

**SENTENCING CHRONIC OFFENDERS:
30 STRIKES AND YOU'RE OUT?**

by

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ABSTRACT

Canadian legislation surrounding sentencing has been prefaced by a statement of the purposes and principles of sentencing since 1996. This legislation identifies proportionality as the fundamental principle in sentencing, and states that sentences should be proportional to the gravity of the offence and the degree of responsibility of the offender. Although prior criminal record may be considered as an aggravating factor by the judiciary when deciding upon an appropriate sentence, our current legislation does not mirror other sentencing systems such as those seen in the United States, where a criminal record may at times form the sole basis for the increasing length of incarceration. The Canadian experience with the sentencing of chronic offenders is an important indicator of sentencing policy in practice. If proportionality is the primary goal of sentencing, how are Canadian judges handling those chronic property offenders who commit dozens or even hundreds of offences over their criminal history? Are sentences strictly controlled by the gravity of the instant offence or are they being inflated by the offender's criminal history? The aim of this study is to examine if indicators of sentence inflation can be observed in the sentencing patterns for one such group of chronic offenders. In general, the results appear mixed, as some increasing severity outside of the nature of the offence can be seen in terms of denial of bail and imposition of a custodial sentence. However, analysis of the length of the custodial sentences does not clearly demonstrate substantial inflation over those that would be expected solely on the basis of proportionality even for the most incorrigible offenders. What this creates, however, is a revolving door for many of these offenders. The difficulty comes with trying to balance the needs of the public in terms of protection from such chronic offenders (Street Crime Working Group, 2005), while still adhering to the legislated purposes and principles of sentencing.

Keywords: sentencing; chronic offenders; three strikes; mandatory minimum sentences; sentencing guidelines; selective incapacitation; Canada; purposes and principles of sentencing; just deserts; proportionality

DEDICATION

This is dedicated to all those who have put up with me over the past decade with the commitment to being a professional student. It was a long road, and your patience and continued support are so appreciated. To my family and friends - thank you, thank you.

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GLOSSARY

ACCS	Adult Criminal Court Survey
Cornet	Corrections database
COU	Chronic Offenders Unit
CPIC	Canadian Police Information Centre
JUSTIN	Justice Information System (BC)
MSO	Most Serious Offence
MSS	Most Serious Sentence
PRIME	Police Records Information Management Environment
RCMP	Royal Canadian Mounted Police
SS	Suspended Sentence
VPD	Vancouver Police Department

1: THE ISSUE OF SENTENCING CHRONIC OFFENDERS IN CANADA

"[t]he man with the longer sentence may be only dimly aware of its inequity after it has been pronounced in the courtroom. But he becomes keenly aware of it when he reaches the penitentiary and compares his sentence with those of others. He has long months to brood about it and is eagerly assisted by his fellow prisoners. It helps to deepen in him a sullen resentment against the law and all its works; many discharged prisoners return to the community embittered and revengeful men. Thus the law defeats its purpose. It not only fails to protect the community but in fact actually endangers it" (Jaffary, 1963, p. 47).

The academic and intellectual focus on chronic offenders has blossomed in the literature following Wolfgang, Figlio and Sellin's (1972) landmark study, which found that the great majority of offences were carried out by only a small minority of offenders. This finding led academics to investigate numerous questions regarding this group, including the reality of their existence. Despite some arguments advocating that this finding is merely a statistical artefact (Cohen, 1983; Blumstein & Moitra, 1980), the majority of research has found that indeed there does appear to be a small percentage of the population that not only offends the most often, but offends for longer during their lifetime (Petersilia, 1980). Questions regarding the age of onset, prevalence vs. incidence, criminal lambda, specialization and desistance have proliferated the literature on chronic offenders (Blumstein & Cohen, 1987; Farrington, 2007; Brame, Bushway, & Paternoster, 2003; Nagin, Farrington, & Moffitt, 1995). Although significant

inroads have been made in the study of this group, there remains an inability to accurately predict who will become a part of this group, how long they will remain a member, and their overall impact in terms of their offending frequency and specialization (Blumstein, Cohen, Das, & Moitra, 1988; Day, Beve, Rosenthal, Duchesne, Rossman, & Theodor, 2003; Tracy, Wolfgang, & Figlio, 1990). The lack of concrete answers becomes particularly problematic when the discussion then turns to policy. Undoubtedly, the desire to construct a reliable prediction system is strong, as the belief is that if that small group of offenders who would cause the most harm were to be incapacitated, this would cause crime rates and the costs associated with the criminal justice system to drop (Blumstein, 1983; Blumstein & Cohen, 1987; Francis, Soothill, & Piquero, 2007). However, without a reliable prediction scheme, it is debatable whether there is any benefit to a selective incapacitation scheme or other sentencing schemes aimed at repeat offenders (Auerhahn, 1999). Surprisingly, what appears to be absent from the body of research is an assessment of the current realities surrounding the sentences handed down to chronic or prolific offenders. Rather, the research has focused almost exclusively on what their sentences *should* be.

