offence, an adult sentence must be imposed (with consideration given to their age and limited level of maturity, as well as their amenability to rehabilitation which takes into account the personal history and character of the youth and the nature of the offence).

conditional supervision in the community (see S.42(2)(q)(i)-(ii) of the *YCJA*). As is evident, these provisions vary considerably from those outlined in Texas legislation, but coincide with the case law findings.

The imposition of an adult sentence in Texas allows for a portion to be served in a youth custody facility, although this is not always the case. Youth who are subject to adult sentences are permitted, in some instances, to remain in youth custody facilities until the court loses jurisdiction over the youth. Beyond this point, the youth is transferred to an adult correctional institution to serve the remainder of their sentence (National Criminal Justice Reference Service, 2012). Prior to the transfer however, youth custody facilities continuously provide access to the appropriate rehabilitative services. In Canada, an adult sentence imposed upon youth under the age of 18 must be sentenced to a youth detention facility. Before Bill C-10 (Part 4), the courts could decide where the youth would serve time. Thus, provisions of this nature under the *YCJA* mirror, to a degree, those found in the case law from Texas that focus on both rehabilitation within the youth facility and punishment in the adult facility. However, with the new legislative amendments, these findings *may* change over time.

In addition, youth sentenced as an adult in Canada are subject to the adult rules governing parole and release. If, for example, a youth is convicted of murder for which there is a mandatory life sentence, the provisions of the *Criminal Code* dictate the rules governing ones eligibility for parole. As such, a person who was a youth at the time of the offence will be eligible to be considered for released by the parole board earlier than their adult counterpart.²⁸⁶

²⁸⁶ Youth who are 14 or 15 years of age when they commit murder and are sentenced as an adult are entitled to a set parole eligibility date of 5 to 7 years by the sentencing judge. Youth who are 16 or 17 years of age when they commit a second degree murder are eligible for parole in 7 years. If the offence is a first degree murder then a 16 or 17 year old will be eligible for parole in 10 years. The determination of parole eligibility, regardless of age,

However, the release of an individual is only granted by the parole board in instances where the person is not considered to be a serious risk to public safety. Moreover, the case law indicates that an individual released on parole is subject to lifelong supervision as well as the possibility of returning to jail for parole violations. The legislation governing these procedures in Texas are similar to those set forth in Canada, however as mentioned above, there is case law that attends to issues regarding the eligibility of parole for youth for those serving mandatory life sentences.

Placement of youth sentenced as adults differs to some extent between Texas and Canada. While youth in Texas tend to serve their adult sentences in adult facilities, Bill C-10 (Part 4) now removes the courts ability to determine whether the youth will be placed in a youth custody facility, an adult provincial correctional facility, or a federal penitentiary to serve the sentence in Canada.²⁸⁷ Youth who fall under the age of 18 at the time of sentencing, in all cases, will serve the full portion of their sentence in a youth custody facility. In situations where, at the time of sentencing the youth is over 18 years of age, the court may seek placement of the youth in an adult provincial correctional facility, or for sentences that surpass two years, in a federal penitentiary for adults.

The transfer to an adult facility mainly applies to cases where the youth has reached the age of 20 (the court's upper age of jurisdiction over youth) or the court is unsatisfied that continued placement in the youth facility would be "in the best interests of the young person and not jeopardize the safety of others" (S.76(9) of the *YCJA*). Interestingly, and similar to the

depends largely on the youth's age, prior record, the degree of involvement in the offence, and the nature of the offence as outlined by S.743.3 and 745.5 of the *Criminal Code*. Note that youth sentenced for murder as an adult is eligible for parole in 5-10 years while adults are eligible for parole in 10-25 years.

²⁸⁷ Provincial correctional facilities are intended for adult offenders who have sentences of less than two years and for less serious offences, while federal penitentiaries are for adults who have sentences for two years or longer and have committed serious offences.

provisions found in Texas, youth who do not receive adult sentences in Canada may nonetheless be transferred to an adult facility after reaching the age of 18 to serve the balance of their sentence; but must only be done so when deemed to be in the best interests of the youth (because youth facilities are no longer able to manage the offender) and the public. As is evidenced in the case law from Texas, concerns about a lack of access to appropriate rehabilitative services for youth once admitted into an adult correctional facility is a topic of contention.

Overall, the similarities and variances between the youth justice legislation in Canada and Texas illustrate the level of diversity between the two models. The analysis above provides evidence for the fact that Bill C-10 (Part 4) has moved Canada closer towards a model of crime control, although it is not nearly as punitive as Texas. This offers support for the argument that the crime control model in Texas is further along the tough-on-crime continuum when compared to Canada.

Both the amendments to the *YCJA* and the legislation in Texas are examples of the ways in which the problem of youth crime has been conceptualized and defined. The legislation in both jurisdictions is indicative of a shift in the focus on how youth were viewed prior to any change in law (Garland, 1996, 2001). This has resulted in a decline in the commitment to the penal-welfare strategies that place emphasis on rehabilitation as opposed to deterrence and punishment. Interestingly, the concept of rehabilitation in both Canada and Texas appears to be largely neo-liberalized. That is, the philosophy underlying rehabilitation appears to be indicative of post-disciplinary strategies that have little in common with traditional disciplinary logics (i.e., as Garland (1996, p. 451) explains, a “poorly socialized misfit in need of assistance”) and practices. In other words, the onus of responsibility is placed

on the youth to correct, treat and discipline themselves in order to transform their offending behaviour through the implementation of available correctional programs given that this new approach views youth as “an illicit, opportunistic consumer, whose access to social goods must be barred” (Garland, 1996, p. 451). To a degree, this new style of penal logic is a result of “late modernity”, a concept which supports the opportunities model in an attempt to self-change the undesirable behaviour leading to further risk. As Fraser (2003) argues,

Neither the Victorian subject of individualizing normalization nor the fordist subject of collective welfare, the new subject of governmentality is the actively responsible agent. A subject of (market) choice and a consumer of services, this individual is obligated to enhance her quality of life through her own decisions. In this new “care of self,” everyone is an expert on herself, responsible for managing her own human capital to maximal effect (p. 168).

Thus, a youth’s acceptance of responsibility and voluntary participation of such rehabilitative programs in both Texas and Canada not only implies that offenders are active consumers of penal services, but that they must manage their self-betterment. The assumption, however, is that the causes of crime are related to environmental issues (i.e., substance abuse, problems with school or home life) or personality disorders (i.e., antisocial attitudes and behaviours) as opposed to any social structural factors. These findings are indicative of a shift in penal logic, and are generally supportive of the argument made about the deterioration of the penal-welfare model towards a culture that emphasizes the importance of managing risk.

On the whole, the various economic and social changes that have occurred have led to a lack of adherence to penal-welfarism. This is witnessed in the youth justice legislation in both Canada and Texas, although it is clear that there is less loyalty to this structure in the latter jurisdiction. These findings are indicative of crime control initiatives that reconstruct a “complex of interlocking structures and strategies that are themselves composed of old and

new elements, the old revised and reoriented by a new operation context” (Garland, 2001, p. 23). On the whole, these findings not only coincide with Garland’s (2001) view that the political state of affairs (and especially the campaigning of crime control), is structured both culturally and socially, but that it is a result of a modified approach that is supported by both the public (on the basis of a consensus) and the state that emphasizes the importance of offender control. These findings strongly support the critical view discussed in the works of Hall et al. (2013), Feeley and Simon (1992), Fraser (2003), Garland (1996, 2001), and O’Malley (1999), although it is clear that this phenomenon is more sophisticated and pronounced in the American context.

The emergence of punitive sanctions and communicative justice that is embodied in the tough-on-crime legislation has a number of ancillary effects on youth, particularly those of minority populations. The legislation enveloping modern penalty effectively target those who are visible minorities, “the underclass”, and those who are otherwise politically, socially and economically powerless within the structural system. The analysis above offers support for the argument that youth who belong to such underprivileged groups are more likely to be burdened and impacted by the consequences associated with the tough-on-crime legislation on account of their social, political, and economic condition (Alvi, 2012; DeKeseredy, 2011; Garland, 2001; Hall et al., 2013; Wortley et al., 2008). This is observed in light of the decline in youth welfare which is not able to uphold the interests of this class of offender. This suggests the legislation enacted in both jurisdictions is more concerned with the reorganization of the ways in which these youth are controlled and supervised within the justice system, and coincides with the works of DeMichele (2014), Feeley and Simon (1992) and Garland (2001). In addition, both jurisdictions show signs of the need to further manage risk, particularly by targeting a

high-risk group of persistent repeat offenders who have potential to become “career criminals”. This is seen in both the Canadian and American context, whereby the newly enacted legislation of Bill C-10 (Part 4) is geared towards violent and repeat offenders, and the Texas legislation has integrated provisions for habitual and violent offenders. These provisions legally allow for better tracking and identification of potentially violent youth and potential “career criminals”, whose behaviour is frequently associated with the least powerful group or the “underclass” (Feeley & Simon, 1992; Garland, 2001).

In Texas, the enacted legislation appears to be extremely good at what it is meant to do. More specifically, the tough-on-crime mandate appears to have the most bearing on youth who are either certified as adults or transferred to the adult jurisdiction. These youth are comprised of the most violent or the most routine offenders whose behaviour requires management and control. There is no evidence in the Texas case law or otherwise that indicate such legislation acts as a deterrent. This particularly lends support to the works of Feeley and Simon (1992) who suggest that this type of legislation is enacted on the basis of a style of governance that places less emphasis on the importance of recidivism. While there has been a noticeable decrease in crime rates in Texas, it can be argued that the enacted tough-on-crime laws have little to do with this. In fact, the case law showed that youth who have had prior contact with the justice system in Texas are subject to receiving harsher sentences than before. This furthers the state’s need to intervene in order to control and manage youth who are simply impervious to rehabilitation. However, the tough-on-crime legislation itself has had little effect on the ways on which youth perceive the laws, because violent crime rates rose in the late 1990s in Texas when this legislation was in force.

In Canada, the newly enacted legislation has not yet revealed the ways in which it will affect youth in conflict with the law. While previous research suggests that such legislation is enacted on account of new attitudes and perceptions on violent youth (Feeley & Simon, 1992; Garland, 1996, 2001), there is no present way of knowing if and to what extent these provisions will translate into the long-term tracking and managing of what is thought to be a dangerous class of offenders. By analyzing legislation from Texas, one may reasonably deduce that these tough-on-crime policies are not overly useful for those who are in need of treatment, rehabilitation, or community-based services that provide youth with both the skills and the assistance needed to become successful, law-abiding citizens. However, the perceived illegitimacy of penal-welfare strategies has led Canada in a direction that has modified its views on juvenile justice to coincide with policy that now controls crime (as part of the “adaptive” and “non-adaptive” strategies employed by the state to address youth crime). Although Canada places a greater emphasis on rehabilitation and reintegration than its U.S. counterpart, only time will determine how the legislative changes of Bill C-10 (Part 4) will be interpreted by the courts and thus how youth may be affected by the amendments. Whether or not the “underclass” or marginal population will be further deprecated remains to be seen.

8.3 Learning from Other Responses to Youth Crime

The first part of Research Question #6 asks what can be learned from the way Texas responds to youth crime in terms of their policies and legislation. Based on the differences outlined above, it is clear that there a number of things that can be taken from a model that is consistent with a philosophy of crime control. The first of these findings is directly related to the transfer provisions enacted in Texas. Although it was determined in the case law that Texas has not abandoned the role of rehabilitation, it would seem that their purpose clause

emphasizes the importance of accountability and deterrence far more than the *YCJA* governing Canadian youth justice. This suggests that the transition from the *YOA* to the *YCJA*, which currently prohibits youth from being transferred to the adult jurisdiction, was a step in the right direction.

The shift in legislation towards transferring young offenders to the adult jurisdiction in Texas is predominately established on the supposition that harsher (adult) sentences will function in a way that hinders, curbs, or discourages youth crime. However, research has shown that offenders whose cases are transferred are rearrested more frequently upon release than similar young offenders handled by the juvenile court (Winner, Lanza-Kaduce, Bishop and Frazier, 1997). In relation to specific deterrence (that is, fitting an adult sentence to a specific offender in an attempt to curb their likelihood of reoffending), and general deterrence (whether transfer laws deter potential young offenders), there is little evidence to suggest these provisions have any real overall effects on deterrence (Lane, Lanza-Kaduce, Frazier & Bishop, 2002; Myers, 2003; Reiman, 1996; Steiner, Hemmens & Bell, 2006; Steiner & Wright, 2006). In fact, prior research suggests that most youth are unaware of the transfer laws that exist in the state. In cases where youth have some knowledge of the governing policies, many do not believe these laws will be enforced against them (Winner et al., 1997). These findings suggest a need to assess and apply movements that create awareness at the state level which could inform youth about the potential ramifications of committing very serious crimes. In a similar vein, the recent changes in the Canadian youth justice legislation do not appear to be articulated in a manner that generates awareness amongst youth. In turn, there may be a level of naivety or vulnerability on the part of the youth who may engage in offending behaviour

without knowing or understanding the full extent of the consequences associated with the crime.

The emphasis on the rehabilitation of youth in Canada is paramount. The significance of this sentencing principle is most noticeable when compared to a judicial system like Texas that, at times, prematurely concludes that rehabilitative measures do not work for high-risk youth. This is particularly the case when youth are transferred to the adult system, although there is evidence to suggest that youth who receive extremely long youth sentences are also less likely to engage in treatment. While the Canadian system genuinely values the role of rehabilitation, research in the American context reports that in numerous cases there have been no attempts to provide treatment through rehabilitative programs or through programs available at the county's youth probation level (Redding, 1999). Thus, youth who are removed from the juvenile system are not eligible to participate in these types of programs; a reality that is especially problematic for youth who are first time offenders, have committed non-violent offences, or have no prior violent criminal history.

Bill C-10 (Part 4) can be commended for its provision which removes the possibility for a youth under the age of 18 to serve their sentence in an adult correctional facility (Clause 186). This provision is an example of what has been learned from other jurisdictions that do not follow this approach. Research shows that adult facilities in Texas are unfit for youth under the maximum age of jurisdiction because they are incapable of addressing the particular needs of youth (Deitch, 2011). Detaining youth in adult facilities essentially jeopardizes the personal and public safety of the youth. Not only does a youth's placement in an adult facility have bearing on their overall well-being, but it has very little to offer in terms of deterrence from future offences. Instead, there is evidence to suggest that this practice increases their likelihood

of recidivism and violence in the future.²⁸⁸ Moreover, youth placed in adult institutions have a greater threat of developing a mental illness, being subject to physical and sexual assault, and attempting suicide. In general, these less favourable results are more prone to transpire in adult institutions because youth are usually exempt from valuable restorative interventions, educational programs, personnel with very comprehensive knowledge, and services that meet the individualized needs for youth. In many circumstances, youth are co-mingled with adults or are secluded for lengthy periods of time which furthers the likelihood of physical risk (Redding, 1999). This suggests that Canada is currently better situated to address the needs of youth through youth facilities, although respondents suggested that improvements to programs can and should be made (e.g., better funding, continuous evaluation and assessment of program success, and implementation of programs that are specifically tailored to youth based on individual needs).

