From Revenge to Restoration: Evaluating General Deterrence as a Primary Sentencing Purpose for Rioters in Vancouver, British Columbia

by

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Abstract

On June 15 2011, the city of Vancouver experienced the largest and most destructive riot in its history. The legal response was highly punitive. Because a restorative justice response to riot cases remains largely unexamined, this thesis explores whether, and in what capacity, restorative justice offers an appropriate response with significant benefits when holding rioters accountable. Two analyses were conducted. The first is an exploratory qualitative analysis of the reasons for decision given for the first 20 adult rioters sentenced in Vancouver Provincial Court, and the second is a calculation of the economic benefits associated with making available to rioters a variety of community-based and restorative alternatives to custody. The findings of this thesis lend strong support to the appropriateness of a restorative response to riots, particularly in regard to ensuring consistency with the stated purposes of sentencing in Canadian law. Implications for sentencing rioters based on these findings are offered.

Keywords: Restorative justice; riots; deterrence; sentencing; content analysis; cost-benefit analysis
Dedication

For my mother, Venera, and my father, Paschales. Without your unconditional love and support, this thesis would have been impossible. Thank you for everything.
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1. Introduction

On November 30, 1963, at Empire Stadium in Vancouver, British Columbia, the Canadian Football League held their Championship game between the BC Lions and the Hamilton Tiger Cats. Football fans from across Canada congregated to witness the event. The atmosphere in Vancouver during the game was festive and good-natured. The evening following the game, however, became unexpectedly violent following an assault against a woman with a thrown bottle. Police officers attempted to intervene when they became aware of the incident, but their efforts were heavily booed and only served to provoke the crowd further (Barnholden, 2005). Before long, the confrontation led to violence breaking out on the street that quickly escalated into a full-scale riot that saw people throwing beer bottles and rocks at police, damaging street signs, and smashing windows ("A Tale of Two Riots", 2011). A total of 319 arrests were made by the police between Friday and Sunday, the majority for public drunkenness and assault. The public disturbance resulted in hundreds of thousands of dollars in damages, and though not the most destructive riot in Vancouver’s history, was certainly among the largest in terms of sheer number of participants (Barnholden, 2005).

Despite the size and scale of the riot, authorities largely brushed it off, insisting that the situation had never gotten “out of hand” and explaining the public disturbance as simply the type of rambunctious behaviour to be expected during Grey Cup festivities. Police and event planners reassured the community they would be better prepared next time the Grey Cup was hosted in Vancouver, a day that finally arrived in 1966. Yet only three years after the 1963 disturbance another riot occurred, this one even more violent and destructive. Not long after the festivities began with the Grey Cup parade on Friday night, the streets were flooded with thousands of attendees eager to uproot street signs, tear down flags and decorations, shatter windows, and assail with rocks and bottles police officers who were attempting to clear the scene. Those present at the event soon found themselves "ankle-deep in broken glass" (Barnholden, 2005, p. 99). The riot’s conclusion saw approximately 300 people arrested - mostly for drunkenness and
malicious damage this time - and 37 people brought to hospital emergency rooms for
treatment for non-serious injuries. This time, coverage of the event was not so playful or
dissmissive; in fact, the riot shook up Vancouver residents and authorities so badly that
some suggested the city stop hosting the Grey Cup altogether (Barnholden, 2005).

The 1966 Grey Cup riot was the largest in Vancouver’s history until, 28 years
later, on June 14, 1994, the city witnessed a massive riot erupt following the Vancouver
Canucks’ loss to the New York Rangers in game 7 of the Stanley Cup Finals. An
estimated 50,000 to 70,000 people had gathered in Downtown Vancouver to celebrate
the anticipated win, and the unexpected loss sparked group violence at Robson and
Thurlow street that rapidly grew in size and continued into the following morning. As with
the previous Grey Cup riots, police were assaulted and city property was destroyed. This
riot was particularly destructive for many major retailers along Robson street, who
suffered extensive vandalism and looting (Barnholden, 2005; “A Tale of Two Riots”,
2011). Subduing the crowd required the direct involvement of over 540 police officers
and the eventual use of tear gas and plastic bullets, the latter of which resulted in one
rioter suffering a four-week coma and permanent brain damage. At the riot’s conclusion,
dozens of participants were arrested. Approximately 200 people were admitted to
hospital, mostly for having been exposed to the tear gas (Arthur, 2011). Total damage to
the downtown core was estimated to exceed $1.1 million CAD (Barnholden, 2005).

Following several comprehensive riot reviews examining the numerous factors
that contributed to the 1994 riot (Furlong and Keefe, 2011), it was hoped the city of
Vancouver would not see another riot of this size and scale for a long time. Regrettably,
only 17 years later, Vancouver experienced another hockey riot following the Canucks’
loss to the Boston Bruins in game 7 of the 2011 Stanley Cup finals – presently the
largest and most destructive riot in Vancouver’s history.

When communities experience instances of large-scale street group violence not
unlike the riots described above, the promise to exact retribution against those
responsible through the infliction of severe punishment is largely met with public support.
This is because the destruction caused by riots goes beyond the mere sum of each act
of vandalism, shoplifting, and violence committed by the individual participants; it
symbolizes a threat to social order itself. When seemingly peaceable crowds of people
use the power of numbers and the guise of anonymity to turn against their neighbours, the result is an overwhelming attack on the community as a whole – on the community’s sense of pride, safety, trust, and humanity. The sense of violation felt by community members is further exacerbated by the seeming inexplicability and pointlessness of the harmful acts committed. Just five days after the riot, social media blog dave.ca (Teixeira, 2011) published a post titled “Report the Vancouver Rioters Out of Civic Duty…or Revenge – Either is Fine”, an excerpt from which reads as follows:

Regular folks, does it make you sick to your core that a bunch of morons trashed our city, made the evening of June 15th unsafe for all, caused millions of dollars in damage which you will pay for in higher taxes and you know the names of the criminals? Report them!

The desire for revenge is a very personal one, much more so than the desire for retribution or punishment. Vengefulness is a retaliatory instinct triggered when one feels wrongfully harmed and seeks to restore balance through returning injury for injury (Sharpe, 2007). Viewed in this manner, it is wholly understandable that riots would provoke such emotionally-fuelled cries for punishment. Yet as reasonable as the anger and pain that fuels such responses may seem, a cursory glance at Vancouver’s history suggests that arrests and jail sentences alone do not do a very good job of preventing these disturbances from consistently reoccurring. On the other hand, responding to riots by working to understand and heal the harm done may yield more visible and long-term results.

Though the suggestion might seem outlandish to many still hurt and angry by the 2011 riot to this day, vengeance and restoration are really not so different in their fundamental aims. Both, ultimately, are attempts to restore balance and reduce the feelings of injustice that result when one person gains something at the expense of another (Sharpe, 2007). The difference between the two is that vengeful responses aim to accomplish these goals by increasing the suffering of offenders, while restorative responses focus on decreasing the suffering of victims. The unconstructive nature of vengeance as a response to crime, however, inevitably limits its utility. Revenge focuses purely on satisfying theoretical ideas about justice and equity via the meting out of punishment, with little attention devoted to the possible long-term benefits or consequences that may result (Walker, 1991). Restoration, instead, is constructive:
Because restorative responses focus on healing, rather than hurting, they carry the potential not only to remedy present imbalances but to address their root causes, thereby preventing future harm as well (Sharpe, 2007). Viewed in this way, restoration is thus just as capable as vengeance in providing justice and closure to those who suffer wrongful harm at the hands of another – and it is also capable of much, much more.

There exists a swiftly growing body of literature on the varied benefits associated with using restorative justice to respond to crimes, both for those who inflict harm and for those who are harmed (Johnstone, 2013; Johnstone and Van Ness, 2011; Latimer, Dowden and Muise, 2005; Sherman and Strang, 2007; Sullivan and Tifft, 2006); yet, little to no research exploring the potential benefits of using such an approach to provide justice to communities affected by riots. The extant literature that does exist for the time being consists mainly of preliminary findings from the UK involving young rioters charged in the 2011 London riots (Gavrielides, 2012). This thesis aims to fill this research gap by exploring the suitability of using restorative justice to respond to and repair communities affected by riots, using the Vancouver 2011 riot as a case study. Given this area of research is unprecedented, this thesis is largely exploratory in nature. Answering the question of whether restorative justice has a place in responding to riots of this size and scale requires answering a wide range of questions, including why riots occur; who are, and what characterizes, the rioters responsible for street group violence; whether prosecution should be the first and sole response; and whether there exists satisfactory evidence to justify general deterrence and denunciation as the primary sentencing purposes for rioters.

Chapter 2 begins by providing background information regarding the Stanley Cup riot that took place in Vancouver, British Columbia, on June 15th 2011. The first part of this chapter begins by examining the events that transpired both leading up to and during the riot, and follows with discussion regarding the various responses to the riot from the community, media, and criminal justice system, respectively. The chapter also discusses the numerous recommendations for restorative justice made following the riot, including those by John Furlong and Douglas J. Keefe in their comprehensive riot report, *The Night the City Became a Stadium* (the “Furlong Report”, 2011).
The second part of this chapter examines the theoretical group dynamics underpinning riot behaviour, following various psychosocial explanations put forward over the years to explain the “mob mentality” so often witnessed of rioters. Special emphasis is placed on deindividuation theories, particularly Zimbardo’s (1969) process model and the social identity view of deindividuation effects (SIDE) model (Reicher, 1984, 1987; Reicher, Spears, and Postmes, 1995).

Chapter 3 begins by providing a brief definition and description of the restorative justice paradigm, including the ways in which it differs from the conventional adversarial (or retributive) paradigm. The key principles of restorative justice are also described in terms of McCold’s (2000) three conceptualizations: victim reparation, offender responsibility, and reconciliation through a community of care.

The second part of this chapter explores general deterrence as a sentencing principle; in particular, the basis for its frequent citation as justification for custody and increased sentence severity (e.g., von Hirsch, 1999). The chapter begins with an overview of classical deterrence theory and follows with an in-depth literature review of the extant research supporting general deterrence and sentence severity. Also discussed is the role that general deterrence as a sentencing principle has played in Canadian criminal law, both historically and in the present day following the 1996 Criminal Code of Canada reforms that saw an increased emphasis on the use of restorative and rehabilitative sentencing measures (Manson et al., 2008).

Chapter 4 examines the sentencing of the rioters charged in the 2011 Vancouver Stanley Cup riot. This qualitative analysis is conducted using a case sample of the first 20 adult rioters sentenced in Vancouver Provincial Court, focusing on the sentencing rational used in determining the sentence. Uncovering emerging patterns in these judicial decisions shed valuable insight on who the individuals who participated in the riot were, and on the sentencing purposes and case law that guided judges’ decision making when sentencing the rioters.

Chapter 5 examines the costs and benefits of integrating restorative justice at various stages of the criminal justice system as part of the justice system response to rioters. The first part of this analysis examines the descriptive variables of a sample of
young adults charged with riot related offences, with particular focus on rioters’ ages, prior criminal histories, and charges. The sample consisted of the public court records of all rioters who were formally charged and in the process of being sentenced in Vancouver Provincial Court between June 15 2011 and November 1 2012. Court data was obtained from the Vancouver Police Department and BC Court Services Online. The second part of this analysis examines the potential economic benefits of sentencing young, first time, nonviolent offenders to a variety of community-based and restorative alternatives to custody, as well as with diverting said rioters to a restorative intervention at the pre-sentencing stage.

Finally, Chapter 6 discusses the cumulative findings of this thesis and the implications they present for sentencing rioters. Several recommendations are made to bring sentencing practices for this population in line with the intended outcomes of the 1996 Code reforms – particularly, those of increasing the use of alternatives to custody and restorative diversionary measures. The thesis concludes with a discussion of future areas of research and some final thoughts for moving forward.
2. The 2011 Vancouver Stanley Cup Riot

2.1. Background

On June 15th 2011, British Columbia's National Hockey League Team, the Vancouver Canucks, played their seventh and final game of the Stanley Cup Finals against the Boston Bruins. Media coverage of the event was extensive. In response to massive and unprecedented public interest prior to the game, city organizers in Vancouver set up a two-block long fan zone on Georgia Street near the Rogers Arena, where two big screen TVs were erected for fans to watch the game outside (Furlong and Keefe, 2011).

Although 1994 had seen a sports-related riot break out in downtown Vancouver under very similar circumstances, experts involved in setting up the fan zone believed the events of that night would not be repeated, because the large crowds that gathered downtown for the previous six hockey games were perceived as having been generally very well-behaved. The men’s hockey final during the 2010 Winter Olympics had proven to be nonviolent as well. Regardless, precautions were taken to reduce the presence of factors known to be conducive to rioting. "Check points" were installed outside the gated zone where police could control access to the area and check for alcohol, and liquor stores in the area were closed much earlier than usual. The check points also allowed police to prevent dangerous overcrowding within the fan site, another source of riot behaviour (Furlong and Keefe, 2011).

Despite these precautions, the crowd that assembled during game 7 was much larger than expected, and the level of intoxication and general hostility much higher than that which had been seen in previous games. As the game progressed, attendees increasingly found ways to enter the fan zone without being stopped by police or checked for alcohol, resulting in packed crowds that blocked off many planned corridors intended to allow movement of emergency vehicles (Furlong and Keefe, 2011).
According to police, this was also the only game of the seven in which some fans came downtown with the express purpose of starting a riot (Vancouver Police Department, 2011b). As the game progressed, approximately 100,000 people eventually crowded into the fan site, with 155,000 people in total estimated to have congregated in the general area of downtown Vancouver (Furlong and Keefe, 2011).

Following the Boston Bruins’ win over the Vancouver Canucks at approximately 7:45PM, two riots simultaneously broke out at the Live Site location on Georgia Street and at Nelson and Granville Street, respectively. Spectators were witnessed throwing bottles and other objects at the large screens in the viewing area, setting jerseys alight, committing acts of assault, and overturning cars (Furlong and Keefe, 2011; “Pandemonium”, 2011). Although riot police eventually managed to push the rioters away from Georgia Street, this proved ineffective in deterring the rioters as the police were unaware of the riot that had broken out near Nelson and Granville Street already. The rioters thus caused further substantial damage to the areas in which they were relocated. In about three hours and with the assistance of other agencies in Metro Vancouver, the Vancouver Police Department (VPD) managed to bring the situation under control, and by midnight the crowd had mostly dispersed (Furlong and Keefe, 2011). Although no serious injuries or deaths were reported, the damage suffered by the riot was immense. As of June 2013, 112 businesses had reported extensive vandalism, arson and theft; at least 122 vehicles were reported damaged or destroyed, 22 of which were emergency vehicles (Howell, 2013). The total cost of the damage estimated by the Downtown Vancouver Business Improvement Association exceeded $5 million CAD (Bulman, 2011). In the days following, the riot was described by Chief Constable Jim Chu of the VPD as “the largest crime spree in B.C.’s history” (Lum, 2011).

In addition to the damage done to businesses and personal property, the riot was enormously traumatic for many of those caught up in the chaos. Many police officers,

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1 In the Vancouver Police Department’s (2011b) review of the riot, one reason given for why the riot was so difficult to control was that it had two “starting” points, rather than one, as police had anticipated; it is highly unusual for a sporting event to trigger two riots simultaneously in two different areas.
bystanders, and employees whose businesses were targeted reported having been directly assaulted by rioters, some while attempting to intervene and stop them (Howe, 2013). Countless more experienced deep psychological harm and trauma from being trapped in the vicinity of the riot, including several hundred theatregoers who found themselves unable to safely leave the Queen Elizabeth Theatre that was situated in the riot zone (“Bystanders Share Experiences”, 2011). Among the most traumatized by the riot were those employees who found themselves trapped inside their place of work when their businesses were attacked, including about 27 employees forced to lock themselves in the basement of a London Drugs that suffered extensive looting and vandalism throughout the riot; many of these individuals later reported that they had feared the store would be set on fire while they were locked inside and were terrified for their lives (Spencer, 2013). Between June 15 2011 and June 15 2012, WorkSafeBC received 51 claims from individuals stating they had been psychologically harmed by the riot, 24 of which have been paid out as of June 2012 (“PTSD Claims”, 2012).

2.2. Aftermath: Anger, shame and vengeance

2.2.1. Investigation and criminal prosecution

Not long after the riot, the Integrated Riot Investigation Team (IRIT), consisting of over 30 members of the Vancouver Police Department (VPD), Royal Canadian Mounted Police (RCMP), special prosecutors, and municipal officers was set up to collect evidence and investigate suspected rioters (Georgia Straight, 2011). The response to the riot on the part of the IRIT was swift and severe, as evidenced in several public statements made by police promising hefty penalties and expressing a clear desire to see rioters punished to the fullest extent of the law. One such statement was delivered on August 17 2011 by Chief Constable Jim Chu:

Our diligence and thoroughness will ensure that we lay the highest number of charges and obtain the greatest number of convictions with the most severe penalties. We will not rest or bow to pressure until all the evidence has been examined. We owe it to those who lost property and others who suffered losses to do this right. If you are in favour of speed, you are in favour of acquittals and lighter sentences (Georgia Straight, 2011).
What distinguished this investigation from others in Canada’s history was the great effort made on the part of the IRIT to secure cooperation from the public in apprehending rioters, primarily through encouraging the submission of photographic and video evidence from the night of the riot. Flyers printed with the faces of alleged rioters were distributed widely to the public, and a website was set up immediately following the riot to allow those with evidence to upload it directly to police. This strategy proved extremely advantageous to the IRIT’s investigation: More than 1,000,000 photos and 1,200 hours of video were eventually sent to IRIT in the months following, with so many sent on June 16 2011 - the day following the riot - that the website temporarily crashed (Vancouver Police Department, 2011b).

As of June 2013, 332 rioters have had 1,113 charges recommended against them; of these, 714 charges against 234 rioters have been approved by Crown Counsel. (Vancouver Police Department, 2013). These numbers are significantly higher than those seen following the 1994 Stanley cup riot, which resulted in only about 50 arrests and approximately 20 criminal charges being laid in total (Arthur, 2011). The much more serious approach to apprehending and sentencing rioters that police have adopted for the 2011 riot is also evidenced in the recommendation that all rioters be charged with participating in a riot, an indictable-only offence with a maximum penalty of two years' imprisonment (see Appendix A for the full list of charges laid against rioters). The decision was confirmed early on by Chu to be a deliberate one, who defended the approach on the grounds that “…this is the most serious charge we can lay and will ensure the most accountability from the courts.” (Vancouver Police Department, 2011a).

As of June 2013 the investigation has been estimated by the IRIT to have cost approximately $2 million CAD in wages, analysts, and forensic lab costs, making it the most expensive investigation of its kind in Canadian history (“Stanley Cup Riot Lawsuit Filed”, 2013)

2 See riot2011.vpd.ca
2.2.2. **Media coverage**

The June 15 riot was covered extensively at the local, national, and international level, with local media coverage beginning almost immediately after the game ended. Many prominent publications ran editorials critical of those who participated in the riots, painting participants as hooligans and lacking in intelligence. One article from *The Atlantic* contained the following passage:

> In Syria they riot for freedom. In Pakistan they riot against drone strikes. In China they riot about many things, most recently in the Guangdong province for worker's rights. But in Canada, which is officially ranked as one of the wealthiest and most peaceful nations in the world, they riot over, yes, hockey (Fisher, 2011).

Similar sentiments were expressed by *TIME Magazine*, who ran an article titled “Vancouver Riots: Hockey Fans Stick It to Their Own City” (Newcomb, 2011), and news website masslive.com, who described Vancouver rioters as “sore losers” (“Sore Losers”, 2011).

Following the continuous negative news coverage in the days after the riot, Vancouver’s reputation suffered greatly. Bob Whitelaw, an investigator who looked into the damage caused by the 1994 riot as well, described the damage done to Vancouver following the 2011 riot as “…a million dollars of property damage, a billion dollars worth of image destruction for Vancouver” and added that it would likely “take years, not months, to retrieve the [city's] good image” (“Vancouver’s Riot”, 2011). News stories and editorials discussing the riot soon became heavy with emotional language indicative of shame, embarrassment, and anger. Vancouver was described by The Province as a “tarnished” city (Gee, 2011), and by CBS news as “embarrassed” over the post-game disturbance (“Vancouver “embarrassed””, 2011). Public statements by prominent figures such as Mayor of Vancouver Gregor Robertson (Hui, 2011) and British Columbian musician Matthew Good (2011) echoed these sentiments, with the latter claiming in an opinion piece in UK newspaper *The Guardian* that the riots had made ”a mockery of Vancouver's claims to be a world-class city”.

Likely fueled by these same feelings of embarrassment and outrage, users on popular social media websites such as Facebook and Twitter rapidly took to further disparaging the rioters’ actions. Before long, these websites were used to personally
target those allegedly responsible for the disturbance. Public Facebook groups with names such as “[the] Vancouver Riot Wall of Shame”\(^3\), “Vancouver Riot Pics: Post Your Photos”\(^4\), and “Report Canuck RIOT Morons”\(^5\) were soon set up to enable and encourage those present at the riot to upload photographs, videos, and any other evidence incriminating to alleged rioters. Though the stated intent of these groups was to expose rioters in a public venue in order to coerce them to turn themselves in, many of those who joined the groups soon took to using the public nature of the group to unreservedly insult, humiliate, and even threaten those suspected of having participated. On a handful of occasions this “naming and shaming” escalated to the point that highly personal information pertaining to alleged rioters, such as phone numbers, home addresses, and the names of family members, were published online, leading to some suspects being personally harassed and threatened by strangers (Beaumont, 2011). Questions soon arose regarding whether this online community vigilantism on the part of Vancouver residents constituted merely another example of unruly mob behaviour in reverse (“Vancouver Riots”, 2011; Torrevillas, 2011).

Not all responses on behalf of the community to the riot were vindictive; social media websites were also used to reach out to the wider community and facilitate cooperation and community solidarity. One well-documented example of this occurred when thousands of volunteers utilized Facebook and Twitter to organize a volunteer-led group clean up of the damage\(^6\). An estimated 15,000 volunteers arrived downtown with brooms and dustpans, many of whom also took the time to cover boarded up windows with apologies and defences of the city’s reputation. Although the event was covered positively in media and described as highly conducive to healing and restoration, it is worth noting that these efforts, for the most part, occurred to the exclusion of rioters. Many volunteers reported they went downtown to clean up the damage so that they could "...show that not all Canucks fans are like that" (O'Connor, 2011); similarly, a

\(^3\) See https://www.facebook.com/pages/Vancouver-Riot-Wall-of-Shame-Named-Photos-ONLY/206702666041629
\(^4\) See https://www.facebook.com/VancouverUp.datesandnews
\(^6\) See https://www.facebook.com/theREALvancouver
substantial proportion of messages written on the boards were affirmations that the rioters did not represent the residents of Vancouver as a whole (Cole, 2011). It is apparent that for many of these volunteers, these actions were motivated by a desire to differentiate themselves from rioters.

### 2.2.3. Requests and recommendations for restorative justice

Not all who witnessed the aftermath of the June 15 riot supported the punitive response advocated by many in the Vancouver community. In contrast to the rampant online vigilantism and threats of severe retribution repeatedly promised by the police, several media outlets also ran articles advocating for the benefits of incorporating restorative justice into the community’s response to the riot. In one opinion piece published in the Georgia Straight, Vancouver-based restorative facilitator and consultant Evelyn Zellerer (2011) questioned the benefits to be gained from “declaring war on rioters” and maintained that the confrontational and emotionally powerful nature of restorative justice demonstrated that such processes were anything but “soft of crime”:

I also cannot stand the thought of all those who rioted having no consequences, ineffective sentences, or filling up our prisons where they will learn more about crime and violence. I want offenders to directly face their victims and their community, understand the full extent of their actions, make amends, and learn some things of value. And we need to find out what is going on in their world and what they need to be non-violent, healthy, contributing citizens. Like it or not, they are a part of our community too. Even if they go to prison, they will return. There is no enemy. It’s only us.

Let me set the record straight: restorative justice is not soft on crime. Think about if you hurt someone: what would be the hardest thing to do? I’m sure it would be to directly face those you harmed and sit alongside your family/peers/community in determining the consequences.

Perhaps most surprisingly, a lengthy request for restorative justice was made in the comprehensive independent riot review *The Night the City Became a Stadium* (2011), also known as “the Furlong Report”, authored by John Furlong and Douglas J. Keefe and delivered to the Police Board in August 2011. Among the many conclusions drawn in the lengthy report were that the riot was likely started by a core group of about 1,000 unruly game watchers, that alcohol and crowd congestion played a critical role in
fuelling the behaviour of these individuals, and that police unfortunately arrived too late
to control the unpredictable crowd of over 155,000 people. As instructed, the report
concluded with numerous recommendations for how Vancouver officials and VPD could
work together to allow the city to continue to hold public celebrations without risking
another riot. Above and beyond its mandated scope, however, the report also included
recommendations for bringing the rioters responsible to justice.

Citing Deputy Prime Minister of the United Kingdom Nick Clegg’s announcement
of plans for a “riot payback scheme” that would embed restorative principles into the
that Vancouver, too, would benefit from following the UK’s example. Their
recommendations echoed Zellerer’s (2011) assertion that “declaring war on rioters” via
persecution and incarceration would not only needlessly sabotage any attempts made
by those who participated to learn from their mistakes and make amends, but would not
benefit the community of Vancouver in any tangible way:

As these young people mature and try to build a useful life they will
find they have a criminal record of a sort that never existed before.
Restorative justice provides a way for an offender to demonstrate
remorse and a renewed commitment to the community.

Many young people break the law. Not many years ago if a person was
not caught by the police, prosecuted, and convicted, there would be no
record of it. And, if there was, it would be sealed. Today a young
person, perhaps with the help of the stranger cheering his antics, can
create his own criminal record – one that cannot be expunged – to dog
him for the rest of his life. The anonymity the rioters of 1966 and 1994
enjoy today is not available to their children and grandchildren. The
community owes them nothing, but a wise community will offer them
something – an opportunity to make amends.

The suggestion to use restorative justice in this way has not gone without
criticism. Acknowledging that restorative justice processes typically cannot proceed
without a guilty plea or expression of remorse on the part of the offender (John Howard
Society of Alberta, 1998), some opponents of the approach have argued that it is overly
idealistic to expect all rioters to be so willing to admit responsibility and cooperate with
the process. How can those seeking justice bring themselves to believe that the angry
and violent young men and women who, only two years ago, seemed perfectly content
to commit such senseless acts of violence and vandalism are capable of learning
anything from the immense harm caused by their actions? As it happens, a growing body of research in the area of social psychology and group dynamics lends strong support to the notion that many people who end up participating in riots do not ordinarily behave in antinormative ways or engage in criminal activity. Rather, their participation is often a result of the curious ways in which group membership and perceptions of anonymity act to lower feelings of fear and guilt, causing people to behave uninhibitedly and in ways they ordinarily would not. Those who participate in riots are often not psychopathic or ruthless at all, but rather, typical young people in the wrong place at the wrong time. In other words, their behaviour can only be understood in the social and emotional context in which it occurred.

2.3. Street group violence and riots

2.3.1. Definition

Inconsistent definitions exist regarding the term “riot”. According to de la Roche (1996), riots may be perceived as a form of street group violence, which subsequently refers to group violence that “occurs on the streets and is unilateral, time-bound and non-governmental”. The World Health Organization (2002, p. 5, as cited in Gavrielides, 2012) lists collective violence, i.e. group violence, as one of three categories of violence, which they define broadly as “the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation”.

The definition utilized in this thesis is that settled on by McPhail and Wohlstein (1983, p. 581), who define a riot as “a gathering or demonstration consisting primarily, but not exclusively, of individual and/or collective violence against person or property.” They further define a “gathering” as “two or more persons present at one time in a public place” (p. 580). Though gatherings are not synonymous with riots, riots nearly always presuppose gatherings – hence, a gathering must occur before a riot (McPhail and Wohlstein, 1983).
2.3.2. “I don’t know why I joined”: Understanding riot behaviour

Riots precipitated by sporting events, such as that which occurred in Vancouver in June 2011, have been acknowledged as a universal and ongoing concern in many nations (Baron and Kerr, 2003; Russell, 2003). They are a troubling and costly phenomena to the communities affected by them, often responsible for thousands - if not millions - of dollars in destruction and property damage. They lead to countless injuries and sometimes, even deaths. Although a definitive answer as to whether recent decades have seen an increase in sports riots remains elusive due to minimal and inconclusive evidence (Russell, 2003), it remains clear nonetheless that they occur worldwide on a fairly consistent and predictable basis (Bryan and Horton, 1976; Van Limbergen et al., 1989, as cited in Russell, 2003).

Researchers in the social sciences have investigated for decades how and why human being collectively organize and control their own behaviours in the presence of one another (Baldassare, 1978; Baron and Kerr, 2003; Forsyth, 2006; Freedman, 1975; McPhail and Wohlstein, 1983; Schneider, 1992; Wheeler, 1966). The particular form of social disorder known as a “riot”, however, continues to be perceived with considerable lack of understanding, as witnessed by the fact that they are so often described in both research publications and media sources as “senseless” or “pointless” (Baron and Kerr, 2003; Forsyth, 2003; Schneider, 1992). One major reason underlying the dearth of research in this field is that riots, by nature, are unplanned with respect to time and place. Another is that, given the illegality of riotous behaviour, potential subjects are generally reluctant or unable to cooperate with researchers, meaning that most research on riot behaviour has relied on archival sources and interviews with members of groups that have a history of violence. Yet a third emerges from this primary reliance on archival data: Not only are “riots” frequently misidentified and mislabelled by reporters and witnesses, but media and other official estimates of spectator violence tend to selectively report the frequency of crowd disturbances (Russell, 2003). Archival data thus not only underestimates the true amount of riot behaviour that occurs, but misrepresents its scale and characteristics.

In spite of the limited research in this area, numerous explanations have been put forward as to how and why riots occur, including several specific to sports riots and
spectator violence (Branscombe and Wann, 1992; Kerr, 2005; Mann, 1989; Simons and Taylor, 1992, as cited in Russell, 2003). Thus far, most studies conducted to identify the variables that predispose individuals to behave antinormatively at sporting events have, regardless of theoretical basis, confirmed the existence of a relationship between group size and aggression. In an early study, Mann (1977, as cited in Mann and Pearce, 1978) reported that fans of Australian football league games who attended matches with others scored higher on a measure of hostility than fans attending alone. Other field studies involving sports spectators (Arms and Russell, 1997; Zani and Kirchler, 1991) have reported similar findings: in particular, they have found that those attending sporting events in groups are typically more angry, more physically aggressive, more willing than others to escalate a disturbance, more impulsive, and more “sensation seeking”. Thus, as the groups within a sports crowd increase in number and size, so too does the threat to public order.