This research seeks to fill this gap by focusing on the current sentences for a group of chronic offenders in Vancouver, British Columbia (B.C.), Canada. Against the backdrop of the chronic offender literature, sentencing in Canada diverges from its American counterparts by way of the legislated purposes and principles of sentencing. Conforming to a “just deserts” approach with proportionality in sentencing held above all other purposes and principles,

Canadian judges are not in a position to solely use an offender's criminal record to increase sentences beyond that which proportionality would allow for most offences¹. This adherence to the principle of proportionality affirms that an offender's punishment must not be used to effect change in others by way of an inordinately harsh sentence, echoing sentiments expressed by Kant and contrary to most utilitarian principles. Proportionality in this context of Canadian law also appeals to consistency: "by measuring the relative seriousness of the crime according to similar offences committed by others, the statutory sentencing scheme provides a rational basis for determining the quantum of punishment" (Fish, 2008, n56). This principle, when considered in light of a prolific offender, would seem to discourage exemplary sentences meant to dissuade or deter the offender from future offending, or attach a sentence outside the realm of what others have received for similar offences.

Despite the relatively clear objective of the primary purpose in Canadian sentencing, numerous other (and often conflicting) purposes and principles such as deterrence are also outlined in the legislation, forcing judges to balance their fulfilment with the proportionality principle. Therefore, in the absence of selective incapacitation schemes, sentencing grids, or stringent mandatory minimums (such as 'three strikes' legislation), the question becomes whether Canadian judges are taking liberties with the sentences of chronic offenders and increasing

¹ In some instances, mandatory minimums are placed on offenders committing a second or third specific offence, and as such, the `step up` in punishment is based on the criminal record. Mandatory minimums are in place in Canada for offences involving a firearm, sexual offences involving children, and impaired driving. These are in addition to the increased penalties upon a subsequent offence for murder and other miscellaneous offences such as illegal betting (Raaflaub, 2006)

their incarceration terms beyond which proportionality would allow? These questions arise from two schools of legal thought; namely, the legal realist approach and the legal positivist approach. The legal realist would consider the 'human' side of sentencing, and would suggest that judges may, upon seeing a lack of deterrence of an incorrigible offender, seek to increase the penalty on that offender in an effort to effect some change. The legal positivist, on the other hand, would not expect this result from the judiciary, as the law on the books with respect to the limits and reasonable ranges for sentences would be the primary guide for all jurists, even when faced with a prolific offender. It is from the latter perspective that this work addresses this question, and assesses whether such a pattern of increasing sentences can be seen for this chronic group beyond that which would be considered proportional in terms of the severity of the offence, the harm done to the victim, and the degree of responsibility of the offender.

This work proceeds in stages, and emerges from two separate subject areas – the literature surrounding sentencing in Canada, and the issues surrounding the chronic offender. Chapter 2 discusses the theoretical basis for the justification of punishment within a Canadian context, paying close attention to theories guiding sentencing such as just deserts or legal realism. Many theoretical justifications for punishment may be placed within one of two camps, either conforming to a retributivist viewpoint or a utilitarian justification. Within the purposes and principles of sentencing in Canada, both are present to varying degrees. Chapter 3 continues with the introduction to sentencing, and aims to provide a summary discussion of the relevant literature surrounding punishment

in Canada from the 1960s onwards. Many of the current discussions in the literature have been circulating for decades. This chapter will aim to highlight the responses in the literature following Bill C-41 (given Royal Assent in 1996), which outlined the legislated statement of the purposes and principles of sentencing.

Chapter 4 moves into the realm of the chronic offender, and serves to introduce the concepts and theories behind this phenomenon, as well as the important research endeavours that first established their existence. Several questions will be explored through the literature reviewed in this chapter, including discussions of how we identify the members of this group, how frequently they offend, whether they specialize in any single offence type, and whether they ever cease their offending. A brief discussion of policy follows, and will be considered throughout the remaining chapters. Chapter 5 continues with the focus on chronic offenders, but pulls the discussion towards sentencing. In particular, this chapter focuses on discussing the many policies that have been proposed for 'dealing' with this population, including selective incapacitation, mandatory minimum sentences, and three strikes legislation.