Penn, Pirtle and Jones (2010) find that there are a number of programs and provisions in Texas law that are “ineffective in reducing juvenile delinquency and crime” (p. 1). These range from “curfew laws, scared straight programs, boot camps, punishment in adult facilities, out of home placement, drug abuse resistance education, confinement in large correctional facilities, and zero tolerance policies” (Penn, Pirtle, & Jones, 2010, p. 1). Moreover, Penn, Pirtle and Jones note that in general, “ineffective programs are those that use general deterrence with a “one size fits all” approach” (p. 2).²⁸⁹ These authors suggest that these programs or provisions are typically defined under a “‘get tough’ philosophy” that supports

²⁸⁸ According to a study that was conducted across the United States, youth have a 100% greater likelihood of violent recidivism when they are transferred and spend at minimum of a year in an adult facility. See Bazemore and Umbreit (1995); Bishop and Frazier (2000); Myers (2003); and Thomas and Bishop (1984) for further details.

²⁸⁹ Bill C-10 (Part 4) does not include general deterrence as one of its amendments, however earlier versions of the Bill (such as Bill C-25 and Bill C-4) did include this provision.

“punishment rather than identifying, addressing and correcting risk factors found in the individual, family, peer group, school and neighbourhood” (Penn, Pirtle & Jones, 2010, p. 2) Thus, prevention and deterrence may be better accomplished by developing protective factors to mitigate the impact of risk factors in a youth’s life (Penn, Pirtle & Jones, 2010; Krisberg, 2005).

Like Krisberg (2005), both Texas and Canada recognize that youth are greatly affected by four major categories of which many risk factors fall under. Krisberg (2005) suggests these include the family, community, school, and individual/peer groups. Krisberg (2005) explains that “extreme economic deprivation, family management problems, family conflict, early and persistent antisocial behaviour and early academic failure are power risk factors for virtually all types of adolescent problem behaviour” (p. 130). In essence, the protective factors (or as Krisberg (2005) refers to them, the “positive factors”) that may “combat the risk factors fall into a social development strategy” that is beginning to be implemented (Penn, Pirtle & Jones, 2010, p. 2).²⁹⁰ This strategy promotes the insulation of youth from risk factors by “fostering pro-social behaviours and being around individuals, community institutions, and peer groups” that cultivate these attitudes (Penn, Pirtle & Jones, 2010, p. 2).

Penn, Pirtle, and Jones (2010) suggest this is especially true for youth in certain “socially disorganized areas” in Texas in which protective factors (amongst which adequate financial and social resources) are deficient (p. 2). In Texas, for example, African-Americans and Latinos are disproportionately represented in vicinities where there are “constant barriers” that prohibit any “positive relations” with other individuals or community institutions (Penn,

²⁹⁰ Elements of this discussion can also be found in the “Guide for Implementing the Comprehensive Strategy for Serious, violent, and Chronic Juvenile Offenders” (Office of Juvenile Justice and Delinquency Prevention, 1995).

Pirtle & Jones, 2010, p. 2). In Canada, the immigration patterns have changed in a way that sometimes draw out an extended “state of social marginality” because many newcomers are subject to exclusion from active participation in the work force and the community on account of numerous social and economic obstacles (Petersen and Mortimer, 1994). This is particularly the case given the current changes in demography in both jurisdictions.

Not surprisingly, many community-based programs have been shown to be triumphant in Texas in holding youth responsible for their offences and directing them towards a more positive path. For example, Texas acknowledges that optimistic results can be derived from well-constructed programs that focus more so on the needs of all parties involved (e.g., young offenders, citizens, victims, etc.) instead of adopting more punitive measures that are very costly and yet do little to rectify the problem. This acceptance indicates a newly disclosed, state-wide change in the perceptions of effectiveness when it comes to tough-on-crime legislation. As such, these alternative approaches frequently stress remedial interventions to alter the youth’s behaviours, safeguard and conserve family values by strengthening its ability to regain control, promote compensation and sympathy towards injured parties, and assess youth to pair them with a fairly specific program that has demonstrated success for comparable youth. In addition, Texas is beginning to focus on avoiding the unnecessary placement of youth in facilities that encourage detention, and ensuring that low-risk youth are not placed in rigorous residential and non-residential programs since they are more likely to succeed on probation. In many ways, Canada has already implemented these approaches through the enactment of the *YCJA*. The emphasis on community-based measures effectively reinforces the Canadian position on both youth rehabilitation and reintegration, and illustrates how the

Canadian model has served as a counterpoint to the philosophy of justice in Texas for the last twelve years.

8.3.1 Informing the Development of Canadian Youth Justice Policies

The second half of Research Question #6 asks in what ways these differences can help inform the future development of youth justice policies in Canada. While there is no doubt that the *Youth Criminal Justice Act* has significantly lowered Canada's rate of incarceration for youth in comparison with the preceding *Young Offenders Act*, Canada should take into account the potential for increasing incarceration given the legislative amendments of Bill C-10 (Part 4). Due to the fact that the rate of diversion in Canada rose dramatically with the enactment of the *YCJA*, it is hoped that Bill C-10 (Part 4) has few significant changes in the way the youth justice systems deals with youth in conflict with the law. In other words, making regular use of available (and appropriate) diversionary measures in response to youth crime will continue to be beneficial to Canadians in the long run. This would suggest the ongoing reliance on penal-welfare strategies that take into account the best interests of the youth as opposed to enforcing more austere sentences.

More importantly, Canada may be better informed in the development of youth justice policy from the responses to youth crime in Texas given the long-standing enactment of tough-on-crime legislation. This implies that Canada is in a position to learn from the shortcomings and failures of an American juvenile justice system that is in line with a fairly punitive crime control model, in an attempt to refine current provisions in Canada. What cannot be disputed is the lack of any evidence suggesting that establishing specific deterrence and denunciation as sentencing principles similar to those provided in the adult criminal jurisdiction will have any positive effect on youth. Learning from policies and legislation in Texas, it does not appear that Canadians will benefit from these particular amendments. Moreover, "requiring the Crown

to consider the possibility of an adult sentence for young offenders 14 to 17 years of age convicted of murder, attempted murder, manslaughter or aggravated sexual assault” *may* have adverse effects on both youth and the justice system as a whole, depending on how these provisions are subsequently interpreted and used (Library of Parliament, 2011, p. 123). If, in fact, the Crown makes substantial use of this provision, a noticeable decrease in the use of extrajudicial measures could be observed over time.

The push for greater community-based programs in Texas illustrates an ideological change in terms of what responses are most successful in relation to youth crime. Texas recently noted that more punitive measures are equally costly and ineffective, and are presently advocating for programs that assist youth in turning their lives around. Community-based programs not only address the rehabilitative needs of youth in conflict with the law, but also serve as a means for implementing preventative measures that help divert youth away from a path of crime. Thus, when fairly punitive jurisdictions like Texas recognize that community-based programs have the potential to deliver better results than enacting harsher legislation, there is evidence that suggests there are more suitable alternatives to tougher sentencing practices. These findings could also be indicative of how the state is adapting to social and cultural changes as a means of providing substitution to incarceration. At the very least, there are signs that the state is deliberating the need for change.

While community-based programs are not new to Canada, it is somewhat surprising to note the change in legislation. Canada’s *YCJA* currently uses community-based programs and diversion measures far more frequently than it did under the *YOA*. Thus, legislation supporting more punitive sanctions which *may* have the effect of broadening the crimes for which youth can be incarcerated as well as increase the length of time for which they *may* spend in custody

seems contradictory with the overall goals of the *YCJA*. Canadians have already benefitted from knowing that responses to youth crime are better addressed through means other than getting tough on crime, yet some of the provisions in Bill C-10 (Part 4) suggest otherwise. An increase in incarceration, for example, *may* lead to a need for more facilities and prisons that house youth, and since the Conservative government came into power in 2006, Canada has observed an 86% increase in its prison budget (“Texas conservatives reject Harper’s crime plan”, 2011).

When conservative Republican Jerry Madden, head of Texas House Committee on Corrections spoke out against the amendments of Bill C-10 overall, he publicly announced that Texas had “been there; done that; it didn’t work” (“Texas conservatives reject Harper’s crime plan”, 2011). Madden claimed that the costs associated with incarceration are atrocious and ineffective. As a result, the legislation in Texas began to change as far back as 2005 given the state-wide budget crisis that occurred. Madden concluded that not all prisoners need to be incarcerated, and that “Texas had diverted money from treatment and probation services in order to build prisons”, but that placing people on probation, parole, under community supervision, or in treatment programs was ten times less costly and far more effective than placing people in prison (“Texas conservative reject Harper’s crime plan”, 2011). As a result, Texas noted a “double digit decline in the last years”, both in the rate of prison incarceration and in the crime rate (“Texas conservative reject Harper’s crime plan”, 2011). More notably, Madden attributes this decrease to “strengthening some of the alternatives to prison” (“Texas conservatives reject Harper’s crime plan”, 2011). These findings may be explained by DeMichele (2014), who suggests that “the community corrections field is positioning itself as the primary location for the supervision of convicted individuals as a response to mass

incarceration” (p. 559). This is done as a means of gaining legitimacy in a field that is attempting to justify its place in the justice system and its success in reducing recidivism rates (DeMichele, 2014).

In contrast to the amendments of Bill C-10 (Part 4), Texas appears to be moving in a different direction. In fact, it has been suggested that hard-line conservatives south of the border such as Florida Governor Jeb Bush, former Speaker Newt Gingrich, the tax-fighter Grover Norquist, and the former Attorney General for President Ronald Reagan, Ed Meese, disagree with the legislation put forth by the Conservative Party in Canada. Instead, what has been learned in the United States is that “if you deal with those underlying issues with the proper assessments up front, doing that before you make a sentencing decision... and you fund programs that will deal with that on a long-term basis, you avoid sending thousands of people to prison” (“Texas conservatives reject Harper’s crime plan”, 2011). This acknowledgement is indicative that the current legislation in Texas has failed at adequately dealing with crime. As such, there are legislative reforms on the way, particularly with regards to youth. Thus, while Texas recognizes that the “underclass” and the otherwise socially, politically and economically marginalized youth respond better to community-based approaches given the need for greater assistance, Canadian justice policies have taken a “180 turn in the wrong direction” (“Texas conservatives reject Harper’s crime plan”, 2011). Although testimonies from conservative expert witnesses from Texas were presented before parliament with regards to the legislative amendments of Bill C-10, the Conservative government chose to discard their advice.

Interestingly, the interview data indicate similar findings. Question #14 on the interview schedule asks participants whether the Canadian government considered how other jurisdictions respond to youth crime prior to presenting any of the Bills in Parliament. While

all participants agreed that looking beyond Canadian youth justice legislation to the ways in which other countries respond to youth crime is extremely valuable to policy formation, not a single participant was convinced that the Conservative government seriously contemplated which strategies were most successful and which were least. When asked whether the government considered responses from other jurisdictions, one participant asserts,

I'd say no [...] I don't think there was enough time in between the introduction of the Bill when it started and the passing of the Bill, even though, you know, at each stage we thought maybe it'll die, and it didn't. It just got slightly reworked. But there was not any consultation that I am aware of. I mean, the only consultation I'm aware of is the one where [he] went and talked to his own, basically his own people, and they didn't say what he wanted them to say [...] But it is extremely important [to learn from other jurisdictions].

Another participant states,

In the past, they would have [considered other jurisdictional responses]. I would think that, you know, in this case it's possible they looked at; I mean the biggest substantive change in the bill has to do with pre-trial release, and they may have looked at other jurisdictions on that one. I can't imagine they would have looked at other jurisdictions on sentencing principles, or on the definition of violence, or things of that sort [...] You certainly can [look at other jurisdictions for responses on youth crime] I mean I think if you look at the research, most of the research on the impact of imprisonment on kids comes from other jurisdictions, and so most of the work in a sense, on general and individual deterrence comes from elsewhere. It's fairly consistent, and I think it's probably information that is pretty well known to the people who at least used to work in the Department of Justice, but my guess is that that's pretty irrelevant and that it'd be useful for them if they were interested in crafting careful youth justice legislation. Then I think they'd be interested in what's going on elsewhere. I don't think they are.

In essence, there appears to be a sort of disjuncture between what Canadians *could* have learned from responses to youth crime in other jurisdictions and what the current Canadian

policies have actually taken from these models. It is not that Canada is unable to learn from other jurisdictional responses to youth crime, but instead, it is that whatever was learned was largely ignored when drafting the amendments of Bill C-10 (Part 4) on the basis of gaining and maintaining legitimacy and restoring confidence in the eyes of the public.

Overall, these findings suggest that the enactment of the tough-on-crime legislation in Canada places a reliance on the law as an instrument to manage youth when other strategies have been exhausted. The sentiments expressed in the legislative amendments of Bill C-10 (Part 4) make clear that the current style of governance has taken a turn towards a more punitive approach that is, to a degree, associated with rationalities that were discarded some time ago (Feeley & Simon, 1992). This legislation then brings to the forefront Garland's (2001) concept of the "dangerous other" which focuses on the "underclass" and other marginalized groups whose behaviour coincides with a class of offenders requiring management and control. The findings from Texas illustrate the ways in which their legislation affects socially, politically and economically deprived youth. What Canada *should* have learned from tough-on-crime measures is that these policies are ineffective at doing anything other than targeting and identifying dispossessed youth who merely suffer from the conditions inherent in the larger social structure.

There are a number of economic and social factors that affect youth in Canada which could be addressed by adopting a more equitable youth justice system. The data suggest that the development of future policy in Canada requires an emphasis on the larger social structure itself, the nature of youth within that structure, and the connection between the micro and macro social processes that lead to youth transgression. Policy analysis of this nature would therefore take into account the responses to youth crime from other jurisdictions as well as our

own, in an attempt to refine the Canadian system towards one that advocates for social justice. Rather than placing greater emphasis on targeting offending behaviour through tough-on-crime legislation, it may prove more beneficial to implement better preventative measures that address some of the underlying factors that make youth more vulnerable to committing crime. This assertion highly supports the critical criminological view (and more specifically the left realist approach) that campaigns for either a modified or entirely updated/renewed angle to youth justice policies (Alvi, 2012; DeKeseredy, 2011).

8.4 Conclusion

The research questions in Issue 3 investigated the ways in which Texas differs in its legislation in response to youth crime. In line with findings from the literature and the case law, the legislation governing Texas' juvenile justice systems is relatively punitive compared to Canada, although the legislative amendments of Bill C-10 (Part 4) appears to have brought some aspects of the two systems closer together (see Research Question #4). Regardless of the jurisdiction, the tough-on-crime movement may be viewed as an approach which redirects the public's focus onto youth as socially deprecated political subjects that are responsible for a series of social problems (particularly crime). This exercise reveals the state's ability to intervene and enact specific legislation by mobilizing the state's political power in an attempt to publicly demonstrate that the issues are being addressed. Part of the findings from both Canada and Texas exhibit elements of what Garland (1996) refers to as "adaptive" strategies employed by the state to respond to youth crime, however there are also signs of "denial" as a reactionary response whereby tough-on-crime policies are associated with an "authoritative intervention to deal with a serious, anxiety-ridden problem" (p. 460).