One explanation that has been put forward for the apparent relationship between group size and aggression is simply that as group size increases, the amount of individual spectators predisposed to commit violence who are likely to be in that crowd increases accordingly (Russell, 2003). Indeed, a number of recent studies have confirmed that those personality traits identified by Mann (1977, as cited in Mann and Pearce, 1978) - a tendency to be impulsive, antisocial, sensation seeking, angry, and physically aggressive – serve as accurate predictors of not just whether a spectator will attend a sporting event in a group, but whether they will actually initiate and/or join a crowd disturbance. Russell (1995) found support for these findings by assessing the importance of various personality measures relative to biographic/demographic variables; a number of follow-up field studies examining fans who engaged in riotous conduct at ice hockey games have since confirmed the relationship (Arms and Russell, 1997; Mustonen, Arms, and Russell, 1996; Russell and Arms, 1995). Additionally, other studies have shown the above personality traits to be important predictors of the level of one’s fanship (Miller, 1976, as cited in Russell, 2003) – which, in turn, has been found to be an important predictor of one’s likelihood of exhibiting violent behaviour (Mann, 1977, as cited in Mann and Pearce, 1978; Wann, Haynes, McLean, and Pullen, 2003; Zani and Kirchler, 1991).
Though these studies are invaluable in lending understanding to how and why some individuals instigate violence at sporting events, they tell only part of the story of how large scale sports riots fully develop and unfold. In particular, these studies do not account for why ordinarily law-abiding individuals can so easily find themselves “swept up” in riots and behaving in uncharacteristically violent and disruptive ways, nor does it account for the “mob mentality” so frequently described by witnesses as characterizing riot disturbances (e.g., Forsyth, 2006). Such behaviour becomes even more puzzling when it is recognized that many classic and recent studies in the fields of sociology and psychology have shown that the presence of others typically produces conditions that should encourage, rather than discourage, conformity to group norms and standards (see Asch, 1951, 1955; Cialdini and Goldstein, 2004; Deutsch and Gerard, 1955; Drury and Reicher, 2000; Reicher, 1999; Reicher and Haslam, 2006; Sherif, 1936). Even those theories that do account for antinormative collective behaviour, such as Turner and Killian’s emergent norm theory (1972) – which posits that group behaviour that appears to be normless is actually governed by temporary norms that emerge from the given situation – do not fully explain the processes underlying how and why destructive, violent behaviours would come to arise as situation-specific norms in the context of a riot in the first place.

One of the most frequently-cited explanations offered in recent years as to why so many people are so often “caught up” in riots, mobs, and other forms of street group violence is that such individuals act as a result of experiencing deindividuation, defined by Postmes and Spears (1998, p. 238) as “a psychological state of decreased self-evaluation and decreased evaluation apprehension causing antinormative and disinhibited behaviour”. The phenomenon of deindividuation is fairly well established, having been portrayed in social psychology texts as having recognizable and predictable effects on human behaviour since the 1980s (see Baron and Kerr, 2003; Forsyth, 2006; Paulus, 1980; Shaw, 1981). Less well understood, however, is exactly how and why deindividuation occurs – and as will be seen, the various theories put forward and tested over the years have been numerous and contradictory.

Deindividuation theories are based largely on the classic crowd theory of Gustave Le Bon ([1895]1995, as cited in Postmes and Spears, 1998), which in turn was influenced largely by the idea of an “aggression instinct”. In The Crowd: A Study of the
Popular Mind, Le Bon describes how, when the psychological mechanisms of anonymity, suggestibility, and contagion combine, individual people may find themselves taken over by the “collective mind”. The individual then loses self-control and personal feelings of responsibility and becomes capable of violating personal and social norms he or she otherwise would not:

Whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character, or their intelligence, the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think, and act in a manner quite different from that in which each individual would feel, think, and act were he in a state of isolation ([1895]1995, p. 27, as cited in Postmes and Spears, 1998).

After a period of stagnation, Festinger, Pepitone and Newcomb (1952) reintroduced Le Bon's theory into mainstream social psychology, though they abandoned the notions of the “collective mind” and “aggression instinct”. Instead, they explained collective crowd violence as occurring when individuals enter a particular psychological state where they do not feel observed nor as though they will be held responsible for their actions, labeling this mental state deindividuation. Festinger et al. (1952) thus theorized that individuals escape from, rather than conform to, social norms within the context of a crowd.

Years later, Philip Zimbardo (1969) built upon this hypothesis in order to construct his process model of deindividuation, which fully developed the theory and laid the initial groundwork for empirical tests of its validity. Supporting Festinger and co-authors’ (1952) definition of deindividuation, Zimbardo went on to specify the exact causes and consequences of the deindividuated state in his model. He contended that a variety of factors could lead to the emotional, impulsive, and irrational behaviour so often displayed by deindividuated individuals, including (among others) the loss of individual responsibility, arousal, sensory overload, novel or unstructured situations, consciousness-altering substances, and – arguably the most important of these variables - anonymity (Postmes and Spears, 1998). According to Zimbardo’s (1969) early model, anonymity facilitates deindividuation because it lowers those feelings of fear associated with detection, evaluation or legal sanctions that ordinarily cause people to comply with norms. One of Zimbardo’s (1969) earliest and most well-known experiments to put this hypothesis to the test appeared to support his hypothesis: when participants
were asked to give electric shocks to two individuals, those participants who were anonymous to participants gave longer shocks than those who were identifiable.

Since Zimbardo developed his process model, studies have found fairly consistent relationships between many of his specified input variables and antinormative collective behaviour. Anonymity has been found repeatedly to play a key role in enabling antinormative and criminal behaviours (Cannavale, Scarr and Pepitone, 1970; Kiesler, Siegel and McGuire, 1984; Mann, 1981; Mathes and Guest, 1976), increasing aggression (Donnerstein, Donnerstein, Simon and Ditrichs, 1972; Mann, Mewton and Innes, 1982, as cited in Russell, 2003; Mathes and Kahn, 1975; Page and Moss, 1976), and reducing fear (Amoroso and Walters, 1969). Conditions that trigger arousal and sensory overload in people have been linked to antinormative collective behaviour as well (Zillmannn, 1979). The phenomenon of diffusion of responsibility, in which individuals feel less responsible for their actions within groups, has also been verified in dozens of studies (Forsyth, 2006) - and accordingly, anonymity has also been demonstrated to have enhanced effects on behaviour within the group context (Cannavale et al., 1970; Diener, Fraser, Beaman and Kelem, 1976; Mathes and Guest, 1976; Mathes and Kahn, 1975). These findings are consistent with sports violence being more likely to take place as group size increases (Arms and Russell, 1997; Zani and Kirchler, 1991), as well as with the “sore loser” reactions observed by Mann (1974) in fans of losing teams: the more fans attributed spectator violence to external factors beyond their control, the more often they had participated in disturbances.

Despite these positive findings, early studies (e.g., Diener, Westford, Dineen and Fraser, 1973) and research reviews (Diener, 1977; Dipboye, 1979) of Zimbardo’s (1969) hypothesis have also yielded inconsistent and contradictory results, particularly regarding the effects of anonymity on aggression. Diener (1980) attempted to amend these inconsistencies by arguing that lack of self-awareness, rather than anonymity, is

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7 Diener (1980) still acknowledged the important role of anonymity in enabling deindividuation, explaining that loss of self-awareness is frequently triggered by anonymity and thus significant overlap between the two variables should be expected in tests of the theory.
actually the most important variable leading to deindividuation (Forsyth, 2006; Postmes and Spears, 1998). Diener's (1980) early tests supported this theory, finding that deindividuated individuals do typically report very low levels of self-awareness; interestingly, they also found evidence suggesting that deindividuated participants reported more extreme altered experiencing than individuals not exposed to deindividuating conditions. Prentice-Dunn and Rogers (1982, 1989) expanded Diener’s hypothesis further through distinguishing between public self-awareness (when others are made aware of one’s antinormative behaviour, such as through visual observation) and private self-awareness (when one is made aware of one’s own antinormative behaviour, such as with the use of mirrors). They concluded that deindividuation is caused primarily by a decrease in private self-awareness, which subsequently occurs when “attentional cues,” such as group cohesiveness and physiological arousal, draw attention away from one’s own behaviour (Prentice-Dunn and Rogers, 1982, 1989).

Although the addition of the self-awareness variable to Zimbardo’s process model addressed some of the inconsistencies found in early deindividuation research, studies that have included this variable have not been entirely consistent either (Diener, 1979). One recently proposed - and very different - alternative to the previously discussed deindividuation models is the social identity view of deindividuation effects model, or SIDE model (Reicher, 1984, 1987; Reicher, Spears and Postmes, 1995). The SIDE model is based on Turner and Killian’s aforementioned emergent norm theory (1972), which developed from Sherif’s (1936) classic analysis demonstrating how norms emerge in ambiguous situations through members gradually aligning their actions. According to emergent norm theory, collective behaviour which may appear antinormative and unstructured actually is normative, but according to temporary norms unique to the group and context – the behaviour is literally experienced as “normal” to in-group members. Hence, unlike Zimbardo’s process model, emergent norm theory makes an important distinction between general social norms and situational (or group-specific) norms (Postmes and Spears, 1998; Reicher et al., 1995).

Like Turner and Killian’s emergent norm theory, the SIDE model posits that “antinormative” collective behaviour is actually guided by group norms that emerge in the specific context of the crowd. However, the model builds on emergent norm theory by using anonymity and self-awareness - among other variables - to explain the process
behind how and why people conform to those group norms. While Zimbardo’s process model posits that assorted input variables enable deindividuation by causing group members to no longer feel obligated to comply with any norms at all, the SIDE model instead asserts that these variables enable deindividuation by causing group members to focus less on their own individual features and more on their status as a group member. This, in turn, causes them to be more responsive to situational group norms than to general social norms (Reicher et al., 1995). A growing body of research thus far supports the assumptions made by the SIDE model, particularly that anonymity increases group identification and conformity to group norms (Johnson and Downing, 1979; Lea, Spears, and deGroot, 2001; Lee, 2004, 2007, 2008; Postmes, Spears, Sakhel and deGroot, 2001; Spears, Lea, and Lee, 1990).

Because the SIDE model distinguishes between general and group-specific norms, it accounts for much of the inconsistency found in previous experiments that manipulated anonymity and deindividuation conditions alone (Reicher et al., 1995). However, the SIDE model still does not explain the process underlying exactly why the situation-specific norms that emerge in groups can so often be so violent and destructive, as seen when a peaceful gathering suddenly transforms into a mob or riot. This issue is addressed somewhat by modeling, in which individuals behave in certain ways that may then suggest to others that such behaviour is normative. Behavioural modeling is a well-established social psychological phenomenon, especially as it pertains to aggression (see Anderson and Dill, 2000; Bandura, Ross, and Ross, 1961, 1963; Paik and Comstock, 1994), and can have particularly strong effects when the behaviour in question evokes attention or approval (e.g., cheers) from others in the group. It can account for why people who would ordinarily not exhibit aggressive or impulsive behaviour within a group context may do if they first witnessed such behaviour on the part of “models” (the “instigators” described earlier), because the theory assumes that many in such a position would feel pressured to mimic the behaviour of the models and “conform” to what they perceive to be the new group norms.

Arguably the best research currently available to determine how well the respective deindividuation theories put forward over the years are able to predict antinormative crowd behaviour is the extensive meta-analysis conducted by Tom
Postmes and Russell Spears (1998). Examining over 60 tests of numerous variations of the theory, they concluded that, overall:

- Anonymity\(^8\) is significantly – but weakly - correlated with antinormative behaviour and aggression;
- Group size and group membership, respectively, are significantly – but weakly - associated with antinormative behaviour;
- Manipulations that combined different variables triggered significantly heightened measures of antinormative behaviour;
- Anonymity, group membership, and reductions in self-awareness are strongly correlated with conformity to norms that emerge spontaneously in the group setting;
- Private self-awareness had no significant link to antinormative behaviour
- Anonymity from in-group members was not linked to aggressive and antinormative behaviour, but anonymity from out-group members was;
- The input variables specified by Zimbardo (1969), Diener (1980), and Prentice-Dunn (1982, 1989) do not trigger psychological changes, nor do these supposed changes mediate the relationship between said variables and antinormative behaviour.

Viewed as a whole, the findings from the existing body of research on deindividuation appear to confirm the key roles that anonymity, group cohesion and group action play in triggering antinormative behaviour, although private self-awareness does not seem to have much predictive value\(^9\). However, there exist several limitations when it comes to verifying with certainty whether the examined variables do, in fact, predict deindividuation. Major generalizability issues present themselves in the fact that

\(^8\) Anonymity was the most frequently included variable in the deindividuation studies examined.
\(^9\) Although decreased public self-awareness did predict antinormative behaviour, it was pointed out by Baron and Kerr (2003) that this variable is virtually identical to anonymity – that is, being in a state in which one feels they are not being observed or identified by others.
different studies measure different outcome variables; while earlier studies tend to measure more general output behaviours such as aggression, studies utilizing the SIDE model measure conformity to group norms, specifically. Thus, different studies may not focus on the same phenomenon. Additionally, an intervening variable that studies often fail to account for is the intense emotion that often accompanies mob action, which is difficult to replicate in lab settings and can significantly influence behaviour (Baron and Kerr, 2003). The full range of deindividuation phenomena thus remains unexplained for the time being.

For the most part, the SIDE model is consistent with other observations that have been made and studies that have been conducted on how and why crowd violence and spectator violence occur. Hockey spectators who report a strong likelihood that they would join in a crowd disturbance, for example, also tend to believe that a disproportionately large number of other spectators would take the same course of action (Arms and Russell, 1997; Russell and Arms 1998); the SIDE model would attribute this to the possibility that such individuals may take encouragement from their perception that participating in a riot would be accepted if they chose to do so. The model also explains why seemingly so few individuals attempt to stop antinormative crowd behaviour when it takes place (Wann, Melnick, Russell, and Pease, 2001, as cited in Russell, 2003; Russell and Arms, 2001; Russell, Arms and Mustonen, 1999). The fact that rioters were not deterred by the presence of cameras and smartphones documenting the destruction that took place that night - and in fact, often willingly posed for photos (Furlong and Keefe, 2011) - is less easy to explain, as the evidence suggests that increased public self-awareness should decrease the likelihood that an individual will exhibit antinormative behaviour. However, if being observed, photographed, and/or filmed by others was interpreted by rioters as encouragement, modeling provides an explanation for this seemingly inexplicable behaviour. Ultimately, deindividuation theories further our understanding of why people participate in riots by acknowledging the importance of the *psychological reality of the group* in guiding the actions of group members.

It may be the case that many of those who participated in the 2011 Vancouver riot were ordinarily law-abiding young people who got carried up in the emerging chaos as a result of the unfortunate combination of situational and circumstantial factors. An
interview by Gavrielides (2012, p. 38) with a rioter charged in the 2011 Vancouver riot lends credence to the implication made by deindividuation theories that people often participate in riots not following planning or deliberation but rather, impulsively and in large part due to unseen group pressures and crowd influence. When asked why he got involved in the riots and what led him to join the crowd, the rioter explained:

I honestly do not know what happened to me. I can’t really explain it. I rarely go downtown – I just went for the game and when I saw lots of people rioting... well, it looked exciting at the time. I joined and I remember it was as if I was watching myself do things I would never do.

A practitioner interviewed by Gavrielides (2012, p. 16) following the London, UK riots made an observation that is also consistent with deindividuation as an explanation for riot behaviour:

I have been involved in most of the serious riots in the UK from the late 60s to the late 80s. The one striking factor that I have noticed is that there is a moment when the crowd of individuals, often individually violent or threatening, does change to a riotous mob with an almost concerted joint action and a loss of individual choice of control.

Stephen Reicher (2011), responding to the riots that took place in and around London, UK in 2011, argues the importance of locating empirically grounded explanations for why riots occur and warns of the dangers of dismissing such attempts at understanding as “making excuses” for people who, some insist, deserve only to be punished. Correspondingly, the findings of this chapter should be considered a valuable contribution to our understanding of why people who typically exhibit little violent or antinormative behaviour will readily participate in riots when they break out, which can then be included in our responses, legal and otherwise, to such events.

If group processes and situational factors did play a primary role in enabling the 2011 Vancouver riot, then a justice response that seeks only to mete out punishment and make an example of these young people may not be the most appropriate use of limited police and court resources. This approach contributes nothing to the community’s understanding of what it was that caused these otherwise law-abiding young people to turn on their own communities, nor to helping rioters understand why they behaved as they did and how they can learn meaningful lessons from their mistakes. The 2011
Vancouver riot requires not a short term solution focused only on achieving temporary deterrence through fear of punishment, but a long-term solution capable of looking to the future and addressing a range of potential underlying root causes in order to minimize the chance that such events will occur again.
3. The Case Against Custody: Establishing Appropriate Sentencing Guidelines for Rioters in Canada

3.1. A restorative response to a riot

Upon examining the scope of the harm inflicted upon Vancouver by the 2011 riot, and the peculiar reasons as to why such riots occur, it is not difficult to imagine the many ways in which communities that suffer riots would be left in need of repair and healing. Riots are not only enormously expensive and destructive for the communities in which they take place, but highly traumatic for individual people caught up in the chaos. The senselessness and unpredictability of the crimes committed undoubtedly leaves those affected confused and desperate to make some sense of the events. And of course, there is the question of how best to hold accountable those hundreds of rioters responsible for the damage, many of whom were likely caught up in the chaos and left just as confused by the senselessness of their actions as those who were victimized by them.

It is clear that more is required to address the harm done to individual people and their communities by riots than just the meting out of punishment. Recovering from riots of this size and scale requires that communities work together to understand exactly what happened, how to repair the damage done and make things right, and how to move forward. If anonymity is a factor in enabling antinormative behaviour, then perhaps a good place to start the recovery process is to build understanding, re-establish behavioural standards of responsible citizenship, and resolve the harm caused by riots publicly and openly, via humanized, face-to-face restorative processes.
3.1.1. The meaning of restorative justice

Restorative justice, varyingly known as reparative justice, is one of three types of criminal justice distinguished by Eglash (1977, cited in Gavrielides, 2012), the other two being retributive and distributive. The conventional justice philosophy that has dominated criminal justice discourse over the years is that of retributive justice. Within this paradigm, crime is viewed first and foremost as a violation of the state, and denunciation and the meting out of proportionate punishment are emphasized as key principles (Sharpe, 1998; Zehr, 2005). Zehr (2005) describes the retributive paradigm as ultimately revolving around three central questions:

1. What laws have been broken?
2. Who did it?
3. What do they deserve?

The restorative paradigm, in contrast, views crime as a violation not against the state but against individuals and the community. Restorative justice is thus an approach to justice wherein responses to crime focus primarily on the needs of victims, offenders, and the wider community (Zehr, 2005). Marshall’s (1999) definition of restorative justice, among the most frequently cited in restorative justice literature, describes it as “…a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”. This definition has since been expanded upon by Susan Sharpe (1998, p. 7), who proposed five key values of restorative justice:

1. Restorative justice invites full participation and consensus.
2. Restorative justice seeks to heal what is broken.
3. Restorative justice seeks full and direct accountability.
4. Restorative justice seeks to unite what has been divided.
5. Restorative justice seeks to strengthen the community in order to prevent further harms.
Although characteristics distinct to restorative justice are identifiable when it is contrasted with retributive justice, there exist many variations in the application and definition of restorative justice, and different approaches emphasize different objectives. It must always be kept in mind that restorative justice is not a specific program but a philosophy based on a set of values and principles; as such, it may take many different forms and is often flexible to the needs of participants (White, 2003). For the most part, however, theoretical definitions of restorative justice propose a more constructive, positive approach to criminal justice than retributive or therapeutic approaches. The three central questions that Zehr (2005) describes the restorative paradigm as revolving around are:

1. Who has been harmed?
2. What are their needs?
3. Whose obligations are these?

Sharpe (1998, p. 7) also distinguishes restorative justice from retributive justice through its constructive approach to crime, describing it as “a justice that puts its energy into the future, not into what is past” by “look[ing] at what needs to be strengthened if [crimes] are not to happen again.”

The critical values, processes, outcomes and objectives of restorative justice practices are numerous and varied. McCold (2000) narrows down the three key principles underlying the restorative “ethos” as ultimately being those of victim reparation, offender responsibility, and reconciliation through a community of care.

3.1.1.1. Victim reparation

Victims of crime suffer tremendously. They can be harmed by crime in obvious ways through physical injuries and financial losses, and in less obvious ways through the infliction of stress and psychological trauma (Bradshaw and Umbreit, 2003; Zehr, 2005). Although the retributive system attempts to right these wrongs by meting out punishment to offenders proportional to the harm suffered by their victims - the “just deserts” approach (Manson, Healy and Trotter, 2008) - such efforts typically serve only to satisfy philosophical notions of justice, while doing little to meet the personal needs of victims.
When included in the sentencing process, victims typically act merely as sources of information, providers of victim impact statements at the time of sentencing, or recipients of restitution – rarely, if ever, are they granted a distinct voice in the sentencing process. Nils Christie (1977), who famously described conflict as property, explains that victims are relegated to this role when the conventional retributive justice system “steals” conflict from those to whom it rightly belongs. It is well-documented in the restorative justice literature that this “stealing” of conflict from victims consistently leaves them feeling dehumanized, disempowered, and unable to find closure (Bradshaw and Umbreit, 2003; Latimer et al., 2005; Strang, 2001; Umbreit, Coates and Vos, 2001; Zehr, 2005).

Because restorative justice conceives of criminal acts as harming relationships between individuals, an integral component of bringing offenders to justice must be the inclusion of victims as active players in the justice process. In order for offenders to provide reparation for the harms they have inflicted, they must first and foremost understand, from the victims of their harm, the full range of what is in need of repair. Without an opportunity for full participation from the victim, there can be no restorative outcome (Bennett, 2007; McCold, 2000). It follows, then, that restorative justice processes, in their purest form, involve victims and their offenders in face-to-face meetings where, with the assistance of a trained facilitator, victims are given the opportunity to communicate the harms they have suffered to their offenders in a venue that ensures their voices are clearly heard and respected (McCold, 2000). Restorative justice is thus profoundly empowering to victims: rather than being relegated to the part of witness or spectator while the state seizes ownership of the justice delivery process, the victim is a central actor in the sentencing process and is therefore able to reclaim ownership and control over “their” conflict (Christie, 1977; Zehr, 2005).

Outcomes of restorative justice conferences between victims and offenders vary depending on the needs and interests of the parties involved, and can include monetary restitution, service to the victim, community service, apologies, and participation of the offender in various intervention programs (Niemeyer and Shichor, 1996; Umbreit, Coates and Kalanj, 1994; Umbreit, Coates and Vos., 2001). Perhaps most importantly, however, restorative processes have been demonstrated to produce a number of important emotional benefits for victims, which often go neglected by the conventional retributive system. A number of research studies have demonstrated that victims who undergo a
restorative justice process, when compared to those who undergo a court process alone, are more likely to receive an apology (Strang, 2001), are less fearful of revictimization (Strang, 2001; Umbreit, 1995; Umbreit and Bradshaw, 1997; Umbreit et al., 1994; Umbreit et al., 2001), are more sympathetic and less angry toward their offender (Strang, 2001), and are more likely to perceive the justice process as having been fair (Coates and Gehm, 1989; 1984; Latimer et al., 2005; Strang, 2001; Umbreit, 1989; Umbreit, 1995). Three relatively recent meta-analyses conducted by Umbreit and co-authors (2001), Latimer and co-authors (2005) and Sherman and Strang (2007), respectively, found that, across a variety of sites and cultures, most victims who choose to participate in VOM are satisfied with both the process and the outcomes reached.

3.1.1.2. Offender responsibility

In addition to being retributive, the justice philosophy that characterizes the conventional justice system is also adversarial. Adversarial justice systems seek to deliver justice by using an objective fact-finding process to “prove” either guilt or innocence (Zehr, 2005). Two advocates – the prosecution and the defense, respectively - present their parties’ positions before an impartial person or group of people, usually a judge or jury, who considers each position based on the strength of the evidence presented. When the most effective adversary is able to convince the judge or jury that his or her perspective on the case is the correct one, the offender’s guilt or innocence is considered "proven", and justice is delivered (Zehr, 2005). Although the adversarial system aims for a fair and impartial approach to justice delivery, the unfortunate outcome of such a system is that offenders are encouraged to deny, rather than accept, responsibility for their actions, so that they may “win” their case and avoid punishment (Perry, 2002). A system that encourages such defensiveness on the part of offenders is not only enormously detrimental to victims in need of closure and healing, but does little to prevent future criminal activity in the way of helping offenders fully understand the impact of their actions (Zehr, 2005). The promotion of a sense of responsibility in offenders, then, must be regarded as a key goal of restorative processes.

In his influential text *Crime, Shame and Reintegration*, Braithwaite (1989) distinguishes between the concepts of disintegrative and reintegrate shaming, both of which are key concepts to understanding the benefits of holding offenders personally
accountable for their actions. Disintegrative shaming is that which stigmatizes the offender, often permanently, and is exclusionary. Reintegrative shaming, on the other hand, is that which recognizes the offenders’ potential to learn from their mistakes and supports their eventual reintegration into the community. Arguably one of the harshest consequences of the retributive state system of justice is that offenders, once found guilty, are set apart from the community and labelled, shamed, and excluded from true reintegration (Braithwaite, 1989, 2002). It is understandable that many people accused of committing a crime would seek to avoid such a fate, and thus would attempt to use the adversarial nature of the conventional justice system to their advantage.

In contrast to the retributive state system, restorative justice focuses on reintegrative shaming: The process of helping offenders understand the impact of their actions not so that they may be ostracized but so that they may be granted the opportunity to learn valuable lessons from their mistakes, make amends, and eventually return to their communities as productive citizens. By hearing about the consequences of their offending, either directly from victims or indirectly from others, offenders gain a better understanding of what they have done and why their actions were harmful (Braithwaite, 1989, 2002; Radzik, 2007). Offenders are also granted the opportunity to repay their debts to victims in tangible and meaningful ways - through, for example, paying restitution, writing a letter of apology, or performing community service work (Radzik, 2007). Research demonstrates that offenders who participate in restorative processes are more likely to deliver repair or restitution to victims (Evje and Cushman, 2000; Umbreit and Coates, 1992; Umbreit et al., 1994; Umbreit et al., 2001), to be satisfied with the agreements reached (Niemeyer and Shichor, 1996; Latimer et al., 2005), and to feel remorse for what they have done, compared to offenders who go through a court process alone (Maxwell and Morris, 1993; Shapland et al., 2006; Sherman and Strang, 2007).

The voluntary nature of restorative justice programming builds normative outcome consensus, rather than an adversarial us vs. them outcome, through upholding a participation criteria that only those offenders who experience remorse and a genuine desire to take responsibility are eligible. Where restorative justice programming operates alongside the conventional court system and accepts referrals from Judges or Crown prosecutors, a guilty plea is typically required beforehand from offenders, as this too is
considered to be indicative of an acceptance of responsibility for the offence (John Howard Society of Alberta, 1998). The voluntary nature of restorative justice also often acts as a major strength during the process, in that it can increase the likelihood of reaching outcomes satisfying to both victims and offenders. Through reconciliation, justice for the offender is justice for the victim, and vice versa (Latimer et al., 2005; Perry, 2002; Umbreit, 1989; Umbreit, Coates and Kalanj, 1994; Umbreit, Coates and Vos, 2001; Zehr, 2005).

3.1.1.3. Reconciliation through a community of care

For the most part, restorative justice philosophy has emphasized first and foremost the importance of repairing harm done to victims, and holding offenders personally accountable for that harm. The result is that, when put into practice, restorative justice tends to be confined to very specific incidents and particular individuals (Bazemore, 1997; Gavrielides, 2012; White, 2003). Although there is no doubt that offenders and victims are major players in the justice process and should remain major players, the important role that the community plays in the restoration process cannot be downplayed. Acknowledging the responsibility that the wider community carries in shaping the outcome of the restorative process allows for collective, rather than solely individual, responses to offending behaviour. The aim of restorative justice is shifted from bringing justice solely to the victim(s) to bringing about a sense of social justice (Bazemore, 1997; McCold and Wachtel, 2002).

Bringing community into restorative justice requires acknowledging principles of interconnectedness and social responsibility (McCold and Wachtel, 2002; Pranis, 2001; White, 2003). When human beings perceive a connection between each other and a common interest in the activities and well-being of the group, they may be described as being part of a community. Where there is no perception of connectedness among a group of people, on the other hand, there is no community (McCold and Wachtel, 2002). Within Western societies, which value individualism and self-sufficiency over collectivism, it is common for people to feel as though they are not part of a community. The lack of meaningful interrelationships and the progressive loss of interest in one another’s well-being that eventually results from this isolation from others is what lays the groundwork for retributive responses to crime, and the accompanying stigma of
being labeled a criminal (Braithwaite, 1989; Perry, 2002; Pranis, 2001). Even if victims and offenders are able to successfully negotiate a restitution agreement, such a process can never be fully restorative as long as it takes place within a community that excludes, rather than includes, those who commit crime. For restorative justice to be fully and completely restorative, accountability by offenders towards victims and the community must be matched by a willingness on the part of the community to welcome offenders back and grant them a chance at redemption (McCold, 2000).

Fundamentally, community justice is about building and using perceptions of connectedness to individuals and groups as a way to prevent crime and wrongdoing (McCold and Wachtel, 2002). Reintegrative shaming relies upon the assumption that an individual’s perception of connectedness to other individuals or to a group acts as a hugely important source of informal social control (Braithwaite, 1989, 2002). Introducing the community as a key player in restorative justice processes acknowledges that most people act in a certain way because they want to avoid experiencing the external shame of disapproval by people they care about and the internal shame of conscience. A primary goal for community justice and crime prevention should thus be strengthening, creating, or restoring healthy interdependences (Braithwaite, 1989; McCold and Wachtel, 2002; Perry, 2002).

Community-led, grassroots restorative justice practices have a long history in British Columbia, beginning with the establishment of the province’s first Victim-Offender Reconciliation Program (VORP) in 1982 (Morrison and Pawlychka, 2012). The varying practices that have been developed and/or implemented in B.C. in past decades have since included Victim Offender Reconciliation Programs (VORPs), Community Justice Forums (CJFs), Sentencing Circles, and Community Accountability Programs (CAPs), all of which meet the needs of victims, offenders, and communities in unique and varying ways. In recent years, however, the aforementioned processes have played increasingly marginal roles in the delivery of justice in B.C. (Funk, 2012; Morrison and Pawlychka, 2012), due in large part to the very poor evidence base that currently exists for programs in the province. Although the 2010 Directory of Restorative Justice Programs lists 49 community-based restorative justice groups in British Columbia, no rigorous systemic evaluation has yet been conducted on the extent to which any of these programs are
taken advantage of in B.C., nor on whether they are successful in achieving their desired outcomes (Morrison and Pawlychka, 2012).