Chapters 6 and 7 discuss the methods and results of the current research, focusing on an exploratory data analysis approach. Through the examination of a sample group of chronic offenders' criminal records, the question of whether the judiciary is increasing the severity of their sentences in step with a growing criminal record can start to be explored. Three primary questions will be posed to examine this issue: 1) is the judiciary sentencing these offenders to prison more often as their criminal record increases, 2) are chronic offenders being held

in pre-trial custody more often as their record increases, and 3) are the custodial sentence lengths becoming longer with their growing number of convictions.

Chapter 8 pulls together the discussion surrounding policy, and focuses primarily on public attitudes towards sentencing in Canada, and the possible ramifications should sentencing practices continue to evolve without a sufficient basis in research. Experience from the U.S. can serve as a useful warning system that any attempts to quell this group's activity by incarcerating for lengthier terms may have detrimental ramifications for both individual rights and liberties and the ability to financially support such policies. However, the primary question in terms of policy becomes, in a system that holds proportionality supreme, how should Canada deal with the revolving door of chronic offenders? This is where future research must be conducted before legislated options come into play, as undoubtedly the impact both financially and ethically of simply locking these individuals up indefinitely may be significant.

Chapter 9 focuses on an issue regarding pre-trial custody that emerged from the analysis, and has impacts on data accuracy and coding nation-wide. While a deep investigation into this issue is beyond the scope of the current work, it is presented as a much-needed aspect of future research.

2: THE JUSTIFICATION FOR PUNISHMENT

This chapter focuses on the theoretical justifications for punishment. Although similar principles were replete throughout the history of Canadian sentencing, the 1996 legislation codified such purposes and principles of punishment such as deterrence, rehabilitation, denunciation and others. These principles were led by the fundamental principle of proportionality, and sought to bring consistency and predictability into judicial sentencing decisions. Although supportive generally of these aims in sentencing (Tremblay, Cordeau, & Ouimet, 1994), the public does not likely appreciate the nuances of the debate over these principles or their complicated historical development.

The goals of the 1996 legislation may have fallen short of their desired objective of providing clarity in sentencing decisions. Rather than providing a clear and consistent direction for judges, the 1996 legislation merely wrote in the major principles and purposes of sentencing already at work in the decision-making process. This left the judiciary on their own in terms of how to appropriately choose between each purpose or principle (Ashworth, 1993). Therefore, deciding upon a sentence and the rationale behind the punishment becomes a balancing act, fraught with uncertainty and sensitive to numerous legal and extra-legal factors (Doob, 1997). However, the objective here is not espouse what justification the judiciary *should* be following; rather, it is to present this decision-making process that they face daily, and begin to discuss the

additional difficulty and confounding variables that come into play when deciding upon a punishment for chronic offenders or those with lengthy criminal records.

This development of the discussion, more akin to a policy debate, will unfold over the next several chapters of this work. The initial stage of this discussion involves the theoretical origins of our Criminal Code and its attending justifications for punishment and censure. Although presented as distinct and separate ideas, it should be plain to see that an absolute distinction does not necessarily exist in modern legal practice. Through the discussion of natural law, positive law, legal realism and critical legal studies, it becomes apparent that our current law encapsulates all of these ideals, at least to some extent. Motivations behind the codification or interpretation of our laws can be seen to be influenced in varying degrees by morality, rule of law edicts, subjective interpretation, and political and social influence. All of these facets are prominent in the four primary theories of law that will be discussed. Although not encapsulating all the available perspectives on the law, these will provide the reader with a broad overview from which to launch into an examination of the theoretical justifications for punishment in forthcoming sections.

2.1 Theories of Law

2.1.1 Natural Law

Natural law, in the most simplistic explanation, is a system of laws that takes validity and influence from a higher authority, generally nature, religion or a

notion of morality in general. As natural law comes from such a perfect source, it is thought of as universally valid, as it is not subject to man-made flaws of interpretation, subjective notions of fairness, nor individualist notions of morality. Therefore, natural law is thought of as a critique or 'mirror' for those man-made laws originating either from governments or individuals. Rather than looking towards a governing body for these rules, natural law, it is argued, can be discovered and observed by simply rational reasoning. Also due to its stature in the hierarchy of law, it would trump any contravening laws that offended its rational, moral order (McLeod, 1999).