The significance of the findings from the case law is that while Canada has taken a tough-on-crime approach in response to youth crime, Texas is demonstrably less likely to focus on rehabilitation for serious and violent offenders in comparison. Since the enactment of tough-on-crime legislation in Texas, a review of the case law suggested that the number of cases transferred has increased dramatically. However, waived cases still represent approximately one to two percent of cases adjudicated as delinquent. On the whole, these findings are illustrative of a crime control model that is arguably further along the tough-on-crime spectrum.

Noting the transfer laws and mechanisms in Texas as the greatest difference between legislation that oversees youth crime in both jurisdictions, the data from the case law is consistent with the tough-on-crime philosophy (see Research Question #5). From this perspective, an analysis of the legislation and the case law suggested that Canada is relatively better equipped with laws that support alternatives to incarceration despite the enactment of Bill C-10 (Part 4), given that they do not transfer youth to the adult jurisdiction. Instead, Canada allows youth to remain under the jurisdiction of the youth court for adult sentences. This is also supported by findings from the Canadian case law in Chapter 7 that place a great deal of emphasis on the limited accountability and rehabilitation of youth when compared to adults who commit similar offences.

In contrast, the case law from Texas indicated that a youth's rashness, short forethought, and limited moral maturity is not accounted for to the same extent as in Canada, since youth who commit very violent crimes frequently get transferred to the adult jurisdiction. Instead of holding youth less responsible than adults who commit similar offences, the tough-on-crime legislation in Texas at times forgoes the possibility of a youth's limited moral and

psychological development. As such, the justice system in Texas holds youth at the same level of accountability as their adult counterparts.

On the whole, learning from other (more punitive) jurisdictional responses to youth crime can help inform the development of youth justice policy in countries attempting to amend their youth justice legislation (see Research Question #6). Given the long list of shortcomings associated with tougher legislation, Canada stood to be better informed by analyzing tough-on-crime legislation from other similar jurisdictions prior to the parliamentary debates. While the findings from the interview data showed that greater consideration of the failures associated with the tough-on-crime mandate in the United States *may* have resulted in legislation that differed from Bill C-10 (Part 4), participants suggested there is little chance to amend the law while the Conservative Party is still in power. Nonetheless, the findings from the case law and legislation in Texas have potential to provide Canadian legislators with a better understanding of which laws and strategies work best when responding to youth crime, even though any outside information pertaining to the tough-on-crime legislation appears to have had little influence on drafting, ratifying, enacting and implementing the Canadian amendments.

Future policy development, however, stands to benefit from a restructuring of both the legislation and the youth justice system to provide more impartial and effective responses to youth crime. These policies would consider the ways in which the conditions imposed upon marginalized youth stem from the larger social structural system, in an attempt to reduce the social problems that are most often associated with youth crime. In effect, the reorganization of criminal justice policy should theoretically have little to do with restoring or maintaining state authority. Instead, it should safeguard the interests of both the youth and the public by

engaging in public discourse to develop useful alternatives to curb the social conditions that systematically disenfranchise youth.

Overall, the findings pertaining to Issue 3 indicated that there is an element of incongruence with regards to the social welfare and crime control models implemented in Texas. These findings support the works of Feeley and Simon (1992), Garland (1996, 2001), Hall et al. (2013), and O'Malley (1999) which discuss the ways in which a shift in the style of governance has led to contradictory rationalities and conflicting sentencing principles. There is evidence to suggest that the push towards legislation that targets high-risk, potentially violent youth in Texas was established on the basis of the perceived illegitimacy of the penal-welfare model. The tough-on-crime policies that are enacted to appease public desire have the effect of systematically pathologizing the “underclass” (i.e., youth who are racially, socially, economically, and politically underprivileged and therefore do not belong to the dominant class) (Garland, 2001; Hall et al., 2013). This is particularly evidenced in Texas’ legislation which facilitates the transfer of youth to adult state prisons and is disproportionately used against disadvantaged African-American and Hispanic youth (Bureau of Justice Statistics, 2003, p. 1). As such, these measures have a tendency to tactically situate the disenfranchised on a path that encourages crimes for the powerless, because there is a greater likelihood of transferred youth to recidivate upon release when compared to other similar offenders processed by the youth court (Winner et al., 1997).

CHAPTER 9 - CONCLUSION

The tough-on-crime campaign set forth by the Conservative government is questionable within the Canadian context for three reasons. First, in much research the underlying goals and principles of tough-on-crime legislation have been rejected by experts in the field as well as opposition parties in parliament. Second, although the research on aspects of tough-on-crime legislation in varying countries is quite extensive, Canadian research on the processes through which Bill C-10 (Part 4) was developed and implemented is noticeably limited in scope. Third, a general lack of evidence for harsher legislation suggests that majority governments are in a position to propose public policy and legislative changes with minimal supporting research or reference to empirical data. Thus, the overall goal of the dissertation was to provide a better understanding of the individual (micro) and governmental (macro) processes associated with the tough-on-crime approach in Canada, with a specific focus on the responses to youth crime.

In effect, the tough-on-crime movement in Canada is a way of diverting attention towards youth as marginal political subjects, by means of deflecting a set of unspecified social problems onto them. This phenomenon occurs in an effort to mobilize the political power of the state, and subsequently demonstrates the state's ability to intervene and enact specific legislation as a means of showing that something is being done to address such social problems. Thus, the consideration of whose values are embodied within the law was investigated, particularly with regards to how these values are reflected in the tough-on-crime legislation in reference to youth crime, how these values are conveyed to the public, and on what basis these values are transmitted to and supported by the public to facilitate and legitimize such legislation. The mobilization of state power, therefore, is achieved through processes that are typical amongst democratic nations (by mean of elections), and are centred on winning mass public support in order to reaffirm the political legitimacy of the authorities.

The multi-method analysis of the tough-on-crime approach used two data sources to address the research questions. First, twenty-two interviews were conducted with individuals who could provide an informed perspective on how and in what ways politicians make meaningful decisions about youth crime and the processes through which Bill C-10 (Part 4) developed and was legislated. When applicable, the data from the interviews were substantiated by analyzing text from *Hansard* to support respondent perspectives. *Hansard* was also used to fill in some of the gaps left behind by the pool of respondents in order to reflect some perspectives that were not captured during the interviews. The analysis of the interviews and *Hansard* consisted of textual coding for salient and emerging themes. Second, a Canadian case law analysis was conducted in order to determine whether the tough-on-crime mandate was implemented within youth courts, and if so in what ways. Similarly, a case law analysis of Texas was carried out in order to identify the ways in which the tough-on-crime legislation is implemented within this highly punitive American state. Texas, therefore, was used as an illustration of the ways in which the state currently operates under laws that are consistent with a model of crime control. Finally, a legal analysis of legislation in Canada and Texas was performed to establish how each jurisdiction oversees and responds to youth crime, while examining how Texas' tough-on-crime legislation differs from that of Canada. In this sense, it was possible to assess where Canada currently sits on the tough-on-crime continuum.

The dissertation research investigated three *central* questions: 1) What are the processes through which Bill C-10 (Part 4) developed and was legislated? 2) In what way(s) has tough-on-crime legislation been implemented in youth courts? 3) How does Texas differ in their policies and legislation in response to youth crime, relative to their crime control model and placement on the tough-on-crime spectrum? Based on what remained unanswered or

unexplored by prior research, these three central questions formed the basis of six research questions requiring investigation.

The objectives of this chapter are three-fold: to review the conservative ideology and the “adaptive” and “non-adaptive” strategies of the state, to summarize significant findings, and to reflect on their implications. First, a brief discussion on the conservative ideology and the neo-conservative stance with regards to its role on crime control is provided in light of Garland’s (1996, 2001) analysis of “adaptive” strategies and “non-adaptive” responses to the problem of youth crime. Second, an overview of the significant findings is provided by the six research questions in the context of current research and the applicable theoretical perspectives. Third, the implications of these findings for future research are discussed in light of data limitations that may potentially be better explained by an alternative theoretical perspective or interpretation.

9.1 Conservative Ideology, “Adaptive” Strategies of the State, and “Non-Adaptive” Responses

In order to understand the state’s role in crime control, it is important to briefly review the conservative ideology and the ways in which the neo-conservative stance has impacted a new (“adaptive”) style of governance. It may be argued that tough-on-crime legislation upholds the conservative ideology by promoting moral discipline through models of crime control while simultaneously maintaining well-established values. At the very least, this style of governance invokes “nostalgic” elements of crime control strategies (Simon & Feeley, 1992) that typically target the “underclass” or the politically, socially and economically marginalized groups in society (Garland, 2001). This summary, therefore, helps to position the perspectives of the participants, and sheds light on the views expressed (either through *Hansard* or the interviews) by the detractors of the Bill.

The conservative ideology of modern capitalist society can be characterized as a reactionary response to welfarism on account of the social and economic shortcomings (i.e., post-war crises) that were ineffectively prevented by the state (Garland, 2001). Although often cited as contradictory or incoherent rationalities, the neo-liberal and neo-conservative views aligned to dismantle much of the success brought about by the welfare state (Feeley & Simon, 1992; Garland, 2001; O'Malley, 1999). In an attempt to overturn and correct perceived state leniency, the general disregard for authority, and the economic ails fueled by welfarism, the modern state has become one that supports, encourages and practices social control/regulation and intervention as a means of exercising legitimate power. Owen (2007) explains this phenomenon as a culture of control that matches with “a new economic style of decision-making, a new criminology of social control, and a new conception of penal-welfarism” that is in line with conservative ideology (p. 3). Thus, this new strategy of governance plays a significant role in the way the state views its responsibility towards crime control. As such, several of the findings discussed in the sections below suggest there is great emphasis on a state-centric approach to addressing the social problem of crime.

According to Garland (2001), the conservative ideology seeped into the political sphere with “a strikingly *anti-modern* concern for the themes of tradition, order, hierarchy, and authority” (p. 99). Frequently advocating for a tough law-and-order approach, this ideology supports the claim that penal-welfare measures have failed miserably at dealing with the problem of crime. Instead, as Garland (1996) suggests, “attention is being shifted to dealing with the effects of crime - costs and victims and fearful citizens - rather than its causes. Above all there is an explicit acknowledgement of the need to rethink the problem of crime and the strategies for managing it” (p. 447). The growing desire to implement so-called innovative

strategies to address crime has led to a number of policy objectives and developments with a conservative undertone; many of which may be considered as an “adaptive” response of the state. The “adaptive” strategies discussed by Garland (1996) are partially attributed to the ways in which the state has had to conform and adjust to the “crisis of penal modernism” and the “dominant political currents” (neo-liberalism and neo-conservatism) that surfaced over time (p. 448). In effect, this has exposed the limits of both the state vis-à-vis its role in crime control (i.e., what Garland (1996, p. 448) refers to as “the myth of sovereign crime control”) as well as the criminal justice system more generally. These “adaptive” responses and policy objectives have led to “modest improvements at the margin, the better management of risks and resources, reduction of the fear of crime, reduction of criminal justice expenditure and greater support for crime’s victims [...]” (Garland, 1996, p. 448). Overall, this suggests the conservative ideology is one that preserves and maintains the notion of state discipline and encourages individual responsibility, punishment and self-control.

Coupled with the normalcy of high crime rates and the limits of the criminal justice state, Garland (1996) suggests that the “adaptive” responses to the problem of crime can be understood in terms a “*criminology of the self*” as an ongoing need to rationalize justice, particularly because it views the criminal as a rational actor and “consumer”. This notion is associated with the growing concern about a loss of public confidence in the state and the criminal justice system, and therefore calls upon the need to include experts and other professionals in the deliberative process of policy debate in support of new crime control strategies. This was witnessed in the deliberative process of Bill C-25, Bill C-4, and to a lesser degree, Bill C-10 (Part 4). Other “adaptive” responses, as discussed in this dissertation, not only include the “responsibilization strategy” (whereby the state extends beyond its confines to

encompass the community (i.e., civil society) as well as the private sector), but also involve “adaptive” strategies that introduce “new strategies of system integration and system monitoring, which seek to implement a level of process and information management which was previously lacking” (Garland, 1996, p. 455). One example of this may be seen in the overall decrease in the use of custody for youth offenders, as stipulated by the *YCJA*. This strategy may also be linked to what Garland (1996) explains as “defining deviance down”, whereby the youth courts in both the Canadian and American context encourage the use of community sentences and the “widespread use of cautioning and diversion from prosecution, and the development of fixed penalties and summary hearings for offences that were previously prosecuted at more serious levels” (p. 456). In turn, this has led to yet another “adaptive” strategy which effectively redefines the public’s understanding and perception of the successes and failures of the state and the criminal justice system. Altogether, these “adaptive” strategies are examples of the limitations of the sovereign state given that they contradict, to a degree, with a state-centric approach which has claim to a monopoly over modern crime control (Garland, 2001).

The drastic changes in both crime control and the criminal justice system more generally have also led to “non-adaptive responses” such as “denial” and “acting out”, which form incongruous responses to the “adaptive” strategies listed above. These responses are said to appeal to conservative ideology by denying the spike in crime rates as well as the ways in which the state and prisons have been unsuccessful at preventing recidivism and encouraging rehabilitation (Garland, 2001). Garland (2001) suggests that “the state’s political machine has repeatedly indulged in a form of evasion and denial that is almost hysterical in the clinical sense of that term” (p. 131). Accordingly, the neo-conservative ideology has imposed upon the

public the ways in which the state would and should respond to the social problem of crime, by implementing agendas that,

Restore public confidence in criminal justice while asserting the values of moral discipline, individual responsibility, and respect for authority. In penal policy as in welfare policy, the imperative was the re-imposition of control, usually by punitive means. In both cases, the population singled out as being most in need of control was composed of the welfare poor, urban blacks, and marginalized working-class youth (Garland, 2001, p. 132).

These neo-conservative policies, then, tend not only to support a law-and-order position that “seeks to deny conditions which are elsewhere acknowledged”, but also attempt “to reassert the state’s power to govern by force of command” (Garland, 1996, p. 460). Acting out, according to Garland (2001), therefore, constitutes legislation that is comprised of spontaneous and “unreflective action, avoiding realistic recognition of underlying problems [...]” on account of the ongoing practice of denial (Garland, 2001, p. 133). These tactics, which are used to bolster the state’s position against its tolerance for crime, are meant to restore confidence amidst the public by offering an immediate response to the problem. Given that electoral campaigns call upon a consensus against crime, there is strong reliance of the state on the public to provide mass loyalty and support for the enactment of such law-and-order policies.