The 2012 Green Paper in British Columbia, titled *Modernizing British Columbia’s Justice System* (British Columbia Ministry of Justice, 2012), drew attention to the need for justice reform in the province that would increase the use of restorative justice processes and bring restorative goals to the forefront. Geoffrey Cowper’s response to the Green Paper, *A Criminal Justice System for the 21st Century* (BC Justice Reform Initiative, 2012), also echoed these sentiments. In his review, which examined the challenges for the justice system set out in the Green Paper and made recommendations for addressing said challenges, Cowper (2012) strongly advised that the province dedicate resources to increasing data collection, research, and evaluation for restorative justice programs operating in B.C., as well as toward allocating greater funding for such programs.

Though the benefits of restorative justice are numerous, a major barrier to the increased use of restorative practices is their frequent use as simply an add-on to the conventional justice system, rather than a true alternative. Further discussion as to the merits of using restorative justice with rioters thus requires an in-depth examination and critique of the rationale governing punitive approaches to crime; namely, the objective of general deterrence.

### 3.2. General deterrence as a sentencing purpose

Although the impersonal nature of the conventional retributive system does little to hold offenders personally accountable for their crimes or heal the harms done to victims, a frequent rebuttal from advocates of the retributive approach is that comparing restorative justice to retributive justice equates to comparing apples and oranges, as these outcomes are not the key aims of the retributive justice system in the first place. On the contrary, the perspective typically adopted by policy makers advocating for increased sentence severity is the utilitarian one theorized by such sociologists as Durkheim, who explains that the true goal of punishment is to set an example for the community that will strengthen social solidarity and reaffirm commitment to community
morals and norms (Elliott, 2011). The various costs incurred from severely punishing those who break the law are thus justified by the supposed decrease in criminal activity that then occurs at the general societal level, resulting in endless savings for taxpayers.

The clear and uncomplicated logic of punishing current crimes in order to deter future ones is difficult to argue with, which perhaps explains why utilitarian aims have served as justification for punishment in various societies for centuries (Golash, 2005; Walker, 1991). Indeed, it is arguable that the historic (Beccaria [1764], 1963) and conceptual core of criminology has always been the study of the effects of sanctions on crime; unsurprisingly then, deterrence has been among the most researched topics in criminology since the late 1960s (Akers, 1990; Gibbs, 1968, 1975; Paternoster, 2010; Pratt, Cullen, Blevins, Daigle and Madensen, 2006; Sherman, 1993; von Hirsch, 1999; Walker, 1991; Zimring and Hawkins, 1973). As the following in-depth examination of the deterrence literature reveals, the logic of deterring others via the threat of punishment does not translate as well into practice as hoped.

3.2.1. Theoretical foundations

Deterrence, as defined by Beyleveld (1979, p. 5), is “the avoidance of a given action through fear of the perceived consequences”. Criminal deterrence is thus the avoidance of criminal acts through the fear of legal sanctions. Criminal deterrence can be subdivided into two categories: Specific deterrence, in which offenders refrain from future criminal acts following apprehension and punishment, and general deterrence, in which members of the general public who have not yet engaged in criminal acts refrain from doing so upon witnessing the punishment of others. General deterrence, in other words, occurs when the punishment of individual offenders sets a wider example for the general public (Gibbs, 1968, 1975; Stafford and Warr, 1993; von Hirsch, 1999; Walker, 1991; Zimring and Hawkins, 1973).

The logic of deterrence theories can be traced back to the 18th century writings of Cesare Beccaria in Italy ([1764], 1963). Drawing from utilitarian principles, the basic premise of his early writings was that criminal behaviour is essentially an exercise in rational decision-making: people intentionally choose to obey or violate the law following a mental calculation of the risk of pain vs. potential pleasure derived from a given act.
Information on the “pains” associated with a criminal act may arrive from several sources, including an individual’s own experience with criminal punishment, their general knowledge of what punishments are imposed by the law, and their awareness of what punishments have been handed down to convicted offenders in the past (Akers and Sellers, 2009). If the potential pain of a criminal act outweighs the potential pleasure, the individual should be deterred from that act. By this logic, Beccaria argued (1764, 1963), crime rates could be reduced via the implementation of criminal laws that applied reasonable penalties in a reasonable fashion, in which a “reasonable” penalty referred to one that was certain, swift, and appropriately severe.

In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, and proportionate to the crimes dictated by the laws (Beccaria 1764[1963], p. 99).

These principles later formed the basis for rational choice theories, which utilize economic modelling principles to predict in more detail the ways in which human actions are based on "rational" decisions — that is, the ways in which people calculate the probable consequences of their actions (Akers, 1990).

3.2.2. Deterrent sentencing in practice

The direct applicability of classical deterrence theory to criminal justice practice has been identified by many policy makers and researchers, including Gibbs (1995, p. 74, as cited in Akers and Sellers, 2009):

The deterrence doctrine is an instructive example of a criminological theory that has immediate policy implications. It is not just that the doctrine identifies possible determinants of offending (individual offending, including recidivism, and the crime rate); additionally, some properties of legal punishments can be manipulated by officials. (emphasis in original)

Other assumptions made by classical deterrence theory continue to guide the way in which offenders are detected, apprehended, convicted, and punished, respectively. The uniformity with which most criminal justice policies are applied, for example, follows the logic that the amount of pain or pleasure derived from a criminal act will be approximately the same for everyone, and that everyone has the capacity to make
rational decisions; thus if the penalty called for a particular crime is applied evenly to all potential offenders, a general deterrent effect should result (Akers, 1990). The fact that criminal justice legislation typically describes a scale of crimes that correspond to a matching scale of threatened punishments, based on principles of proportionality, is also based on the principle that crimes are best prevented with the threat of an equally, if not more, severe punishment (Akers and Sellers, 2009).

Of the assumptions made by classical deterrence theory, arguably the most attention has been paid by policy makers to the supposed relationship between sentence severity and deterrence: the more severe a criminal sanction, the higher the deterrent effect. As it happens, this assumption derives from a misinterpretation of the original theory; Beccaria ([1764] 1963) initially argued that the certainty with which a criminal penalty is applied will actually have stronger deterrent effects than its severity, because the greater the severity of a penalty, the less consistently it can be applied. Zimring and Hawkins (1973, p. 19) have critiqued the overgeneralizations made in this argument as well, simplifying it so as to illustrate its faulty logic:

If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will be deterred; if doubling a penalty produces an extra measure of deterrence, then trebling the penalty will do still better.

Unfortunately, the mistaken belief that increasing the severity of a given criminal sanction will consistently produce matching increases in general deterrence has been the primary justification for a wide range of justice policies enacted in recent decades, particularly those aiming to “get tough” on crime. Examples from the United States and Canada of such policies include the restoration of capital punishment, the restriction of judicial sentencing discretion through mandated sentences, and “three strikes and you’re out” life sentences for habitual offenders (Cullen, Fisher and Applegate, 2000; Lynch and Sabol, 1997; Pratt et al., 2006; Webster, Doob, and Zimring, 2006). Among the most recent of these efforts takes the form of the Safe Streets and Communities Act (Bill C-10), the most recent set of amendments to the Criminal Code of Canada (henceforth referred to as the Code). Combining amendments from nine separate bills that had failed to pass in previous sessions of parliament, changes brought in by the Act include (but are not limited to): increasing mandatory minimum sentences and introducing new
mandatory minimums; selectively eliminating conditional sentences; and the introduction of new, harsher sentencing principles for young offenders\textsuperscript{10} (Canadian Bar Association, 2011).

The rationale that sentence severity is positively correlated with deterrent effects is often cited by policy makers when defending the increased use of custody in response to crime (see Mackrael, 2013). If a custody sentence is the most severe punishment the justice system can offer, it is argued, then such a sentence must also be the most effective at achieving the sentencing purpose of general deterrence (Cayley, 1997). Surveys indicate that both the public and offenders agree that a custody sentence is the most severe sanction available for criminal acts (Canadian Sentencing Commission, 1987; Spelman, 1995). Predictably, then, one of the most notable effects of these “get tough” policies have been the enormous increase in both the number of prisons and the number of Canadians in prison and under criminal justice supervision. In 2010/2011, Canada’s incarceration rate was 140 inmates per 100,000 population, or about 38,000 offenders in custody on any given day (Dauvergne, 2012). The cost of getting tough on crime is not insignificant either – according to Rajekar and Nathilakath’s (2010) recent report titled The Funding Requirement and Impact of the ‘Truth in Sentencing’ Act on the Correctional system in Canada, operations and maintenance expenditures of the federal adult correctional system were approximately $2,092 million annually in 2009-2010 – 28% higher than they were in 2005-2006.

\textbf{3.2.3. Does deterrent sentencing work?: Evaluating the evidence}

Prior to the 1960s, empirical research designed to test whether, and to what extent, legal sanctions deter criminal behaviour was extremely rare. Most discussions of deterrence revolved around the philosophical and moral implications of punishment rather than the empirical validity of the theory (Ball, 1955; Gibbs, 1975). The first studies on the extent to which individuals are deterred by perceptions of sentence severity

\textsuperscript{10} The \textit{Safe Streets and Communities Act} was passed by the 41st Canadian Parliament and came into law during the writing of this thesis, on March 12 2012.
focused on the death penalty, arguably the most severe sanction available in the United States. These studies used aggregate data to compare the crime rates of states that provided capital punishment for first-degree homicide to those that did not, and to perform longitudinal studies on how crime rates in certain states were affected by the abolition of capital punishment. Although rife with methodological limitations that later deterrence studies sought to amend, these early findings did not bode well for classical deterrence theory: Whether or not a state practiced capital punishment appeared to have no significant deterrent effects on homicide rates (Bedau, 1964; Sellin, 1959). These results were interpreted by many criminologists at the time, perhaps unwisely, as evidence that the penal system as a whole was not successful at deterring potential offenders (von Hirsch, 1999)

Soon after these studies were conducted, the late 1960s to early 1970s saw a number of important publications that moved beyond mere examinations of crime rates toward testing deterrence theory’s validity on a whole range of sanctions and criminal offences. Important publications by criminologists such as Becker (1968), Gibbs (1968, 1975), Logan (1972), and Tittle (1969) introduced new variables that examined the relationship between specific aspects of punishment, such as certainty and severity, and crime rates, thus facilitating the theory’s transformation into one aiming to predict the direct effects of varying types and degrees of punishment on criminal behaviour. The assumption guiding the theory soon became that areas with more certainty or severity of objective punishment would experience lower crime rates, with much research today continuing to utilize the variables and methods conceptualized in these early studies. Following these studies, deterrence theory has become one of the most frequently discussed and researched theories in criminology (see Pratt et al., 2006; von Hirsch, 1999), as well as the most controversial and inconsistent in its findings.

The question of whether or not the criminal justice system deters would-be offenders cannot be answered without first addressing the difference between initial

11 These early studies did not examine celerity of punishment as a significant dependent variable, and it has rarely been included in deterrence research since (von Hirsch, 1999).
deterrence and *marginal* deterrence, both of which are outcomes predicted by classical deterrence theory. *Initial* deterrence concerns the effects of establishing a prohibition against previously permissible conduct, whereas *marginal* deterrence concerns the increases in deterrence that result from altering penalties for criminal conduct that is already punishable. For the most part, studies have consistently supported the notion that sanctions in general have some deterrent effect (see Paternoster, 2010; von Hirsch, 1999), though this is not a particularly surprising or revelatory finding: If there were no criminal justice system and no penalties at all for harmful acts against others and society, it would be highly unusual if crime did not increase by at least some degree. Therefore, the important research question policy-makers are concerned with is not that of whether people are deterred by threats of sanctions at all, nor whether the criminal justice system as a whole has a deterrent effect on potential offenders, but rather that of whether - and to what degree - *marginal* deterrent effects can be produced through altering the certainty and/or severity of punishment.

Most deterrence studies in recent years evaluate the relationship between the severity and certainty of criminal sanctions and crime rates through the use of one of two kinds of measures: Objective and subjective. *Objective* measures of deterrence strictly examine the relationships between crime rates and various legal sanctions, as early deterrence studies did, with variables typically derived from official justice statistics. Conversely, *subjective* measures of deterrence (also known as perceptual studies) examine the relationships between crime rates and individuals’ subjective perceptions of legal penalties; that is, what they *believe* about the certainty and severity of legal punishment (Apel, 2013; Gibbs, 1968, 1975; von Hirsch, 1999). Although both objective and subjective measures of deterrence often yield similar findings, inconsistencies between the two can arise when individuals have limited and/or inaccurate knowledge regarding particular legal sanctions (see Apel, 2013; Scheider, 2001). von Hirsch (1999, p. 7) predicts that five conditions must be satisfied in order to successfully achieve marginal general deterrence via the altering of criminal penalties:

1. A potential offender must realize that the probability of conviction or the severity of punishment has changed.
2. A potential offender must take these altered risks into account when deciding whether to offend.

3. A potential offender must believe that there is a non-negligible likelihood of being caught.

4. A potential offender must believe that the altered penalty will be applied to him if he is caught.

5. A potential offender must be willing to alter his or her choices regarding offending in the light of the perceived change in certainty or severity of punishment.

In order to yield as complete a picture as possible of the relationship between sanction severity and/or certainty and marginal deterrent effects, it is thus necessary to assess findings from both objective and subjective measures of deterrence (Pratt et al., 2006; von Hirsch, 1999).

To this day, most deterrence studies that have attracted attention remain association studies at the objective/aggregate level (Akers and Sellers, 2009; Nagin, 2013; von Hirsch, 2009). Typically, such studies examine changes in law enforcement or punishment policies in different jurisdictions, assessing how such differences correlate with variations in crime rates. The majority of these studies, however, have yielded inconclusive and contradictory findings with regard to whether actual or perceived threats of legal sanctions provide significant marginal deterrent effects (Akers and Sellers; 2009; Chiricos and Waldo, 1970; Loughran, Pogarsky, Piquero, and Paternoster, 2012; Pratt et al., 2006; von Hirsch, 1999). This is due primarily to major and numerous methodological differences between studies, most of which result from there simply being too many intervening variables that may feasibly explain changes in crime rates but cannot be easily controlled for in such large-scale observational and comparative studies. These include differences in:
• The ways in which studies conceptualize important dependent variables, particularly those of certainty and severity\(^\text{12}\);

• The specific laws examined, as penal legislation is enacted in different ways in different geographic areas;

• The reliability of the crime data utilized;

• The specific offences examined\(^\text{13}\);

• Whether, and to what degree, intervening variables are recognized and controlled for;

• Whether, and to what degree, long-term deterrent effects and “deterrence decay” are examined\(^\text{14}\); and

• Whether, and to what degree, they distinguish between deterrent and incapacitative effects.\(^\text{15}\)

(Blumstein, Cohen, and Nagin, 1978; Pratt et al., 2006; 1978; von Hirsch, 1999).

All aggregate studies also suffer from a number of other inherent limitations. Perhaps the most disadvantageous of these is that they can determine only correlations between variables, not causality, resulting in endless ways to interpret findings and subsequent difficulty in coming to firm conclusions regarding deterrence theory’s

\(^{12}\) E.g., Some studies classify the receipt of a custody sentence as a measure of certainty of punishment when it should actually be classified as a measure of severity, because a custody sentence is only one of many possible sentences an offender may receive upon conviction.

\(^{13}\) Although there are thousands of criminal laws, many studies focus on only one or two specific offences (e.g., homicide or drunk driving).

\(^{14}\) Most studies examine only short-term deterrent effects, but several that have examined long-term deterrent effects have noted the possible existence of “deterrence decay”, in which the effects of changes in sanction enforcement are only temporary and diminish soon after they take effect.

\(^{15}\) in which crime rates decrease not due to deterrence but due to the fact that more habitual offenders than usual are in custody and therefore unable to offend.
decrease in the United States that began in the 1990s and eventually reached record
lows, for example, is just as likely to be attributable to get-tough crime policies and
increases in prison populations as to a greater availability of rehabilitative and treatment
programs within prison, a significant decrease in the proportion of young males, a
decrease in the nationwide unemployment rate for young males, or changes in the level
and quality of security available to people (see Farrell, Tilley, Tseloni and Mailley, 2008;
Zimring, 2007). Another important limitation is that aggregate data is only able to utilize
data from reported crime, which compromises a very small fraction of the total amount of
crime that occurs (Akers and Sellers, 2009; Statistics Canada, 2010). Aggregate data
thus cannot track deterrence that occurs among unreported offenders, nor distinguish
between those individuals who are legitimately deterred by the penal system from those
who are simply good at not being caught.

Taking into account these limitations and common methodological errors, when
the body of carefully conducted deterrence research is examined as a whole, the
findings generally support Beccaria’s ([1764]1963) premise that there is a positive
correlation between certainty of conviction and deterrence (Beyleveld, 1979; Blumstein
et al., 1978; Chiricos and Waldo, 1970; D’Alessio and Stolzenberg, 1998; Loughran et
al., 2012; Nagin, 2013; von Hirsch, 1999; Zimring and Hawkins, 1973). Among the most
thorough of these research studies to come to this conclusion are a series conducted by
David Farrington and his colleagues comparing criminal justice practices and crime rate
trends in England and the USA\textsuperscript{17}. The first of these studies (Farrington and Langan,
1992) examines these relationships during the six-year period 1981-1987, the second
(Farrington, Langan and Wikström, 1994) examines the ten-year period 1981-1991, and

\textsuperscript{16} E.g., One explanation put forward to explain the repeated finding that involvement with the law
may increase future offending is that frequent offenders are more likely to be caught and
punished (Akers and Sellers, 2009); another explanation for the inability of a sanction to
produce the desired deterrent effect is that its overuse may have caused it to be seen as less
stigmatizing to the public, thereby neutralizing any possible deterrence effect (Nagin,1998).

\textsuperscript{17} The studies are particularly notable in the attention devoted to conceptualizing their variables,
and for being among the first to incorporate cross-national victim survey data. Additionally,
the 1994 study included supplementary data from a third comparator country (Sweden).
the third (Langan and Farrington, 1998) surveys the 15-year period 1981-1995. All three studies found statistically significant negative correlations between the likelihood of conviction and crime rates. Consistent with these findings, a more recent comprehensive meta-analysis by Pratt et al. (2006) also concluded there exists a correlation between certainty of punishment and general deterrence, albeit a weak one.

The association between severity of punishment and crime rates is considerably weaker, with most studies finding no correlation between the two variables or correlations too weak to achieve statistical significance (e.g., Chiricos and Waldo, 1970; Farrington and Langan, 1992; Farrington et al., 1994; Langan and Farrington, 1998). Even when arguably the most severe punishment available (death) is examined, the findings suggest that neither the existence of capital punishment nor the certainty of the death penalty have a statistically significant effect on the rate of homicides (Cochran and Chamlin, 2000; McFarland, 1983; Nagin, 2013; Pratt et al., 2006), and some studies have even found increases in violent crime in states that practice capital punishment (Archer and Gartner, 1984; Shepherd, 2005). One explanation put forward by von Hirsch (1999) for the limited deterrent effects generally associated with increases in sentence severity is that such effects are subject to thresholds: that is, once criminal penalties increase beyond a certain level, they begin to lose their effects. For example, increasing a minimum sentence for an offence from 25 years imprisonment to 30 years imprisonment may mean little to an offender who already perceives the 25 year sentence to be severe enough to deter him or her from committing that offence; and conversely, an offender who is undeterred by the 25 year sentence, believing the certainty of being apprehended is low enough to render the sanction’s severity meaningless, is unlikely to be deterred by subsequent increases in severity.

If these are the findings yielded by aggregate studies, what about perceptual studies - those that evaluate what potential offenders perceive the threatened penal consequences to be and how the threat of such consequences affects their likelihood of offending? The most common method used to measure the relationship between perceptions of the severity and/or certainty of legal sanctions and deterrence has been to survey selected groups of the general population on their opinions, with data regarding participants’ criminal activity typically derived from questions asking about self-reported delinquency or intentions to offend (Akers and Sellers, 2009; Apel, 2013;
Paternoster, 1985; von Hirsch, 1999). Perceptual studies of this nature overcome some of the limitations of aggregate studies: The use of self-reported data overcomes the issues associated with using crime data that reflects only those offenders who have been apprehended, and questioning participants regarding hypothetical criminal behaviour and crime scenarios allows for much more manipulation of variables (von Hirsch, 1999). However, such studies suffer limitations as well. Like aggregate studies, they yield only correlations rather than proof of causation. Additionally, they can only measure how potential offenders say or think they would behave, rather than actual behaviour, which affects reliability as many factors are often involved in crime beyond conscious planning and deliberation. Participating in a riot, for example, appears to be contingent to some degree on circumstances that allow for deindividuation (see Chapter 2); as such we cannot be sure that those who eventually participate in riots, if asked whether they would do so under ordinary circumstances, would consistently answer in the positive.

Although perceptual studies often access data that differs greatly from that examined in aggregate studies, Paternoster and co-authors' (1983) comprehensive review of such studies yielded findings similar to those produced by aggregate studies: Perceived certainty of punishment was found to be fairly consistently linked with self-reported criminality, as well as with self-reported intents to offend in hypothetical scenarios. Their study found fewer studies that investigated the relationship between perceived severity of punishment and deterrence, but those that did also found very weak and frequently insignificant correlations between perceived sanction severity and deterrence. Interestingly, when longitudinal perceptual measures of deterrence – in which a given panel of respondents are surveyed at several time intervals about past offending and perceived punishment risks, and then followed up in official records for involvement with the law - are examined, the relationship between perceived certainty of punishment and deterrence was weak to non-existent. One possible explanation for these findings is the aforementioned phenomenon of deterrence decay (von Hirsch, 18

It should be noted that these correlations, though significant, remained weak to moderate in strength.
If sanction severity does not reliably predict deterrence at the general level, could it still predict deterrence at the specific level? Although most deterrence research is conducted on general deterrence\(^\text{19}\) (von Hirsch, 1999), the principles of deterrence theory do assume a relationship between the certainty and severity of legal sanctions and individual recidivism, because personal experience with the law should inform the internal decision-making process. To date, however, studies examining the effects that sanction severity has on specific deterrence have also not yet found a consistent relationship between the two variables (see Paternoster, 2010; Sherman, 1993; Tyler, 1990), and some have even found an inverse relationship in which punishment increases, rather than decreases, an individual’s likelihood of future offending - the “emboldening” effect (Piquero and Pogarsky, 2002). Paternoster and co-authors (1983) were among the first to document this relationship, although their study suffered a serious methodological flaw in that it examined only prior behaviour, rather than prior experience with legal sanctions\(^\text{20}\). When offences that have been punished are examined, however, this “emboldening” effect still appears (Piquero and Pogarsky, 2002; Pogarsky and Piquero, 2003; Sherman, 1993; Wood, 2007).

Although it suffers the same limitations as nearly all research involving aggregate data, arguably the simplest method available to determine the existence of a relationship between specific deterrence and sentence severity is to examine overall recidivism rates among incarcerated individuals. If a custody sentence is in fact the most severe

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\(^{19}\) Crime control policies are typically more concerned with producing general deterrence than specific deterrence. Additionally, specific deterrence as a sentencing purpose is sometimes difficult to distinguish from the separate sentencing purpose of rehabilitation, in which an offender, after being punished, does not reoffend (Manson et al., 2008)

\(^{20}\) According to classical deterrence theory, if the respondents in this study described offences they had committed but not been punished for, they would actually be less likely to be deterred by legal sanctions.
sentence a court can hand down, there should be a negative correlation between the receipt of a custody sentence and recidivism rates when custody is compared to other sanctions; similarly, length of time spent in custody should be positively correlated with decreased likelihood of recidivism upon release. Unfortunately, what data is available suggests not only that prisons are not very effective at rehabilitating offenders nor at reducing recidivism rates (Cayley, 1997; Correctional Services Canada, 1993, as cited in Brantingham and Easton, 1998), but that community-based alternatives such as conditional sentences frequently offer equal or greater success (Gendreau and Andrews, 1990). These findings were confirmed in a recent and thorough meta-analysis by Gendreau, Goggin, and Cullen (1999), which examined the relationship between length of time in prison and recidivism, as well as differences in recidivism rates between offenders who received a prison sentence and offenders who received a community-based sanction instead. Their findings found a 7% increase in recidivism for those offenders who were imprisoned, with some tendency for lower risk offenders to be more negatively affected by the prison experience. Additionally, there was no significant relationship between length of time in prison and recidivism rates.

Attempts to deter juveniles from criminal behaviour through “scared straight” programs and boot camps have also proved largely fruitless. The “scared straight” moniker is derived from the title of the 1978 Oscar-award winning film of the same name, which appeared to demonstrate that juveniles could be deterred from criminal activity through being exposed to the realities of prison life. The implication of the film for justice policy thus became that juveniles could be scared or threatened into refraining from criminal activity. Although the pilot scared straight program initially reported that up to 90% of juveniles who participated in the program had been “scared straight”, a follow-up study soon revealed not only that “scared straight” programs were ineffective at deterring youth, but that those who participated in the pilot program were, over time, more likely to offend than those who did not (Finckenauer, 1980). Other evaluations of boot camps and “scared straight” programs have also yielded disappointing findings (Bourque, Han, and Hill, 1996; Jensen and Rojek, 1998, cited in Akers and Sellers, 2009; MacKenzie and Souryal, 1994) with a recent meta-analysis concluding that “…these programs result in an increase in criminality in the experimental group when compared to the no-treatment control group” (Petrosino, Petrosino and Buehler, 2006, p. 98).
To account for the aforementioned inconsistencies in deterrence research and the significant mediating role that intervening variables appear to play, criminologists have increasingly been expanding upon the principles of classical deterrence theory so as to take informal social processes into account. The findings thus far are promising: informal sanctions have generally been found not only to be more strongly related to criminal behaviour than formal sanctions (Matthews and Agnew, 2008; Nagin and Pogarsky, 2001; Sherman, 1993) but to substantially weaken – or even remove entirely - the relationship between formal sanctions and criminal behaviour when included (Paternoster, 1985; see also Pratt et al., 2006). Among the most consistently reported finding in these studies is that individuals who report higher stakes in conventionality are more likely to be deterred by legal sanctions than those with lower stakes; that is, in-group members are more likely to be deterred by legal sanctions than out-group members (Meier and Johnson, 1977; Nagin, 1998; Sherman, 1993; von Hirsch, 1999; Williams and Hawkins, 1986). Correspondingly, the degree to which individuals perceive sanctions as legitimate or fair also seems to play a significant role in moderating the relationship between sanction severity/certainty and deterrence (Bridgeforth, 1990, as cited in Sherman, 1993; Makkai and Braithwaite, 1993, as cited in Sherman, 1993; Paternoster, Brame, Bachman, and Sharma, 1997; Tyler; 1990).

As promising as these findings are, any effort to demonstrate the existence of a relationship between deterrence and informal sanctions does not lend any credible support to classical deterrence theory. The core premise of the theory is that refraining from criminal activity occurs due to one's perceived risk of legal punishment, not perceived risk of any sort of punishment. The fact that classical deterrence theory does not appear to carry much predictive strength is indicative of the theory’s main flaw: It is not an incorrect theory but rather, an overly simplistic and incomplete theory. There is no room in the theory to account for the fact that criminal sanctions verifiably have opposite or different effects in different social settings, on different kinds of offenders and offences, and at different levels of analysis (see Nagin and Paternoster, 1993; Sherman, 1993; von Hirsch, 1999). Deterrence studies that merely test the effects of various legal sanctions on crime rates will not recognize these differences either; because they are able only to detect average marginal deterrence, only a small percentage of the population need actually be deterred by crime policies in order to produce significant
findings and the appearance that a given policy has universal effects (see Zimring and Hawkins, 1968).

If the evidence cannot clearly demonstrate the existence of a link between sentence severity and general deterrence, how is it that this presumption continues to exist as a legitimate and fundamental principle of Canada’s criminal justice system? After all, no well-controlled evaluation research has reliably concluded that get-tough crime policies have had the intended effects of reducing recidivism and crime rates (Cayley, 1997; Haney and Zimbardo, 1998; Lynch and Sabol, 1997; von Hirsch, 1999; Webster et al., 2006; Zimring, 2007); further, the primary conclusion arising from Gendreau and co-authors’ (1999) extensive meta-analysis was that prisons should be used exclusively for the purposes of incapacitating offenders or exacting retribution in particularly offensive crimes, and never with the expectation of reducing criminal behaviour. In the years following the Code’s enactment and in the absence of comprehensive empirical studies, many of the key purposes of Canada’s criminal justice system did revolve around the idea of achieving general deterrence through punishment. However, the priorities of the justice system have evolved in recent years in response to growing concerns regarding the efficacy of punishment for the purpose of achieving general deterrence.

3.2.4. General deterrence as a sentencing purpose in Canadian Criminal Law

Historically, general deterrence and denunciation have always been considered important sentencing purposes in common-law based justice systems such as Canada’s. However, prior to 1996, these sentencing purposes were not stated in writing anywhere in the Criminal Code of Canada. Indeed, the Code did not actually provide any guidance as to what exactly the objectives of sentencing in Canada were, nor how these potentially conflicting objectives were to be balanced with one another. Judges instead adopted a highly specified approach to sentencing, drawing upon Common law principles and case law to determine what would constitute a fit and proportional sentence in each individual case that came before them. This case-by-case approach to sentencing, known as the “wise blending” approach, granted judges an enormous amount of discretion and flexibility during sentencing (Manson et al., 2008).
One of the earliest Canadian cases to explicitly name general deterrence a sentencing purpose that must be given some degree of consideration in all criminal cases was *R. v. Willaert* (1953):

...The governing principle of deterrence is, within reason and common sense, that the emotion of fear should be brought into play so that the offender may be made afraid to offend again and also so that others who may have contemplated offending will be restrained by the same controlling emotion. Society must be reasonably assured that the punishment meted out to one will not actually encourage others, and when some form of crime has become widespread the element of deterrence must look more to the restraining of others than to the actual offender before the court.

The sentencing purpose of retribution\(^{21}\), typically considered to play an important role in achieving a general deterrent effect, is also discussed:

...the community is anxious to express its repudiation of the crime committed and to establish and assert the welfare of the community against the evil in its midst. Thus, the infliction of punishment becomes a source of security to all...

In addition to establishing general deterrence as a key sentencing purpose, *Willaert* remains an important case for having, at the time, validated the individualized approach to sentencing. Not only is sentencing described as a “very difficult art” in the written reasons for this decision, but specific guidance as to how differing sentencing purposes are to be balanced is provided only via the equivocal recommendation that sentences reflect “…a wise blending of the deterrent and reformative, with retribution not entirely disregarded” (*Willaert*, 1953). Several landmark decisions that eventually followed *Willaert* reiterated general deterrence and retribution as two among four key sentencing purposes to be considered in all criminal cases, the others being protection of the public and rehabilitation (*R. v. Goltz*, 1991; *R. v. L.*., 1986; *R. v. Luxton*, 1990; *R. v. Lyons*, 1987; *R. v. Sargeant*, 1974; *R. v. Shropshire*, 1995), yet still in none of these cases was specific guidance provided as to where and when each of these principles

\(^{21}\) Reformation was the third sentencing purpose named in this decision.
were to be given precedence when sentencing any given offender. Rather, they too affirmed the case-by-case approach:

In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offence (R. v. Lyons, 1987, para. 329).