Natural law theories have an extensive history, and featured prominently in the works of St. Thomas Aquinas, Thomas Hobbes and John Locke. Going back even farther, its history is also inextricably linked to the work of Aristotle, building on Socrates, via the work of St. Thomas Aquinas. Natural law philosophy also has a parallel religious background, as a number of Church elders began to incorporate natural law philosophy into Christianity, advocating that law through nature was no longer possible and salvation should be sought through the law according to Jesus Christ (Finnis, 2007). Consequently, St. Thomas Aquinas advocated for restoring natural law to its more independent state as originally envisioned. Although rich in history, proponents of natural law have had to defend their doctrine throughout more contemporary times as being out of date and far too intertwined with the morality of the Church (Friedmann, 1967).

Despite criticism, those who support the natural law perspective continually defend its premise by arguing that it was only through their perspective that the Nazi laws in Germany would have been rendered invalid, as adherence to a more positive law perspective would have not been able to strike down such racist legislation, despite its outward immorality (Friedmann, 1967). Notably, positivist theorists such as H.L.A. Hart would have argued against punishing German informers, as punishment was only valid when citizens committed an act forbidden by the State (Hart, 1958). However, even steadfast positivists such as Hart may inadvertently be advocating for both, as further examination of his writings have made some contemporary theorists realize that Hart advocated not only for a positivist conception of legal rules, but surreptitiously espoused a minimum set of principles that can be considered natural law, and would be required for minimal human flourishing (Finnis, 2007).

Despite the altruistic flavour of natural law, critics argue that natural law has exhausted its historical function and is no longer necessary to provide restraints to the production and interpretation of the law (Pino, 1999). Today, it is the judge in a common law system that provides the necessary link between law and morality, led by experience and the social milieu of the time and the continual reinterpretation of the law via the varied multitude of cases that must be assessed (Cotterrell, 2000). However, we can see elements of both in our legal systems. One example of this distinction in the common law system comes from our differentiation between principles that are considered *mala in se*, or things wrong in themselves, from principles that are *mala prohibita*, or things wrong only

because prohibited by positive law (Finnis, 2007). Despite these historic distinctions that survive today, there is a resurgence of natural law scholars, led by Finnis (2005; 2007) who discuss the intersections and necessity of both natural law and positive law, despite the existence of these distinctions.

In Canada, although obedience to the positive law perspective is apparent in our adherence to legislation and legal statute, we see natural law's influence in such legislation as the *Charter of Rights and Freedoms*. The adage from natural law, "an unjust law is no law at all", is literally put into action via *Charter* challenges in the Supreme Court of Canada. Insofar as the *Charter* can be thought of as an instrument instructed by natural law (i.e., fundamental human morality and rights), it is the use of this instrument that weighs whether the existing positive law, in the form of legislation and the *Canadian Criminal Code* is just. Although some might argue that *Charter* challenges are merely a positivist exercise of validating one piece of legislation with another, the reality is that the pure adherence to natural law and positive law in our modern common law is difficult at best, despite instances of clear distinction.

2.1.2 Positive Law

"The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."
(Austin, 1832, p. 157)

Considered often as a response to natural law, positive law consequently defines itself often by what it is not – that is, natural law. Rather than receiving

validity from moral or religious tenets, positive law received its validity from the mere fact of being enacted by a “historically determined human legislator” (Pino, 1999). In this way, positivism’s concern focused on the existence of the laws, not necessarily their form or content. The emergence of positivism out of the Enlightenment and the rise of the modern state, was more of a fundamental shift in the social attitude towards the law rather than a separate theory of law in itself. In the spirit of ‘revolting’ against natural law, positive law theorists contended that there was “no necessary connection between law and morals” (Hart, 1958, p. 595). This can be interpreted by a Hard Positivist approach that sees this as saying it is necessary that there is no connection between law and morals, or by a Soft Positivist approach, which argues it is not necessary to have a connection between law and morals (Leiter, 1999). Therefore, instead of receiving the law from the divine authority such as natural law does, positive law provides “the rules of the game that allow diverse private moralities to co-exist” (Cotterrell, 2000, p. 15). Others similarly see positive law as a system for deciphering how the societal rules and standards interconnect and are organized (Coyle, 2002).