The importance of reviewing the conservative ideology, the neo-conservative stance, and the “non-adaptive” strategies of “denial” and “acting out” stem from a need to emphasize the complexities of tough-on-crime policies and their adherence to punitiveness (Garland, 1996, 2001). According to Garland (1996), the concept of denial is deeply rooted in “the willingness to deliver harsh punishments to convicted offenders” by means of substituting tough-on-crime policies for the shortcomings and breakdowns of the state, and its “failure to deliver security to the population at large” (p. 460). These policies, therefore, fulfill a primary role of

compensating for the limitations and inadequacies of the state by tying together the concept of punitiveness and efficient methods of crime control (Garland, 1996). However, as Garland (1996) suggests,

[...] these 'law and order' policies frequently involve a knowing and cynical manipulation of the symbols of state power and of the emotions of fear and insecurity which give these symbols their potency. Such policies become particularly salient where a more general insecurity – deriving from tenuous employment and fragile social relations – is widely experienced and where the state is deemed to have failed in its efforts to deliver economic security to key social groups (p. 460).

Given the American and Canadian economic crisis of 2008 (Bank of Canada, 2011), it may be that the tough-on-crime legislation in Canada is linked to Garland's (1996) analysis of "non-adaptive" strategies such as "denial" and "acting out" on account of the "general insecurity" experienced by the nation. While no specific mention of such crises were expressed through the opinions of the participants in this research, their perspectives do touch upon the public's growing anxieties and fears of youth crime and the ways in which the government manipulated state power to implement Bill C-10 (Part 4).

Overall, these policies demonstrate the ways in which the state attempts to address the problem of youth crime (i.e., the "threatening outcast, the fearsome stranger, the excluded and the embittered" or the "*criminology of the other*" (Garland, 1996, p. 461)) in an expedient fashion. As a result, those most affected by the policies and legislation that ensue are groups that "lack political power and are widely regarded as dangerous and undeserving; because the groups least affected could be assured that something is being done and lawlessness is not tolerated; and because few politicians are willing to oppose a policy when there is so little political advantage to be gained by doing so" (Garland, 2001, p. 132). The conservative ideology in modern capitalist society is one that supports the movement of more punitive

punishment in a way that illustrates the supreme power of the state and emphasizes the need to “get back to basics”, to “restore family values” and to reassert “individual responsibility” (Garland, 2001, p. 99). As Garland (1996) states, there is “no need for co-operation, no negotiation, no question of whether or not it might ‘work’” (p. 461). While the significant findings of the research data discussed below show this to be partially true, there are signs that a degree of negotiation took place (i.e., during the deliberative process of the Bill C-25 and Bill C-4 proposals). However, any question regarding the feasibility and (in)effectiveness of Bill C-10 (Part 4) did not appear to have been carefully considered by the state, although such aspects were publicly deliberated per proper protocol.

Much of the problem with the conservative/neo-conservative stance in this regard can be linked to the fact that tough-on-crime policies embody a state-centric approach to crime control (where emphasis is placed on state institutions of justice – law, police, courts, and prisons) that essentially undermine other forms of social control by civil society/community groups (i.e., the “responsibilization strategy” that calls upon those outside of the criminal justice system to participate in and take accountability for the problem in a manner that is less formal than the criminal justice state). The latter are often seen as far more effective as agents of social control as expressed through the views of both the participants of this study as well as previous research. However, the interview data showed that the newly enacted tough-on-crime legislation moves Canada further away from a reliance on various collaborative approaches and community based programs, and therefore supports a strong state approach to crime control (see Sections 9.2 and 9.3 for further details).

Nonetheless, these conflicting and contradictory responses are demonstrative of the sovereign power of the state as described by Garland (1996), and provide evidence for the

ways in which the concept of punishment is linked to “an act of sovereign might” (p. 461). That is, it is “a performative action which exemplifies what absolute power is all about. Moreover, it is a sovereign act which tends to command widespread popular support [...]” (Garland, 1996, p. 461). Thus, both the “adaptive” and “non-adaptive” strategies employed by the state may be understood in terms of a symbolic exercise that relies on the public as symbolic victims to build a consensus for mass loyalty and support. As noted elsewhere in this dissertation, consensus is heavily dependent on the institutionalization and compartmentalization of crime consciousness given that it is embedded in modern culture, is dispersed through the media, and is structurally entrenched in the capitalist state (Hall et al. 2013).

Many of the elements outlined in this section have a bearing on the positions and perspectives articulated by the research participants on the processes of the development of Bill C-10 (Part 4), the values embodied in the tough-on-crime legislation, and the impact of such policies. Further, some of the “adaptive” and “non-adaptive” strategies asserted by Garland (1996, 2001) are illustrated in the key findings presented in subsequent sections. Of particular concern is the concept of “denial” which not only demonstrates a complete disregard for statistics and other evidence that suggest youth crimes rates have declined, but also serves as a symbolic exercise of building consensus and reaffirming public faith and confidence in the state and the criminal justice system. Above all, the act of “denial” brings the crime victim to the forefront as a “representative character whose experience is assumed to be common and collective, rather than individual and atypical” (Garland, 2001, p. 144). This strategy, therefore, can be directly linked to the construction of the symbolic victim often portrayed in the media

and conveyed to and by the public. In effect, such techniques are instrumental in facilitating legislation as they are found to have great political use (Garland, 2001).

9.2 Processes of the Development and Legislation of Bill C-10 (Part 4)

Notwithstanding that prior research indicates that enacting tougher sentencing practices have minimal effects on youth crime rates, the processes through which Bill C-10 (Part 4) developed had little to do with the overall lack of supporting research or reference to empirical data (i.e., statistics). The complete disregard for statistics was exemplary of the underlying crisis of penal-welfare strategies that are discussed primarily in the works of Garland (1996, 2001) and O'Malley (1992) with regards to state denial, and appeared to surface in much of the interview data. In accordance with the Marxist/critical theoretical perspective, Bill C-10 (Part 4) was created on account of a number of forces within the social structural system that combined to produce a consensus on tougher legislative provisions. There was in fact evidence to suggest that lawmakers, interest groups, the media, law enforcement agencies, the public, and other social organizations had a direct influence on the ways in which the interests of the dominant group successfully became almost everyone's interest. Although theoretically there is no reason to believe, as the instrumentalist perspective suggests, that all forms of legislation are passed in favour of society's most dominant groups, the evidence provided by the interview participants and *Hansard* implies that within this particular political context, the interests of the dominant group were transformed into public policy by means of consensus, as a source of re-legitimation in an attempt to avert a full-scale crisis of legitimacy.

Bill C-10 (Part 4) was born out of two preceding Bills that failed to come into fruition, but was nonetheless part of the Conservative Party's political agenda from the moment of election into office in 2006. Much of the findings demonstrate that the public was used as an

intermediary for gaining consent for state intervention, even though there was evidence to suggest that the public was likely misinformed about the seriousness and prevalence of violent youth crime. The ways in which the criminal justice system has been regarded by the public often characterizes notions of its limitations and likelihood for failure instead of considering any hope for future success. Typically, such fragmented information is disseminated through the media, which often reproduces the dominant ideology. Public perceptions on the ineffectiveness of the *YCJA* were used by the state to advance crime policy, and serve as examples of the alleged illegitimacy of penal-welfarism, state denial, and the need to react. Similar findings were also reported by Garland (2001), Hall et al. (2013), Feeley and Simon (1992), and O'Malley (1999), albeit these accounts were established within different jurisdictions from Canada.

Despite a general consensus of cross-national roundtable discussions suggesting that (1) a more punitive approach resulting in sending more youth into custody for longer periods of time will not result in a safer society, (2) the *YCJA* worked well prior to any legislative amendments, (3) such decisions result in both significant financial and social costs as opposed to producing the desired effects the Bill is meant to achieve, and (4) the Bill C-10 (Part 4) amendments to the *YCJA* are inconsistent with some of the rights of a young person, efforts by opposing politicians, academics, and other experts in the field to curb the tough-on-crime mandate were dismissed by the Conservative government. Since nominal consideration was given to the reports generated from these discussions, there is evidence to suggest that the interests embodied in the Bill C-10 (Part 4) legislation reflect the values of individuals from the most powerful and dominant segments of society as opposed to those in less powerful segments. The legitimacy gained herein was formed on the basis of public inquiry, a concept

which Habermas (1975) considers imperative when proposing new legislation which is to include the active participation of the public during the deliberative process. In effect, the ways in which evidence (such as public inquiries) are used by the state have a direct influence on the problematization of certain activities (i.e., framing and defining the problem of youth crime), and is therefore connected to how the public is expected to think about the problem.

The results from the thematic coding of the interview data do suggest that winning a majority government was pivotal to legislating Bill C-10 (Part 4) without much debate. Despite the preceding crime Bills that failed to pass in the House of Commons, the Bill C-10 (Part 4) agenda continued to be propelled by the Conservatives regardless of resistance. Overall, the processes through which Bill C-10 (Part 4) developed were on the basis of an ideological philosophy. There is evidence from the interview data to suggest that the enactment of the Bill itself was not founded on any social or empirical evidence demonstrating its need, had nothing to do with good policy choices or intuitive crime policy, and was more politically driven rather than having anything to do with strategies that better keep Canadians safe (Interview Participant #2). In fact, much of the interview data corresponded with previous research on policies which aims to systematically identify, target and manage potentially violent youth, by enacting legislation that serves as a mechanism and “adaptive” strategy to control conceivably dangerous populations (Feeley & Simon, 1992, Garland, 2001). This shift in youth crime governance is not exclusive to Canada, but is illustrative of the types of transformations that have occurred in many Western Nations on account of an altered political ideology, neo-liberal rationalities, and paradigmatic metamorphoses’ of the state (O’Malley, 1999).

Evidence also suggested that the need for tougher legislation was a rather symbolic exercise whereby the public was made to believe that a change in policy would lead to a safer

society by protecting victims and “getting tough” on young criminals (particularly violent young offenders). The safeguarding of society against potentially violent “career criminals” adds to the notion that the symbolic victim can, more generally, be understood as the public itself. This is strongly connected with Garland’s (1996, 2001) analysis of both the “adaptive” and “non-adaptive” strategies of the state in order to build consensus for mass loyalty and support by invoking images of the emblematic persona. As a result, the Conservative’s gained popularity and used the tough-on-crime approach as a political strategy to secure votes all the while veiled as legislation that would improve Canada’s youth crime policy. Theoretically, this finding demonstrates elements of both the conflict perspective and the Marxist/critical approach. This is first illustrated through Vold’s (1958) assertion that a group’s success within the law making process to promote one’s interests is dependent upon gaining the maximum number of votes in a democratic society. It then serves as an example of Habermas’ (1975, 1985) argument that legitimacy is gained via the process of electing government (through mass support) so that the public plays a role in the decision making process. This latter claim has come to fruition on account of the modern capitalist, democratic state, and is an example of the processes through which state power is marshalled to maintain political legitimacy. On the whole, this finding therefore provides evidence for the ways in which the state exercises its sovereign power by relying on the public for widespread support to enact tough-on-crime measures.

The interview findings suggested that the legislative amendments effectively represent the dominant ideology instilled in society. This ideology, which is characterized by the capitalist, ruling class philosophy, spans across all facets of the superstructure. It is inherently reproduced through the public so that most classes within society come to uphold similar

values and beliefs, particularly against crime (Habermas, 1985; Hall et al., 2013). Given that the Bill C-10 (Part 4) legislation expresses the dominant ideology, by definition, it addresses very little of the needs and interests of youth in conflict with the law. This suggested that the values embodied in the legislation were those of the politicians, lawmakers, various interest groups (including victims), the public, the police, Crown attorneys, and to a degree, the media. Presently, the ways in which crime is viewed appears to be aligned with the conservative ideology that emphasizes the importance of punishment as a means of responding to the problem. This finding lends support to Garland's (2001) discussion on the neo-conservative stance and the position taken against violent youth crime.

The current structure of government in modern, democratic societies also contributes to the ways in which majority governments can suggest, shape and implement legislation that advance the dominant ideology. Given the Conservative Party's ultimate position of legitimate power and authority, opposition arguing against the legislative amendments was rejected. Thus, the promotion of dominant values and interests in policy are best accomplished when the initiating party is arranged in such a way that it commands the utmost authority and control. These findings not only suggested that hegemony was exercised over subordinate groups, but that public opinion was used as a proxy for consent for maintaining support of state intervention for responding to potentially violent youth.

Overall, the findings reflected some of the complexities of building a consensus on the problem of high-risk youth, and illustrated elements of a process which revealed that a state of crisis on the misbegotten penal-welfare strategies was in effect (Feeley & Simon, 1992; Garland, 2001; O'Malley, 1999). It was also evident that the legislative process (i.e., the state/formal political sphere) is not at all value-neutral when responding to outside interests,

but instead has interests of its own (e.g., gaining and maintaining legitimacy) (Habermas, 1975; Hall et al., 2013). In the process of gaining the consent and support of the public for its mediation in various social and economical fields, politicians do in fact have an interest in enacting legislation that is supported by the public. This was witnessed in the legislative process of Bill C-10 (Part 4), and has been noted in other (albeit less frequent) instances where the legislative process is taken up in support of the least powerful groups in an attempt to appease the public (Chambliss & Seidman, 1971). What this suggested then, is that it is not always a question of the law itself, but likely has more to do with the *willingness* to enforce certain legislation over others. In effect, this phenomenon is part of the state's responsibility to successfully "steer" the economy and thus society in a certain direction in an attempt to avoid crises (Habermas, 1975).

When discussing values that should be embodied in the Bill C-10 (Part 4) legislation, the findings suggested that factors that take into account the rehabilitation of a youth is of utmost importance. These include greater emphasis on the swiftness of responses, legislation that corresponds with various elements of education, solutions that enable youth to understand the impact of their offence by connecting the behaviour to the consequences, and providing youth with the necessary skills and tools to build confidence. These findings were more in line with the traditional penal-welfare strategies as opposed to "late modernity" and the neo-liberalized scheme, which currently places responsibility and accountability on youth to discipline themselves through available correctional programs. In effect, these new tactics and strategies of personal liability and punishment are examples of what Garland (1996) refers to as the validation or justification of the criminal as a rational-minded individual and consumer.

While prior research shows that there are numerous factors that contribute to youth being at risk of criminal involvement, the findings suggested that Bill C-10 (Part 4) most typically represents a political ideology that upholds certain values at the cost of minority or “underclass” youth (see Alvi, 2012; Hall et al., 2013; Kubrin & Stewart, 2006; Osgood & Anderson, 2004). These findings coincide with the critical theoretical perspective in that it considers the historical, cultural, social, political and economic circumstances which come together to create structural inequality for various groups of marginalized people. It is these underprivileged youth who are more likely to be burdened and impacted by the consequences associated with the tough-on-crime legislation, since these laws are targeted towards high-risk, potentially violent youth. More notably, the enactment of Bill C-10 (part 4) strategically situates many marginalized youth on a course that not only propels some youth towards further crime, but also advances conservative ideology. These findings were congruent with those of Alvi (2012), DeKeseredy (2011), Simon and Feeley (1992), Garland (2001), Hall et al. (2013), O’Malley (1999) and Muncie (2006), and were demonstrative of the shift in youth crime governance.