With time, the “wise blending” approach found judges increasingly struggling with the issue of how to reconcile seeming conflicting purposes when sentencing – in particular, those of general deterrence and rehabilitation. As discussed, general deterrence is typically cited as justification for custody in sentencing, since it is considered the most punitive sentence available to those who break the law (see Gendreau et al., 1999). However, it has also long been recognized in Canada that offenders cannot easily be rehabilitated from within a custodial institution. The question for judges thus became that of which of these two sentencing purposes is to receive precedence when an offender is accused of a serious crime from which the public must be deterred, but also possesses strong promise for rehabilitation (Canadian Sentencing Commission, 1987; House of Commons Standing Committee on Justice and Solicitor General, 1988; Manson et al., 2008).

This question was finally answered in R. v. Preston (1990), one of the first decisions to address in detail the deterrence/rehabilitation paradox. Citing as crucial the finding that incarceration is both costly and demonstrably ineffective in deterring certain types of criminal activity, Preston concluded that sentencing judges must seriously consider a non-custodial form of disposition anytime the successful rehabilitation of an offender remains a likely possibility (Manson et al., 2008). A similar logic underlies why deterrence was, until very recently22, not considered an appropriate sentencing purpose under the Youth Criminal Justice Act (YCJA) –

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22 Specific deterrence was re-introduced into the YCJA as a sentencing purpose during the writing of this thesis, in October 2012.
Unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher; its effect is never mitigating. The application of general deterrence as a sentencing principle, of course, does not always result in a custodial sentence; however, it can only contribute to the increased use of incarceration, not its reduction (R. v. B.W.P, 2004, para. 36).

_Preston_ addressed - and revisited - a number of important questions regarding the lack of specific guidance provided to judges during the sentencing process, particularly regarding the balancing of punitive aims with rehabilitative aims. Although many maintained that a justice system seeking to remain fair and proportional must allow judges to refer to an array of different considerations particular to each offender, it was also acknowledged that the current “wise blending” approach, which asserted virtually no priority among the varying sentencing aims, resulted in a great deal of disparity and lack of clarity during sentencing (Manson et al., 2008; Roberts and von Hirsch, 1999). Around the time that _Preston_ was decided, many questions were also beginning to arise around the ostensible overuse of custody in Canada and, consequently, exactly how important a role general deterrence was to play as a sentencing consideration (Manson et al, 2008).

### 3.2.5. **Bill C-41: The Sentencing Reform Act**

For many years prior to the Code’s reform in 1996, it had been argued that Canadian law required a statutory statement of the purposes and principles of sentencing to amend the myriad issues resulting from the “wise blending” approach (Manson et al., 2008; Roberts and von Hirsch, 1999). Although a number of comprehensive reviews and reports have played major roles in sentencing reform over the years, two in particular were instrumental in drawing attention to the overuse of custody in Canada and in steering sentencing aims toward a more restorative direction (Daubney and Parry, 1999; Roberts and LaPrairie, 2000).

The first of these reports followed the creation of the Canadian Sentencing Commission in 1984 (Daubney and Parry, 1999). In 1987 the Commission published _Sentencing Reform: A Canadian Approach_, containing extensive recommendations for reform founded upon a utilitarian sentencing philosophy. Among others, the
Commission’s report acknowledged the problem of massive disparity during sentencing and the overuse of custody, and recommended solutions including:

- A legislative declaration of the purposes and principles of sentencing;
- The creation of a permanent sentencing commission to develop presumptive sentencing guidelines;
- The reduction of maximum penalties and abolition of mandatory minimum penalties;
- A ranking of the seriousness of each Code offence; and
- The increased use of community sanctions as alternatives to custody.

(Daubney and Parry, 1999; Manson et al., 2008).

To further examine the recommendations of the Canadian Sentencing Commission – particularly with regard to sentencing and conditional release - the House of Commons Standing Committee on Justice and Solicitor General (also known as the Daubney Committee) was established. After holding public hearings and visiting correctional institutions throughout the country, Taking Responsibility was published in 1988. Many of the report’s recommendations, of which there were over 100, echoed those made in the Canadian Sentencing Commission’s (1987) report one year earlier – in particular, the enactment of a statement of the purposes and principles of sentencing, the reduction of the use of custody as a sanction, and the need to make greater use of community sanctions, particular those able to incorporate restorative justice principles (Daubney and Parry, 1999; Manson et al., 2008).

Guided by the findings of both reports, Bill C-41 - known as The Sentencing Reform Act - was drafted in 1994, passed by Parliament in 1995, and finally came into force on September 3rd, 1996 (Daubney and Parry, 1999). The first major sentencing reform in Canada, Bill C-41 made many important changes to the Code. Two in particular are notable from a restorative justice perspective. As per recommendation, the first of these was the amendment of the Code to provide a legislative statement of the aims of sentencing in Canadian law. These aims can today be found in section 718 of the Code, the first part of which reads as follows:
The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Arguably, sections 718(a) through (d) merely restate the basic sentencing aims already established in previous decades of case law. What is new are paras. (e) and (f), which bring particular focus on the key restorative goals of repairing harm suffered by victims and promoting a sense of responsibility on the part of offenders. The amended Code thus now explicitly encourages the use of restorative justice and community-based sentencing wherever possible, symbolizing the overall effort on the part of the Canadian Justice system to move toward a more restorative approach to sentencing (Daubney and Parry, 1999; Manson et al., 2008).

In an effort to resolve previous issues associated with balancing conflicting sentencing aims, section 718 also contains clauses providing guidance as to the degree of importance to be placed on each of these purposes during sentencing. Section 718.1, also known as the fundamental purpose of sentencing, instructs as follows -

718.1. A sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.

This principle of restraint is very similar to Beccaria’s ([1764]1963) argument that deterrence is best achieved when offenders receive punishments no more harsh than they deserve, and although it serves as a helpful reminder to avoid over-punitive sanctions, it does not provide much specific guidance as to which sentencing aims deserve priority over others. Section 718.2 provides more specifics -
718.2. A court that imposes a sentence shall also take into consideration the following principles [...]  

b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;  
c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;  
d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and  
e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.  

In the context of the codified purposes and principles of sentencing, it is clear that these provisions - in particular, that which is contained in section 718.2(e) - are intended to further encourage sentencing judges to exercise restraint and caution when considering a custody sentence (Roberts and von Hirsch, 1999).  

The second Code amendment of significance from a restorative justice perspective is the creation of the conditional sentence order (CSO), which allows offenders to serve out a sentence of imprisonment in the community, with mandated conditions placed upon them. As per the recommendations made in the aforementioned reports, the logic of the CSO is that, by making such a sentence available to low-risk offenders who would ordinarily serve out their sentence in a custodial institution, prison would be used less frequently as a sanction and community-based alternatives would be utilized more frequently in its stead (Canadian Sentencing Commission, 1987; Gemmell, 1999). The guidelines for how and when CSOs are to be made available to offenders can be found in section 742 of the Code:  

742.1. If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if  

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; [...]

For the most part, these instructions are unambiguous; however, section 742.1(a), dictating that conditional sentences are not to be considered unless their use would be consistent with the statutory purposes and principles of sentencing legislated within section 718 of the Code, warrants further clarification. According to the Code, criminal sanctions are required to meet only “one or more” of the sentencing purposes legislated in section 718, as there will inevitably be variations in the sentencing purposes prioritized in each case based on the seriousness of the offence and personal circumstances of the offender. However, section 742.1(a) merely states that the use of a CSO for a given offender must be consistent with the “fundamental purpose and principles of sentencing”, providing no specific guidance as to exactly which sentencing purposes CSOs must be consistent with in order to be considered. As discussed in Preston (1990), this is problematic because sentencing aims often conflict with one another. It is highly difficult, if not impossible, for a sentence to be consistent with all sentencing purposes simultaneously (Manson et al., 2008).

The landmark case of R. v. Gladue (1999) helped answer the question of when, and for what reasons, CSOs should be considered during sentencing. Speaking for the minority\(^\text{23}\), Justices Cory and Iacobucci referred to section 718.2(e) for guidance, explaining that CSOs were to be given some degree of consideration in every case, as per their intended purpose -

The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(e) must be construed and applied in this light (para. 40).

\(^{23}\) The appeal in this case was ultimately dismissed, but Gladue remains significant for providing clarification regarding the interpretation of this section in future cases.
Gladue went on to recommend that CSOs always be considered before custody in cases where rehabilitative and restorative aims were of notable importance, echoing that well-known fact stated in both Sentencing Reform (1987) and Taking Responsibility (1988) and reiterated in Preston (1990): “Restorative sentencing goals do not usually correlate with the use of prison as a sanction”. (para. 43).

While Gladue was instrumental in establishing that CSOs were more than capable of meeting the purpose and principles of sentencing where rehabilitative and restorative goals were concerned, it did not address the issue of whether CSOs - introduced for the explicit purpose of serving as alternatives to custody (Gemmell, 1999) - were able to meet the same sentencing purposes as custody. As discussed, custody sentences are typically handed down when general deterrence and denunciation are considered primary sentencing goals, yet the Code amendments were driven primarily by the need to reduce reliance on custody (Cole, 1999; Manson et al., 2008; Roberts and von Hirsch, 1999). The question thus remaining was that of whether the use of CSOs could be considered consistent with the fundamental purposes and principles of sentencing where general deterrence and denunciation are considered key goals. That is, can CSOs achieve the sentencing purposes of general deterrence and denunciation?

Just one year after Gladue (1999), a comprehensive answer to this question was provided in R. v. Proulx (2000), still regarded to this day as the leading case on the imposition of CSOs (Manson et al., 2008). In short, Proulx concluded that CSOs could adequately meet these dual purposes:

Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances... (para. 104).

The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender’s criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison (para. 105).
Further to the point of when and where conditional sentences are to be used in place of custody, Proulx echoed Gladue in reiterating that custody should rarely, if ever, be considered where restorative and rehabilitative goals are of primary importance:

While incarceration may provide for more denunciation and deterrence than a conditional sentence, a conditional sentence is generally better suited to achieving the restorative objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender... consequently, when the objectives of rehabilitation, reparation, and promotion of a sense of responsibility may realistically be achieved in the case of a particular offender, a conditional sentence will likely be the appropriate sanction, subject to the denunciation and deterrence considerations outlined above (para. 109).

If it is now mandated in Canadian law that restorative and community-based measures are to be seriously considered anytime the successful rehabilitation of an offender remains a likely possibility (Cole, 1999; Manson et al., 2008), then the highly punitive approach adopted by the Integrated Riot Investigation Team to apprehending and punishing rioters is worryingly at odds with the stated goals of the Canadian justice system, particularly if it is found that those who participated in the riot did not have histories of criminal behaviour and possess strong promise for rehabilitation. An in-depth examination of the reasons for judgment provided for those rioters sentenced thus far sheds much-needed light on the question of whether punishing these rioters “to the fullest extent of the law” is, in fact, consistent with the stated goals of the newly-reformed Code.
4. Recurring Trends and Issues in the Sentencing of Adult Rioters in Vancouver, British Columbia

4.1. Introduction

It is important to examine whether those who participated in the 2011 Vancouver riot are being sentenced in ways consistent with the stated aims of the recently-reformed Criminal Code of Canada for a number of reasons. Despite the severe punishment that members of the Integrated Riot Investigation Team (IRIT) have repeatedly assured the public that rioters will receive, studies have consistently failed over the years to verify a relationship between severity of punishment and specific or general deterrence (See Chapter 3.2.3). Additionally, a growing body of social psychology research in the area of deindividuation and group dynamics is offering increasing support for the existence of a “mob mentality” among those who participate in riots and other crowd disturbances, suggesting that rioters are neither motivated by rational decision-making nor a lack of general deterrents (See Chapter 2.3.2). Both of these findings seriously challenge the suitability of a criminal justice response premised on the notion that riots can be prevented simply through increasing the severity of the punishments associated with participating in one.

It is always desirable for communities to avoid dedicating societal resources to crime prevention practices that either do not achieve the intended outcomes or cannot be proven to do so. However, the stakes associated with doing so are arguably much higher when the criminal event being responded to is one as enormous in its impact and harm as a riot. As if the millions of dollars in damages incurred by the city of Vancouver following the riot are not enough, the social, emotional, and fiscal costs of processing the sheer number of rioters estimated by the IRIT to be sentenced at the investigation’s conclusion will be even higher, particularly if the majority do receive some form of
custody. Given that one of the major aims of the 1996 Code reforms was to reduce the use of custody as a sanction, there is value in investigating who exactly these rioters are, what sentences they are receiving, and the legitimacy of the justifications being offered for these sentences. The costs associated with punishing this population according to deterrence ideology and unproven practices alone are far too high for these questions to go unanswered.

The purpose of this chapter is therefore to examine and identify the key factors that guide the sentencing of adult rioters who participated in the 2011 Stanley Cup Riot in Vancouver, British Columbia. This examination is conducted by means of an exploratory content analysis of the written reasons for decision given by sentencing judges for convicted rioters. The themes that are identified during the analysis are considered in the context of: the purposes and principles of sentencing that are highlighted in sections 718 to 718.2 of the Code; the reasons for which the aforementioned sections were introduced in 1996; the limited evidence base in support of general deterrence and denunciation as appropriate sentencing purposes; and finally, the growing evidence base in support of the deindividuating capabilities of riots. Some of the questions addressed in this content analysis by the researcher include the following:

- What sentences are recommended to rioters by Crown Counsel and Defense Counsel?
- What rationale guides the sentences recommended to rioters by Crown Counsel and Defense Counsel?
- Is this rationale consistent with the stated purposes and principles of sentencing within the Code?
- To what extent do judges agree with the rationale offered by Crown Counsel and Defense Counsel?

The chapter concludes with recommendations for updating the sentencing guidelines for rioters so as to take into account what is known about why people generally participate in riots, and ensure they are consistent with the stated aims of the Code and the overall effort on the part of the justice system to increase the use of restorative measures and alternatives to custody wherever possible.
4.2. Data and methods

This exploratory investigation is based on an ethnographic content analysis of information contained in the reasons for decision provided for adult rioters who participated in the 2011 Vancouver riot and were sentenced in Vancouver Provincial Court between June 15, 2011 and December 31, 2012. This research method, defined by Altheide (1987, p. 65) as “the reflexive analysis of documents”, begins with data collection and specific observations of that data. The collected data is then repeatedly and thoroughly examined so as to identify recurrent categories and themes, from which general theories can then be constructed and conclusions can be drawn. Throughout the course of the research process, it is expected that additional categories and variables will emerge; when this happens, the theory is modified accordingly (Berg, 2009). Exploratory (inductive) research is recommended when conducting research on topics that are generally unprecedented and/or for which no “guiding” theoretical framework is known, because this method avoids the forcing of numerical and narrative data into predefined categories and any resulting bias (Altheide, 1987; Berg, 2009).

The data in the present study consisted of the written legal judgments for the first 20 adult rioters who were sentenced in Vancouver Provincial Court for their role in the 2011 riot (See Appendix B for a list of the cases). This population was selected because the total population of rioters sentenced at the time of this writing was too small for a random sample to be obtained, and because an exhaustive sample would allow for an unbiased examination of central themes and patterns. Because not every case that appears before the judiciary is recorded24, the 20 reasons for judgment had to be obtained using a variety of sources. Fifteen of the 20 judgments were recorded and thus obtained using Quicklaw25, an electronic legal research database and search engine containing significant coverage of Canadian legal judgments. Of the five unrecorded

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24 Formal written reasons for trial decisions are issued in only a small number of cases; otherwise they are provided orally and rarely transcribed (Busby, 2000, para. 11). This is particularly common for cases where guilty pleas are entered.

25 Learn more about Quicklaw at http://www.lexisnexis.com/ca/legal/
judgments, two were obtained in person from Vancouver Provincial Court via payment and transcribed to electronic documents, and three were obtained from JCWord, the transcription service used by Vancouver Provincial Court, via payment. To ensure that the search for the first 20 cases sentenced was, in fact, exhaustive and that no cases were overlooked, the names and file numbers of rioters in the process of being sentenced were supplemented by print and electronic news media, the Provincial Court of British Columbia website, and British Columbia Court Services Online, an online search engine that allows one to search for, and obtain, the public court records of any individual convicted in British Columbia.

The first stage of data collection began with reading through each set of written reasons once, so as to gain a better understanding of the nature of the crimes committed by each rioter during the 2011 riot, as well as an idea of the key concerns taken into account during the sentencing of each rioter. Following this step, each set of reasons was carefully coded for recurring themes using NVivo. An “open coding” strategy was employed, in which cases were read and coded repeatedly, and themes were conceptualized as they “emerged” through the coding process. A series of recurring issues in sentencing rioters eventually surfaced, and a preliminary coding framework was established.

To ensure consistency and accuracy in the identified themes, both within cases and amongst cases, cases were read and coded three times. As the coding process continued, some themes were abandoned due to a lack of sufficient evidence, while others were consolidated if found to have significant overlap. Throughout the process, the coding scheme was modified accordingly. Coding was finally considered complete (that is, all key evidentiary and procedural issues were considered identified) when no additional items were discovered upon further reviews.

26 This website, maintained by British Columbia of its respective provincial, supreme, and appellate courts, publishes most of its judgments directly within a month of sentencing. See more on the Provincial Court of British Columbia website at http://www.provincialcourt.bc.ca/judgments-decisions
4.2.1. Descriptives

Table 1 provides details regarding the names and ages\textsuperscript{27} of the 20 rioters examined, as well as the charge(s) they each were convicted for and the sentence(s) they each received. All descriptive information was gathered from British Columbia Court Services Online. Of the 20 convicted rioters examined in this analysis, 19 were male and only one was female. The ages of the rioters ranged from 18 to 37, but with the exception of the 37 year old offender, all were 25 years of age or younger at the time of their participation in the riot. All rioters examined for this content analysis were convicted on one charge of participating in a riot (CCC 65), with four having been convicted on additional charges as well. Two of these four were convicted of an additional charge of breach of undertaking, and the other two were convicted of an additional charge of assault.

Regarding sentencing, 19 of the 20 examined rioters received some form of custody as part of their sentence; Camille Cacnio was the only rioter to receive a suspended sentence and a community work service order with a probationary period. Of those rioters who received custody sentences, ten received a custody sentence to be served in a custodial institution, and nine received conditional sentence orders (CSOs). Thirteen rioters had orders to complete a set amount of hours of community work service (CWS) as part of their sentence, and nine had orders to pay victim surcharge fees. No rioters received conditional discharges, absolute discharges, or any other sentence with diversionary goals, nor were any adult rioters known to have been diverted from court at the pre-sentencing stage when this analysis was performed.

Examining these descriptives reveals significant variability in the sentences received by the examined rioters, despite their similar charges. These findings raise a number of important questions regarding the factors that go into determining the sentences that rioters receive, as well as the severity of their sentences.

\textsuperscript{27} Expressed in year of birth (YOB), as British Columbia Court Services Online does not disclose the exact birthdate and/or age of offenders.
Table 1. Descriptives and sentences of adult rioters sentenced in Vancouver Provincial Court between January 1 2012 and December 31 2012

<table>
<thead>
<tr>
<th>Name</th>
<th>YOB</th>
<th>Date sentenced</th>
<th>Charges convicted</th>
<th>Sentence received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ryan Dickinson</td>
<td>1992</td>
<td>Feb. 16, 2012</td>
<td>Taking part in a riot</td>
<td>17 months incarceration, 2 years' probation</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Breach of undertaking</td>
<td></td>
</tr>
<tr>
<td>Emmanual Alviar</td>
<td>1991</td>
<td>Jun. 11, 2012</td>
<td>Taking part in a riot</td>
<td>30 days incarceration, 16 months' probation, $100 victim surcharge, 150 hours CWS</td>
</tr>
<tr>
<td>Robert Snelgrove</td>
<td>1986</td>
<td>Jul. 3, 2012</td>
<td>Taking part in a riot</td>
<td>5 months CSO, 16 months' probation, $500 victim surcharge, 150 hours CWS</td>
</tr>
<tr>
<td>Sean Yates</td>
<td>1989</td>
<td>July 20, 2012</td>
<td>Taking part in a riot Assault peace officer</td>
<td>7 months incarceration, 1 year probation, $500 victim surcharge</td>
</tr>
<tr>
<td>Camille Cacnio</td>
<td>1989</td>
<td>Sep. 7, 2012</td>
<td>Taking part in a riot</td>
<td>Suspended sentence, 2 years' probation, 150 hours CWS</td>
</tr>
<tr>
<td>Sean Burkett</td>
<td>1993</td>
<td>Sep. 7, 2012</td>
<td>Taking part in a riot</td>
<td>90 days CSO, 1 year probation, 50 hours CWS</td>
</tr>
<tr>
<td>Alexander Peepre</td>
<td>1990</td>
<td>Sep. 13, 2012</td>
<td>Taking part in a riot Assault</td>
<td>60 days intermittent incarceration, 18 months' probation, $2000 victim surcharge, 125 hours CWS</td>
</tr>
<tr>
<td>Lincoln Kennedy-Williams</td>
<td>1990</td>
<td>Sep. 21, 2012</td>
<td>Taking part in a riot</td>
<td>90 days intermittent incarceration, 15 months' probation, 100 hours CWS</td>
</tr>
<tr>
<td>Alexander Pennington</td>
<td>1990</td>
<td>Sep. 25, 2012</td>
<td>Taking part in a riot</td>
<td>6 months CSO, 2 years' probation, 100 hours CWS</td>
</tr>
<tr>
<td>Dylan Long</td>
<td>1992</td>
<td>Oct. 5, 2012</td>
<td>Taking part in a riot</td>
<td>6 months CSO, 15 months' probation, 100 hours CWS</td>
</tr>
<tr>
<td>Jacob Pateman</td>
<td>1992</td>
<td>Oct. 5, 2012</td>
<td>Taking part in a riot</td>
<td>60 days CSO, 15 months' probation, 100 hours CWS</td>
</tr>
<tr>
<td>Connor Epp</td>
<td>1991</td>
<td>Oct. 24, 2012</td>
<td>Taking part in a riot</td>
<td>90 days CSO, 9 months' probation, $100 victim surcharge, 50 hours CWS</td>
</tr>
<tr>
<td>Richard Dorosh</td>
<td>1993</td>
<td>Oct. 24, 2012</td>
<td>Taking part in a riot</td>
<td>4 months incarceration</td>
</tr>
<tr>
<td>John Sawicki</td>
<td>1992</td>
<td>Oct. 25, 2012</td>
<td>Taking part in a riot</td>
<td>9 months CSO, 15 months' probation, $100 victim surcharge</td>
</tr>
<tr>
<td>Timothy Lau</td>
<td>1990</td>
<td>Nov. 5, 2012</td>
<td>Taking part in a riot Breach of undertaking</td>
<td>4 months incarceration, 2 years' probation, $1500 victim surcharge, 150 hours CWS</td>
</tr>
<tr>
<td>Wallintong Grueso</td>
<td>1974</td>
<td>Nov. 29, 2012</td>
<td>Taking part in a riot</td>
<td>4 months CSO, 15 months' probation, $100 victim surcharge, 100 hours CWS</td>
</tr>
<tr>
<td>Ledesma</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Willmar Renderos</td>
<td>1986</td>
<td>Dec. 21, 2012</td>
<td>Taking part in a riot</td>
<td>45 days incarceration, probation until expiration of sentence</td>
</tr>
<tr>
<td>Eric Hodson</td>
<td>1992</td>
<td>Dec. 21, 2012</td>
<td>Taking part in a riot</td>
<td>6 months CSO, 18 months' probation, $100 victim surcharge, 125 hours CWS</td>
</tr>
</tbody>
</table>
4.3. The precedent: R. v. Loewen

Arguably the most important finding to emerge during the coding process was that all 20 examined cases cited the 1992 British Columbia Court of Appeal decision R. v. Loewen as the guiding precedent on sentencing for participation in a riot. Due to the consistency with which Loewen was cited and the weight placed on this decision during sentencing, it is assumed this decision will continue to be relied upon for guidance throughout the sentencing of all adult rioters charged in the 2011 Vancouver riot.

The appellant in this case, George Loewen, was charged with one count of mischief under $1000, one count of mischief over $1000, and one count of participating in a riot, following his partaking in the riot that took place in Penticton, B.C., on July 28\textsuperscript{th} 1991. During his sentencing, Loewen was acknowledged to be an offender who ordinarily would not receive a custody sentence: He was 18 years old at the time of the offence and carried no criminal record, and an extensive pre-sentence report prepared before the trial court revealed a number of additional mitigating factors, including that Loewen was the product of a broken home, that he struggled with ADHD, that he was liked and admired by many teachers and students at the high school he attended, and that he had pled guilty for his actions and expressed deep remorse throughout his court hearings. Despite all these mitigating factors, Loewen was sentenced to a surprising twelve months imprisonment for his role in the riot, one month for each count of mischief and ten months for one count of participating in a riot. Although the British Columbia Court of Appeal later reduced his sentence to six months (in conjunction with one year’s probation and 150 hours of community work), the judge ruled that the imposition of a custody sentence remained appropriate in the circumstances.

As the Court of Appeal is the highest court in B.C., it follows that Loewen is regarded as binding and persuasive to this day. However, if this decision is to be relied on for guidance in the sentencing of the rioters who participated in the 2011 Vancouver riot, it must be done so in the context of the significant reforms made to the Criminal Code of Canada in 1996 (see Chapter 3). As discussed, major changes to the Code that were brought about as a result of these reforms include, but are not limited to: The explicit definition of the purposes and principles of sentencing; the introduction of restorative purposes into the purposes and principles of sentencing, including the
promotion of responsibility in the offender and reparation of the harm done by the crime; and finally, the introduction of the conditional sentence, a community-based sanction intended to serve as an alternative to custody. Thus, if pre-1996 decisions such as Loewen are found to be based on legal principles no longer considered applicable or reduced in importance, they must be weighed accordingly so as to not compromise current sentencing objectives.

During the course of the analysis, the Loewen decision was found to have influenced the sentencing of the 2011 Vancouver rioters in four major ways:

1. Through framing the context of a riot as an aggravating factor;
2. Through stipulating that deterrence and denunciation are the key sentencing purposes in riot cases;
3. Through stipulating that the two sentencing purposes of deterrence and denunciation could only be met through the imposition of a custody sentence served in an institutional setting; and
4. Through downplaying relevant mitigating factors that would ordinarily rule out the use of custody.

4.3.1. Context of riot as aggravating factor

The most fundamental way in which Loewen (1992) guided the sentencing of the examined rioters was through establishing that a crime that takes place during the course of a riot is aggravated by the context of the riot, and thus warrants a more punitive sentence than had the crime taken place in isolation. Arguably the most frequent reason cited by Crown Counsel in defense of this position was that the act of participating in a riot, by its very nature, encourages others nearby to join in and participate as well. Rioters are thus to be held responsible not only for their own actions, but for the actions of others around them. This logic is derived directly from paragraph 8 of Loewen (2012), which was quoted verbatim in four of the 20 examined cases:

To take part in a riot is by mere presence to contribute to the excitement, fervor, intimidation and dangerousness of the unlawful assembly.
This reasoning was repeated and expanded upon in several of the examined judgments as justification for a severe sentence. In *Dickinson* (2012), in which the accused destroyed a newspaper box, aided in the destruction of two police cars, and damaged a business window, Crown Counsel acknowledged that the accused did not personally assault anyone nor indirectly cause harm to any individual through his actions, but then implied that the accused should be held partially responsible for the many violent and nonviolent acts of crime committed during the riot by others, due to his own general participation having likely helped fuel those actions:

The Crown does not allege that Mr. Dickinson personally caused physical harm to any one or that he directly caused the damage to The Bay, or that he broke into any premise to steal property. The Crown says, however, his actions in taking part in the riot encouraged others to take part in it. In that sense, Mr. Dickinson’s acts must be considered in the context of the overall riot (para. 20).

Additionally, in *Dorosh* (2012), in which the accused looted a store and attempted arson during the riot, it is accepted by the court that “each of the participants in the riot must take some responsibility for the totality of the riot as well as responsibility for their individual acts” (para. 64); the accused is thus blamed not only for his own act of theft but for potentially “inspir[ing] others who saw him” (para. 64). In *Alviar* (2012), in which the accused caused minor property damage and rocked a vehicle with others28, an aggravating factor in the case was deemed to be that he “encouraged others to join in” (para. 32). It thus appears that the crime of participating in a riot acts as an aggravating factor against itself.

The logic that participating in a riot inherently encourages the participation of others as well appeared to influence what Crown Counsel regarded as “participation” in the first place. Although the degree to which each of the examined rioters participated in the riot was taken into account as a factor that could either aggravate or mitigate the actions of the accused (see Chapter 4.3.4), Crown Counsel typically recommended

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28 It is clarified in these reasons that the accused did not actually tip over the vehicle, nor participate in the eventual tipping over of the vehicle.
sentences to rioters on the grounds that mere presence at the scene of a riot was enough to constitute participation, and subsequently, to encourage the participation of others. In other words, the gravity of any individual rioter’s actions lie primarily in the fact that they were present while the riot took place. From *Patillo* (2012):

> Participating in a riot includes a vast range of behaviors. A riot will only end when those involved do what they should have done in the first place: stop and leave the area. As long as there are observers, who by their very presence are encouraging the destruction, people watching, sometimes cheering, and frequently taking photographs, the riot will continue (para. 41).

The sentences recommended to rioters (see Table 2) evidently put this belief into practice: 19 of the 20 examined rioters were recommended custody sentences by Crown Counsel, despite wildly varying degrees of participation. In cases such as *Alviar* and *Dickinson*, Crown Counsel argued that a custody sentence was warranted because the accused in each case had participated in the riot over a matter of hours, while in *Peepre* (2012) and *Yates* (2012), a custody sentence was recommended on the grounds that the accused in each case had committed an assault during the course of their participation in the riot. However, nonviolent rioters who participated for far shorter periods of time and committed arguably far less serious acts were also recommended custody sentences. In *Cacnio*, the accused’s total active participation in the riot is described to have occurred over 20 seconds (2012, para. 15); in *Hodson*, the accused’s total active participation in the riot was described to have occurred over 70 seconds29 (2012, para. 30); and in *Burkett*, the accused’s total active participation in the riot is described to have taken place over “a matter of minutes” (2012, para. 11).