While natural and positive legal theories are inherently different in their allegiance, they are not entirely opposite and mutually exclusive. Positivists may accept a minimum of natural law to validate certain basic laws such as murder or rape; and, more recently, natural law has been seen as providing an evaluative framework under which positive law can be examined (McLeod 1999: 18). Even John Austin, coined the ‘father’ of legal positivism, argued that all human laws (as positivism viewed them) had to conform in general to God-given laws, or more

generally, morality. This has been vehemently opposed by more contemporary positivists such as H.L.A. Hart as muddying the distinction between positivism and natural law; however, formally and structurally, historical positivist writers such as Bentham argued that one should be able to ascertain what the law was, without the necessity of engaging in moral reasoning (Waldron, 1996). The pendulum may again be swinging back to the earlier propositions of Austin, however, as more contemporary theorists begin to espouse that the rudimentary distinctions between natural law and positivism are unfounded and mistaken:

[P]ositivist opposition to natural law theories is pointless, that is redundant: what positivists characteristically see as realities to be affirmed are already affirmed by natural law theory, and what they characteristically see as illusions to be dispelled are no part of natural law theory. (Finnis, 2007)

The adherence to the positive law can be best seen in cases where judges are compelled to adhere to the 'rules' of the law, even if the decision to do so does not appear to be morally the best scenario (Atria, 1999). This recognition of the human aspect of judicial reasoning brings forward the discussion of the 'response' to positivism – that of Legal Realism. While positivist scholars focused more on the foundations of the validity of the law and less on judicial reasoning or adjudication, which is considered the most notable failing of positivism, Legal Realists focused almost entirely on this aspect of the law. Therefore, this led to the assertion that positivism was essentially a theory of law, while Realism was essentially a theory of adjudication (Leiter, 1999).

2.1.3 Legal Realism

This focus on adjudication by Realists originated from the recognition that the law on the books was often very different from the law in action (McLeod, 1999). As the decisions made were formed by human actors (i.e., the judges), they were subject to individual differences, bias, and other human subjectivities. Specifically, Realists argued that in deciding cases, judges react primarily to the underlying facts of each case, rather than the guiding laws or reasons on the books. This reality, according to Realists, led to a situation of indeterminacy of legal decisions, evident in the inability to predict outcomes according to the statutory rules in many cases. The level of indeterminacy, however, differs between Realists. Some in the minority choose to argue that judicial decisions are largely based on the whim of the judge, being illustrated by the popular adage of arguing results were dependent upon “what the judge had for breakfast”. Others, recognizing that it is not entirely impossible to predict judicial outcomes, take a slightly less pessimistic view and argue that decisions fall into discernable patterns based on certain factual scenarios, and are therefore predictable. However, these discernable patterns and scenarios are not often based on the legal rules. Rather, Realists argue these non-legal reasons are often judgements of fairness or societal norms, although the decisions can be justified after the fact by reverse-engineering the decision to fit within the legal parameters and/or legislation (Leiter, 1999; Leiter, 2001).

Even in a common law system, where decisions must be based on *stare decisis*, Realists argue that the belief that this constrains the subjective nature of

decisions is highly misleading. Due to the existence of countless cases that may provide relevant precedents for widely different viewpoints and outcomes, judges are able to pick and choose which cases to use as support for the adherence to competing rules (Altman, 1986). Interestingly, this sentiment is echoed by those forming a far more critical view of legal theory and jurisprudence – the Critical Legal Studies movement. They agree with the Realists that any legal principle can be utilized to obtain different results in particular situations; however, the motivation for doing so is conceptualized somewhat differently (Minda, 1995).

2.1.4 Critical Legal Studies

The Critical Legal Studies (CLS) movement, emerging in the late 1970s, held similar viewpoints to the Realists insofar as they recognized the subjective nature of jurisprudential decision-making, and the ability to use widely varying justifications to almost reverse-engineer decisions to fit within the legal framework as dictated by the legislation (Altman, 1986). However, instead of personal bias, subjective interpretations of fairness, etc., that typified the Realist response, CLS scholars argue that it was politics that drove decisions and coloured outcomes. In this way, CLS scholars explored ways in which they believed law perpetuated injustice, and how those in power were able to preserve their own position by manipulating the legal system. Therefore, these scholars would argue that the most appropriate avenue for examining the law and legal decisions was not through philosophy, but rather, through politics and the political agendas of the individual judges and of the larger groups they may pledge

allegiance to (McLeod, 1999; Ward, 1998). As a result, legal arguments and political rhetoric were essentially similar (Coyle, 2002).

This notion of 'law is politics' is further illustrated by the recognition that, unlike Realists who assert judges must choose between competing rules, CLS theorists argue that judges must choose between competing principles and ideals. Despite the differences in these fundamental notions, both theories arrive at the same conclusion – as ultimately the judge makes decisions which are fed by rationales outside of the law, it is difficult to find determinacy in the law and jurisprudential decisions (Altman, 1986). While this may appear manipulative and pessimistic, some CLS scholars recognize that the law, inasmuch as it is a playing out of politics, was actually a vessel for working out political conflicts in order to contribute to the stability of the social order (Tushnet, 1991). Ultimately, the idea is: "all of those ideological controversies which play a significant part in the public debate of our political culture are replicated in the argument of judicial decision. In other words, the spectrum of ideological controversy in politics is reproduced in the law" (Altman, 1986, p. 222).