The findings further suggested that Bill C-10 (Part 4) is a youth justice policy that is predominately unilateral in that it erroneously implies more punitive sanctions better respond to crime. In general, this illustrated the prevalence of the conservative ideology relative to both the state’s failures and the ways in which it stresses punishment as part of the state’s role in crime control (Garland, 1996). Since youth crime is a social phenomenon that broadly affects society in vast array of ways, the findings concluded that youth justice legislation is better received only when it accounts for the needs of the general public *and* youth in conflict with the law. Instead of implementing legislation which, at times, consists of contradictory

sentencing principles and incoherent neo-liberal/neo-conservative rationalities (Feeley & Simon, 1992; O'Malley, 1999), the approach should be one that balances fairness, accountability, and rehabilitation. Notwithstanding the legislative amendments put forth by Bill C-10 (Part 4), the general position of the interviewees was one that maintained that youth crime legislation has a limited role to play when responding to youth crime. This suggested that most participants were not in favour of the conservative ideology that underlies tough-on-crime measures. Overall, provisions of better community and mental health services for youth, changes within the educational system, increasing youth employment, development of better neighbourhood support systems, and injecting more resources into the community or other social institutions (schools) have a stronger impact on youth crime than any substantive change to the legislation. These findings suggested that there is a greater need for implementing welfare strategies as opposed to the modern crime control techniques currently put into practice.

While certain members of the federal Conservative government were the most instrumental in influencing the enactment of Bill C-10 (Part 4), policy ideas leading to legislative change originated from various stakeholders and ideals of what society ought to look like in relation to crime and crime policy. Although there was evidence to suggest that a few key members of the Conservative Party fueled these policy changes (group 1), the shift towards a new style of governance was also influenced by provincial Ministers of Justice (group 2) and American youth crime models (which may be linked to the beliefs of the Reform Party of Canada suggesting that youth cannot be rehabilitated). In addition, enforcers such as police and Crown attorneys (group 3), the media (group 4), and most notably victims' groups (group 5) were prominent figures in the legislative process. While these influential groups gave

rise to a process of public consensus on the issue of youth crime, they were also illustrative of the allegiance between neo-liberal and neo-conservative rationalities which currently place greater emphasis on the tracking and surveillance of high-risk youth. This allegiance has not only led to a shift in youth crime governance based on a redefinition of the problem, but lie beneath the ways in which policies and legislation are developed. The results from the thematic coding of the interview data suggested that the collaborative efforts of these five groups collectively (but not equally) influenced the enactment of Bill C-10 (Part 4), as their conceptions of what society ought to look like closely resembled one another. In addition, these groups not only provided backing for the Conservative government's position on Bill C-10 (Part 4), but also augmented the wide-ranging desire for more punitive sanctions.

The unequal distribution of power amongst interest groups (particularly amidst victims' groups) heavily influenced the enactment of Bill C-10 (Part 4). This included influence over the legislation itself as well as input on notions of victimization, and various reactions to crime. Interestingly, there was evidence to suggest that these interest groups were deliberately manipulated and used by the Conservative Party by selectively choosing which groups or individuals to include in the parliamentary debates. This supports the assertion that the ways in which other evidence such as public inquiries are used has an effect on the response to the problem of youth crime (including previous attempts at governing, such as the *YOA*), and places accountability for the problem onto youth (typically marginal youth). This, as interviewees suggested, was done in order to further the Conservative position on the legislation and can be linked to Garland's (1996, 2001) discussion on the "adaptive" strategies of the state. In this sense, there appeared to be an intricate relationship that developed between the individual (micro) and governmental (macro) processes during the enactment of the Bill,

which not only encompassed the government but also accounted for some victims and the general public (Hall et al., 2013; McMurtry & Roy, 2008). The inclusion of victims is part of the new governance strategy which helps legitimate the need for additional legislation (Garland, 2001). This suggested then, that the public was used to forward the state's agenda by achieving a consensus on the basis of a perceived problem. Congruent with the Marxist/critical theoretical perspective, the involvement of these various key influential persons within the political sphere necessarily controlled, shaped and enacted the legislation in a manner that was most compatible with the dominant ideology. Contrary to the instrumentalist view however, enacting laws in favour of society's most dominant groups is not always a successful endeavour given the nature of the social structural complexities and institutional relationships that exist in modern society.

Despite a lack of Canadian literature regarding the processes through which Bill C-10 (Part 4) was legislated and developed, these findings generally concur with prior research using data from the United States that illustrate the ways in which tough-on-crime policies are legislated and enforced (Bishop & Decker, 2006; Feeley & Simon, 1992; Garland, 2001; Hall et al, 2013; Krisberg, 2006; O'Malley, 1999; Snyder, 2002; Tonry & Doob, 2004). Even though Bill C-10 (Part 4) was subject to numerous revisions in its earlier forms (Bill C-4 and Bill C-25), the third and final version of the Bill was passed relatively effortlessly. This provides evidence to suggest that majority governments are in a position to propose public policy that reflects the dominant values as well as legislative changes to the law with limited supporting research. As a result of gaining a majority government, these findings indicate that the public does not appear to be adequately safeguarded against judgements passed on public policy or legislation, especially since this particular Bill was not presented on the basis of

impartial policy views. Although the public actively participates in the formation of government and legislation on the basis of public deliberation and inquiry, the public merely reproduces the views, values, and ideology embedded within the social superstructure. Moreover, a general disregard for developing a policy that better addresses youth crime by accounting for the needs of youth illustrate not only partisan views, but the work of a typical myopic bureaucracy. As such, these findings are congruent with previous research which suggests that Canada (and most of the Western world) has been subjected to a neo-political trend that appears to advance, through various mechanisms, “adaptive” strategies, “non-adaptive” responses and legislation in support of controlling risk and managing crime (Feeley & Simon, 1992; Garland, 1996, 2001; O’Malley, 1999). The law, therefore, is used as an instrument of power and legitimacy.

9.3 Impact of the Tough-on-Crime Policy

Investigations into Canadian case law between the years of 2003 and 2013 found that slight differences do exist from one province to the next in the way youth are formally dealt with in court, but that *none* of these disparities were linked to the new amendments. An analysis of findings concluded that the sentencing principles (accountability, rehabilitation and proportionality) outlined in the Section 3 of the *YCJA* were largely adhered to across all provinces in every year, given that the majority of judges placed a great deal of emphasis on the alternatives to custody when searching for the least restrictive approach.²⁹¹ These findings

²⁹¹ The sentencing provisions in the *YCJA* place specific restriction on the use of custody and in lieu create alternatives which have successfully reduced the use of custody (in comparison to the *YOA*). The additional alternatives introduced by the *YCJA* (along with the sentencing principles) have reduced the use of custody, and by the very fact are in direct contradiction with the provisions of Bill C-10 (Part 4). Community sanctions are seen as less punitive than custodial sentences given the direction provided by the legislation (proportionality). For more information, see the *YCJA*, S.3(1)(a)(iii); S.4(a); and S.38(2)(d); and Bala, Carrington & Robert (2009). These

indicated that the *YCJA* does in fact reflect a balance between rehabilitation and accountability, even amongst cases judged after the enactment of Bill C-10 (Part 4).

While there was some degree of variation in the number of case law published within each year, there was very little difference that surfaced with regards to the most common offences that appeared over the ten year time frame. The main focus of the case law analysis, however, predominately pertained to the presumptive offences as these were the ones most likely subject to the imposition of an adult sentence. Whether youth were sentenced as youth or adults varied on a number of considerations that included (but were not limited to) the severity of the crime, age, feelings or remorse (or lack thereof), prior criminal record, and other mitigating circumstantial factors, such as mental illness or the level of involvement in a crime (partners and accomplices).

In some instances adult sentences were imposed on youth where youth sentences were inconsistent with the seriousness of the offence; that is, a youth sentence would have been unable to hold the youth accountable for the offending behaviour. There is evidence that shows youth sentences were imposed only on a minority of youth for many of the presumptive offences. This finding suggests that prior to the legislative amendments of Bill C-10 (Part 4) the *YCJA* was already quite punitive in nature, without requiring the Crown to consider the possibility of seeking an adult sentence for youth convicted of these crimes. Further, the case law analysis concluded that there was an *increase* in adult sentences imposed upon youth in violation of the law from 2007 onward, even in instances where a presumptive offence was not involved but was one that warranted more punitive sanctions. While presumption applied to cases involving a third conviction for a serious violent offence, in 2008 the Supreme Court of

findings differ from what research finds for adults in many ways due to the focus of the *YCJA* on meaningful consequences and the least restrictive alternative.

Canada held that a presumption that a youth would receive an adult sentence is unconstitutional (see *R v D.B.* (2008)). While in theory, under the *YCJA* courts are generally asked to consider the imposition of an adult sentence only for youth who have committed the most serious offence, in practice however the *YCJA* continues to allow for the possibility for an adult sentence to be imposed on a young offender for a broad range of offences, both violent and non-violent.

A number of recurring themes were found in the case law pre-enactment of Bill C-10 (Part 4). First, the case law addressed issues pertaining to pre-trial detention, most notably in relation to whether or not youth were eligible for release or had committed crimes while on bail. This finding suggests that in a small fraction of cases, there was in fact confusion when it came to the rules regarding the release or detention of youth. Frequently, this confusion stemmed from the fact that pretrial detention is a denial of freedom of a person not yet found guilty of an offence, and in some sense is inconsistent with the presumption of innocence.

Additionally, there are potentially harmful effects of pretrial detention on youth because it interferes with the youth's development, particularly in relation to family, peers, and school. A second theme is connected to lifting the publication ban, especially in instances where a youth sentence was imposed for an offence that carried a presumption of an adult sentence. As time progressed, however, the issue of lifting the publication ban *decreased*, because some youth court judges commonly believed that publication of offenders' names have minimal effect on rehabilitation. Third, the case law indicated that there was a lack of clarity with regards to the definition of violent offences, although this occurred minimally. While presumptive offences were exempt from this category, cases pertaining to endangering public safety were contentious.

Given the enactment of Bill C-10 (Part 4), it is expected that case law commencing in the latter part of 2013 and onward will demonstrate that offences will be designated as violent if it causes bodily harm or intends to do so. Finally, an analysis of the case law concluded that prior to the enactment of Bill C-10 (Part 4) the sentencing principles of denunciation and deterrence were somewhat controversial. While the *YCJA* at that time did not include these sentencing principles, the case law indicated that previously some youth were given sentences that reflected denunciation without considering rehabilitation and reintegration. These findings suggest that even before Bill C-10 (Part 4) came into effect, some sentences mirrored sentencing principles similar to those provided in the adult criminal justice system, albeit they were appealed because they were inconsistent with the *YCJA* principles.

Whether or not the amendments of Bill C-10 (Part 4) will adequately address these issues is unknown at this time. While the first half of the case law from 2013 demonstrated similarities in sentencing trends to previous years (especially 2011-2012), only one case referred to the new sentencing provisions of Bill C-10 (Part 4). Although the *YCJA* provisions governing the proceedings had changed, the court still operated on the presumption that the youth was guilty with diminished moral blameworthiness or culpability. Thus, there is evidence to suggest that, at least for the time being, youth in conflict with the law remain unaffected by the provisions of Bill C-10 (Part 4).

The findings here provided tentative support for the Marxist/critical theoretical perspective on the various circumstances, conditions, barriers, social and economic structural inequalities, and political marginalization that afflict certain groups of youth in modern capitalist society. While there was no evidence in the case law suggesting youth are currently impacted by the Bill C-10 (Part 4) legislation, there were indications that youth had been

affected by tough-on-crime legislation prior to the amendments. The effects of the tough-on-crime legislation were two-fold. First, the enactment of the *YCJA* was put forth by the government in an effort to get tough on crime in ways the *YOA* did not (Bala & Anand, 2012). For example, the case law concluded that the *YCJA* is in some ways more punitive than the *YOA*, especially with regards to lowering the age limit from 16 to 14 years of age for the presumption of adult sentences for the most serious offences. In addition, “the most serious offences that carry a presumption of an adult sentence are extended” under the *YCJA* to “include patterns of serious, repeat, and violent offences” (see Lightstone, n.d.). These findings can be linked to Garland’s (1996, 2001) analysis of the neo-conservative stance given that, to some degree, the *YCJA* represents a greater commitment towards punishing those charged with a presumptive offence. It should, however, be noted that other “adaptive” strategies of the state (such as Garland’s (1996) interpretation of “defining defiance down” and “system integration and system monitoring”) also presented themselves in the case law.

Second, there was sufficient evidence in the case law that showed that a very large proportion of youth in conflict with the law are negatively affected by more punitive measures, especially since a significant number of them are from groups that may be viewed as the “underclass” (i.e., socially, politically, culturally and economically underprivileged). Consequently, they are afflicted by a complexity of issues by virtue of their racial/ethnic and cultural background, which at times contributes to systematic discrimination within the judicial system (Alvi, 2012; Bala, 1997; Calverley, Cotter & Halla, 2010; Caputo & Vallée, 2007; Feeley & Simon, 1992; Hall et al., 2013; McMurtry & Curling, 2008; Mosher, 1996; Wortley et al., 2008). Together, these findings were indicative of a shift in political rationale on youth

crime governance when compared to preceding legislation, and lends support to Garland's (2001) argument on new penological ideologies that underlie current youth crime policies.

The implication of these findings is that, up until June 2013, youth in conflict with the law had not been directly affected by the Bill C-10 (Part 4) legislation. Since the genuine effects of the legislation may not readily surface for some time, it is difficult to project if and how youth may specifically be affected by the provisions of the Bill in the future. Within this context, it may be argued that any negative impact forecasted by empirical studies from other jurisdictions is speculation. Accordingly, the precise consequences of enacting such legislation remain to be determined through the case law. This in itself provides mixed support for the critical theoretical view put forth by Alvi (2012); DeKeseredy (2011); Garland (2001); Hall et al. (2013); Wortley et al. (2008).

9.4 Responses to Youth Crime in Texas

An analysis of case law and legislation from Texas concluded that the ways in which this state responds to youth crime coincides with a model of crime control that is further along the tough-on-crime continuum, relative to Canada. Evidence of this is first witnessed in Texas' purpose clause which places a great degree of emphasis on punishment and deterrence, although rehabilitation and reintegration are also considered *after* "providing safety for the public", "promoting the concept of punishment", and "removing the taint of criminality from children" (Section 51.01 *Texas Family Code*). There are, however, further signs of the tough-on-crime ideology given the principles on which Texas' juvenile justice laws are formed. Prior research showed that Texas was subject to a number of revisions to its legislation in the mid-late 90s in order to reflect the tough-on-crime mandate after noting a spike in crime rates (Krisberg, 2006; Snyder, 2002). In the Canadian context, similar revisions occurred during the

same time frame resulting in a number of amendments to the *YOA* (Caputo & Vallée, 2007). This finding suggested that both Canada and Texas have undergone similar youth justice transformations and shifts in youth crime governance/political ideology, though the tough-on-crime legislation in Texas is far more sophisticated and advanced. While the analysis of case law and legislation in Texas served as a counterpoint to the philosophy of justice in Canada given its highly punitive nature, there was evidence to suggest that the legislative amendments of Bill C-10 (Part 4) is a modified model of crime control that brings the two systems of youth justice closer together. Thus, the analysis not only shed light on where Canada presently sits on the tough-on-crime continuum, but also developed a more comprehensive understanding of the political and legislative choices that have been made with regards to the current youth justice approach in Canada.