Crown Counsels’ view that any degree of involvement in a riot (beginning with mere presence) constitutes participation is consistent with all 20 of the examined rioters having been convicted on the charge of participating in a riot, and with 16 having been...

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29 Crown Counsel defended their position in this case by arguing that the accused participated in the riot even while not actively destroying property by “stay[ing] in the area after the riot began” and “support[ing] others in their rioting by his expressions of pride in his own vandalism and his enjoyment of the destruction effected by others” (*Hodson*, 2012, para. 26).
convicted exclusively on this charge. As described in Chapter 2, the charging of all rioters with the indictable-only offence of participating in a riot was intentional; however, the majority of the examined 20 rioters were initially charged with at least one property offence as well (discussed further in Chapter 5). How can 20 rioters, of arguably widely differing levels and types of participation, all be convicted on the same sole charge? This appears to be possible due to the fact that the Criminal Code of Canada does not clearly define what participating in a riot entails.

Section 64 of the Code defines a riot as “an unlawful assembly that has begun to disturb the peace tumultuously”. This section of the code must be interpreted in the context of section 63.1 of the Code, which defines an unlawful assembly:

63.1. An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(a) will disturb the peace tumultuously; or

(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

However, section 65, describing how rioters are to be punished, describes the crime of participating in a riot only as that of “taking part in a riot”. This vague wording has not gone unnoticed: Both R. v. Brien (1993) and R. v. Berntt (1997) have, in recent decades, addressed the issue of what exactly constitutes participation in a riot. Brien held that participation in a riot requires subjective mens rea (subjective intent), while Berntt held that participating in a riot involves contributing to “…an air or atmosphere of force or violence, either actual or constructive” (1997, para. 26); however, neither case examined or defined the specific behaviours involved in participating in a riot. The lack of specificity in the wording of section 65 of the Code is therefore likely intentional, as it allows the act of participating in a riot to encompass a wide range of unspecified behaviors, ranging from mere presence to looting to extreme property damage and violence against others. All one needs to do to participate in a riot, according to case law, is knowingly contribute to the “air of violence or force of violence”, however that may be.
Expanding upon the notion that participating in a riot encourages others to participate as well, the context of a riot was described in several cases by Crown Counsel to be an aggravating factor because riots, through the power they hold to influence otherwise law-abiding citizens to behave in violent and destructive ways, present a serious threat to civil society. A riot thus constitutes a breach of societal norms and rules on a scale far larger than that caused by an individual committing a single criminal offence against another. This argument is also derived from Loewen:

A riot is, by its very nature, a serious threat to orderly society. If riots become prevalent, they will undermine many of the values of a free and democratic society (para. 10).

The symbolic threat to “orderly society” and/or the “rule of law” that riots pose was a frequent theme in the examined cases. Lau, for example, contains the following passage:

The seriousness of participating in a riot cannot be understated. This is because during a riot the rule of law becomes non-existent for the participants. They are no longer guided by societal rules; rather, they become guided by mob rules. It is the abandonment of those societal rules that leads to the loss of peace, order and ultimately, the protection of persons and property (2012, para. 41).

Similar sentiments were echoed in cases such as Dickinson, Patillo, Burkett and Ledesma (2012). Loewen goes on to explain that riots, due to their size, carry the potential to be far more destructive and threatening than an individual person:

The number of persons involved in the Penticton riot, the physical injury inflicted upon police officers, the physical damage occasioned to civic as well as to private property, and the damage done to the general reputation of the Penticton community, demonstrate that the circumstances of the riot were far from “ordinary” (1992, para. 12).

Patillo also cites this argument in describing how “…by sheer force of numbers, the rioters can break through any security device and loot and destroy at will (2012, para. 40)”; in these reasons it is also described that the enormous burden riots place on emergency personnel result in there being “no assistance available for anyone else in the community” (2012, para. 40). Indeed, Crown Counsel and Judges described in detail many consequences of the riot, including the harm done to the reputation of Vancouver; the reduced sense of security experienced by citizens of Vancouver; the resulting
damage and massive monetary costs to business owners, individuals, and the city; and, finally, that the riot risked others' lives and caused significant emotional trauma. The gravity of the crime of participating in a riot is thus demonstrated to lie not only in the act of encouraging participation from others, but in the consequences of doing so.

To strengthen the applicability of *Loewen* (1992), Crown Counsel sometimes cited other cases in which rioters had been sentenced according to similar principles. One such case was *Fuller*, a 1995 unreported decision involving an individual charged for committing minor mischief during the riot that followed the Stanley Cup final game in Montreal in 1993. *Fuller* (1995) was cited in three of the 20 examined cases to further the argument that rioters should be held partially accountable for the actions of others in addition to their own. The following passage from *Fuller* was included in the proceedings for *Patillo*:

> Those acts must be analyzed in the context of the riot. The gravity of the act does not lie in the destruction of the sign itself. The relative minor offence of damaging and removing a "ONE WAY" sign installed on a pole, at the St. Marc and Ste. Catherine intersection, becomes much more serious when it is committed during a full blown riot. His actions have a direct impact on the multitude. His acts encourage others to take part in the riot (para. 46).

Another case was *Blackshaw* (2011), an England and Wales Court of Appeal decision. *Blackshaw* was cited in five of the 20 examined cases to elaborate on why crimes committed in the context of a riot are more serious than similar crimes committed in isolation. Two key passages from *Blackshaw* are included in the published reasons for *Dorosh*:

> The broad submission on behalf of each appellant is that the sentences passed on the individual offender for his or her individual offence were disproportionately severe. If the court were dealing with a single isolated offence, that submission would have considerable force. If, for example, a young man went down a quiet street in the middle of a

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30 Although *Blackshaw* involved an offender charged in the UK, it remains (like *Loewen*) a Court of Appeal decision, and thus is both persuasive and binding to Vancouver Provincial Court decisions regarding the sentencing of rioters.
town miles away from any rioting, but at a time when rioting was occurring miles away elsewhere, and broke into shop premises and there, without causing any damage, stole some cigarettes, and then left the premises, for the unfortunate shopkeeper to discover on the following morning that he had been burgled, the case would be serious enough. It would properly be dealt with in accordance with sentencing principles as the offence that it was, an offence without the aggravating feature that the offence formed part of the mob criminality which produced the public disorder (para. 7)

It is elementary that sentencing courts cannot ignore the context in which the crime or crimes for which sentence is to be passed was committed. It is an essential feature in the assessment of culpability. In some cases, the context would provide the most powerful mitigation, for example, a genuine mercy killing as a final act of love and devotion. In other cases, including the present appeals, the context hugely aggravates the seriousness of each individual offence. None of these crimes was committed in isolation. Eight of them were intrinsic to or arose from the widespread lawlessness and two more were intended to contribute to or aggravate it at a time when the disorders were at their most disruptive and alarming (para. 8)

*Blackshaw* (2012) thus frames the issue as one of culpability: People who commit crimes in the context of a riot should be held more culpable for their actions than people who commit the same crime in isolation, due to the encouraging context of the riot.

Sentencing judges, in all examined cases, accepted the Crown’s argument that the context of the riot was to be considered an aggravating factor. However, they were more willing than Crown counsel to recognize differences in each rioters’ degree of participation, and placed more importance on the sentencing purpose of proportionality, particularly in those cases where the accused was ultimately not sentenced to a period of incarceration. Defense counsel also typically accepted the Crown’s argument that the context of a riot was an aggravating factor, and in only one case was the notion put forward that treating the context of the riot as an aggravating factor may unfairly punish
rioters for acts committed by others that they did not directly nor intentionally aid or abet\textsuperscript{31}.

Typically, the most common explanation put forward by Defense counsel for why rioters had behaved in the manner they did was that they had found themselves unexpectedly “caught up” in the riot, suggesting that intent and/or foresight on the part of the accused was minimal. Although this explanation has seen some support over the years in various studies on deindividuation and group dynamics (see Chapter 2.3.2), it was typically dismissed or minimized by Judges. In Dickinson, for example, when Defense counsel argued that the accused’s participation in the riot was not as serious as that of his peers and that he had been caught up in the mob mentality, the sentencing judge responded that the accused’s actions “did not reflect someone who simply got caught up in the moment” (2012, para. 25) as evidenced by the serious nature of his participation, his continuous participation - “there were times [Dickinson] could have walked away but he did not” (2012, para. 24) - and his decision to go downtown knowing it would result in a breach of his bail. Similarly, in Cacnio, the accused is described as having “voluntarily participated in a large scale riot” for “no other reason other than the thrill of having done it” (2012, para. 20).

\textit{4.3.2. Deterrence and denunciation as primary sentencing principles}

The second way in which Loewen (1992) guided the sentencing of the rioters was by establishing general deterrence and denunciation as the most important sentencing purposes to be considered for those charged with participating in a riot. General deterrence, specifically, is called for in paragraph 9 of Loewen (1992):

\textsuperscript{31} From Dorosh (2012): “There must be strict limits on the concepts of common purpose and commonality… each accused must be differentiated and the court must avoid ‘sentencing the mob’… otherwise the court’s sentence simply becomes part of the public clamour” (para. 40).
This is not the time for unwarranted leniency nor by the same token for unwarranted severity. Care must be taken at the same time to preserve the message of general deterrence.

The reason given as to why a sentence with a general deterrent effect is needed is the same as that given for why the context of a riot must be treated as an aggravating factor: Because a riot carries far more destructive potential and poses a greater threat to civil society than an individual person, there is a greater need to deter people from ever participating in them. As such, the need for general deterrence was discussed in all 20 examined cases. *Alviar*, for example, clarifies why a sentence with a general deterrent effect is important:

Accordingly, this court must protect the values of our society by deterring those who are inclined to participate in riots. As such, it is through the imposition of meaningful consequences that the objective of deterrence is achieved (para. 27)

Similarly, in *Cacnio*, the sentencing Judge makes clear that –

...a sentence which has the potential to deter others from such conduct is appropriate... those we seek to deter must become aware of the unpleasant consequences which flow from such conduct (2012, para. 46).

Following similar logic, denunciation was also held by Crown Counsel to be a key sentencing purpose for the majority of cases examined. Crown argued that by sending the message to broader society that a particular crime is regarded by others as shameful and reprehensible, individuals will feel deterred from committing that crime – thus, denunciation essentially serves as a means of deterrence. *M.* (1996), cited by Crown counsel in several of these cases, explains in further detail the purpose served by imposing a sentence with a denunciatory element for a criminal offence:

The objective of denunciation mandates that a sentence should also communicate society’s condemnation of that particular offender’s conduct... 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 basis code of values as enshrined within our substantive criminal law (para. 81).

Crown Counsel go on to apply this logic in several cases, including *Cacnio*:
A denunciatory sentence is appropriate where it is sought to condemn the offender’s conduct in violating our core societal values, particularly where the crime is particularly offensive or prevalent in the community (2012, para. 46).

The focus on these two intertwined sentencing principles during the sentencing of the rioters is particularly relevant in the context of the 1996 Code reforms. In all but the most serious cases, where a term of incarceration was assumed to be non-negotiable\(^\text{32}\), both Defense Counsel and Judges acknowledged that the current legal landscape differed from that which existed during Loewen (1992), and that all sentencing purposes listed under section 718.1 of the Code must be taken into account during sentencing. However, those sentencing purposes other than general deterrence and denunciation (restoration, responsibility, public safety, and specific deterrence/rehabilitation) appeared to be taken into account only as secondary in importance to general deterrence and denunciation, which remained unquestioned as the most important sentencing goals for rioters. This is seen, for example, in Snelgrove:

The case law establishes from those riots that general deterrence and denunciation are paramount factors to be considered, and that rehabilitation is to be given a reduced value. By operation of law, I cannot ignore rehabilitation, but denunciation and deterrence remain paramount (2012, para. 33).

The practice of treating other sentencing purposes as secondary in importance to general deterrence and denunciation was seen even in cases where the circumstances were such that a restorative approach would ordinarily have been considered more appropriate. In Peepre, involving a rioter who, over several hours and while severely intoxicated, committed significant property damage and assaulted a civilian, the accused is described as having turned himself into the police to give a “frank and full” (2012, para. 14) account of his behavior just days after the riot. He is further described in the written reasons as having expressed deep remorse throughout his court sentencing and as having made significant efforts to turn his life around following the riot by taking such

\(^{32}\) E.g., Yates (2012), where the accused participated for a prolonged period of time and assaulted a police officer.
measures as: improving his school performance; securing more stable employment involving a greater level of responsibility; becoming involved in overseas volunteerism; completing a private anger management counselling programme; and making efforts to regularly attend AA meetings. Regardless, the paramount sentencing principles in this case were accepted to be deterrence and denunciation in accordance with Loewen (1992), and Peepre was sentenced to an intermittent custody sentence of 90 days instead of a conditional sentence order (CSO) on those grounds\textsuperscript{33}.

The need for restoration was addressed to some degree in the sentences handed down to rioters. Eleven of the 20 cases that were examined received community work service orders as part of their terms of probation, eight were ordered to pay victim surcharge fees, three received orders to complete a written letter of apology\textsuperscript{34}, and three had orders to meet with the victims of their crimes in order to complete a victim-offender mediation session, if their victims chose to pursue such a meeting. In only two cases, those of Pateman (2012) and Long (2012), was the potential for a restorative approach to sentencing the rioters seriously discussed in any meaningful capacity\textsuperscript{35}; however, in both of these cases, the primary sentencing purposes were still held to be those of general deterrence and denunciation.

Arguably the least amount of consideration was given during sentencing to meeting the additional sentencing purposes of specific deterrence/rehabilitation, protection of the public, and the promotion of responsibility. This was not, however, because the precedent set by Loewen demanded that deterrence and denunciation take precedence over these purposes; rather it was because these sentencing purposes were seen as inapplicable in the examined cases. It was overtly stated in most cases

\textsuperscript{33} In October 2012 Crown Counsel appealed Peepre’s sentence, arguing that it reflected “unwarranted leniency” on the part of the courts (Lazaruk, 2013); they had asked for 9 months incarceration. The appeal was dismissed in March 2013.

\textsuperscript{34} Only three rioters were ordered to write a letter of apology because 15 of the 20 examined rioters had already written a letter of apology to the city and made it available for public viewing prior to their sentencing.

\textsuperscript{35} See page 13 of this thesis for the excerpt from The Night the City Became a Stadium (2011) that was included in the proceedings for both these cases.
that there was little to no need to consider public safety or specifically deter the accused, as they posed a minimal threat to the community and were not at risk of reoffending. With regard to promoting a sense of responsibility, all twenty of the examined rioters were described as having already expressed remorse and/or a desire to take responsibility for their actions at the time of sentencing, thus eliminating the need to pursue a sentence that would need to meet these purposes as well (See Chapter 4.3.4).

Interestingly, the notion that general deterrence and denunciation should be considered key sentencing principles during sentencing was not questioned by Crown Counsel or sentencing judges in any of the examined cases even when social-psychological explanations were offered for the rioters’ behaviour. Research has repeatedly found evidence in support of the phenomenon of deindividuation, or “mob mentality”, in which individuals who would ordinarily conform to general societal norms may find themselves unexpectedly abandoning them in favour of situation-specific norms when certain conditions, such as anonymity, overstimulation, and intoxication, are present in the group context (Diener, 1979; Diener et al., 1973; Prentice-Dunn and Rogers, 1982, 1989; Zimbardo, 1969; see Chapter 2.3.2). In Dorosh, the actions of the rioters are attributed (in part) to the perception of anonymity each rioter acquired from being part of a group:

Each individual rioter is able to commit crime with impunity believing their actions are in amongst a group, finding comfort in anonymity. (Dorosh, 2012, para. 30).

Similarly, in Sawicki, the behavior of the accused is attributed in some degree to his having felt he had “anonymity in a large mob” (2012, para. 40), and Snelgrove, Peepre, and Williams (2012) all discuss the accused’s level of intoxication as having helped disinhibit them, thus increasing their likelihood of being “caught up” in the crowd disturbance. The fact that so many of the examined rioters reported no motive for their

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36 Rioters were deemed unlikely to reoffend for a number of reasons, including: that they had already been deterred by their remorse (Burkett, 2012; Cacnio, 2012), that they acted out of character (Burkett, 2012; Epp, 2012), that they had already been deterred by the publicity of the event (Cacnio, 2012), and that they had already made efforts to rehabilitate themselves since the riot (Dorosh, 2012; Peepre, 2012; Sawicki, 2012; Williams, 2012),
actions at all, expressed confusion and bewilderment regarding their behaviour, and claimed to have acted on impulse rather than with planning and deliberation is also consistent with deindividuation having played a role in their behaviour. In Peepre, the accused is described to have “appeared mortified by his conduct on display in the video played for the Court” (2012, para. 24); in Williams, the accused writes in his letter of apology that he “…does not understand how he went from being a normal guy who went to work every day to someone who did what he did that night” (2012, para. 26); in Dorosh, the accused states that “…he does not know why he committed this offence and feels like an ‘idiot’” (2012, para. 22); in Lau, the accused, when asked how he felt about his actions, responded that he was regretful and “normally… not one to start this type of thing.” (2012, para. 30).

Despite these accounts, deindividuation was regarded only as a possible and curious explanation for an accused’s behaviour. In no way was it considered one that reduced the need for a severe sanction that would make an example of them and send a strong message to the public regarding the consequences of taking part in such disturbances. Rioters were still assigned a high amount of moral culpability for their actions, and the need for society to express its condemnation of their acts was still considered paramount. This is seen in Patillo:

Those who get involved in a riot are usually otherwise decent and law-abiding people who are often, after the fact, shocked at their own behaviour. This is the puzzling reality, but affords no excuse (2012, para. 9).

Similarly, in Sawicki, anonymity is recognized as a factor influencing why the rioters participated, but it is implied that the rioters felt anonymous due to mere ignorance on their parts rather than the deindividuating effects of the crowd:

How these young people thought that they could get away with this is beyond me. The main participants are bound to get caught. That is all there is to it (2012, para. 41).

In Long and Pateman, deindividuation is acknowledged as an explanation for riot behaviour, but only in the context of it having been unusual that so many rioters who ended up being caught participated under the guise of anonymity and had no prior convictions:
It is somewhat ironic that one of the theories of why people engage in this kind of conduct is that they feel protected from scrutiny by seeking anonymity in a mob. Of course, in this day and age, almost everyone carries on their person a device for taking high resolution video and pictures of those individuals who decide to participate. It was this complete lack of anonymity that has led to hundreds of individuals being charged with serious criminal offences. The majority of these people have no experience with the criminal law (Long, 2012, para. 35; Pateman, 2012, para. 35).

Deindividuation was also seen as having had little to no effect on rioters’ intentions to participate, nor the rationality of their actions. In Burkett, the accused’s actions are attributed to his having been unable to “…muster the maturity to resist joining the destructive group activity” (2012, para. 26), and in Snelgrove, the accused is described as having “… voluntarily chose to participate in what became an enormous riot.” (2012, para. 43). The aforementioned English case of Blackshaw (2011) provides perhaps the most thorough dismissal of deindividuation and mob mentality as a mitigating factor, making the argument that the rioters were not “mindless” in any obvious way and therefore cannot be described as having acted without intent and deliberation:

Perhaps, too, the sheer numbers involved may have led some of the offenders to believe that they were untouchable and would escape detection. That leads us to address the suggestion that perhaps this level of public disorder should be treated as "mindless" activity. It was undoubtedly stupid and irresponsible and dangerous. However none of these appeals involves children or young offenders (where different sentencing considerations arise) nor indeed offenders with significant mental health problems. None of the offenders before us was "mindless". The actions were deliberate, and each knew exactly what he (and in one case, she) was doing (para. 9)

In only one case was the appropriateness of general deterrence as a primary sentencing principle seriously questioned as to its relevance to the Vancouver rioters. In Dorosh, defense counsel make the point that the accused was “only one year old at the time of the last Stanley Cup Riot in Vancouver” (2012, para. 67) and thus he could “…hardly be expected to be deterred by the sentences given at that time and the same might be expected of sentences that the court now imposes.” In response, Crown Counsel argued that the law “is of more general application than dealing with Stanley Cup and hockey issues… this case and related cases are about social responsibility and the rule of law”, and the accused thus “…must be used as an example to all others who
may contemplate riotous breaches of the public peace, wherever and whenever they may occur” (para. 67). The evidence in support of this approach is not discussed.

4.3.3. **Custody as necessary to achieve general deterrence**

The third way in which Loewen (1992) guided the sentencing of the Vancouver rioters was through establishing a custody sentence, served in an institutional setting, as the benchmark for rioters. It is notable, however, that the practice of sentencing rioters to custody was not a particularly new or groundbreaking one before Loewen; the decision was highly informed by the custody sentences handed down to several other rioters who had participated in the same riot. In *R. v. Post* (1991), arguably the most informative of these decisions, Justice Oliver stressed the need for a sentence that would send a strong message of general deterrence and denunciation to the public, going so far as to assert that custody should be considered “inevitable” in such cases:

> It is a monstrous thing that in this peaceful community citizens should be terrorized; retired people should be put in fear; small business operators should face vast expense for damage to their premises; tourists, upon whom the economy in large measure depends, should be scared away; damage should be done to civic property, and the property of all of the people of Penticton, by gangs of yahoos and hooligans who in their thousands believe this to be acceptable conduct. It is not. The people of Penticton are entitled to look to the courts for protection. If rioting to be unrestrained and unpunished, violence and mob rule will replace peaceful government.

> It must be clearly understood that participation in a riot such as this will inevitably result in substantial terms of imprisonment.

Other informative decisions involving Penticton rioters who received custody sentences included those of *R. v. Starcevic* (1991) and *R. v. McCabe* (1991). What it is that sets Loewen as the precedent, then, and distinguishes it from Post, Starcevic. and McCabe, is that the latter cases involved repeat offenders who had assaulted police officers during the course of their participation in the riot; the gravity of their crimes thus arguably lay in the individual acts themselves. Loewen, on the other hand, involved a young, first-time offender who would ordinarily have received an alternative to custody were it not for the unique circumstances of the riot. The decision was thus instrumental in establishing the *context of the riot* as an aggravating factor, meaning that anyone who
participated in a riot could now receive a custody sentence - even if they ordinarily would not under other circumstances:

Taking into account all of the foregoing circumstances I am of the view that in this case the sentencing principle of not imposing a custodial sentence upon a first time offender must yield to the imposition of a custodial sentence that will recognize the principle of general deterrence (para. 12).

Citing the above passage, Post (1991), and several other decisions involving young first-time offenders who were sentenced to custody following Loewen37, Crown Counsel repeatedly insisted during the sentencing of the examined rioters that the key sentencing purposes of general deterrence and denunciation could only be met through the imposition of a custody sentence – in some cases, going so far as to argue that the pressing need for general deterrence overrode any consideration of section 718.2(e) of the Code (see page 54) (Hodson, 2012; Renderos, 2012). Even in those cases where the negative effects that such a sentence would have on rioters was acknowledged, Crown counsel treated it as a non-negotiable necessity. From Epp (2012):

It is unfortunate for Mr. Epp that the sentence that will be imposed in this case will result in him having a criminal record, but that is part of the message that must go out to the public to deter persons in the future from participating in riots or riot-like situations. The message must be that if you participate in such an event, even to a minor degree, you will likely be photographed, identified, charged, and convicted, with the result that you will likely be given a criminal record that will have negative consequences for your life for years to follow (para. 65).

Consistent with their stance, Table 2 reveals that Crown Counsel recommended

37 See: Adboukhazaal, 1994; Holness, 1994; Newth, 1992; Psarrakis, 1995. Note that the majority of these decisions (arising from either the 1991 Penticton riot or the 1994 Vancouver Stanley Cup riot would, like Loewen, have taken place before the 1996 Code reforms.
<table>
<thead>
<tr>
<th>Name</th>
<th>Sentence recommended by Crown Counsel</th>
<th>Sentence recommended by Defense Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ryan Dickinson</td>
<td>15 to 18 months incarceration, 2 years' probation</td>
<td>1 year and 14 days incarceration, 2 years' probation</td>
</tr>
<tr>
<td>Emmanuel Alviar</td>
<td>4 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length)</td>
</tr>
<tr>
<td>Robert Snelgrove</td>
<td>30 to 90 days intermittent incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length)</td>
</tr>
<tr>
<td>Sean Yates</td>
<td>9 months incarceration, 1 year probation</td>
<td>4 to 6 months incarceration</td>
</tr>
<tr>
<td>Luke Patillo</td>
<td>4 to 6 months jail or intermittent incarceration (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Camille Cacnio</td>
<td>15 to 30 days intermittent incarceration, probation (unspecified length)</td>
<td>Conditional discharge, probation (unspecified length)</td>
</tr>
<tr>
<td>Sean Burkett</td>
<td>4 to 5 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length)</td>
</tr>
<tr>
<td>Alexander Peepre</td>
<td>9 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Lincoln Kennedy-</td>
<td>6 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Williams</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alexander Pennington</td>
<td>9 to 12 months CSO, 3 years' probation</td>
<td>9 to 12 months CSO</td>
</tr>
<tr>
<td>Dylan Long</td>
<td>4 to 5 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Jacob Pateman</td>
<td>30 to 90 days intermittent incarceration, probation (unspecified length)</td>
<td>Conditional discharge or CSO (unspecified length)</td>
</tr>
<tr>
<td>Connor Epp</td>
<td>3 months incarceration</td>
<td>Conditional discharge, probation (unspecified length)</td>
</tr>
<tr>
<td>Richard Dorosh</td>
<td>4 to 6 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>John Sawicki</td>
<td>6 to 9 months incarceration, probation (unspecified length)</td>
<td>CSO (unspecified length) or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Timothy Lau</td>
<td>6 to 9 months incarceration, probation (unspecified length)</td>
<td>2 months incarceration, probation (unspecified length)</td>
</tr>
<tr>
<td>Walintong Grueso</td>
<td>4 to 6 months incarceration, probation (unspecified length) including</td>
<td>3 to 4 months CSO, probation (unspecified length), or 30 to 60 days</td>
</tr>
<tr>
<td>Ledesma</td>
<td>150 hours community service</td>
<td>intermittent incarceration</td>
</tr>
<tr>
<td>Jerry Wernicke</td>
<td>3 months incarceration, probation (unspecified length)</td>
<td>3-6 months CSO or 21-30 days intermittent incarceration</td>
</tr>
<tr>
<td>Willmar Renderos</td>
<td>4 months incarceration</td>
<td>CSO or intermittent incarceration (unspecified length)</td>
</tr>
<tr>
<td>Eric Hodson</td>
<td>3 to 5 months incarceration, probation (unspecified length), or intermittent</td>
<td>Not stated</td>
</tr>
</tbody>
</table>

Table 2. Sentences recommended to adult rioters sentenced in Vancouver Provincial Court between January 1 2012 and December 31 2012
incarceration to 19 of the 20 examined rioters.\textsuperscript{38}

The sentences recommended by Defense Counsel were markedly different from those recommended by the Crown. Although in most cases Defense Counsel accepted the notion that the context of the riot was an aggravating factor that warranted a custody sentence, they did not agree with Crown Counsel that such a sentence needed to be served in a custodial institution. Rather, they were very favourable toward CSOs, placing much more weight on the individual circumstances of each case and recommending incarceration only in those circumstances where the gravity of the offence was deemed particularly severe (e.g., \textit{Yates}, 2012). Further, cases where rioters were determined to have very minimal culpability were deemed acceptable for a conditional discharge (e.g., \textit{Cacnio}, 2012). In total, Defense Counsel recommended CSOs in place of incarceration in 13 of the 20 examined cases and conditional discharges in 3 of the 20 cases.

Although CSOs would have been unavailable at the time \textit{Loewen} was decided, a CSO is technically a custody sentence, and \textit{Loewen} does not openly state that the custody sentences that rioters must “inevitably” receive cannot be served in any environment other than that of a custodial institution. Thus, whether or not CSOs were appropriate for rioters was a source of significant controversy during sentencing. In the majority of examined cases, it was repeatedly acknowledged by both Crown and Defense Counsel that many rioters met the criteria determining suitability for a CSO, as outlined in section 742.1 of the \textit{Code} (see page 52). Where Crown and Defense Counsel disagreed was in regard to whether sentencing a rioter to a CSO would be “consistent with the fundamental purpose and principles of sentencing”. Crown Counsel repeatedly argued that the use of CSOs with rioters would be “…inconsistent with the fundamental purposes and principles of sentencing in that [it] would fail to satisfy the level of denunciation and deterrence that is mandated in the circumstances…” (\textit{Alviar}, 2012, para. 22), while Defense Counsel by and large defended CSOs on the grounds that they

\textsuperscript{38} Crown Counsel recommended a CSO to only one rioter, Alexander Pennington, because he suffered from multiple mental disabilities and it was believed he would not benefit from a custody sentence. In the written reasons, Crown described the circumstances as highly unique and a rare exception to the general practice of recommending incarceration to rioters.
could serve as a general deterrent and denounce the crime of rioting just as effectively as a period of incarceration. The landmark case of *Proulx* (2000), instrumental in establishing that CSOs should be seriously considered in all cases where the criteria listed under section 742.1 are met and could also effectively meet the sentencing purposes of general deterrence and denunciation, was frequently cited by Defense Counsel in support (see page 55).

Defense Counsel’s assertion that a CSO could fulfill the principles of deterrence and denunciation as effectively as a period of incarceration was rooted in the idea that the public sentencing process itself would deter individuals just as much, if not more, than the threat of incarceration, and thus the general public had already been deterred simply through witnessing the arrests and convictions of those rioters sentenced thus far. Denunciation could also be assumed to have been met through the same means. Defense Counsel further argued that incarceration was particularly unnecessary in those cases where the accused was a young, first-time offender whose participation in the riot was at the lower end of the scale, because sentencing such an individual would send a particularly strong message to the public regarding the likelihood, and consequences, of being caught and convicted. From *Cacnio*:

> As I understand it, the thrust of this submission is that those who are likely to be deterred from similar conduct have likely been deterred by the widespread publicity Ms. Cacnio has received and the realization of how easy it is, in this day and age, to be caught, humiliated and prosecuted. From that it would follow that denunciation and general deterrence ought to be less than the paramount sentencing objectives and that a conditional discharge would not be contrary to the public interest (2012, para. 44).

This sentiment appeared to be echoed somewhat by sentencing judges: In many cases involving young first-time offenders (see: *Alviar*, 2012; *Burkett*, 2012; *Cacnio* (2012; and *Sawicki* 2012), they recognized the imposition of a criminal record as a hefty consequence worth treating as a very serious punishment in and of itself and devoted considerable time to discussing the many ways in which it would permanently affect the lives of the accused. Indeed, the shaming and stigma that accompany a public sentencing and criminal record, respectively, have been acknowledged for decades in criminology discourse as part of the process of how societies bring offenders to account.
for their behavior. The landmark case of R. v. D.E.S.M (1992), cited in Alviar, explicitly dictates that this stigma and shaming should be taken into account during sentencing:

By convicting him, society has already stigmatized him as a person who has committed a serious offence, and has denounced his offence. Quite recently, the Supreme Court of Canada has expressed itself quite strongly on the importance of stigma as a consequence of criminal proceedings. The court has been saying what most lawyers and criminologists have known all along, that a public charge, trial and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct (para. 376).