2.2 Theoretical Justifications for Punishment

While the current work focuses primarily on examining the sentencing patterns of chronic offenders, this very quickly becomes intertwined with policy discussions surrounding punishment in general and imprisonment specifically. There is an important distinction – a discussion of sentencing should focus on the process by which an appropriate sentence is imposed upon an offender found

guilty of a crime. A discussion of punishment, conversely, focuses on the nature of punishment – the intention infliction of pain or deprivation on a person. Although punishment is more often than not the typical response to crime, it is not the only available avenue. Restorative justice approaches have sought to move the response to offenders into a more rehabilitative and community-centred orientation. Although worthy of discussion, due to the specific focus and nature of the topic at hand, this will not be discussed at length herein. The following discusses the primary justifications for punishment with the underlying flavour that it is within the context of the chronic offender, who by all rational supposition will likely receive a prison sentence for their offences. As much as is practical, the nature of sentencing (i.e., the process of applying an appropriate sanction) will be discussed, but the futility of attempting to identify which process a judge adhered to when dealing with aggregate data would be naive at best.

There are two primary schools of thought when it comes to justifying punishment. The first being retributivist theories, who justify punishment through the notion of deservedness and duty on the part of the State to punish wrongdoers. The second school of thought is the utilitarian perspective, which encompasses justifications for punishments that see offenders as means to an end. The objective of the foregoing is to discuss these schools of thought in greater detail vis-a-vis the Canadian *Purposes and Principles of Sentencing* as laid out in s. 718 of the *Criminal Code*.

2.2.1 Retributivist Theories

Theories that adhere to the notion of retribution share common elements of a notion of 'deservedness', insofar as an offender deserves to be punished and it is ultimately the State's obligation to do so. Inherent within this, however, is the notion of proportionality, which has evolved from the well known 'eye for an eye' stance to one of more restraint. Perhaps two of the most influential philosophical leaders within this stream of thought are Kant (1770s) and Hegel (early 1800s). Still today, Kant's views on punishment and responsibility are deeply entrenched within our legal system. Broadly, Kant believed that human beings were rational actors that could choose between right and wrong. If they erred and made the wrong choice to offend, then they deserved a measure of punishment to respond to that error in judgement and rational decision-making (Kant, 1991 [1797]). However, Kant was very much against using punishment as some 'means' to achieve other goals. Regardless of their seeming utility in society, Kant argued that people should not have their human dignity violated in the name of deterrence, protection, or other utilitarian objective. If punishment was deserved, then it was deserved on its own right – whether or not it accomplished any of the other aims mentioned (Kant, 1970).

Although falling in and out of favour throughout the years, likely due to the unfortunate comparison to vengeance, retribution is now more well known by a more palatable construction – that of 'just deserts'. The modern retributivist approach of just deserts, as often seen through Andrew von Hirsch, does not preclude other aims, but rather advocates that all other goals should be achieved

within the context of a justly deserved sentence (Ruby, 1976; von Hirsch, 1976). Like Kant, von Hirsch (1976) argues that there must be a just proportion between the crime and the sentence, which should be no more than the offender deserves. As such, a just deserts model often conceptualizes punishment on a continuum between being too lenient and being excessively punitive (Tonry, 1996). This model also advocates an inherent restraint on custody, as prison must be reserved for only the most severe crimes (Wasik & von Hirsch, 1998).

Retributivist theories, primarily in the form of just deserts, are at the heart of Canadian sentencing legislation, and were advocated for as the primary rationale for sentencing by both the Law Reform Commission of Canada (1974a; 1974b) and the Canadian Sentencing Commission (1987). The fundamental principle of sentencing, set out in s. 718.1 holds that, "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender", a clearly desert approach (Young, 1997).

2.2.2 Consequentialist or Utilitarian Justifications

Under these theories, punishment is justified by the presumed benefits that it will reap on the offender and/or society. These benefits may include incapacitation whereby the offender is separated from society and is unable to offend against the general public for that length of time; rehabilitation in cases where addiction or other afflictions may be the root cause of the offending behaviour; and, deterrence, both specific and general.

Utilitarianism as a doctrine can be traced back to the works of Bentham (1789) and Beccaria (1764), and is most closely associated with the theory of deterrence. These theories were based on the philosophical testament that without a system of laws that all people subscribed to, society would be in a constant state of war. Only by giving up a certain amount of personal liberty for the greater good could society live in peace. This would form the basis of the social contract, whereby legislators sought to establish the greatest good for the greatest number. This very family idea of the social contract traces its roots also from Hobbes (1651; in Windolph, 1951), Locke (1980 [1689]) and Kant (1991 [1797]).