While Canada oversees and responds to youth crime by taking into account the principles of rehabilitation and reintegration, Texas responds on the basis of protection, and to a much lesser degree rehabilitation. Consistent with previous research, the findings suggested that Canada is more inclined to informally proceed with diversion than Texas. However, where a serious, violent offender is concerned, there is much less emphasis on diversion in Texas because priority is given to offender accountability and reduction of crime via deterrence and punishment. Some of these elements have presently manifested themselves in the Canadian youth justice legislation.

Texas addresses youth proceedings as delinquent as opposed to criminal unless transferred to adult court. The case law in Texas indicated that it relies heavily on determinate sentencing of violent or habitual offenders for youth who remain under the jurisdiction of the juvenile court, but waives jurisdiction by means of discretionary transfer to the adult criminal

court for certain offences. Both previous research and the case law findings indicated that youth transferred to the adult criminal jurisdiction were no more likely to have committed a violent offence than those who received a determinate sentence (Dietch, 2011). This suggested a degree of disproportionality of youth being transferred to the adult courts for offences of similar nature, although the overall number of cases waived is less than one percent. The legislation allowing the transfer of youth to the adult court jurisdiction in Texas is similar to the provisions previously outlined in Canada's *YOA*, but because the Canadian court's made significantly greater use of custodial sentences for adolescent offenders as opposed to diversion and informal programs, the *YOA* legislation was rescinded. This finding, in effect, coincides with Garland's (1996) analysis of "defining deviance down" as part of the state's response to youth crime.

The analysis of Texas' legislation lends support to the argument put forth by Garland (2001) on the genealogy of youth justice and the ways in which North America (or Texas, more specifically) has experienced a number of transformations, particularly on the discourse of youth justice. The shift towards a more punitive style of youth crime governance in Texas can be attributed to a great deal of changes not only to the welfare approach of crime control, but to the superstructure itself, spanning over the economic, political, social and cultural systems (Feeley & Simon, 1992; Garland, 2001; O'Malley, 1999). The enactment of the tough-on-crime legislation originated in a similar fashion to that of Canada by sparking fear across Texas about youth crime (see Chapter 4), and echoes the findings of Hall et al. (2013) on the need for tougher laws typically summoned by conservative governments for seemingly out-of-control youth. The tough-on-crime legislation in Texas was proposed and implemented by the Republican Party, pushing for anti-crime laws that closely resembled the sentencing principles

found in the adult justice system. The desire to implement harsher punishments is illustrative of the conservative ideology that demands respect for authority and discipline (Garland, 1996). These views were not only supported by the public, but acted as the catalyst which gave rise to the state's authority and ability to exercise legitimate power (Habermas, 1985).

The findings from the case law, however, are particularly congruent with the work of Hall et al. (2013) with regards to policies that aim to track, control and manage problematic (potential "career criminals", or the "dangerous other") youth, and support the critical theoretical perspective. The tough-on-crime philosophy outlined in Texas' case law shed light on the ways in which such legislation is meant to target high-risk, potentially violent youth. The tough-on-crime policy that has been enacted for nearly twenty years has translated into the systematic mistreatment of youth who represent the "underclass", therefore belonging to a socially, economically, politically, and ethnically undesirable group of youth (Garland, 2001; Hall et al., 2013). This is particularly evidenced in Texas' legislation which facilitates the transfer of youth to adult state prisons, but has also been observed through the procedural mechanisms that rely on the imposition of a determinate sentence. Both sentencing options were repeatedly noted in the case law as being excessively used against underprivileged African-American and Hispanic youth (Bureau of Justice Statistics, 2003), and lends supports to the ways in which the youth justice system in Texas further contributes to the marginalization of these youth.²⁹² As a result, there is a greater likelihood for tough-on-crime

²⁹² There is evidence to suggest that the tough-on-crime policies and legislation enacted in the state of Texas unintentionally target youth of varying racial and ethnic backgrounds (see the *Juvenile Justice and Delinquency Prevention Act* of 1974; Center for Children's Law and Policy, 2013, specifically "Fact Sheet: Disproportionate Minority Contact"). This assertion is made in conjunction with the statewide youth crime statistics organized by offence type, age and race which acknowledge that certain groups who do not represent the dominant class are disproportionately represented in the criminal justice system.

measures to produce adverse effects on the disenfranchised, simply because it perpetuates the social conditions that act as barriers for youth to pursue normal, productive lives.

The tough-on-crime legislation in Texas differs from that of Canada in three major ways. First, unlike in Texas where the minimum age of responsibility is 10 years of age, Canada's minimum age of jurisdiction is 12 years of age. In contrast, while the maximum age of responsibility in Canada is up to a young person's 18th birthday, Texas limits their juvenile jurisdiction to those who are 16 years of age or younger. This establishes that youth over the age of 17 that come into contact with the justice system are treated as though an adult. While there is evidence to suggest that Canadian adolescents between the ages of 16 and 17 are mostly likely to engage in serious violent behaviour (Brennan, 2012), these findings imply that Canadian youth are governed by youth justice legislation that consider the principle of limited accountability for an additional year beyond Texas.

Second, the procedural mechanisms through which a youth may be tried and sentenced as an adult varies significantly in Canada and Texas. Most notably, youth in Texas may be transferred to the adult criminal court jurisdiction while provisions in the *YCJA* exclude this possibility. This finding concluded that youth in Texas are treated with the same level of accountability as adults, and are therefore governed by the same legislation and sentencing principles designed for adults. Decisions regarding whether or not a youth will be waived to the adult jurisdiction rests solely at the discretion of the judge in Texas. In contrast, judicial discretion in the Canadian context can result in the imposition of an adult sentence within the youth court.

Third, the placement of a youth sentenced as an adult in Texas and Canada differ to some extent. While youth in Texas typically serve their adult sentences in adult facilities, youth

under the age of 18 in Canada are not permitted to serve their adult sentence in an institutional designed for adults. These findings showed that there is a greater degree of discretion in the Canadian judicial system on the placement of youth, and also considers the best interests of the child with respect to the needs and circumstances of the individual youth (*YCJA*, S.3 (1)(c)). In comparison, youth in Texas are less likely to receive rehabilitative services in the adult facilities and are therefore more likely to recidivate (Bishop & Frazier, 2000; Deitch, 2009a).

Although there are some differences in the legislation amongst both jurisdictions, the findings support the critical theoretical perspective and particularly the works of Feeley and Simon (1992), Garland (2001), Hall et al. (2013), and O'Malley (1999). More specifically, there is evidence to suggest that the tough-on-crime legislation enacted in both Texas and Canada was done so on the basis of an ideological shift that altered the ways in which youth crime is perceived and defined. Both jurisdictions are illustrative of a decline in the loyalty to penal-welfare strategies, although the case law in Texas indicated that the state generally holds less faith in the welfare model than does Canada. The findings from both Canada and Texas are examples of jurisdictions that have been affected by the various social, economic, political, cultural, and structural changes that have influenced governing techniques. As a result, the organization and structuring of the current governmental paradigm is characterized by a reconceptualized understanding of crime control, including rehabilitation. This shift in political rationale not only embodies a modified approach to youth crime control, but calls upon the public for mass support of dominant ideology in order to legitimate state authority and power (Garland, 2001; Habermas, 1975, 1985).

Further, while the enactment of the tough-on-crime legislation in both jurisdictions are perceived as being good at what they were meant to do, the consequences associated with them

have the most bearing on underprivileged minority groups, particularly affecting the “underclass” youth found within the social structure. These findings suggested that tough-on-crime legislation does not represent the interests of these youth, but reflect the dominant ideology that promotes policies that often attempt to control and manage risk, and encourage greater supervision of persistent offenders who exhibit tendencies of violence. The most important implication of these findings is the distinction made between the tough-on-crime legislation in both Canada and Texas, with regards to the ramifications they have for youth (particularly as marginal political subjects least capable of mobilizing political power) in each jurisdiction. Evidence from Texas indicated that their youth justice legislation is more punitive in nature when compared to that of Canada. This finding stood despite the enactment of Bill C-10 (Part 4), although these amendments mirror some aspects of Texas’ youth crime policy.

Overall, however, the *YCJA* is still far more prone to adhering to the principles of rehabilitation and reintegration of youth in conflict with the law. This finding, therefore, substantiates the assertion that Texas is further along the tough-on-crime continuum relative to Canada, although it does not diminish the ways in which accountability for the problem of youth crime is delegated onto youth and acted upon through various punitive measures (i.e., adult penalties, long sentences, etc.). Both jurisdictions, however, have displayed elements of “denial” and “acting out” as a non-“adaptive” response to the issue of youth crime, particularly on account of the various failures and shortcomings of the state and its perceived inability to control crime effectively (Garland, 1996).

In terms of what can be learned from the legislation responding to youth crime in Texas, the most substantial characteristic has to do with the ability to waive youth to the adult criminal jurisdiction. The transfer provision in Texas was found to be consistent with a crime control

philosophy, and is reflective of the purpose clause stipulated in the legislation. The shift in legislation towards transferring youth to the adult jurisdiction is based on the belief that harsher sanctions will act as a deterrent for youth. There is ample evidence that not only suggests that these measures are ineffective at achieving this goal, but that the right to waive jurisdiction over youth when appropriate diminishes any policy provisions of rehabilitation and reintegration, particularly when used disproportionately (Tonry & Doob, 2004). Overall, these findings showed that the *YCJA* better addresses youth crime because it protects youth from being prematurely sentenced as an adult, and prohibits them entirely from being adjudicated in the adult criminal justice system.

Another important factor to be considered is that youth who are sentenced as adults are subject to a number of adverse effects when placed in an adult institution. Most notably, they do not have any chance of taking advantage of valuable rehabilitative services and treatment available in the juvenile justice system, even if the programs are neo-liberalized and deviate from traditional disciplinary practices (Bentham, 2008; Foucault, 2008). In addition, adult facilities are not suitable for youth who fall below the maximum age of jurisdiction because it neither meets their specialized age-appropriate needs nor provides personal safety. In fact, adult correctional facilities are largely ineffective in reducing youth crime in the long run because it does not address or correct risk factors that make youth vulnerable to crime (Bazemore & Umbreit, 1995; Bishop & Frazier, 2000; Deitch, 2009a; Myers, 2003; Thomas & Bishop, 1984).

Learning about the failures or shortcomings of other, more punitive jurisdictions provides an awareness of which legislative strategies fall short and which succeed when responding to youth crime. There is evidence to suggest that both community based programs

and collaborative approaches between prosecutors, defence counsels, judges, probation officers, victims, and service providers that educate and mentor youth are far more effective and beneficial than amending legislation to enact more punitive measures. Dealing with the underlying issues of youth crime on a long-term basis (via continuous comprehensive programmatic evaluation) may help avoid the financial and social costs associated with incarcerating youth. In fact, Texas is beginning to move towards more holistic approaches that implement measures which help divert youth away from youth court. Yet, when considering the legislative amendments of Bill C-10 (Part 4) which *may* have the effect of expanding the category of crimes for which youth can be tried and sentenced to a term of custody (broadened definition of “violent offence”), and *may* increase the length of time for which youth can spend in custody (increased detention), there is some evidence to suggest there may be a degree of contradiction in Canadian youth justice legislation between these amendments and the efforts to enhance public safety. In addition, increasing the amount of time youth may spend in custody could have a negative effect on rehabilitation, because “for some vulnerable youth, placement in custody can lead to a downward spiral of dropping out of school, recruitment into gangs and further offending” (Bala, 2011, p. 1).

The implication of these findings is that governments attempting to enact tough-on-crime legislation should place a greater emphasis on the ways in which such agendas have both failed and prevailed. Like Canada, Texas has experienced a similar attack on penal-welfare strategies, and perhaps to an even greater degree. However, there are signs that maintaining confidence in penal-welfarism better accounts for both the interests and needs of youth in conflict with the law, because it places greater emphasis on traditional styles of rehabilitation as opposed to focussing on tougher measures. What is clear is that both jurisdictions have

taken a very strong state approach to dealing with youth crime, although Texas is arguably more state-centric in its responsibility for crime control than Canada. While there are significant variations in approaches to youth justice between these two jurisdictions, a better understanding of tough-on-crime legislation from Texas has the potential to provide insight on a range of techniques and strategies of varying crime control models that have proven to be ineffective in response to youth crime. Moreover, the case law from Texas indicated that youth most frequently impacted by the tough-on-crime legislation are those that are politically marginalized and face many financial, educational, familial, social and sometimes mental obstacles. These findings, therefore, support the Marxist/critical theoretical view on the ways in which the modern capitalist state is linked to youth transgression (Alvi, 2012; DeKeseredy, 2011; Garland, 2001; Hall et al., 2013).

9.5 What Have We Learned About Tough-on-Crime Policies and Legislation?

In an attempt to explain why such phenomena occur, the results suggested that the tough-on-crime approach is a product of a multifaceted interaction between interest groups, politicians, lawmakers, the offender, the victim, the public, the media, the police, the judiciary, and the Crown (Wortley et al., 2008). This new concept of penology (which includes the redefinition of the problem of youth crime) and the shift in youth crime governance occurred on account of various economic and social changes. These changes in political rationale are perpetuated by the media and gain legitimacy through the public by means of mass support and consent (Habermas, 1975). As such, the tough-on-crime legislation is not only reflective of the dominant values and ideology held by society's most powerful groups (Chambliss & Seidman, 1971; Garland, 2001; Hall et al., 2013), but of the state's incessant act of "denial" (Garland,

1996). Together, these elements reaffirm the state's need to implement tougher legislation as a means of addressing and making up for its insufficiencies and shortfalls.

Based on prior research, the data from the interviews, and the case law findings from Texas, tough-on-crime legislation is ineffective at deterring youth crime both on an individual level and one that is more widespread. The current results showed many similarities in the processes (and the basis upon which) the tough-on-crime approach developed in Canada and Texas, although Canadian legislation includes some sentencing principles that represent somewhat of a departure from their American counterpart (i.e., strong emphasis on rehabilitation, reintegration and diminished blameworthiness). While the newly enacted amendments of Bill C-10 (Part 4) resemble Texas' legislation in certain ways, the findings suggest that Canadian youth justice policy is generally better designed to respond to youth crime. In effect, Texas is much further along the tough-on-crime continuum, although both jurisdictions reflect a definitive shift from the penal-welfare model to one that is consistent with a model of crime control. This can be linked to Garland's (1996) concept of denial and the limitations of the state more generally.

Currently, the legislative amendments have not translated to any substantive changes in practice. As such, the findings from the Canadian case law analysis were unable to determine whether or not any substantial changes will occur in the way youth are sentenced over time. However, these findings do not suggest that changes will not occur in the future, but only that it is too premature to reach a conclusion on the ways in which youth *may* be impacted by the amendments in Bill C-10 (Part 4). Nonetheless, if we are to learn from responses to youth crime from more punitive jurisdictions, it may very well be that an increase in the proportion of sentenced youth for longer periods of time may be observed.