Defense Counsel argued that D.E.S.M was particularly relevant to the examined rioters due to the fact that many highly important technological changes had taken place since Loewen that allowed for each rioters’ conviction to have a far more detrimental effect on their lives than such a conviction would have had in 1992. Because the internet allowed the 2011 Vancouver riot to receive so much international and widespread publicity, Defense counsel argued, the rioters involved were placed under far more intense media scrutiny than rioters of previous decades would have been. Consequently, due to the massive public outcry for punishment that followed the riot, arguably far more public shaming accompanied the sentencing of the examined rioters as well. The elevated levels of vitriol and public scrutiny that the rioters experienced was acknowledged in many cases as a unique factor limiting the applicability of Loewen, including Patillo:

...the situation is different for Mr. Patillo and those who face similar charges arising from the events of June 15, 2011, than the situation of the usual offender. The level of media scrutiny and public condemnation experienced by those involved in the riot goes far beyond what occurs for most offences and most offenders. This is a significant consequence which complements any sentence handed down by the Courts (2012, para. 45)

It is of note here that this negative publicity was generally not regarded as a mitigating factor during sentencing (see Chapter 4.3.4).

Defense Counsel further argued that the burden of each rioters’ respective criminal convictions was significantly elevated by the preservation of information about their conviction and sentencing on the internet, and the ease with which such information
can be publicly accessed. This “virtual jail” was described in detail in an excerpt from *The City that Became a Stadium*, included in the proceedings for both Long and Pateman:

The foolish young rioters of today have a problem the rioters of 1966 and 1994 we referred to at the beginning of this section did not. The modern rioter’s noxious behaviour is on worldwide display from now on thanks to digital photography and the Internet. This is a life sentence to a virtual jail. As these young people mature and try to build a useful life they will find they have a criminal record of a sort that never existed before.

...Not many years ago if a person was not caught by the police, prosecuted, and convicted, there would be no record of it. And, if there was, it would be sealed. Today a young person, perhaps with the help of a stranger cheering his antics, can create his own criminal record – one that cannot be expunged - to dog him for the rest of his life (Long, 2012, para. 36; Pateman, 2012, para. 36)

This was also acknowledged in Sawicki, in which the sentencing Judge discussed not only the frequency with which employers conduct criminal background checks, but the ease with which anyone can search one’s name on the internet and immediately locate news stories describing their criminal history:

I should note here that this is a very public charge. I am told that and I accept that if you Google Mr. Sawicki’s name, the first stories that come up are stories involving Mr. Sawicki and his involvement in the Stanley Cup riots of 2011. He can never escape that. He can never escape the fact that he is going to have a criminal record. That has to be a significant deterrent in modern society. Employers are conducting criminal record’s checks on a much more frequent basis these days than they had in the past, and that has to be seen as a significant deterrent (2012, para. 36).

Defense Counsel also discussed how the permanent effects of this “virtual jail” are exacerbated by the advent of portable devices that allow one to take photos and/or record video footage, and the increase in the number of individuals who carry such devices with them at all times. As discussed in Chapter 2, a substantial amount of the photographic and video evidence captured by witnesses present at the riot was published online as part of the ongoing effort to vilify and shame offenders, and distributed far and wide via social media websites such as Facebook and Youtube. Rioters are thus forced to contend not only with a publicly searchable criminal record, but
the personal stigma of having their faces and their actions known to the general public for years to come.

Defense Counsel posited similar arguments for the use of conditional discharges, though they argued further that for some rioters, a restrictive sentence would be detrimental to the accused’s rehabilitation. Additionally, such sentences had previously been handed down even in those cases when the crime was arguably very serious, and thus the practice would be consistent with case law. In 11 out of 20 cases (see Table 1), sentencing judges accepted the argument that incarceration was unnecessary for rioters for whom the sentencing purposes of general deterrence and denunciation were less pressing and/or had already been met through other means. Further, in those cases where incarceration was deemed necessary, they often recommended intermittent sentences so that the sentence would only minimally interfere with the offender’s life (See: Burkett, 2012; Peepre, 2012; Williams, 2012; Snelgrove, 2012). Judges did not, however, accept the argument that conditional discharges were acceptable for rioters, and in all three cases in which such sentences were recommended, explicitly stated that they fundamentally could not meet the principles of deterrence and denunciation mandated in the circumstances. Discharges were also determined unsuitable for rioters on the grounds that such a sentence would be “contrary to the public interest” (Hodson, 2012; Renderos, 2012).

4.3.4. Minimization of mitigating factors

The fourth and final way in which Loewen (1992) guided the sentencing of the examined rioters was through instructing that those mitigating factors that would ordinarily rule out the use of custody be minimized in the face of the pressing need for deterrence and denunciation. As discussed, this precedent was set in Loewen when the accused was sentenced to custody despite recognition on the part of the sentencing judge that such an offender would ordinarily not receive such a sentence (see page 77). This rationale appeared to be responsible in large part for Crown Counsel's decision to recommend custody sentences to nearly all examined rioters, despite the extensive variation in each rioter’s type and degree of participation. Indeed, as made explicit in Epp, Crown Counsel took mitigating factors into account merely in order to determine the length of custody that would be appropriate for a given rioter:
The Crown submits that any degree of participation in a riot must be denounced and deterred by the imposition of a jail term, the length of which is determined by the degree of participation of the offender (Epp, 2012, para. 39).

Consistent with the fundamental purpose of sentencing contained within section 718.1 (see page 53) of the Code, the main factor taken into consideration by Crown and Defense counsel as either aggravating or mitigating in each case was the degree of participation exhibited by the accused during the riot. This was typically determined through some combination of: the length of time that the accused participated; the nature and seriousness of the crimes committed by the accused; and the degree to which the accused’s acts had the effect of instigating the riot and/or directly encouraging other individuals who were present at the riot to participate. Although no clear measure was given for each of these components, Dickinson states that, according to case law, it is typically those cases in which “offenders inflicted personal injury on others” that are treated as most serious in nature, while those in which “the offender committed relatively minor acts of vandalism while taking part in a riot” (2012, para. 37) typically receive sentences at the lower end of the spectrum. There was some contradiction among cases regarding the degree of seriousness to be ascribed to looting during the course of a riot, however: in Cacnio, the single act of looting committed by the accused during the riot was deemed to place her at the “lower end” of culpability, whereas in Dorosh and Long, the act of looting during a riot was treated as particularly serious for having had the effect of encouraging others who witnessed it to participate.

As informed by case law[39] and the fundamental purpose of sentencing, a number of other aggravating factors were also taken into account by Crown Counsel, the rationale being that these factors increased culpability or made the accused more blameworthy. These factors included: whether the rioter had previous convictions (Dickinson, 2012); whether there was actual or threatened violence committed by the accused (Peepre, 2012; Yates, 2012); whether the offence was committed while

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[39] Section 718.2(a) of the Code lists some factors that may be deemed aggravating, but this list is by no means exhaustive and was not applicable to any of the crimes committed by the rioters.
subjected to judicially imposed conditions (*Dickinson*, 2012); and whether there were multiple victims or multiple incidents (*Lau*, 2012). Case law also dictates that acts committed while part of a group or gang, acts resulting in substantial economic loss, and acts committed against victims who are particularly vulnerable be treated as aggravated, although these factors are arguably addressed through treating the context of the riot in and of itself as an aggravating factor.

Defense Counsel did not agree that standard mitigating factors be given less weight than usual in light of the particularly pressing need for deterrence and denunciation that is present in the context of a riot; rather, they urged judges to take into account all relevant mitigating factors evident in each case as reason for why CSOs and conditional discharges were more appropriate sentences than incarceration. In particular, in those cases where they recommended alternatives to custody, Defense Counsel made many efforts to draw attention to the sheer number of mitigating factors present in each case, in furtherance of their argument that such factors would ordinarily rule out the use of a custody sentence and that alternatives such as CSOs should be considered now that they are available. As many of these mitigating factors were identified repeatedly in numerous cases, what follows is a list of the most common of these identified mitigating factors. As the *Criminal Code of Canada* does not explicitly define what factors shall be deemed mitigating during sentencing and only lists important aggravating factors, the factors identified were classified according to the typology set out by Manson (2008). These factors, and the cases in which they were identified, are also listed in Table 3.

**First offence.** Being a first offender is typically considered a significant mitigating factor that, in most circumstances, would warrant a non-custodial sentence and the prioritization of rehabilitative goals. The assumption for such an offender is that the conviction itself will constitute a severe enough punishment to produce specific deterrent effects. Being a first offender is also consistent with demonstrating good character prior to the offence. 19 of the 20 examined rioters were found to have had no criminal record prior to their participation in the riot, although one rioter had a prior youth record for what was described as a “minor assault” (*Pateman*, 2012). Two rioters also had charges from criminal incidents that took place after the riot (*Snelgrove*, 2012; *Lau*, 2012); it is unknown what effect the riot may have had in their participation in these subsequent
### Table 3: Aggravating and mitigating factors present in written reasons for Vancouver rioters (N=20)

<table>
<thead>
<tr>
<th>Name</th>
<th>First offence</th>
<th>Youth</th>
<th>Prior good character</th>
<th>Guilty plea and remorse</th>
<th>Evidence of impairment</th>
<th>Employment/academic record</th>
<th>Post-offence rehabilitative efforts</th>
<th>Acts of reparation/compensation</th>
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criminal events.

Youth. Although youthfulness is not listed as a mitigating factor in Manson’s (2008) list, it is typically considered a factor that would also warrant a non-custodial sentence and the prioritization of rehabilitative goals - and indeed, it is for this reason that the Youth Criminal Justice Act does not list deterrence as a sentencing goal. Although all rioters examined in this analysis were adults, 18 of the 20 examined were 24 years of age or younger at the time of the riot. Additionally, 4 of the 20 examined rioters were 18 years old during the time of the riot and described as “having not been adults for very long” (e.g., Burkett, 2012).

Prior good character. Evidence demonstrating prior good character, and that an individual’s offence was committed “out of character” is typically considered an important mitigating factor, particularly when the evidence demonstrates the offender typically behaves according to values antithetical to those that underlay the offence in question (Manson et al., 2008). 18 of the 20 examined rioters were overtly described as having been of “prior good character” by employers, family, and teachers, and in many cases their participation in the riot was so far described as “surprising” and “out of character”. In Patillo, a family friend testified that “the riots were one bad day in the life of an extremely good man” (2012, para. 5); in Cacnio, the accused is described as having led an “exemplary life” prior to her participation in the riot and in numerous letters of support is described as “honest, hardworking, smart, responsible, dedicated, caring, generous and compassionate” (2012, para. 23); and in Long, the accused is described as having had a “squeaky clean” (2012, para. 21) image prior to the riot. Consistent with the rationale underlying the treating of a first offence as a mitigating factor, all 18 rioters explicitly described as having been of prior good character were also first-time offenders (see Table 3).

Guilty plea and remorse. Although a plea of not guilty is never to be treated as an aggravating factor, a guilty plea can be considered a mitigating factor when it is believed to imply remorse and a desire to take responsibility. The earlier the guilty plea, the more remorse is implied. All 20 of the rioters examined in this content analysis were not only found to have entered a guilty plea, but were described as having turned themselves in to the police early on in the riot investigation and to have been cooperative with police
throughout their sentencing. Furthermore, all examined rioters were found to have explicitly expressed severe remorse and regret during their sentencing. For example, a statement from the accused in *Patillo* reads as follows:

“...I will always regret that I went downtown that night; regret the havoc I wrecked, and the fear I instilled. I do hope to one day put the shame behind me, but please know that I have and will continue to learn from this grievous mistake.” (2012, para. 7)

A similar description of the accused is found in *Sawicki*, when the sentencing judge describes how the accused, in his letter of apology, wrote that he “…let down everybody in his family, everybody who has had some positive regard for him, who held him in high esteem… and he is completely deserving of the consequences” (2012, para. 22). The accused is also described as having expressed such severe regret and shame that those close to him began to worry about his mental health (2012, para. 24).

*Evidence of impairment.* Voluntary intoxication has been the subject of varying opinions regarding whether it is to be treated as a mitigating factor. Generally, impairment of judgment is treated as a mitigating circumstance in accordance with the fundamental principle of justice that sentencing must respond proportionately to culpability and “moral blameworthiness” – that is, the more intent and foresight into the consequences of the criminal act, the more punitive the sentence should be. On the other hand, treating voluntary intoxication as an inherently mitigating factor risks setting a precedent where individuals aware of the personal dangers of intoxication are able to commit criminal acts while intoxicated and not be held fully accountable for their actions – and in fact, becoming wilfully intoxicated while aware of the risk to others of doing so is usually treated as an aggravating, rather than mitigating, factor (Manson et al., 2008). Voluntary intoxication thus should not be treated as either an aggravating or mitigating factor in and of itself – rather, it is merely one factor that aids in determining the overall amount of culpability and blameworthiness to be attributed to a given offender.

16 of the examined 20 rioters were described as having been intoxicated when they participated in the riot; however, those rioters who reported being heavily intoxicated also reported by and large that they did not plan on rioting in advance, but rather acted on impulse as a result of being “caught up” in the riot. These accounts are consistent with all 16 of these rioters also being first-time offenders, and with 15 of these
16 being young and of “prior good character”. In addition, many of the younger rioters were described as having been “inexperienced with alcohol”, lending support to the disinhibiting properties that alcohol would have had on them and the lack of foresight they would have had as to the consequences of drinking. In Burkett, for example, it is stated that the 18 year old accused was “not accustomed to drinking” and “…has only a vague memory of what he did” (2012, para. 25) on the night of the riot; similarly, in Sawicki, the actions of the 18 year old accused are attributed in part to the fact that he “…does not have a great deal of experience with alcohol and… its effects on the capacity to make reasoned decisions” (2012, para. 7). These findings suggest it may be appropriate to treat voluntary intoxication as a mitigating factor for many of these rioters.

Employment/academic record. A good employment and/or academic record is typically considered a mitigating factor because it implies pro-social responsibility and conformity to community values and norms, as well as promising rehabilitative prospects. In the absence of such a record\(^{40}\), volunteer work or a pattern of assistance to others can serve the same mitigating purpose. 17 of the examined 20 rioters were described as having had notable work histories, or, in the case of many of the young offenders, future prospects in the form of eventual career advancements or academic achievements. Further, all 16 rioters described as having such prospects were also described as having been of “prior good character” by friends, family, and employers. A few rioters were even described as having had particularly exemplary records: The accused in Cacnio, for example, is described as having been a recipient of “numerous academic scholarships" and “involved in many community activities and charitable works as a volunteer” prior to the riot (2012, para. 23), while the accused in Wernicke was described as a “tireless volunteer contributing much more than the average person to the lives of those less fortunate than he is” (2012, para. 15).

\(^{40}\) The lack of such a record is not an aggravating factor in itself; judges should take into account during sentencing that crime is linked with areas of high unemployment, and that offenders of limited training and education tend to have diminished opportunities for work.
Post-offence rehabilitative efforts. Efforts to deal with personal problems and/or improve one’s social situation are nearly always given mitigating credit. Because the extent of the mitigating effect of rehabilitative efforts will depend on sincerity, actual progress, and relevance to the offence, it is always preferable if an offender is already participating and achieving some degree of progress – although at least some credit is typically given for demonstrating interest and some planning. It was noted in the written reasons for six of the 20 examined rioters that they had made efforts to rehabilitate themselves following their participation in the riot. These efforts typically took the form of attending or completing various treatment programs, such as Alcoholics Anonymous meetings (Dickinson, 2012; Snelgrove, 2012; Peepre, 2012), seeking and gaining meaningful employment (Peepre, 2012) or pursuing further education (Pateman, 2012; Patillo, 2012), although some rioters described themselves as having made rehabilitative progress since the riot simply through reflecting upon their actions in order to mature and avoid making the same mistakes again. A letter written by the accused in Patillo reads as follows:

For me personally, the fallout from my actions in the riots has brought deep shame and regret, but also great growth. I am ready to accept whatever penalty is decided upon, and I am determined to continue to grow into a respectful – and respectable – member of society (2012, para. 8).

It should be noted that most rioters who did not demonstrate post-offence rehabilitative efforts were not unwilling to address their personal problems; rather, they simply did not have significant personal problems to address in the first place, having been by and large first time offenders of prior good character with good academic and/or employment prospects and strong community ties.

Acts of reparation/compensation. As two purposes of sentencing listed in section 718 of the Code are to provide reparations for harm and to promote a sense of

Judges should not treat the lack of such plans as an aggravating factor due to the fact that not all communities have appropriate resources available locally, nor are all treatment facilities available at public expense.
responsibility in offenders, respectively; offenders are typically entitled to some mitigating
credit when they have already demonstrated a desire to take responsibility for their
actions or make reparations prior to sentencing. It should be noted here that the degree
to which rioters are realistically able to make amends to victims is severely limited by the
fact that Vancouver does not have a restorative justice program in place, and that
procedural aspects of the justice system limit the amount of contact offenders are able to
have with victims. Regardless, most rioters were noted as having made at least some
effort to repair the harm caused by their actions or compensate the victim for the losses
they suffered, including through returning stolen merchandise (Cacnio, 2012; Snelgrove,
2012), expressing a willingness to make reparations and/or pay restitution to victims (list
cases), expressing a willingness to participate in a restorative justice meeting (Pateman,
2012), and publishing apology letters.

There was inconsistency regarding whether or not suffering collateral
consequences following participation in the riot constituted a mitigating factor. In cases
where deterrence and denunciation are considered primary sentencing purposes, the
various consequences that an individual may suffer following the commission of a
offence (e.g., the loss of employment due to community stigma) may be considered
mitigating if they are considered so effective in denouncing the crime and deterring
others that the need for a sentence that meets these same purposes is drastically
reduced. On the other hand, where the consequence is so directly linked to the nature of
an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished.
In the majority of examined cases, it was acknowledged by both counsel and judges that
the rioters suffered significant personal consequences following the disturbance,
including through being the recipients of significant vitriol and criticism from the public
(Cacnio, 2012; Snelgrove, 2012), experiencing severe depression and anxiety (Sawicki,
2012), and losing employment (Cacnio, 2012). In Burkett and Cacnio, the “intense and
widespread publicity” suffered by the rioters was acknowledged as having creating a
situation “…significantly different than when Loewen was decided and there is less need
for an appropriate sentence to emphasize denunciation and general deterrence”
(Cacnio, 2012, para. 49); in cases such as Lau, however, it was explicitly stated that
Crown would reject this argument on the grounds that many of the rioters who suffered
negative publicity following the riot did not act in any way to prevent their names and
photos from circulating; rather, they seemed to have posed voluntarily for photos and welcomed attention during the riot.

4.4. Discussion and limitations

The findings of this content analysis raise several concerns regarding the approach adopted by law enforcement officials to charging and sentencing the rioters involved in the 2011 Vancouver riot. At the root of these concerns is the finding that Loewen (1992) has been relied upon much more heavily for guidance during sentencing than it should have been, particularly on the part of Crown Counsel.

This overreliance has resulted in major inconsistencies in the sentencing options considered appropriate for rioters by Counsel and judges, respectively. Defense Counsel and judges typically recognized that the major amendments made to the Code since Loewen to introduce restorative sentencing purposes and CSOs forced serious reconsideration of the applicability of alternatives to custody for rioters. However, Crown Counsel neither considered the possibility of using CSOs with rioters, nor took into account as an important guiding factor the 1996 Code reforms and the underpinning rationale for why it was amended. For Crown Counsel to dismiss CSOs as inappropriate for rioters is problematic and runs contrary to current sentencing practices and goals. Case law (e.g., Gladue, 1999; Proulx, 2000) has clearly established that CSOs are just as capable of meeting the purposes and principles of sentencing as custody in even serious cases, and that CSOs must be seriously considered anytime rehabilitation is a priority and public safety is not a concern.

In addition, overreliance on Loewen resulted in far too much focus being placed on meeting the sentencing purposes of deterrence and denunciation, to the neglect of others introduced into section 718 of the Code following the 1996 reforms - and in fact, as of this writing, Crown Counsel have appealed two decisions examined in this analysis, on the grounds that judges did not place enough emphasis on meeting the
sentencing purposes of deterrence and denunciation\textsuperscript{42}. This is a dangerously misguided approach, particularly in light of the knowledge that \textit{Loewen} was a highly controversial and contested decision even before the \textit{Code} reforms and the introduction of CSOs. As discussed, general deterrence and denunciation are typically prioritized in cases where punishment is considered a key sentencing goal. To focus primarily on the sentencing purposes of general deterrence and denunciation to the exclusion of others introduced into the \textit{Code} in 1996 thus also runs contrary to the stated aims underpinning the \textit{Code} reforms, particularly those of reducing the use of custody and increasing the use of restorative and diversionary measures.

Although \textit{Loewen} closely resembles many of the riot cases that have been or will soon be sentenced in Vancouver Provincial Court, and section 718 of the \textit{Code} does take into account the important role that case law plays in ensuring consistency in sentencing\textsuperscript{43}, its influence must be limited by its having taken place in the context of a legal landscape vastly different than that which exists today. Indeed, the majority of arguments for custody made on the part of Crown Counsel appear to derive from an overdependence on case law in general. Prioritizing case law above \textit{Code} principles risks sentencing individuals according to outdated legal principles not only when pre-1996 decisions are cited but when recent decisions are cited as well, if they themselves are informed by outdated decisions and legal principles. This is the case, for example, with \textit{Blackshaw} (2011): Though the decision is recent, the logic and case law guiding it are derived primarily from the 1970 Court of Appeal decision \textit{R. v. Caird}, which took place 41 years earlier. Reliance on case law also presents problems where there may be similarities between offences but not between offenders\textsuperscript{44}. When sentencing practices are followed that minimize, if not outright dismiss, those policy reforms that occur over time to accommodate new developments in research and justice system needs, such reforms are rendered redundant and powerless. There is little point in attempting to

\textsuperscript{42}In March 2013, the appeals for both cases – \textit{Peepre} (2012) and \textit{Williams} (2012) - were denied, and their sentences were held to not be “demonstrably unfit”.

\textsuperscript{43}Section 718.2(b) (see page 55) was quoted verbatim in \textit{Williams} (2012).

\textsuperscript{44}See: \textit{R. v. Cole} (2011), in which the rioter acted with planning and deliberation, or \textit{R. v. Catenacci} (2011), in which the rioter had prior convictions.
reform sentencing practice in Canada unless such reforms are able to have some notable effect during sentencing.

There are several important limitations present in the content analysis that must be acknowledged as well. The first and most obvious of these limitations is the sample size of 20 cases and the selection of such a sample through convenience, which ultimately limits its generalizability. Additionally, the promising rehabilitative prospects possessed by the majority of rioters examined in this analysis are likely to be the product of bias, because offenders who plead guilty and come forward to law enforcement authorities very soon after the commission of a crime are typically sentenced much sooner and much more quickly than those who plead not guilty and opt for a trial. Further, many rioters who eventually are apprehended and pled not guilty may go a long time before ever being identified and caught. This limitation ultimately limits the generalizability of the sample to all adult rioters who will eventually be sentenced in Vancouver Provincial Court. A final limitation is that conducting a content analysis on the reasons for judgment given for a particular offender entails examining court data, which does not always include all data relevant to an offender or case. This presents problems with coding: the researcher can record how many times a given item was cited, but cannot conclude that value is consistent with actual population characteristics.

If Loewen may now be considered outdated and limited in applicability, the question that follows is exactly what purposes and principles rioters should be looked to when sentencing rioters, if not deterrence and denunciation. A restorative approach to sentencing, which would provide a more direct means by which rioters can be held accountable for their actions, would arguably be much more suited for this population in many ways than a deterrence- and denunciation- focused approach. A necessary prerequisite for most restorative justice programming is voluntariness and remorse on the part of participating offenders, and all 20 examined rioters expressed remorse and the vast majority a desire to take responsibility for their actions. In addition, most individuals typically referred to restorative justice programs are young, nonviolent, first time offenders such as those examined in this analysis, with cases involving property crimes being among the most likely to reach mediation when compared to other categories of crime (Wyrick and Costanzo, 1999).
Although these findings cannot be generalized to the wider rioter population as a whole, a conservative generalization may be useful in assessing the feasibility of adopting a restorative approach to all rioters involved in a criminal incident as large and drastic in its consequences as a riot. The aim of the final chapter of this thesis is to predict the cumulative costs associated with sentencing all the rioters anticipated to be sentenced by the investigation's conclusion.
5. The Big Picture: Costs and Benefits of Using a Restorative Approach to Sentence Rioters in Vancouver, British Columbia

5.1. Benefits of a restorative approach to sentencing

The benefits associated with the ways that restorative justice humanizes the justice delivery process have been well-documented, and are highly relevant in any discussion regarding how communities affected by riots may best respond to the harm done (see Chapter 3.1). Restorative justice also has a valuable place in responses to riots due to the monetary savings often associated with making restorative justice meetings available as an alternative measure to custody, a benefit of the practice that has generally received far less attention.

Few comprehensive cost-benefit analyses have been conducted with regard to how the costs of diverting offenders to restorative alternatives compare to the costs of processing offenders via the conventional justice system, due (among other reasons) to high variability in operating costs among restorative justice programs, insufficient sample sizes as a result of the voluntary nature of restorative justice programming, and difficulties in quantifying the emotional benefits of restorative processes. Regardless, those analyses that have been published have unanimously concluded that restorative justice programming, when made available as an alternative to custody, can produce significant cost savings for society (Lee, Aos, Drake, Pennucci, Miller and Anderson, 2012; Matrix Evidence, 2009; Native Counselling Services of Alberta, 2001). This is an unsurprising finding given that the operating costs associated with restorative justice programming are typically much lower than those associated with the conventional criminal justice system (Fercello and Umbreit, 1998; Umbreit et al., 1994); in the case of victim-offender mediation, for example, volunteers typically mediate sessions, cases can
often be dealt with in a few hours, and most offenders do not require legal representation (Perry, 2002).

The potential that restorative justice alternatives hold to reduce criminal justice expenditures is a particularly important discussion to have in the context of street group violence instances such as the 2011 Vancouver Riot because riots of this scale bring a large number of offenders into a given jurisdiction’s court systems within a relatively short period of time. Sentencing even a single individual via the court process is a lengthy and expensive process that can sometimes take years, let alone the hundreds of rioters expected by the time the riot investigation in Vancouver has concluded (see Chapter 2). The task of sentencing such an enormous population in such a short period of time becomes particularly difficult when the court systems bearing the burden are already overburdened and underfunded, as is the case in British Columbia. The most recently published Review of the Provincial Justice System in British Columbia (Ministry of Finance, 2012) calls attention to the worrying fact that, despite a decrease in both provincial crime severity and crime rates, the number of cases being dealt with by the province’s justice system has risen in recent years. The resulting slowing of the processing times for these cases has also led to increases in the time it takes to get to trial, the length of trials, and in the number of cases being dismissed and/or stayed, all of which have lead to increased processing costs as well (Tilley, 2012). The Review (2012) concluded that enhancing efficiency, reducing court costs, and decreasing the volume of cases entering the justice system all must be considered primary goals for British Columbia’s court system in the coming years. It is clear that the decision to sentence as many rioters in court as possible will not aid in achieving this goal.

British Columbia’s prisons do not appear to be faring much better than its courts. Many are dangerously overcrowded, leading to failing rehabilitative efforts and increasing injuries among staff. These problems do not come as a surprise when it is considered that since 2001, the budget for court services (including administrative staff and security) has been cut by 42%, the budget for corrections has been cut by 29%, and the funding for legal aid has been cut by 36%. Further, despite the aforementioned decrease in crime in British Columbia, B.C. jails housed 16% more prisoners in 2008 than they did in 2001 (Tilley, 2012). These numbers do not bode well in light of the
Integrated Riot Investigation Team’s (IRIT) and Crown prosecutors’ aims to sentence as many rioters to custody as possible.

What follows is a presentation of several descriptive trends for those adult rioters currently being sentenced through Vancouver Provincial Court for their role in the 2011 Vancouver riot. These descriptives are notable for providing evidence in support of the suitability of members of this population for alternatives to custody, in particular restorative justice. A brief economic analysis of the viability of several of these alternatives follows a discussion of these trends. The analysis consists of the following estimates:

1. The costs, and cost savings, associated with sentencing adult rioters who may be suitable for restorative justice to conditional sentences, in place of a conventional custody sentence.

2. The costs, and cost savings, associated with sentencing adult rioters who may be suitable for restorative justice to conditional discharges following successful completion of a victim-offender restorative justice process.

3. The cost, and cost savings, associated with diverting adult rioters who may be suitable for restorative justice to a pre-sentence victim-offender restorative justice process.

The first two estimates examine cost savings associated with alternatives to custody that at the present time may be offered by Vancouver Provincial Court at the sentencing stage, while the third examines the savings associated with implementing a diversion scheme in which suitable rioters could be referred to a restorative justice meeting at the pre-sentencing stage. This chapter concludes, based on the results of these calculations, that diversion to a restorative intervention at the pre-sentencing stage is the most cost-effective option available for rioters who may be suitable for alternatives to custody.
5.2. Data

The data used for these calculations was gathered from British Columbia Court Services Online\(^45\), an online search engine that allows one to search the public court records of any adult offender charged with a criminal offence in British Columbia who is currently being sentenced, or has been sentenced, within a British Columbia Provincial Court. To locate the court records of individuals charged in the riot, full names and case numbers were obtained via an online database maintained by The Province online, a news source that briefly collaborated with the IRIT (Integrated Riot Investigation Team) to compile a public searchable list of all offenders who had had charges against them approved by Crown Counsel. Full names and case numbers were also obtained from the Vancouver Police Department’s official riot media releases website\(^46\). Using these sources, detailed information was gathered on 130 adult offenders who were either in the process of being sentenced or had been sentenced in Vancouver Provincial Court between June 15, 2011 and October 31, 2012. Any adult offenders who entered the court system and began the sentencing process on or after November 1\(^{st}\), 2013 were not included in this analysis.

5.2.1. Descriptives

Regarding suitability for a restorative intervention, several characteristics of this population are notable.