The primary recognition under utilitarianism is that people were in general subject to two drives – the desire for pleasure and the avoidance of pain. Therefore, the system of laws that was based on rewards and punishments would promote the most adherence and therefore provide the most utility. Although people would, as illustrated above, give up a certain amount of liberty (i.e., agree to be punished for wrongdoing), they would be rewarded with the peace that came from general and specific deterrence. As all people would weigh the benefits of wrongdoing with the pain of punishment, it stood to reason that few would engage in offences with any regularity if the punishments were enacted successfully to maximize deterrence.

According to utilitarian premises, punishment would be justified if it deterred sufficiently. This recognition disturbed some retributivists, as they argued that this secured the need for some measure of deserts-based principle in

sentencing to provide some limit and proportionality on punishment (Goldman, 1998). However, this fear may have been slightly unwarranted, as although retributivists took this tenet to mean that utilitarians would punish beyond what was deserved if it was shown to deter others or effect some other goal, they apparently neglected to recognize that one of the central tenets of deterrence was the requirement for it to be the least onerous under the circumstances (Bentham, 1789).

Although the Law Reform Commission of Canada in the 1970s affirmed utility as a guiding principle of sentencing, research into deterrence began to question whether this was a solid foundation from which to base jurisprudential decisions. It has been well recognized, even by the founding scholars, that in order for deterrence to be effective it must be public, immediate and proportionate to the crime (Beccaria, 1764). Swift punishment was essential to solidify the deterrence effect on the offender's and the general public's mind, and the certainty of punishment was paramount to deterrence. Severity, however, was not seen as essential for deterrence and rather, has since been shown to be counterproductive if the sentence is not seen as proportional, fair or justified. This creates a situation whereby the sentence appears arbitrarily harsh, and the utility therefore is negated by the disappearance of respect for the law. However, it was originally thought that as punishment is often neither swift nor sure, it was necessary to increase the severity in order to make up for the lack of these two requirements (Bentham, 1789). For the most part, this has been rejected, as even the Law Reform Commission of Canada recognized that it would not be

prudent to base any `step up` in severity on this assertion, as the reality of apprehension in Canada was such that it was unreasonable to assume that increasing severity would make up for the well known low chance of conviction for most common crimes (Law Reform Commission of Canada, 1974).

In past decades, deterrence has fallen out of favour with criminologists with the influx of positivist theories and deterministic explanations of crime. Research continues to indicate that severity of sentence has little deterrent effect (von Hirsch, Bottoms, Burney, & Wikstrom, 1999), while others criticize its inappropriateness for certain types of crimes. It is thought that the goal of general deterrence is of little use for impulsive crimes (Ashworth, 1995: 60), and there is also the realization that "... the deterrent role of the criminal law is effective mainly with those who are already subject to the dominant socializing influences of the day" (Ruby, 1976, p. 9). At best, it can only deter some people in some ways in some situations (Walker, 1985). Likewise, some research suggests that only some classes of offenders may be deterrable, such as those who are more strongly bonded to society (i.e., at lower risk). Consequently, Orsagh and Chen (1988) have posited a U-shaped threshold theory for the punishing event, by which a "moderate" dosage of prison would be optimal. This brings in the additional element of more modern deterrence literature, insofar as it examines not only *if* prison will deter, but the conditions under which prison will deter. Nagin (1998) feels strongly that the deterrence literature in general is persuasive, but despairs that if the rate of imprisonment keeps climbing, prisons

will be seen as less stigmatizing, thereby neutralizing any possible deterrence effect.

Despite constant debate and criticism, deterrence continues to be examined from all angles, and further refined as a theory or objective of punishment. In general, most scholars would agree with the recognition that regardless of whether deterrence works as we envision it in an ideal scenario, the assumption that it never works is unwarranted (Walker, 1985), and surely the threat of punishment effects more compliance than the complete absence of it (von Hirsch, 1976; von Hirsch, 1999; Law Reform Commission, 1974).

2.2.2.1 Incapacitation

The concepts of selective and general incapacitation as a policy will be discussed in later chapters of this work; however, a general discussion of the theory of incapacitation is appropriate here. Generally, it is agreed that imprisonment produces a certain incapacitative effect on an individual offender (Owens, 2009). This effect comes from the recognition that generally, while in prison, the offender is unable to offend against the general public for that portion of time. However, this does not preclude the offender from either committing crimes against other inmates while in prison or perhaps being able to direct criminal efforts of other accomplices outside the prison walls or while on conditional or day release into the community.