Rather than enacting tougher legislation, the findings from both Canada and Texas reveal that long-term crime prevention strategies and early intervention programs are much more valuable and effective at reducing the risk of violence, increasing public safety and improving youth justice overall. These strategies and programs are also more likely to assist underprivileged youth as well as and those who exhibit early signs of criminal involvement or behaviour. Further, in line with prior research, apprehended youth already in conflict with the law have a greater likelihood of benefitting from restorative justice, community-based sentencing and circle sentencing as opposed to harsher and longer sentences (Bala & Anand, 2012; Doob & Cesaroni, 2004; Krisberg, 2006; McCord, 2002). Generally speaking, there is evidence to suggest that youth benefit from these programs in Canada, but these findings showed that in many instances provincial resources are either scarce or mismanaged (McMurtry & Curling, 2008).

Additionally, the availability for such services in some provinces for youth appears minimal. This latter finding leads to two broad questions within the Canadian context. First, instead of enacting more punitive legislation that reflects the dominant ideology, why has the federal government not invited provinces to enhance or employ *all* aspects of the *YCJA* equally through the provision of more resources, especially if rehabilitation is a main concern? Second, why have some provinces not prioritized the delivery of youth criminal justice (for youth already in conflict with the law) within a reasonable period of time in order to ensure that youth profit from these programs more expediently? Virtually none of the limited Canadian research that has broadly investigated the benefits and effectiveness of youth programs has addressed these questions.

9.6 Recommendations for Future Research

This research provides a better understanding of the individual and governmental processes associated with the tough-on-crime approach in Canada, with a specific focus on youth crime. The results provide a current picture of the ways in which the tough-on-crime policy has come to fruition within the Canadian context. However, further research is required to pick up where this study leaves off.

First, the interview data were collected not only to explore the processes through which Bill C-10 (Part 4) developed, but also on the perceptions of youth crime from a very broad perspective. While all of the participants were able to comment on their perceptions of youth crime, not all were familiar with the specific processes associated with the tough-on-crime legislation. While three-quarters of the interviewees had *some* general knowledge of the politics behind the enactment of the Bill, only a few were directly involved in the parliamentary debates. In other words, none of the participants were active politicians at the time of the Bill's legislation, and very few were involved in providing expert testimony, drafting the legislative amendments, and producing reports for the Minister of Justice.

On the one hand, the data collected from all twenty-two interviews provided enough information to conclude that participants agreed about the ways in which Bill C-10 (Part 4) had developed and been legislated. On the other hand, none of the participants approved of Bill C-10 (Part 4) and they questioned the need for amendments. In addition, none of the participants identified themselves as Conservative Party supporters. This was due to the general composition of the sample and a lack of diversity of participants. Thus, a larger sample size is needed in order to include the perspectives of those in agreement with the legislation. To help fill in some of these gaps, *Hansard* was used to substantiate the data provided by the respondents. In addition, it shed light on the Conservative Party's perspective, even when they

were reluctant to participate in the interviews. In effect, a more comprehensive understanding of the processes associated with the development of the Bill can be gained with interviewing those in agreement with the legislation. These perspectives may include aspects of the deliberation process that were not made available to the public (e.g., Privy Council), and were therefore not found in *Hansard*.

Second, because the research questions intended to better understand the processes through which Bill C-10 (Part 4) was enacted, the specific processes associated with the dynamics between politicians and interest groups other than victim's groups fell outside the scope of this study. While the findings in this research illustrated a perfect example of a symbiotic relationship, where some interest groups such as victims fueled the tough-on-crime cause and the government used this to support their legislation, further research and analysis is required to investigate four main questions. First, what is the actual degree of influence had by interest groups within the political realm? Second, what are the conditions under which interest groups surface? Third, what is the basis upon which some interest groups are able to push forward their agendas within the political sphere more so than others? Finally, what role do the media play in relation to augmenting specific interest group positions? These research questions may be guided by a governmentality approach that examines the exercise of power in terms of the "conduct of conducts" (Foucault, 2000, p. 341; Foucault, 2008, p. 186). That is, it is a framework for analysis that begins with the observation that governance is a very widespread phenomenon that occurs whenever individuals and groups seek to shape their own conduct or the conduct of others.

Third, additional research is required to better explain the criminal justice policy-making process. While there is some evidence to suggest that American criminologists have

attempted to explain why certain policies attract the attention of policy-makers and move onto the legislative agenda (a process known as agenda-setting), scant empirical research has examined this issue (Ismaili, 2006). Within the Canadian context, further investigation is required to better understand how members of the government conceptualize the spread of policies in light of the shift of youth crime governance. However, accurately probing the numerous twists in policy-making processes and determining the myriad of concerns that affect policy-makers' decisions are foreseeable challenges. The lack of previous Canadian research may be due to the mammoth methodological difficulties posed by this issue, although modification of the current theoretical perspectives to reflect Kingdon's (2003) influential theory of policy agenda-setting, Windlesham's (1998) theory of populist criminal justice policy-making, and the policy diffusion research tradition (Karch, 2007; Mintrom, 1997) may resolve some of these problems.

Fourth, the data collected from the case law post-enactment of Bill C-10 (Part 4) was inconclusive in providing information on whether or not youth are affected or impacted by the newly enacted amendments to the *YCJA*. Given that case law typically involves cases that are felt to be potentially precedent setting, it was expected that pivotal cases were most likely to have occurred after enactment of the Bill. However, case law is a dynamic and constantly developing body of law; thus, it may take years before any evidence surfaces on the impact or consequences associated with the tough-on-crime legislation. This may explain why none of the post-enactment case law could provide enough evidence on the effects of the enactment, although the time limitation for the analysis may have played a role in this finding (only eight months of post-enactment case law was analyzed). Further, only a small fraction of the cases heard in youth court involve seriously violent offenders. Thus, the frequency with which these

types of cases actually make case law is relatively low when compared to other crimes committed by youth.

Finally, and most importantly, the results from this study suggest that more research is required in the Canadian context that incorporates dimensions of decision-making in the realm of politics using data from active politicians and lawmakers that have insight into information that is not publicly available (e.g., Privy Council). In order to fully appreciate how and in what ways meaningful decisions are made about tough-on-crime legislation in Canada, consideration must be given to various federal and provincial level politicians of all parties, as well as other individuals involved in these behind-the-scenes processes. In effect, this argument extends to some degree to any type of youth justice related policy and legislative amendments, not just to tough-on-crime legislation.

Although one limitation of this study is that it does not include insight from active politicians, gaining the perspectives of various politicians and lawmakers is important for two reasons. First, it offers a multi-dimensional aspect on the current legislation that goes beyond what is known by those who gave expert testimony. Second, it provides a basis of understanding for the enactment of future youth crime legislation. There are numerous complexities connected with evidence-based policy making in Canada, but much of this revolves around statistical deficiencies which do not properly present data on violence (including the harm associated with it, and its causes, consequences and prevention). In order for legislation to be effective, the evidence used to develop policies should be based on research that not only includes trustworthy data, but information that is well-founded. Although the information collected through *Hansard* suggested that “other” data aside from the report generated by the roundtable discussion was considered, there is no mention of what

other input really went into this legislation. Additional research is required to investigate what types of evidence is in fact used (if any) to develop any future youth crime legislation, and how these are influenced by the various cultural and social circumstances or structures that currently exist.

Undeniably, such research may be difficult to conduct considering that much of the youth crime legislation is based on a reactive mentality that does not necessarily consider evidence regarding what prompts youth to become “career criminals”, or what life experiences increase the likelihood of becoming persistent offenders. To an extent, this questions the ways in which evidence itself is constituted or discounted (i.e., how the problem of youth crime is defined or how declining youth crime statistics are dismissed) so that responsibility for the problem is displaced onto youth, therefore motivating certain types of legislation. Further, much research does not consider the ways in which the larger superstructure affect youth, and the implications imposed on them on account of the economic, political, social and cultural systems. In this sense, the problem is two-fold because reliable data is lacking both on the evidence-based decision-making process itself and the fundamental research that focuses on the aforementioned factors. Without this information, an effective and efficient response to youth crime is doubtful.

Despite these limitations, however, this research contributes to the overall understanding of youth crime legislation with regards to the micro and macro processes associated with the tough-on-crime legislation, not only by expanding our knowledge within a Canadian perspective but also by addressing the shortfalls in the literature as a whole. What is clear is that these crime control strategies are harmonious with the constitution of modern capitalism, and are characterized by specific problems, reactions, responses (including

“adaptive” and “non-adaptive” responses) and transformations of the state. These techniques, therefore, coincide with a new style of youth governance that makes inferences and assumptions about class structure on account of the political, economic, social and cultural policy decisions made by the state, and provides evidence for the ways in which the tough-on-crime movement is predicated on maintaining state power and political legitimacy in today’s complex democratic society. In the end, it is the youth who are least capable of mobilizing political power that are adversely affected by these policy choices.

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APPENDIX A: INTERVIEW SCHEDULE

Preamble

- Are there any questions regarding the project?
 - Briefly summarize Bill C-10 (Part 4)
 - Sign Informed Consent Form
 - Provide participant with a copy of the signed Informed Consent Form
 - Reiterate Consent and discuss audio recording of the interview
 - The respondents may turn the recorder off at any time during the interview if they would prefer to answer the questions off the record
 - Restate that participants may decline to answer a question or withdraw their participation in the study at any time without penalty
 - Confidentiality is ensured as no statements will be directly quoted (referenced to their names)
 - Exchange business cards or confirm rank and spelling of last name

Background Information

- 1) How long have you been your current position? (If applicable)
- 2) How long have you been involved in politics? (If applicable)
- 3) What was your motivation to enter into politics? (If applicable)

Bill C-10 (Part 4)

- 4) What can you tell me about the Omnibus Crime Bill C-10, particularly in reference to Part 4?
- 5) In your opinion, why was there so much opposition to passing the Bill?
- 6) Which political party was least in favour of passing this Bill? Why?
- 7) What were the overall concerns brought forth by politicians (including yourself, if any) that were associated with the “get tough on crime” legislation?
- 8) Where do you think some of the most influential policy ideas have come from with regards to tough-on-crime legislation? Who are the major players?
- 9) Can you tell me about the specific processes involved in the passing of Bill C-10 (Part 4)?
 - How did it happen despite opposition/criticism?
- 10) How was the enactment of the bill rationalized when Statistics Canada concluded that youth crime rates were steadily declining? (Assuming participants are aware of this fact).
- 11) In your opinion, what is the purpose of Bill C-10 (Part 4)?
- 12) Prior to the enactment of Bill C-10 (Part 4), was there any evidence suggesting that tough-

on-crime legislation can deter youth from committing crime (either as a first offence or repeat offences)?

13) In what way did the government consider the expense of tough sentencing practices when it is claimed that the provinces do not have enough money for adequate treatment programs for youth in conflict with the law?

14) Prior to the enactment of Bill C-10 (Part 4), did the government consider how other jurisdictions respond to youth crime in an effort to assess which strategies work and which do not?

- Do you feel it is important to learn from responses to youth crime in other jurisdictions? Why or why not?

15) To your knowledge, did the government rely on reports or studies that were produced *outside* the government agencies such as Statistics Canada?

- Did these exist at the time of the enactment of the statute?

- Which reports/studies are these specifically?

16) To your knowledge, were there any testimonies of expert witnesses presented before the Parliamentary committee responsible for studying the Bill?

- Do you recall what information was presented and by whom?

Perceptions of Youth Crime

17) How do you feel people acquire their knowledge on youth crime in Canada?

18) In your opinion, how much of a role would you say the media has in constructing general views on youth crime (types of crime and rates of crime)?

19) How accurate do you think media reports are about youth crime?

20) In your opinion, does the public's general view of youth crime influence the government's decision to enact crime legislation?

- Why or why not?

21) From your perspective, what are some of the factors that are related to youth at risk of criminal involvement? (Prompts will be used if required)

a) Systemic factors such as culture, family, socio-economic

b) Inter-generational factors

c) Age

d) Race and racism

e) Relational factors

f) Risk assessments

- 22) In your opinion, was the *Youth Criminal Justice Act* adequate in dealing with youth crime (prior to any legislative amendments presented by Bill C-10 (Part 4))?
- Why or why not?
 - If yes, in what ways was it inadequate?

Summary Questions

- 23) Hypothetically speaking, how do you think we as a society should deal with young offenders?
- 24) What types of responses would you say have “meaningful consequences” for youth?
- 25) Do you believe there are adequate resources available to the province when responding to youth crime in general?
- 26) Do you believe the amendments put forth by Bill C-10 (Part 4) will effectively address youth crime?
- Will harsher sentencing practices deter youth from committing crime?

Reflection

- 27) Are there any additional comments you would like to add that we have not talked about concerning the enactment of Bill C-10 (Part 4)?
- 28) Because one of my methods for attaining interviews is respondent driven, is there anyone else you suggest I contact for interviewing?
- 29) Now that the interview is complete, do you have any questions that I can answer for you?

THANK YOU FOR AGREEING TO PARTICIPATE IN THIS STUDY!

APPENDIX B: RECRUITMENT LETTER

Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes Associated with Tough-on-Crime Legislation

[Date]

Dear [insert name],

This letter is an invitation to consider participating in a study I am conducting as part of my doctoral degree in the Department of Sociology and Legal Studies at the University of Waterloo under the supervision of Professor Jennifer L. Schulenberg. I would like to provide you with more information about this project and what your involvement would entail if you decide to take part.

As you may know, the Omnibus Crime Bill (Bill C-10) was set in motion earlier this year by the Canadian Conservative government, and covers a wide range of justice and public safety measures. Particularly relevant to this study is the assessment of the underlying premises of Bill C-10 (Part 4), known as “An Act to Amend the Youth Criminal Justice Act and to Make Consequential and Related Amendments to Other Acts”, which *may* expand the crimes for which youth can be incarcerated and the amount of time they can spend in custody. The purpose of this study, therefore, is to better understand the individual and governmental processes associated with the “get tough on crime” approach in Canada, with a specific focus on responses to youth crime.

I am conducting interviews with interested participants in order to examine the processes through which Bill C-10 (Part 4) developed and was legislated. When faced with legislative changes such as those put forth by Bill C-10 (Part 4), it is important to consider how and in what ways politicians make meaningful decisions about youth crime laws in Canada. Therefore, this study will rely on the inclusion of various responses from Members of Parliament, Members of Provincial Parliament and Federal civil servants, as they are best suited to speak on issues pertaining to the provisions of Bill C-4 and the specific processes involved in this particular piece of legislation.

Participation in this study is voluntary. It will involve an interview of approximately 45-60 minutes in length to take place in a mutually agreed upon location. Alternatively, the option of a telephone interview or an interview via Skype can be arranged if you are unable to provide an in-person interview. You may decline to answer any of the interview questions if you so wish. Further, you may decide to withdraw from this study at any time without any negative consequences by advising the researcher. With your permission, the interview will be audio recorded to facilitate collection of information, and later transcribed for analysis. All information you provide is considered completely confidential. Your name will not appear in any thesis or report resulting from this study, however, with your permission anonymous quotations may be used.