Most rioters were first-time offenders. As seen in Table 4, the vast majority of adult offenders (83%) in the process of being sentenced had no criminal record in British Columbia prior to June 15\(^{th}\) 2011, nor any further charges in British Columbia since June 15\(^{th}\) 2011. Following the riot, media sources repeatedly reported that those responsible were likely “hooligans”, “hardened criminals”, or “bad apples” looking for trouble (Lindsay, 2011; Mason, 2012; Uechi, 2011) – and as it happens, this was the case with

\(^{45}\) See https://eservice.ag.gov.bc.ca/cso/index.do
\(^{46}\) See http://vancouver.ca/police/2011riot/riot-updates.html
Table 4. Descriptive statistics of adult rioters being sentenced in Vancouver Provincial Court (N=130)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Categories</th>
<th>N (%)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year of birth</td>
<td>Before 1987</td>
<td>28 (22%)</td>
</tr>
<tr>
<td></td>
<td>On or after 1987</td>
<td>102 (78%)</td>
</tr>
<tr>
<td>Number of charges</td>
<td>1</td>
<td>3 (2%)</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>64 (49%)</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>36 (29%)</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>21 (16%)</td>
</tr>
<tr>
<td></td>
<td>5 or more</td>
<td>6 (5%)</td>
</tr>
<tr>
<td>Additional criminal convictions before or after June 11th 2011</td>
<td>None</td>
<td>104 (83%)</td>
</tr>
<tr>
<td></td>
<td>One or more</td>
<td>21 (17%)</td>
</tr>
<tr>
<td>Plea</td>
<td>Guilty</td>
<td>57 (44%)</td>
</tr>
<tr>
<td></td>
<td>Not guilty/to be tried by jury</td>
<td>15 (12%)</td>
</tr>
<tr>
<td></td>
<td>No plea entered</td>
<td>56 (43%)</td>
</tr>
<tr>
<td></td>
<td>Unknown (publication ban)</td>
<td>2 (2%)</td>
</tr>
<tr>
<td>Sentenced</td>
<td>Yes</td>
<td>15 (13%)</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>115 (87%)</td>
</tr>
</tbody>
</table>

*Some percentages do not total 100% due to rounding.

the 1994 Stanley Vancouver riot, in which half of those arrested were unemployed and most had prior criminal records (Barnholden, 2005). This finding is consistent with several studies that have identified a history of aggressive encounters, disorderly conduct, and prior criminal convictions as some of the most important determinants of the likelihood of participating in crowd disturbances and riots (Arms and Russell, 1997; Mustonen et al., 1996; Roversi, 1991; Russell and Arms, 1998; Trivizas, 1980). If the assumption on the part of justice officials is that the typical rioter is an individual with a violent history and prior criminal involvement, there is logic in assuming that custody is necessary in order to deter other individuals with similarly violent tendencies. However, the rioters who participated in the 2011 riot do not appear to fit this pattern. Instead, the results are far more consistent with the explanations for antinormative collective behaviour offered by social psychologists, such as the phenomenon of deindividuation: when conditions provide individuals with a heightened sense of anonymity and unaccountability, individuals who ordinarily conform to general societal norms can find themselves unexpectedly abandoning them in favour of situation-specific norms (Fromer, Walker and Lopyan, 1982; Postmes and Spears, 1998; Reicher, 1984; Reicher
Most rioters were young adults. The second finding of note is the relatively young age of charged rioters. Data on the exact age of rioters at the time of arrest was not available because British Columbia Court Services Online only makes data on the year of birth available for individuals being sentenced within the court system. An examination of the birth years of adult rioters currently being sentenced via court reveals the average year of birth to be 1989, and thus the average age of rioters at the time of the riot to have been between 21 and 22; however, this average is slightly misleading due to the presence of several much older outliers. A closer examination of the age distribution of rioters reveals that 102 (78%) were born in 1987 or later, and thus would have been 24 or younger at the time of the riot. Figure 1 displays this age distribution.

With the exclusion of taking part in a riot, most charges were for nonviolent property crimes. As seen in Table 5, all rioters (100%) were charged with the indictable offence of taking part in a riot, listed in section 65 of the Criminal Code of Canada. Excluding this charge, the three most common charges recommended against rioters were mischief to property under $5000 (section 430(3)), breaking and entering and committing an indictable offence (section 348), and mischief to property over $5000 (section 430) (see Appendix A for full list of charges). When the crime of participating in a riot is excluded, these three charges make up the overwhelming majority of charges.
Table 5. \textit{Top charges approved by Crown against rioters charged in 2011 Stanley Cup riot (N=136)}

<table>
<thead>
<tr>
<th>Criminal Code of Canada offence</th>
<th>Charges approved (%)*</th>
<th>Rioters charged (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s. 65 Taking part in a riot</td>
<td>130 (36%)</td>
<td>130 (100%)</td>
</tr>
<tr>
<td>s. 430(4) Mischief to property under $5000</td>
<td>66 (18%)</td>
<td>45 (35%)</td>
</tr>
<tr>
<td>s. 348(1)(b) Break and enter and commit indictable offence</td>
<td>63 (18%)</td>
<td>54 (42%)</td>
</tr>
<tr>
<td>s. 430(3) Mischief to property over $5000</td>
<td>50 (14%)</td>
<td>37 (28%)</td>
</tr>
<tr>
<td>s. 266 Assault</td>
<td>15 (4%)</td>
<td>15 (12%)</td>
</tr>
<tr>
<td>s. 434 Arson damaging property</td>
<td>9 (3%)</td>
<td>9 (7%)</td>
</tr>
<tr>
<td>s. 348(1)(a) Break and enter with intent to commit indictable offence</td>
<td>8 (2%)</td>
<td>8 (6%)</td>
</tr>
<tr>
<td>s. 351(2) Disguise with intent</td>
<td>6 (2%)</td>
<td>6 (5%)</td>
</tr>
<tr>
<td>s. 145 Breach of undertaking or recognizance</td>
<td>4 (1%)</td>
<td>4 (3%)</td>
</tr>
<tr>
<td>s. 355 Possession of stolen property</td>
<td>2 (1%)</td>
<td>2 (2%)</td>
</tr>
<tr>
<td>s. 88(1) Possessing weapon for dangerous purpose</td>
<td>2 (1%)</td>
<td>2 (2%)</td>
</tr>
<tr>
<td>s. 267(a) Assault with a weapon</td>
<td>2 (1%)</td>
<td>2 (2%)</td>
</tr>
<tr>
<td>s. 334 Theft</td>
<td>1 (0%)</td>
<td>1 (1%)</td>
</tr>
<tr>
<td>s. 270(2) Assault peace officer</td>
<td>1 (0%)</td>
<td>1 (1%)</td>
</tr>
</tbody>
</table>

\*Percentages do not total 100% due to rounding.

laid against all 130 rioters (78%). Under the Code, these charges are nonviolent hybrid offences that do not carry minimum sentences. It is also notable that only three rioters were charged solely with participating in a riot; the overwhelming majority of rioters (98%) had two or more charges recommended against them (see Table 5). This suggests that the charge of participating in a riot charge was recommended against all rioters primarily as a means by which to increase the likelihood of conviction.

The findings described above echo those found in earlier chapters of this thesis: Custody may be inappropriate and unnecessary for many members of this population, particularly those charged with nonviolent property offences who do not carry prior criminal records (Gendreau et al., 1999). One alternative to custody that is already being utilized by judges is the Conditional Sentence Order (CSO), which allows offenders to serve out their sentences in the community and Crown Counsel to recommend additional conditions for the offender to comply with as part of their sentence. As instructed by section 742.1 of the Code, a conditional sentence may be considered in place of a custodial sentence only for those offenders charged with offences that do not demand a minimum prison term and that would ordinarily receive a custody sentence of two years or less. Table 5 demonstrates that the majority of rioters examined above satisfy these
requirements (see Appendix A for a list of these charges). Section 742.1 also instructs that a conditional sentence be considered only if Crown Counsel are satisfied that the offender receiving the sentence will not pose a threat to the community to which they are returning. Again, the descriptives suggest it is unlikely that many of these nonviolent first-time rioters would pose a threat to their communities were they to return to them to serve out their sentences, and the majority of such rioters sentenced thus far in Vancouver have been determined by judges to be highly unlikely to reoffend (see Chapter 4).

Another alternative to custody worthy of consideration for nonviolent first-time offenders is the conditional discharge, contingent on the offender complying with conditions that have been ordered by the sentencing judge. If these conditions are complied with, the charges against the offender are dropped and no criminal record results. Conditional discharges are available as a sentencing option only for those charges that do not demand a minimum term of imprisonment and in those circumstances where the court considers a discharge to be in the best interests of the accused and consistent with public interest. Although the public in Vancouver has typically been opposed to discharges for rioters, and judges have repeatedly deemed them unsuitable for rioters as of this writing, they may still serve the best interests of many nonviolent first-time rioters due to the fact that they result in no criminal record. A criminal record limits one's future employment and educational opportunities, amounting to greater societal costs in the long term due to decreased opportunities and earning potential (Carson, 2010; Pager, 2003). For those offenders who are both unlikely to reoffend and whose future opportunities would be significantly compromised by a criminal record, such a record may do far more harm than benefit.

In the case of both conditional sentences and conditional discharges, participation in a restorative justice meeting is sometimes ordered by judges as a condition after a formal admission of guilt has been accepted by the court (John Howard Society of Alberta, 1998), allowing the opportunity for offenders to face consequences for their actions by means that require minimal justice resources and, in the case of discharges, avoid the stigma of a criminal record. Although both the described alternatives are less costly than custody and relieve many of the pressures placed on overcrowded British Columbia jails to house prisoners, they can only be offered at the post-conviction stage. Thus, even a focused effort to sentence rioters to alternatives to
custody whenever possible will do little to relieve the immense workload placed on the provincial courts, nor reduce the associated sentencing costs. Indeed, the justice response to the 2011 Vancouver riot has received significant criticism in Vancouver due to public perceptions of the sentencing process being lengthy, cumbersome, and expensive (Fong, 2011; Hager, 2012; Woo, 2012). As Table 4 demonstrates, these criticisms are not entirely baseless: As of November 2012, only 15 (13%) rioters have been sentenced and almost half (48%) have not yet entered a plea. These numbers do not include the 95 rioters who have had charges recommended against them by police that are still awaiting approval by Crown Counsel.

In addition to being a potential condition of sentencing, restorative justice can be recommended to offenders before charges are laid, or even as an alternative to laying charges at all. This referral process is legislated under section 717 of the Code and developed within provincial guidelines (Daubney and Parry, 1999). Thus, a third alternative to custody worthy of consideration when it comes to responding to riots such as the 2011 Vancouver riot is that of diverting nonviolent first-time rioters away from the court process altogether via referral to a restorative justice intervention, such as conferencing or victim-offender mediation, at the time of arrest. Cases can be referred at this stage by any number of individuals, including judges, probation officers, victim advocates, prosecutors, defense attorneys, or police. Typically, when such a program is in effect, Crown Prosecutors approve the majority of cases referred to a community based restorative justice process (John Howard Society of Alberta, 1998). This type of restorative diversion is likely to be less costly than either of the sentencing alternatives, due to the decrease in court and prosecution costs.

47 In the case of diversion from prosecution, for example, the Crown prosecutor must first approve the meeting; following approval, the case worker then conducts an initial screening process and the case, if deemed suitable, is assigned to restorative justice facilitator (John Howard Society of Alberta, 1998)
5.3. Methods

As per the custody alternatives described above, three different scenarios are offered in this analysis. Figure 2 outlines the structure of the model (Model 1) used to estimate the benefits associated with recommending conditional sentences in place of custody sentences for nonviolent first-time offenders who plead guilty. Figure 3 outlines the structure of the model (Model 2) used to estimate the economic benefits associated with offering interested victims and offenders from the aforementioned population the opportunity to undergo a restorative justice meeting as a condition of discharge and probation. Figure 4 outlines the structure of the model (Model 3) used to estimate the benefits associated with diverting, where victim and offenders are interested, all first-time nonviolent offenders to a restorative justice process at the time of arrest.

5.3.1. Variables

In order to populate each model, the following components of the cost-effectiveness analysis were estimated. These components are listed in Table 6.

*The cost of custody.* This variable refers to the cost associated with housing and
supervising an adult offender within a custody setting. The cost of supervising a single adult offender in a provincial correctional institution in British Columbia from 2008-2009 was $192.00 CAD per day (Yalkin and Kirk, 2012). When adjusted for inflation to 2012, this cost increases to $202.45 CAD per day. This is the value used for this analysis.
Table 6. Variables and sources for cost-benefit analysis

<table>
<thead>
<tr>
<th>Component</th>
<th>Unit cost 2012 CAD$</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custody supervision (per day)</td>
<td>$202.45</td>
<td>Yalkin and Kirk (2012)</td>
</tr>
<tr>
<td>Community supervision (per day)</td>
<td>$7.93</td>
<td>Yalkin and Kirk (2012)</td>
</tr>
<tr>
<td>Probation supervision (per day)</td>
<td>$5.00</td>
<td>Statistics Canada (2006)</td>
</tr>
<tr>
<td>Restorative justice referral service</td>
<td>$330.79</td>
<td>Umbreit et al.(1994)</td>
</tr>
<tr>
<td>Restorative justice meeting</td>
<td>$990.94</td>
<td>Umbreit et al. (1994)</td>
</tr>
<tr>
<td>Court costs (per case)</td>
<td>$1,495.21</td>
<td>Yalkin and Kirk (2012)</td>
</tr>
</tbody>
</table>

The cost of conditional sentencing. This variable refers to the cost associated with supervising an adult offender serving out their sentence within a community setting. The cost of supervising a single adult offender within a community setting in British Columbia from 2008-2009 was $7.52 CAD per day (Yalkin and Kirk, 2012). When adjusted for inflation to 2012, this cost increases to $7.93 CAD per day. This is the value used for this analysis.

The cost of probation. This variable refers to the cost associated with supervising an adult offender on probation. Depending on the intensity and conditions of the probation order, the cost per day of supervising a single adult offender in British Columbia may range from $5 CAD to $25 CAD per day (Prison Justice, 2007). For this analysis, the conservative estimate of $5 a day was chosen.

The cost of undergoing a restorative justice (RJ) process. This variable refers to the cost of processing a single offender through a restorative justice (RJ) meeting. This subsequently consists of the costs associated with the referral service, the costs associated with arranging the meeting between victim and offender, and the costs associated with mediating each case. Though this variable does not refer to a particular RJ process, costs associated with victim-offender mediation (VOM) programs were utilized to arrive at an estimate. These costs vary widely from program to program; Umbreit et al. (1994) compared three U.S programs and found referral service costs ranged from $81 to $346 USD per case, while the cost of mediation ranged from $292 to $986 USD per case. The average cost of referral across these three programs was $233 USD and the average cost of mediation was $698 USD. When adjusted for inflation to 2012 and the Canadian exchange rate, these numbers become $330.79 CAD for the average cost of a referral and $990.94 CAD for the average cost of mediation, bringing...
the total to $1,321.73 CAD per case. This is significantly higher than the cost of $1,000.00 CAD per case, estimated by the Vancouver Association for Restorative Justice (Personal Communication, July 2012), of referring and processing each rioter through an RJ process if such a diversion scheme was implemented in Vancouver. Umbreit et al.'s (1994) adjusted estimates are thus used to yield more conservative results.

*The costs of court.* This variable refers to the total cost associated with court operations for an adult offender who pleads out in British Columbia. Costs specific to British Columbia were not available; thus, the average cost of court services per case in Canada of $1,418.00 CAD was used instead (Yalkin and Kirk, 2012). When adjusted for inflation to 2012, the average cost of court per case increases to $1495.21 CAD per case. The absence of court costs specific to British Columbia is acknowledged as a major limitation, as court costs vary widely across provinces and according to the specifics of each case. In the absence of accurate data, additional costs such as the prosecution costs associated with pleading out and parole board costs were omitted so as to increase the likelihood that $1,495.21 per case would produce a very conservative estimate.

5.3.2. Assumptions

In order to populate the above model and compensate for missing data, the following assumptions were adopted for this analysis.

*All RJ meetings will result in a successfully negotiated restitution agreement.* This assumption is derived from Umbreit et al.'s (1994) research on victim-offender mediation (VOM) programs that found, on average, 95% of referrals resulted in a successfully negotiated restitution agreement. For the purposes of this analysis, this estimate was rounded up to 100%. To compensate for this overestimation, Umbreit et al.'s (1994) conservative estimate of 21% was used to estimate the percentage of cases referred to VOM programs that result in a meeting, rather than their more generous estimate of 64%.

*Under the new sentencing regime, all offenders who plead not guilty will receive a custody sentence.* As discussed in Chapter 4, a plea of guilty is typically considered to
be indicative of remorse and can be taken into account by Crown Counsel as a mitigating factor that then decreases the length and severity of a recommended sentence (Manson et al., 2008). Thus, it is assumed that only those rioters who plead guilty will be considered suitable for alternatives to custody, so as to yield a conservative estimate of this population.

_There will be no changes in rates of recidivism regardless of the sentence an offender receives._ Typically, cost-benefit analyses of alternative sentencing scenarios include changes in probability of recidivism as a key variable, so as to calculate the costs associated with future criminal activity. This variable was omitted from this analysis due to a lack of suitable data (Brantingham and Easton, 1998). Estimates of recidivism rates for specific crimes are sometimes derived from general episodic data, but due to the high number of nonviolent first-time rioters offenders charged in the Vancouver riot and the unique nature of riots, applying general recidivism rates to this population was assumed to be inappropriate. It was also assumed that omission of this variable would not significantly impact the findings of this analysis because the body of research investigating whether, and how, RJ processes affect offenders’ likelihood of recidivating has typically been favorable. When examining offenders who underwent restorative justice process as an alternative to formal sentencing, Bradshaw and Roseborough (2005), Evje and Cushman (2000), Nugent and Paddock (1995), Nugent, Umbreit, Wiinamaki and Paddock (2001), Rodriguez (2007), Sherman and Strang (2007), and Wiinamaki (1997) all reported decreases in recidivism rates, while Niemeyer, and Shichor (1996), Roy (1993), and Stone, Helms and Edgeworth (1998) reported no difference in recidivism rates between offenders who participated in victim-offender mediation and those who did not. A recent meta-analysis conducted by Latimer and co-authors (2005) also found restorative processes to be more effective at reducing recidivism than conventional nonrestorative justice approaches.

Although these findings are not entirely consistent, what can be stated with confidence is that no major studies have yet found referral to restorative justice programming to result in an _increase_ in recidivism. At best, such programs will yield additional long-term cost savings by reducing recidivism; at worst, such programs will have no effect on recidivism rates but will nonetheless produce savings for society due to their lower operating costs. Thus, this analysis conservatively estimates that
sentencing outcomes will have no major effect on recidivism rates for this offender population.

5.3.3. Probabilities and costs of sentences

Next, the typical sentences that might be received by a nonviolent first-time offender were estimated in order to calculate the expected costs, and cost savings, associated with sentencing an offender of this type to a custody sentence, conditional sentence, or conditional discharge, respectively\(^{48}\). This was done by examining the sentences handed down to rioters convicted in Vancouver thus far. Because these sentences varied widely due to the individual mitigating and aggravating factors of each case, it was difficult to estimate an “average” sentence a rioter might receive. Conservative estimates were used whenever possible.

**Custody sentence.** The typical custody sentence recommended for a nonviolent first-time offender was decided as 1 month (30 days) in custody. Custody sentences recommended by Crown Counsel to nonviolent first-time offenders sentenced as of November 2012 have ranged from 15 days to 5 months; 30 days is thus assumed to be a conservative estimate. This sentence was also assumed to be accompanied by an 18-month probationary period, as most sentenced rioters received a probation order of between 12 to 24 months in length as part of their sentence.

**Conditional sentence.** The typical conditional sentence for a nonviolent first-time offender was set at six months (180 days) in the community. As of November 2012, seven rioters have received conditional sentences, ranging in length from 2 to 9 months. When only sentenced nonviolent first-time offenders were examined, the longest conditional sentence was six months in length. Six months is thus assumed to be a more conservative estimate. This sentence is also accompanied by an 18-month probationary period.

\(^{48}\) The restorative justice diversion scheme is compromised only of the costs associated with referral and mediation and thus no “typical” sentence was calculated.
Table 7. Criteria for eligibility for alternatives to custody

<table>
<thead>
<tr>
<th>Offender type</th>
<th>First offender</th>
<th>Charges</th>
<th>YOB</th>
<th>N (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligible</td>
<td>Yes</td>
<td>s. 65 Participating in a riot</td>
<td>≥1987</td>
<td>68 (52%)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 430(4) Mischief under $5000</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 430(3) Mischief over $5000</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 145(3) Breach of undertaking</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 334 Theft</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 355(b) Possession of stolen property</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 348(1)(b) Break and enter and commit indictable offence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not eligible</td>
<td>No</td>
<td>s. 255 Assault</td>
<td>≤1986</td>
<td>62 (48%)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 434 Arson damaging property</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 88(1) Possessing weapon for dangerous purpose</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>s. 351(2) Disguising face with intent to commit offence</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Conditional discharge.* The typical conditional discharge for a nonviolent first-time offender was also assumed to be accompanied by an 18-month probationary period.

To calculate the amount of adult rioters likely to be eligible for alternatives to custody within each of the three models, adult rioters were categorized as either eligible or not eligible for alternative sentences based on the nature of their charges and prior involvement in the justice system. All rioters with prior criminal convictions and/or violent or indictable-only charges were excluded from consideration, restricting eligible offenders to those without prior convictions and those charged either with property offences or administrative offences. The criteria on which eligibility for alternate sentences is based is outlined in Table 7. A full list of the min/max sentences associated with charges approved against offenders can be found in Appendix A.

Using the court data gathered from BC Court Services, 86 of the 130 adult offenders were found to be eligible for alternatives to custody. Assuming a total of 300 offenders would be charged by the end of the riot investigation and that 69 would be

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49 As predicted by IRIT (2011)
young offenders\textsuperscript{50}, it was estimated that approximately 231 adult offenders would eventually be sentenced in court. Using the estimated percentages in Table 5, a maximum of 152 of these 231 adult offenders are predicted to be eligible for alternatives to custody.

Next, the amount of offenders who might reasonably agree to an RJ meeting and thus receive a conditional discharge (under Model 1) or have their charges dropped (under Model 2) was estimated. Restorative justice is a strictly voluntary process that cannot take place unless both the victim and offender agree to the process, and often one or both parties turn down the opportunity to participate. From Umbreit et al.’s (1994) research on VOM programs in the United States, the conservative estimate of a 21\% successful referral rate was used. Extrapolating from the maximum 152 adult offenders estimated to be eligible for the restorative approach, a maximum of 32 adult offenders are estimated to successfully negotiate an RJ meeting with a victim and successfully complete the process. Because this analysis assumes all nonviolent first-time offenders are suitable for diversion, probabilities associated with whether or not an adult offender is deemed suitable for referral to restorative justice are not considered for the purposes of this analysis.

5.4. Findings

Table 8 summarize the costs and benefits associated with the sentencing schemes described in Models 1, 2, and 3, respectively. As per the alternatives proposed, each nonviolent first-time rioter who received a conditional sentence in place of a custody sentence is estimated to save approximately $4,646.10, with the maximum possible savings that could be achieved were all nonviolent first-time rioters to receive a conditional sentence in place of a custody sentence being approximately $557.532. The

\textsuperscript{50} Of the 275 rioters who had as of November 2012 had charges recommended against them, 62 (23\%) were young offenders. This ratio was used to estimate how many of the anticipated 300 offenders would be young offenders (.23 * 300 = 69)
findings also show that allowing a nonviolent first-time offender to receive a conditional discharge contingent on successful completion of an RJ process is estimated to result in potential savings of $4,751.77 for each offender who would have ordinarily received a custody sentence, with the maximum possible savings that could be achieved were all nonviolent first-time rioters who are able to successfully negotiate an RJ meeting able to receive a conditional discharge in place of custody being approximately $118,794.25. Finally, every rioter granted the option to complete an RJ process in exchange for having their charges dropped resulted in savings of $4,195.21 for every rioter who would have ordinarily received a conditional discharge upon completion of an RJ process, $4,300.88 for every rioter who would have ordinarily received a conditional sentence, and $8,946.98 for every rioter who would have ordinarily received a custody sentence. The maximum that could be saved if all 25 of these rioters were diverted from custody is $223,674.50. If both models 1 and 2 were implemented simultaneously - that is, offenders who would ordinarily receive a conditional sentence were also granted the option to be conditionally discharged upon successful completion of an RJ process - then each offender referred to RJ in place of a conditional sentence would save an additional $105.67. Notably, this difference in cost between the conditional sentence and conditional discharge is not very high. In fact, $105.67 is the approximate cost of
supervising an offender in a community setting for 13 to 14 days at $7.93 a day, meaning that a conditional sentence even 14 days shorter than the conservative 180 days assumed for this analysis would actually be *more* costly than the option to conditional discharge upon successful completion of a VOM session. These cost comparisons alone are obviously not enough to conclude that a conditional sentence is a more appropriate sentence for a rioter than diversion via conditional discharging and an RJ meeting; as mentioned, restorative justice offers participants many benefits that the conventional court system does not offer, and the individual aggravating and mitigating circumstances of each case require different sentences in order to meet all required needs. What these findings do reveal is that conditional discharging accompanied by an RJ meeting should not be viewed as a significantly less expensive or resource-intensive alternative to conditional sentencing.

One of the most important findings to emerge from this analysis is that restorative justice, if it to be realistically offered for suitable offenders, would be most appropriately offered as a form of diversion at the pre-sentencing stage. If a primary goal of offering restorative justice to low-risk offenders is to provide a diversionary alternative to custody and offer swift and satisfying resolutions for both victims and offenders, then offering it at the post-sentencing stage is needlessly costly and an ineffective use of court resources. As discussed, the process of sentencing offenders in court is lengthy, costly, and extremely time-consuming. This is particularly so in the case of the 2011 Vancouver riot, where Crown prosecutors have staggered the laying of criminal charges against riot suspects so that charges are approved only when court resources are available. Although this practice reduces the amount of charges likely to be dismissed or stayed, it does so at the cost of greatly increased processing times, resulting in further dissatisfaction on the part of the community. Offering restorative justice at the pre-sentencing stage would also increase the likelihood of successful outcomes, particularly for property crime: Wyrick and Costanzo (1999) found that the longer the time lapse between the crime and the referral to VOM, the less likely victims of property offences are to reach mediation. And, implementing such a diversion scheme at the pre-sentencing stage would free up court resources for riot cases unsuitable for diversion to be processed much more quickly.
5.4.1. Excluded costs

Due to insufficient data, several variables were excluded from this analysis. However, this author believes it is reasonable to assume that a number of benefits in areas other than those included in this analysis may be produced as a result of offering alternatives to custody and/or diversion to RJ meetings to first-time nonviolent rioters. These hypothetical cost savings are as follows:

Cost savings associated with decreased number of cases requiring trial. Court costs are typically lower in cases where an offender has pled guilty (rather than not guilty) as this alleviates the workload of prosecutors, reduces the need for judicial resources and courtroom facilities, and decreases all the other expenses typically necessitated by a trial (Department of Justice Canada, 2012). Were alternatives to custody considered standard and appropriate when sentencing riot cases, it is likely there would be an increase in the number of defendants willing to plead guilty due to the perceived likelihood of receiving a less severe and restrictive sentence. The lack of subsequent trials would result in further savings for the justice system. However, exactly how much each avoided trial generates in savings is very difficult to estimate, because the cost and duration of a trial can vary widely depending on the nature and specifics of each case. The average cost of prosecution for a case gone to trial in Canada from 2008-2009 provided by Yalkin and Kirk (2012) was $1,114 CAD, but this value included summary prosecutions and offences under the Controlled Drugs and Substances Act (CDSA) and was derived from incomplete provincial data on Code offences. In comparison, a cost-benefit analysis conducted by The Native Counseling Services of Alberta (2001) on a restorative program based in Hollow Water, Manitoba, estimated the average cost of trial for a Code offence to be upwards of $12,000 CAD per adult offender.

Cost savings associated with improved quality of life for victims. As discussed earlier, many victims of the 2011 Vancouver riot reported being traumatized by the events of that night. The effect that crime has on victims with regard to decreased quality of life can lead to further monetary costs in the form of health services, victim services, and counselling. Miller, Cohen and Wiersema (1996) estimate that a break and enter can cost a victim up to $300 USD in lost quality of life, while an arson may cost up to $18,000
USD. Restorative justice may be able to restore this lost quality of life for some victims due to the emotional benefits it can provide in the form of restitution (Evje and Cushman, 2000; Umbreit et al., 1994, 2001), apology, and/or emotional closure (Strang, 2001).

Cost savings associated with increased productivity and output for both victims and offenders. Productivity loss often results from criminal activity, incurring costs for both victims (in the form of lost wages for unpaid workdays lost) and society (lost productivity for paid work days). Miller and co-authors (1996) estimate that an arson may cost up to $1,750 USD in lost productivity while an assault may cost up to $950 USD. An increase in productivity and output for victims may also result from the emotional benefits of restorative justice that may be associated with improved quality of life. Finally, productivity loss occurs by incarcerating individuals, as it results in lost wages, lost tax revenue, and lost earning potential due to the acquisition of a criminal record (in the case of sentencing options that result in a record). Lee and co-authors (2012) estimated that every young offender who was able to graduate high school due to diversion from the formal youth justice system to VOM resulted in savings of $1,030 USD for the youth and $379 USD to taxpayers.

Cost savings associated with increased sense of security for victims. This variable refers to the monetary savings associated with the increased sense of safety and security that victims may feel as a result of completing an RJ meeting. It includes the costs associated with being fearful of future offending, such as the costs associated with moving or installing security. As discussed, restorative justice has been shown to reduce fears of revictimization for victims and decrease their anxiety about the crime happening again (Umbreit, 1995; Umbreit and Bradshaw, 1997; Umbreit et al., 1994; Umbreit and Roberts, 1996; Strang, 2001). Similarly, many victims who have undergone restorative practices such as VOM have reported high levels of satisfaction (Coates and Gehm, 1989; Collins, 1984; Umbreit, 1989; Umbreit, 1995; Umbreit, Coates and Vos., 2001; Umbreit and Roberts, 1996). This satisfaction may also increase victims’ feelings of confidence in the justice system and lead to demand on their part for decreased sentences and alternatives to custody.
5.5. Discussion and limitations

The goal of this chapter is not simply to demonstrate the potential savings associated with offering alternatives to custody, as the immediate costs savings associated with alternative sentencing practices should never be the sole determinant of their viability. Any discussion of this nature is rendered redundant without an accompanying discussion of whether such alternative sentences actually work to reduce crime in any meaningful way. Further, it is not possible to accurately estimate the actual number of rioters in Vancouver who might reasonably be suitable for the suggested alternatives to custody, due to the individual aggravating and mitigating factors of each case. Indeed, the range of sentences that have been handed down to convicted rioters as of November 2012 have varied widely, ranging from 17 months’ imprisonment to probation. These variations are due only in small part to the nature of the charges themselves. The goal of this analysis is, rather, to strengthen existing arguments for the increased use of alternatives by shedding light on who the rioters currently being sentenced for their role in the riot that took place in Vancouver on June 15, 2011 really are.

The estimates calculated showed all three posited alternatives to be significantly less costly than custody, an unsurprising and not particularly important finding given the high costs known to be associated with processing offenders through the criminal justice system. What does make this finding important is the knowledge that the majority of rioters do not appear to fit the profile of offenders likely to recidivate, thus leaving little reason to assume they would not benefit from the use of alternatives and/or diversionary measures. Indeed, many of the nonviolent first-time offenders that were examined in this analysis will likely receive conditional service orders (CSOs), as several rioters have already received such sentences. Regardless, it remains a concern that Crown Counsel have recommended custody to nearly all rioters sentenced in Vancouver Provincial Court thus far, on the grounds that it is believed to be the only reasonable means by which to achieve the goals of general deterrence and denunciation. Further, it has been explicitly stated in the reported judgments for several riot cases that under no circumstances should a conditional discharge be considered an appropriate sentence for a rioter. Upon examining the main characteristics of the offender population charged for
participating in the riot, this author believes strongly that a refusal to seriously consider far more affordable diversionary options for these rioters on the basis that it is far more important to satisfy the unproven need for deterrence and denunciation is not merely inappropriate but a gross waste of justice resources. Even referring one low-risk rioter to an alternative sentence will result in significant savings.

As with any cost-benefit analysis, a number of limitations affect the accuracy of the results presented in this report. By far the biggest limitation is that many costs associated with justice systems operations were not included in the estimates, as British Columbia does not record or make publicly available a number of important statistics regarding the treatment of offenders. These include, but are not limited to, provincial conviction rates, trial costs, and average prison sentence lengths. Although overestimations were minimized by using conservative estimates wherever possible and/or omitting variables altogether, the estimated costs must still be acknowledged as inaccurate. Due to missing data, it was also necessary to extrapolate the final number of offenders that would end up in the justice system and eventually be eligible for alternatives to custody, as the riot investigation has not yet concluded. These estimates may too not be accurate, as it is possible that the majority of offenders likely to be eligible for alternatives to custody are those already in the justice system due to having turned themselves in and pled guilty early, whereas offenders likely to be ineligible for alternatives to custody are more likely to be uncooperative with police and unremorseful, and thus less likely to have been apprehended early in the investigation, if they are ever even apprehended at all. Thus, by the investigation’s conclusion, the actual percentage of offenders ineligible for alternatives to custody may be much higher.

Other limitations include that only BC court data for rioters was located, leading to the possibility that some rioters who were labelled as first-time offenders may have had prior convictions in other provinces. Similarly, prior charges that offenders may have had as youth under the Youth Criminal Justice Act (YCJA) are unaccounted for, as youth records are closed upon reaching adulthood. It is unlikely that enough offenders in the sample examined for this analysis held prior criminal convictions in other provinces or under the YCJA to render the results of this analysis unreliable; regardless, it must be acknowledged that these limitations amount to a possible overestimation of the amount of rioters in this analysis who were indeed first-time offenders. Finally, young offenders
were not able to be taken into account due to a lack of publicly available court data; however, it is likely the precedent set by Loewen would not be used to guide the sentencing of young offenders, as deterrence is not a sentencing principle of the YCJA.

Though it is important to acknowledge these limitations, ultimately they do not negate the economic benefits to society that could result from utilizing any of the proposed alternatives to custody discussed in this analysis. Implications for sentencing based on the findings of this thesis are discussed in the following and final chapter.
6. Conclusion

This analysis of the riot phenomenon, and the unsubstantiated logic of using a justice response focused on achieving general deterrence through punishment to respond to such events, suggests that riots may present restorative justice with a unique opportunity to showcase its potential.

Chapter 2, which provided background on the 2011 Stanley Cup riot in Vancouver and sought to explain why the riot happened from a social-psychological standpoint, found that in spite of the highly punitive approach adopted by the Integrated Riot Investigation Team (IRIT) to sentencing rioters, there remains notable interest in using restorative justice with rioters in Vancouver. The chapter also found in examining the theoretical group dynamics that underpin riot behaviour that deindividuation theories, particularly the social identity model of deindividuation effects (SIDE model), are consistent with the “mob mentality” so often witnessed of rioters and can contribute enormously to understanding, from a justice delivery standpoint, how and why riots occur.

Chapter 3 explained the applicability of restorative justice to communities affected by riots through the lens of McCold’s (2000) three conceptualizations of restorative values: victim reparation, offender responsibility, and reconciliation through a community of care. In examining general deterrence as a sentencing principle, the literature review demonstrated that there is little conclusive evidence supporting a connection between sentence severity and general deterrence, and that the role that general deterrence occupies as a sentencing principle in Canadian has been limited since 1996 in light of this revelation. Rather, more emphasis is now to be placed on restorative and rehabilitative sentencing measures.

Chapter 4 examined the sentencing of the rioters charged in the 2011 Vancouver Stanley Cup riot. The findings of the qualitative analysis showed that, despite the 1996 Code reforms encouraging the use of alternatives to custody, deterrence and
denunciation remained the primary sentencing purposes for rioters and alternatives to custody were strongly discouraged by Crown Counsel. This legal position was largely premised on the outdated case *R v. Loewen* (1992). Further, the findings show that the characteristics of the rioters examined revealed many important mitigating qualities that, where it not for the context of the riot, would ordinarily rule out the use of custody. These mitigating factors also raise important questions regarding the applicability of a deterrence-focused response to rioters.

Chapter 5 examines the costs and benefits of integrating restorative justice at various stages of the criminal justice system as part of the justice system response to rioters. The results of this analysis demonstrate that a large ratio of rioters met the criteria for alternatives to custody, and that the availability of restorative alternatives to custody could generate significant cost savings for the justice system. In particular, the analysis finds diversion at the pre-sentencing stage to be the most cost-effective option.

The probable benefits associated with using restorative justice with riots are substantial: the personal directly accountable nature of restorative justice provides opportunity for emotional closure to traumatized victims; an opportunity for offenders to understand the impact of their behaviour, and for those impacted to understand and humanize them; and immeasurable cost savings for the community and provincial justice system. Perhaps most important, restorative justice would allow the enormous desire that so many who participated in the riot still hold to make amends for their acts not to go to waste. Restorative justice provides an opportunity for healing and change through Sharpe's (1998) vision for restorative justice: It invites full participation and consensus from all stakeholders; heals what is broken; attains full and direct accountability from offenders; unites the divided community of Vancouver; and, finally, strengthens the community so as to prevent future instances of street group violence.

The restorative process would still, in many ways, demand a significant amount of accountability from rioters and send a very strong message of disapproval to the community. The shame and regret of confronting those harmed by one's crimes can be a very painful experience indeed; for some, maybe even more painful than custody. But unlike a custody sentence imposed for no other purpose other than to denounce a crime and set an example to the community, the restorative process is a transformative and
constructive experience. It ends not with a lifetime of shame and stigma but with understanding, growth, and a second chance.

6.1. Implications for sentencing

Having made the argument for the applicability of restorative justice to riots, it is not possible at this point to draw firm conclusions regarding its benefits as compared to a purely retributive response, as no comprehensive studies have yet been done in this area. Nonetheless, one clear conclusion does emerge from the findings of this thesis: The approach adopted by the IRIT and Crown Counsel to apprehending and sentencing rioters, focused largely on achieving general deterrence through denunciation and lengthy custody sentences, is not substantiated for this population. What is known about how and why people participate in riots suggests that such decisions are often impulsive and irrational. Further, despite repeated attempts, little evidence has been generated to support the notion that sentence severity predicts general deterrence. Further, the extensive data gathered on those who participated in the riot suggests that many of these young people exhibited no prior patterns of criminal behaviour nor currently pose risks to the public. Finally, research and case law has consistently concluded in recent years that custody should not be considered an option wherever rehabilitation is a realistic possibility and the safety of the public is not a concern.

Among other reasons, the Criminal Code of Canada was reformed in 1996 to respond to the overuse of custody in Canada and encourage the use of community-based and restorative alternatives. The findings demonstrate that these reforms were not upheld during the sentencing of the 2011 Vancouver rioters, due in large part to overreliance on outdated case law that, having taken place before 1996, does not reflect the full range of sentencing options now available to young adults nor what we now know about the ineffectiveness and overuse of custody. Due to the sheer size of the rioter population in question, the costs borne by the provincial justice system of having not upheld these reforms during this particular event are especially enormous. There is very little practical utility to be gained from incarcerating these young first-time offenders, but an overwhelming amount to be lost from needlessly putting each of them through the costly and cumbersome justice system and burdening them with criminal records that will
potentially hinder career prospects and other social trajectories. In light of what is now known about the needs of this population, the following recommendations are put forward to more effectively respond to those who participate in riots in the future.

### 6.1.1. Deterring through certainty, rather than severity

Although the body of deterrence literature that exists to date does not lend particularly strong support to the notion that sentence severity predicts general deterrence, there does appear to be a significant (if weak) positive correlation between certainty of punishment and general deterrence. That is, the higher a potential offender perceives their risk of apprehension for a given criminal act, the greater the likelihood they will be deterred from that act; and similarly, the higher the general public perceives the risk of apprehension for a given criminal act, the more members of that population are likely to be deterred from committing the act.

It is important to be mindful of this correlation when examining those findings within this thesis that are consistent with deindividuation as an explanation for the rioters’ behaviour. Many of the input variables specified by Zimbardo (1969) to enable deindividuation would have been present for the examined rioters, including perceived anonymity, sensory overload, and intoxication due to consumption of drugs and/or alcohol. Perhaps more importantly, evidence that the examined rioters acted with planning or intent is extremely minimal, as is evidence that they would have engaged in violent and destructive criminal activity outside the circumstances of the riot. The latter is further supported by the amount of rioters who reported that they felt ashamed and remorseful about what they did (see Chapter 4.3.4).

According to deindividuation theories, anonymity within the group context is one of the most reliable predictors of antinormative behaviour. That is, when group members perceive themselves as anonymous and do not feel as though they will be caught, they become much more likely to exhibit antinormative behaviour. This is consistent with classical deterrence theory's hypothesis that offending behaviour increases as peoples' perception of the likelihood of apprehension decreases. However, as the Furlong report (2011) noted, the 2011 Vancouver riot was notably different from many riots that took place in Vancouver before it with regard to the likelihood of apprehension and the
photographic and video evidence available to police. Unlike the 1991 Penticton riot or 1994 Stanley Cup riot, thousands of individuals present at the 2011 riot had on their person portable devices equipped with photo and video capabilities, and many made use of these devices to obtain visual evidence of the rioters' behaviour which they then sent to police. The fact that police were soliciting such evidence was no secret to the wider public - and in fact, as described in Chapter 2, many online websites were set up for people to "name and shame" rioters using these collected media files.

If any potential rioters believed prior to the 2011 Vancouver riot that they could take part in a riot and avoid detection due to the anonymity provided by the mob, these beliefs have surely been disproven. Rather, the riot sent a very strong message to the entire community of Vancouver that, in the age of smartphones and digital cameras, it is more difficult to remain anonymous than it ever was. Coupled with the role that social media has played in circulating photographic and video evidence worldwide, the young rioters who took part in the night's events have emerged anything but unknown.

Being a first offender is considered in Canadian Criminal Law to be a mitigating factor that reduces - or eliminates entirely - consideration of a custody sentence because it is assumed that, for such individuals, the formal sentencing process and stigma of a criminal record will already serve as effective deterrents. For members of the public with no experience with the law, then, it is likely that the threat of being apprehended and publicly convicted will serve as just an effective, if not more effective, deterrent of riot behaviour than the threat of a custody sentence. There is thus little to demonstrate that the imposition of a custody sentence will provide any more marginal deterrence to rioters, and the general public at large, than being apprehended, publicly sentenced, and burdened with a criminal record already will.

6.1.2. Increased use of alternatives to custody

Since Loewen (1992) established general deterrence and denunciation as the key sentencing purposes to be considered when sentencing rioters, and custody as the default sentence for achieving these sentencing aims, no evidence has demonstrated that custody is the only means by which to deter rioters nor that a deterrence- and denunciation-focused approach has reduced rioting in Canada in any notable way.
Because opportunities to participate in riots do not occur with the same frequency as opportunities to participate in other types of crimes, any deterrent effects that may occur from sentencing rioters is likely to be lost over time due to “deterrence decay” (see Chapter 3). For example, by the time the most recent 2011 Vancouver riot occurred, 17 years had passed since the 1994 riot; as many of the rioters who participated in the 2011 riot were young adults in their late teens and early 20s, it is likely that many, if not most, of these individuals would not have been old enough to have been deterred by the sentences handed down to rioters from previous decades. Similarly, it is unlikely the custody sentences handed down to rioters now will have much deterrent effect even a decade or two from now.

According to the recommendations made by the Canadian Sentencing Commission (1987) and the House of Commons Standing Committee on Justice and Solicitor General (1988), custody cannot, and should not, be employed anytime restorative or rehabilitative considerations are of primary importance. These recommendations were further reinforced by Gladue (1999) and Proulx (2000), the latter of which established that community-based alternatives to custody, such as community service orders (CSOs), are far more appropriate for enabling restorative and reparative goals to be achieved and should be considered anytime such goals are at the forefront. If the evidence suggests that deterrence and denunciation are not appropriate sentencing purposes for young-first time rioters such as those examined in this analysis, then both s. 718 of the Code and case law mandate that custody sentences can no longer be considered appropriate for this population.

Making greater use of alternatives to custody that are focused specifically on achieving restorative outcomes would also be consistent with the recommendations made in Taking Responsibility that victims be granted more opportunities to be directly involved in the justice delivery process. As discussed in Chapter 5, the conditional sentence order (CSO) introduced following the 1996 Code reforms offers not only a less expensive, more rehabilitative alternative to incarceration, but contains provisions allowing for additional conditions to be attached to the order. Judges are given broad discretion as to what these additional conditions may consist of, and as such the CSO can easily be tailored to meet the specific needs of victims; in addition to those conditions that are already compulsory to the CSO, judges may prescribe, for example,
that offenders pay restitution, perform community service, or meet with their victim(s) to negotiate a reparation agreement. The conditions for ordering restitution are set out in sections 738(1) through 741.2 of the Code.

The findings from Chapter 4 show that judges have typically only required that rioters pay victim surcharge fees or complete community service orders as additional conditions of their CSOs. The latter benefits victim support programs but not victims personally, and it is unclear in any of the examined reasons whether the community service orders are intended to benefit any of the victims directly impacted by their actions. The malleable nature of CSOs presents an important opportunity for the integration of personal, victim-focused measures.

6.1.3. Increased use of pre-sentence diversionary measures

Finally, in the case of B.C., it would be wise to utilize diversionary tactics at the pre-sentencing stage to deal with the examined rioters. An additional provision that the 1996 Code reforms brought to the Code was section 717, which sets out the conditions under which offenders may be diverted from the justice system altogether. Former Minister of Justice and Attorney General of Canada Allen Rock (“Allan Rock on Criminal Code”, 1995) explains the potential benefits afforded by this section:

Another innovation in the bill is the introduction for the first time in the context of adult sentencing of alternative measures. By providing for this instrument, the federal government is responding to requests made by the provinces themselves. Each province will have the right to set up and administer its own process of alternative measures.

For offenders who are before the court for the first time, never before having committed an offence and are facing charges of a less serious, non-violent nature, the system will provide for taking that person out of the court stream. As long as they acknowledge their wrongdoing, alternative ways of ensuring that they learn the lesson will be established. These measures will free up scarce and valuable court time for the more serious offences where the need is greater.

Options typically included as part of alternatives measures programs are diverse and may include - but are not limited to - restitution, personal service work for the victim, community service work, or victim-offender mediation.
As discussed in greater detail in Chapter 5.1 of this thesis, British Columbia’s provincial courts are largely overburdened and underfunded, and several reports have explicitly recommended that measures be taken to increase the case load currently being dealt with by courts. There is also substantial evidence to suggest that many of the examined rioters pose little to no risk of reoffending and would face significant barriers to rehabilitation if burdened with a criminal record. The section 717 alternative measures provisions were, like CSOs, introduced into the Code as a response to the overuse of custody, in the hopes that they would provide judges with added tools with which to tailor creative, individual responses to offenders who would likely benefit from diversion. The fact that these completely appropriate alternatives have not been taken advantage in favour of sentencing all rioters through court to satisfy idealistic notions of justice is needlessly wasteful and fails to uphold the recommendations made in the sentencing reports that influenced the 1996 Code reforms. British Columbia barely possesses the resources to sentence the hundreds of rioters anticipated to be charged at the investigation's completion, and as such, diversion schemes should be considered an attractive option for riots.

6.2. Future research

Incorporating restorative justice into community-wide responses to riots is an unprecedented area of research, and the many potential benefits associated with this largely untested practice are beginning to spark new debates among international governments regarding where and when to use such practices. As such, it is not within the scope of this thesis to discuss in detail the full range of research that remains to be conducted on this topic. This thesis instead concludes with a brief examination of two current projects of interest.

6.2.1. The Vancouver Restorative Justice Demonstration Project

As of this writing, the city of Vancouver does not have a restorative justice service delivery program in place capable of taking on referrals from the court system. In fact, it is one of the only municipalities in Metro Vancouver (or the lower mainland of Vancouver) that does not have a municipally funded program. This is surprising given
that there has been significant interest in restorative justice in the city of Vancouver following the 2011 riot from victims, offenders, and practitioners (Gavrielides, 2012) - and even before the riot, beginning with the founding of the Vancouver Association for Restorative Justice in 2006. The mother of a young rioter charged summarized the concerns of many in favour of restorative alternatives to custody:

...I am speaking of a large number of easily excitable, adrenaline fuelled, alcohol induced, impulsive young people who made the mistake of their lives. Are they hard-core criminals? Of course not. Most are likely one-time offenders. Will criminalizing them and/or jailing them help them become criminals? Possibly. Will that be a positive outcome for the community at large? No. Are they likely to be involved in a similar situation again? Not likely. Should they be held accountable and make reparations for their actions? Absolutely! This is where I believe the idea of restorative justice and/or community service comes in. This is not a solution that should be viewed as weak on crime, but rather one that is strong on community. (Gavrielides, 2012, p. 39)

Despite the aforementioned support from members of the community for such a program, and the considerable amount of money that has been allocated for the criminal investigations following the riot, there is limited interest from justice officials in funding such a program. A representative of the IRIT was quoted in Gavrielides (2012, p. 38) as follows:

We have a good handle of the situation; identification of almost all suspects is now almost complete and we have started bringing these criminals to justice. Diverting our energy to implementing untested practices is not wise.

In response, the Vancouver Association for Restorative Justice (VARJ) has proposed a pilot restorative justice demonstration project, the purpose of which would be to document and evaluate how the integration of a restorative justice component alongside the criminal justice process benefits victims and offenders, respectively. Formally known as the Vancouver Restorative Justice (RJ) Demonstration Project, this pilot study would be offered as part of a partnership with the Centre for Restorative Justice at Simon Fraser University, VARJ, and in consultation with a network of advisors from the Ministry of Justice, Crown Counsel, Vancouver Police Department, the Downtown Vancouver Business Improvement Association (DVBIA), the City of Vancouver and the broader community of restorative justice practitioners within Metro
Vancouver. The Centre for Restorative Justice will provide oversight and coordination of the main functions of this project, and will manage external communications in consultation with VARJ and North Shore Restorative Justice (NSRJ).

A maximum of 20 cases currently in the process of being sentenced through the justice system that have successfully completed a restorative process will be compared to similar cases sentenced through the criminal justice system alone, using a matched-pairs study design. This design proves most effective in controlling for the impact of confounding variables in light of the small sample sizes that are unavoidable in a demonstration project of this nature. Suitability of cases for restorative justice will be determined by first conducting an eligibility assessment of both victims’ and offenders’ readiness to meet. Following this assessment, all interested parties will be prepared for the process; finally, following completion of the restorative process, all participating parties will be asked to sign follow-up agreements, if necessary.

As the Vancouver Restorative Justice Demonstration Project has limited time and funding, it will make restorative justice processes available only at the post-charge or post-sentence stage; there will be no diversion cases. Further, because young offenders are processed in the criminal justice system via separate juvenile justice legislation and a separate court system, and the majority of offenders charged by the Integrated Riot Investigation Team (IRIT) are adults, the study will include only cases involving adult offenders (18 years of age or older). As with all restorative justice processes, participation on the part of both victims and offenders in this pilot study will be voluntary. Participants will be recruited primarily by referral from justice personnel, such as the IRIT, judges, and crown and defense counsel.

As of June 2013, the Centre for Restorative Justice at SFU has received a $21,500 grant from the Vancouver Foundation to begin coordinating face-to-face mediation sessions between victims and offenders. Meetings are anticipated to begin in September 2013.
6.2.2. Restoring Communities: Using Restorative Justice with Riots and Street Group Violence

The second project currently examining the benefits of incorporating restorative justice into community responses to riots is an international qualitative analysis titled *Restoring Communities: Using Restorative Justice with Riots and Street Group Violence*, led by Dr. Theo Gavrielides at Independent Academic Research Studies (IARS) in London, UK. This large-scale study, to which the Vancouver Pilot Project will contribute, is made possible through a partnership between the Centre for Restorative Justice at SFU, IARS, and Panteion University in Athens, Greece (Gavrielides, 2012).

Inspiration for this project arrived following the riots that erupted in and around London on August 6th 2011, following the shooting of 29 year old Mark Duggan by police in Tottenham. For five days, London experienced intense rioting that saw participants commit serious acts of looting, physical violence, arson, vandalism, theft and robbery. The riots were notably more severe than the public disturbance that took place in Vancouver the same year: Five people were killed, and hundreds lost their businesses and homes in the chaos. The financial loss is estimated to be anywhere from £100 to £300 million. As in Vancouver, the days following the riot saw the media heavily criticizing the young people responsible for the violence, and the UK coalition government, perhaps swayed by public outcries for retribution, was swift and highly punitive in its response (“UK Riots”, 2011). As of February 2012, 13,000 to 15,000 people are estimated to have been actively involved in the riots and more than 4,000 suspected rioters have been arrested. An estimated 95% of rioters were 24 or younger (Gavrielides, 2012).

Not long after the riots, politicians such as mayor of London Boris Johnson and Deputy Prime Minister Nick Clegg voiced their support for using restorative justice to handle some of the young rioters and reduce the burden on the criminal justice system (Gavrielides, 2012). Despite these promises, however, no concrete proposals for a formal restorative justice scheme to compliment, or bypass entirely, the conventional justice system have been piloted. The aim of Gavrielides’ (2012) research is thus to demonstrate the potential that restorative justice holds to benefit both victims and offenders involved in street group violence, by building a comprehensive and diverse evidence base comprised of case studies in restorative justice was used in the context of
riots, youth group disturbances, and street group violence. Through compiling and analyzing these cases, much-needed knowledge is contributed to our understanding of the potential benefits and limitations associated with using restorative justice with these particular populations. For the time being, the project consists largely of case studies from India, Northern Ireland, Vancouver and England; however, it is expected that as additional case studies emerge, the focus of the study will adapt accordingly.

In 2012 Gavrielides published *Waves of Healing: Using Restorative Justice with Street Group Violence*, which documented preliminary findings from his international study. Although the utility that can be gained from the case studies examined is limited, and reliability or generality cannot be established from the findings, they remain insightful and supportive of restorative justice’s potential with this population. The book discusses in detail the aftermath of the riot in Vancouver and the interest in restorative justice that subsequently emerged in the community from victims, offenders, and some members of the public. Among the promising case studies included in the book are several that emerged from the London, UK riots, which provide guidance for Vancouver (Gavrielides, 2012).

### 6.3. Concluding thoughts

Of the thousands of photographs taken of the violence and destruction that took place in downtown Vancouver the night of June 15 2011, one of the most iconic remains that of Nathan Kotylak, a 17-year-old former star athlete, attempting to light a police car on fire (see Figure 7).

Typically, the identity of youth charged in Canada is protected from publication in print media under the *Youth Criminal Justice Act*. Additionally, the Canadian Charter of Rights and Freedoms assures those accused of criminal acts that they will be considered innocent until proven guilty in a fair court of law. The numerous difficulties that arise from attempting to regulate content posted on the Internet, however, allows many who use it for the purposes of distributing information to easily ignore and sidestep these laws. Almost immediately after the photograph was published online and Kotylak was identified, the 17-year-old was identified by users on Facebook and other social
media sites, and the backlash he suffered from the public was swift, unfeeling, and overwhelmingly broadcast. Kotylak’s identity and photographic evidence of his alleged crimes was rapidly distributed around the world through various blogs and social media websites, where he was subjected to a flood of verbal abuse, demands for punishment, and threats at the hands of the Internet (“Rioting Teen”, 2012; “Teen Athlete Apologizes”, 2011). Before the formal process of sentencing Kotylak had even begun, he had already, in a sense, been convicted and sentenced to life in a virtual jail with no rules or regulations or protection from abuse.

The Friday following the riot, Kotylak made an application to provincial youth court to come forward to the public, thus officially waiving his right to have his name protected from publication in print media in the process. Two days later, Kotylak appeared on public television to deliver a heartfelt public statement in which he apologized, took full responsibility for his actions, and expressed deep shame and remorse for the harm he caused (“Teen Athlete Apologizes”, 2011). Excerpts from that statement read as follows:
For reasons I can’t really explain, I went from being a spectator to becoming part of the mob mentality that swept through many members of the crowd… I want to say as clearly as I can that there is no excuse for my behaviour… I am truly ashamed of what I did… My life took a very bad turn on Wednesday night based on choices I made. Now I must face the consequences.

Vancouver mayor Gregor Robertson acknowledged the public apology as a brave and positive decision on Kotylak’s part, adding that “…it’s important that those responsible come forward and own their tragic mistakes, and accept the consequences.” (“Rioting Teen”, 2012). Vancouver residents and the wider Internet were not so merciful. It was well publicized in the weeks following his apology that Kotylak suffered a variety of painful consequences: in addition to facing serious criminal charges, he was suspended from Canada’s national water polo team and lost his scholarship to the University of Calgary, where he was due to begin studies. Yet despite the fact that Kotylak made no attempt to excuse his behaviour nor deny that he deserved to face criminal penalties, the thirst for punishment from the public remained insatiable. A Facebook petition was launched to extend Nathan’s two year ban from the Canadian national water polo team to a lifetime one (the petition has since been deleted). A cursory Google search of Kotylak’s full name now yields pages upon pages of news articles and blog posts devoted to vilifying him, and the accompanying user comments on these pages range from unfounded claims that Kotylak was a “spoiled rich kid” who “only apologized because he was caught”, to hopes that he would be imprisoned and physically harmed, to links to his personal contact information for purposes of harassment. When the home address of Kotylak and his family eventually appeared online and they began to receive personal threats, they were forced to flee their home (“Rioting Teen”, 2012).

Vancouver Mayor Gregor Robertson has voiced his disappointment at the growing online rage toward rioters, stating that such behaviour “…just makes things worse, and ramps up the hatred and the anger we were all shocked by during the riots.” (“Rioting Teen”, 2012) This author agrees wholeheartedly. The community of Vancouver is vindicated in feeling hurt, angry, and violated by the senseless and reprehensible actions committed by these young people, and in wishing to see them held accountable and made to face meaningful consequences for the harms they have done to others. However, there is nothing to be gained from settling for nothing less than the total destruction of these young people’s lives through robbing them of their future
opportunities, their sense of security, and their self-respect so early in their lives. Many young people break the law, and many learn from their mistakes and lead meaningful lives as mature, productive, law-abiding citizens. Most could not have done it without the support of others willing to grant them a second chance. Whether these young people learn from their mistakes and grow is entirely contingent on us, and what we do next.

As unacceptable as the actions of the rioters who wreaked havoc on our city on June 15 2011 were, these people all remain members of our community. They are the sons, daughters, nieces, nephews, brothers and sisters of people in our community. They are friends, employees, students, volunteers. Most of us, upon learning that someone close to us had made a terrible mistake for which they wished to make amends, would support them in their efforts, recognize the good they have done in their lives, and believe in their ability to learn from their mistakes. It is unfortunate so many of us are unable to regard those who participated in the riot with the same humanity.

The community of Vancouver does not owe the rioters forgiveness for the pain and suffering they have experienced. Forgiveness is a gift, and as such cannot be demanded or required (Braithwaite, 1989, 2002). But by granting rioters who wish to redeem themselves the chance to do so, the community of Vancouver does not condone, exonerate, or justify their acts. Rather, it means deciding that their acts will not define us as a community, that we are above and beyond them, and that we can let go of our hate. Though it seems to be in opposition to our self-interest to willingly let go of the harms committed against us, the paradox of forgiveness, described by Hope (1987), often finds the opposite: “When we give to others the gift of mercy and compassion, we ourselves are healed”. 
References


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List of Cases

R. v. Fuller, [1995] QJ No. 3127
R. v. McCabe, (16 October 1991), Penticton 18947 (BCPC) Unreported decision of Weddell, J.
R. v. Willaert, [1953] 105 CCC 172 (Ontario CA)
Legislation

Criminal Code (R.S., 1985, c. C-46)
Safe Streets and Communities Act (2012, c. 1)
Youth Criminal Justice Act (2002, c. 1)
Appendices
Appendix A: List of all *Criminal Code of Canada* offences for which offenders have been charged in 2011 Stanley Cup Riot in Vancouver, British Columbia

**Punishment of Rioter**

65. Every one who takes part in a riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**Possession of weapon for dangerous purpose**

88. (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

**Failure to comply with condition of undertaking or recognizance**

145. (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction

**Assault**

266. Every one who commits an assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

**Assaulting a peace officer**

270. (1) Every one commits an offence who

(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or

(c) assaults a person

(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
(ii) with intent to rescue anything taken under lawful process, distress or seizure.

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Theft

334. Except where otherwise provided by law, every one who commits theft

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction, where the value of what is stolen does not exceed five thousand dollars.

Breaking and entering with intent, committing offence or breaking out

348. (1) Every one who

(b) breaks and enters a place and commits an indictable offence therein

is guilty

(e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

Disguise with intent

351. (2) Every one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Possession of property obtained by crime

354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

355. Every one who commits an offence under section 354
(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Mischief

430. (1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

(4) Every one who commits mischief in relation to property, other than property described in subsection (3),

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Arson — damage to property

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
Appendix B: List of Cases


R. v. Pennington (25 September 2012), Vancouver 223519-1-V (BCPC) Unreported decision of Rideout, J.


R. v. Epp (24 October 2012), Vancouver 223510-1-V (BCPC) Unreported decision of Bastin, J.


R. v. Lau (05 November 2012), Vancouver 223529-1-V (BCPC) Unreported decision of Harris, J.

R. v. Ledesma (29 November 2012), Vancouver 223555-1-V (BCPC) Unreported decision of Walker, J.