If you are interested in receiving more information regarding the results of this study, or if you have any questions or concerns, please contact me at either the phone number or email address listed below. If you would like an executive summary or a copy of the full report, please let me know by providing me with your email address.

If you have any questions regarding this study, or would like additional information to assist you in reaching a decision about participation, please contact me at 416-409-1644 or by email at tmkassab@uwaterloo.ca. You can also contact my supervisor, Dr. Jennifer Schulenberg at (519) 888-4567 ext. 38639 or email at jlschule@uwaterloo.ca. I would like to assure you that this study has been reviewed and received ethics clearance through the Office of Research Ethics at the University of Waterloo. If you have any comments or concerns resulting from your participation in this study, please contact Dr. Maureen Nummelin, the Director, Office of Research Ethics.

Your opinions and perspective are valuable to ensure everyone's voice is included. Please let me know by email or phone if you continue to be interested in participating in an interview. I look forward to hearing from you at your earliest convenience.

Yours sincerely,

Taline Kassabian BAH, MA, PhD Candidate
Department of Sociology & Legal Studies
University of Waterloo
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Waterloo, Ontario N2L 3G1
Tel: (416) 409-1644
Email: tmkassab@uwaterloo.ca

APPENDIX C: LETTER OF INFORMATION AND INFORMED CONSENT

Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes Associated with Tough-on-Crime Legislation

Researcher: Taline Kassabian BAH, MA, PhD Candidate
Department of Sociology & Legal Studies
University of Waterloo
200 University Avenue West
Waterloo, Ontario N2L 3G1
Email: tmkassab@uwaterloo.ca

Dear [Participants name],

As you may know, the Omnibus Crime Bill (Bill C-10) was set in motion earlier this year by the Canadian Conservative government, and covers a wide range of justice and public safety measures. Particularly relevant to this study is the assessment of the underlying premises of Bill C-10 (Part 4), known as “An Act to Amend the Youth Criminal Justice Act and to Make Consequential and Related Amendments to Other Acts”, which *may* expand the crimes for which youth can be incarcerated and the amount of time they can spend in custody. The purpose of this study, therefore, is to better understand the individual and governmental processes associated with the “get tough on crime” approach in Canada, with a specific focus on responses to youth crime.

Purpose of the Study

This study will examine the processes through which Bill C-10 (Part 4) developed and was legislated. When faced with legislative changes such as those put forth by Bill C-10 (Part 4), it is important to consider how and in what ways politicians make meaningful decisions about youth crime laws in Canada. Therefore, this study will rely on the inclusion of various responses from Members of Parliament, Members of Provincial Parliament and Federal civil servants, as they are best suited to speak on issues pertaining to the provisions of Bill C-10 (Part 4) and the specific processes involved in this particular piece of legislation.

Procedures involved in the research

I am requesting your participation in an interview on a day and time convenient to you. To minimize any personal or organizational disruptions, the interviews will last no longer than 45-60. I will invite your open ended responses to several questions about your experiences in relation to Bill C-10 (Part 4). You may decline to answer any of the interview questions if you so wish. Further, you may decide to withdraw from this study at any time without any negative consequences by advising the researcher. With your permission, the interview will be audio recorded to facilitate collection of information, and later transcribed for analysis. All information you provide is considered completely confidential. Your name will not appear in any thesis or report resulting from this study, however, with your permission anonymous

quotations may be used. Data collected during this study will be retained for no more than 10 years in a locked filing cabinet in my home.

Potential harms, risks, or discomforts

There are no known or anticipated risks to you as a participant in this study. While the interview questions directly ask about personal opinions, controversial topics, and decisions or situations that have previously been dealt with in legislative assembly, the interviews are concerned with the varying perceptions of each participant regarding the newly enacted legislation that affect both youth and society as a whole. The goal of conducting interviews is to obtain a better understanding of the perceptions of effectiveness in relation to the responses to youth crime. In addition, they strive to uncover the underlying processes behind the enactment of Bill C-10 (Part 4). Given the public nature of policy implementation, these questions do not pose risks, harms or discomforts to you by taking part in this study. Further, the information collected and your identity will remain confidential due to various sensitivities associated with occupational positions.

Potential benefits

Upon request, you will be provided with a copy of the final dissertation. The results from this study will be of direct benefit to academics, law enforcement, government officials, and policy experts on matters related to youth crime. By participating in this project you have the ability to promptly access the findings that pertain to the perceived effectiveness of various responses to youth crime, particularly in relation to responses that work best when dealing with youth crime. It is expected that the results from this study will contribute to the collective search for the most effective and appropriate ways to respond to youth crime based on data collected from Canada as well as other jurisdictions that have implemented similar tactics. It is anticipated that this study will add to the overall understanding of youth crime in Canada, predominantly with regards to the micro and macro processes associated with the “get tough on crime” legislation. It is hoped that this research will foster dialogue between various social welfare agencies and encourage a collaborative approach to addressing youth crime.

Confidentiality

The interview will be audio taped to ensure accuracy and to facilitate data analysis. I would like to emphasize agreement to participate in the interview does not require you to answer any of the questions if you do not want to and you can end your participation at any time without any negative repercussions. If you decide to withdraw from the study before, during, or after the interview, you can request that any, or all, of your data recorded on audio, paper, or electronically be destroyed immediately. I am assigning a number to each participant rather than your name, and all of your answers to questions. I will keep your responses in strict confidence in several ways.

First, the informed consent form will be kept separate from the audio, paper, and electronic focus group data and destroyed ten years after study completion. Second, your taped recorded responses will be assigned an alphanumeric code and this will not be identifiable in any

presentations or publications. Third, the audio recording will be kept secure in a locked cabinet. Once the accuracy of the transcript is verified, the audio file will be erased when the study is complete. Once again, if you choose to withdraw from the interview at any time you can choose to have your recorded responses destroyed immediately. Fourth, anonymity will be maintained for research participants through the use of anonymous quotations in the executive summary, the final report, and in all presentations and publications. If the situation arises where there is any possibility that a quotation will not protect your right to anonymity (as stated above), I will contact you prior to the use of the quotation so you can review the quote and I can obtain your express informed consent for its use.

You will receive a signed copy of this consent form for your records. If you have any questions regarding this study, or would like additional information to assist you in reaching a decision about participation, please contact me at 416-409-1644 or by email at tmkassab@uwaterloo.ca. You can also contact my supervisor, Dr. Jennifer Schulenberg at (519) 888-4567 ext. 38639 or email at jlschule@uwaterloo.ca. I would like to assure you that this study has been reviewed and received ethics clearance through the Office of Research Ethics at the University of Waterloo. If you have any comments or concerns resulting from your participation in this study, please contact Dr. Maureen Nummelin, the Director, Office of Research Ethics, at 1-519-888-4567, Ext. 36005 or at maureen.nummelin@uwaterloo.ca.

I very much look forward to speaking with you and thank you in advance for your assistance in this project.

Sincerely,

Taline Kassabian

Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes
Associated with Tough-on-Crime Legislation

Please mark the “Yes” and “No” boxes with your initials to indicate whether you are providing consent to each of the consent and privacy options outlined below.

	Consent and Privacy Options	Yes	No
1	I understand and willingly agree to participate in a face-to-face interview to be scheduled and conducted at my convenience.		
2	I agree to have the interview tape recorded.		
3	I would like to review a copy of my transcript.		
4	I am willing to allow the researcher to use quotations from the interview providing they are cited anonymously (the quote does not identify me).		
5	I am willing to allow the researcher to use quotations from the interview that are not completely anonymous as long as I am contacted by the researcher so I can review the quotation and give my consent to use it.		
6	I would like to receive a copy of the final dissertation.		
7	I agree to be contacted at a future date if the researcher would like clarification on my answers to any of the interview questions.		

I have read the information presented in the attached Letter of Information about a study being conducted by Taline Kassabian of the University of Waterloo. I have had the opportunity to ask questions about my involvement in the study and to receive additional details I wanted to know about the study. I understand I can choose to withdraw from the study at any time and I voluntarily agree to participate in this study.

This project has been reviewed by, and received ethics clearance through, the Office of Research Ethics at the University of Waterloo. I understand that if I have any comments or concerns resulting from my participation in this study, I may contact your supervisor, Dr. Jennifer Schulenberg at (519) 888-4567 ext. 38639 or email at jlschule@uwaterloo.ca, or the Director, Office of Research Ethics at 519-888-4567 ext. 36005 or at maureen.nummelin@uwaterloo.ca.

By signing this consent form, you are not waiving your legal rights or releasing the investigator or involved institution from their legal and professional responsibilities.

Name of the Participant (please print) – Date (dd/mm/yyyy)

Signature of the Participant

Email address

In my opinion, the person who has signed this informed consent is agreeing to participate in this study voluntarily, understands the nature of the study, and any consequences of participation.

Signature of Researcher or Witness

APPENDIX D: THANK YOU LETTER

Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes Associated with Tough-on-Crime Legislation

[Date]

Dear (Insert Name of Participant),

I would like to thank you for your participation in this study entitled “Responses to Youth Crime in Canada: An Examination of the Micro & Macro Processes Associated with Tough-on-Crime Legislation”. As a reminder, the purpose of this research is to better understand the individual and governmental processes associated with the tough-on-crime approach in Canada, more accurately known as Bill C-10 (Part 4), with a specific focus on responses to youth crime.

The data collected during interviews will contribute to an overall improvement in our comprehension of how politicians make meaningful decisions about youth crime laws in Canada. In particular, the processes through which Bill C-10 (Part 4) developed and was legislated is examined, especially with reference to the specific processes encountered through which these decisions are reached.

Please remember that any data pertaining to you as an individual participant will be kept confidential. Once all the data are collected and analyzed for this project, I plan on sharing this information with the research community through my dissertation, as well as in seminars, conferences, presentations, and journal articles. If you are interested in receiving more information regarding the results of this study, or would like a summary of the results, please provide your email address, and when the study is completed, anticipated by fall 2013, I will send you the information. In the meantime, if you have any questions about the study, please do not hesitate to contact me by email or telephone as noted below.

As with all University of Waterloo projects involving human participants, this project was reviewed by, and received ethics clearance through, the Office of Research Ethics at the University of Waterloo. Should you have any comments or concerns resulting from your participation in this study, please contact Dr. Maureen Nummelin, the Director, Office of Research Ethics, at 519-888-4567, Ext. 36005 or at maureen.nummelin@uwaterloo.ca. You can also contact my supervisor, Dr. Jennifer Schulenberg at (519) 888-4567 ext. 38639 or email at jlschule@uwaterloo.ca.

Sincerely,

Taline Kassabian

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APPENDIX E: INFORMAL RESPONSES TO YOUTH CRIME IN TEXAS

Youth taken into custody may be disposed of informally without a referral to the youth court only in cases where these arrangements have been previously agreed upon by the juvenile board. These types of dispositions usually involve very minor cases and are not subject to further legal action. According to Texas Family Code S.52.03(c), a referral to an organization other than the youth court typically entails a “conference with the juvenile and the juvenile’s parents”, although a referral to a family services agency or a Department of Family and Protective Services (DFPS) program for youth in at-risk situation are not uncommon.

A First Offender Program, on the other hand, is for youth “who have not been previously adjudicated as having engaged in delinquent conduct. That is, youth must not have a prior record”.²⁹³ Pursuant to S.52.032 of the Texas Family Code, all juvenile boards in Texas are “required to adopt guidelines for informal dispositions of First Offender Programs to encourage more law enforcement agencies to implement such programs”, however these “guidelines are not considered mandatory”. Youth taken into custody for a third degree felony or higher are not eligible for First Offender Programs, nor are youth who have committed misdemeanors or state jail felonies involving violence or weapons.²⁹⁴ Similar to the extrajudicial sanctions found in Canada, a youth who has formerly been referred to a First Offender Program without referral to a youth court upon discharge may be referred to this program on a subsequent account. Contrary to the tough-on-crime approach, participation in a First Offender Program may “involve voluntary restitution to a victim; voluntary community service; vocational training, education, counseling, or other rehabilitative services; anger management and conflict resolution programs; cognitive-behaviour therapy; boot camps; gang prevention/intervention; substance abuse prevention, intervention and treatment; and periodic reporting by the youth to the designated agency”.²⁹⁵ Youth who successfully complete these programs are not referred to juvenile court, although failure to comply with the terms of successful completion (either due to voluntary withdrawal or because the youth has been taken into custody within 90 days of completion of the program) results in such referrals.²⁹⁶

²⁹³ *Texas Family Code* S.52.032.

²⁹⁴ See S.52.031(a) of the *Texas Family Code*.

²⁹⁵ See *In re Expunction of D.R.R.* (2010), where the Court of Appeals held that minors have the capacity to enter into contracts for pre-trial diversion programs, and as a result are bound by their conditions.

²⁹⁶ See *Texas Family Code* S.52.031(f), (g), and (j); and S.58.001(f).

APPENDIX F: DEFERRED PROSECUTION IN THE STATE OF TEXAS

According to S.53.03(a) of the *Texas Family Code*, deferred prosecution is deemed as “an alternative to seeking a formal adjudication of delinquent conduct or conduct indicating a need for supervision” (Texas Juvenile Justice Department, 2013b). In other words, deferred prosecution may be seen as a period of probation not exceeding 6 months. Most frequently kept for youth who engage in less serious offences and those who are not “habitual offenders”, deferred prosecution is a “voluntary alternative” in which all parties involved agree to certain probation conditions (Texas Juvenile Justice Department, 2013b). *Texas Family Code* stipulates that youth who opt for this approach are not to be detained as a result of the process, especially since the terms of this method involve counselling and recommendations to outside organizations for rehabilitation (e.g. a twelve week teen dating violence court program). In addition, restitution and community service are both obligatory stipulations in all programs that entail probation. Successful completion of deferred prosecution results in a discharge from probation; however violation(s) of the terms are reported to the juvenile court which may lead to taking the original case back to court since the effort at informal probation failed. It should be noted that the “type and availability of deferred prosecution programs vary from county to county in the state of Texas”.²⁹⁷ Deferred prosecution in Texas is quite similar to a deferred custody and supervision order in Canada. In both instances, this alternative to custody is meant to permit youth who would otherwise have an imposition of a custodial sentence to serve their sentence in the community under stringent a set of conditions. Thus, the threat of immediate incarceration if any of those terms are violated is present. Successful completion of a deferred prosecution program can be expunged from the record immediately via petition with no chance of it being used against the person in the future. In Canada, however, extrajudicial sanctions remain on a youth’s record for two years before being sealed, but can carry over into the adult record if convicted for a new offence.

²⁹⁷ See the National Center for Juvenile Justice, 2012. These programs may include “referring a child to a social agency, contacting parents to inform them of their child’s activities, or simply warning the youth about their activities” (National Center for Juvenile Justice, 2012).