While this inherently ‘feels’ like an appropriate response, the major critique of the incapacitative justification comes from those who forward notions of the costs associated with imprisonment, and whether or not those costs are actually

offset by the 'savings' of crime. What this critique draws on is the attempt to determine how much crime an offender will commit in any given free time (i.e., time not incarcerated). Again, this phenomenon will be discussed at greater length in future chapters, but the primary issue is the debate of whether we can actually determine how much crime would be saved if a particular offender would be taken off the streets, and for exactly how long that incapacitative effect would last (Auerhahn, 1999; Blumstein, 1983; Cohen, 1984; Cohen, 1983). This latter point is associated to the determination of how long offenders tend to offend over the course of their 'career', again, a very salient issue in the chronic offender paradigm, which will be discussed at length in future chapters.

In short, the most effective incapacitative approaches would be able to prospectively identify those offenders who would be sure to reoffend, exactly how long their careers would be, and place them in jail only for that amount of time (Auerhahn, 1999). By all accounts, we have not developed the instruments necessary to do this with any great efficiency, and thus far, incapacitation in our current justice system is considered to be more akin to protecting the public against dangerous offenders than establishing a cost-benefit calculus for determining who should be sentenced to prison and for how long.

2.2.2.2 Rehabilitation

Although rehabilitation is noted as a primary purpose and principle of sentencing under s. 718, there is considerable criticism and controversy over this utilitarian objective of punishment. In general, rehabilitation aims to break the cycle of offending by addressing the core reasons that may be propelling an

individual into offending. Most often, particularly in the case of chronic offenders, this is due to drug and/or alcohol addictions. However, this can also include anger management issues, violent tendencies, sexual compulsions, paraphilias, etc. Although there is often a strong belief that rehabilitation opportunities should be afforded to offenders while in prison, many academics and practitioners have critiqued the actual effectiveness of these programs (Cullen & Gendreau, 2000; Gendreau, Goggin, & Cullen, 1999; Welsh, 2007).

More often than not, these rehabilitative approaches necessitate voluntary submission and a lengthy commitment. For the majority of offenders this is not the reality – more often than not, offenders are in and out of custody for minor offences and serving relatively short periods incarcerated. This clearly would circumvent any real benefit from rehabilitative approaches, which then begs the question, is this a reasonable goal or aim for all offenders and all offences? In the mid-1970s, Robert Martinson's article "What Works? Questions and Answers about Prison Reform" showed a scathing critique of the reformatory impact of all programs in prison. Although it is claimed that his views were perhaps overblown, it did appear to shake the confidence of those adhering to the rehabilitative idea (Martinson, 1974). More recently, studies have shown some measures of success with particular programs and particular populations (Welsh, 2007). While still far from justifying rehabilitation on its own grounds, these studies have been used as advocacy for their continued existence and availability for those that choose to take advantage of them. While there is a great deal of disagreement about this principle of punishment, it is often recognized by the

majority that rehabilitative programs are more effective in the community than in secure custody – a reality that again shakes the existence of rehabilitative programs in prison (Cullen & Gendreau, 2000).

Overall, there are considerable critiques on both sides of the debate over how to justify punishment. Utilitarian justifications are criticized on the basis that it is recognized that there is little achievement of these goals. Deterrence has not been shown to exist on any measureable level when connected with punishment, incapacitation can only be truly effective when prospective identification techniques are developed, and rehabilitation, at least within a prison context, has not been found to be effective. Another serious critique of utilitarian justifications comes from a more theoretical basis, which is to acknowledge that using individuals as a means to achieve a collective end is a serious threat to personal liberties. However, there continues to be the possibility of strengthening what we know about deterrence and rehabilitation to modify programs and policies, thereby changing how our system of punishment operates.

2.3 Purposes and Principles of Sentencing in Canada

. . . it is important to stress that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions. Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment . . . the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation and the protection of society . . . In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender (C.J. Lamer, *supra* note 6 at p. 559; as cited in Young, 1997).

In July of 1995, Bill C-41 presented Canada with a legislated statement of purposes and principles of sentencing. The fundamental purpose was to contribute to a just, safe and peaceful society by imposing sanctions adhering to objectives of denunciation, deterrence, separation, rehabilitation, reparation and responsibility on the part of the offender. As previously mentioned, the fundamental principle of sentencing resembled a retributivist scheme by adhering to the tenet that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (Bill C-41, 1995). This is arguably taken directly from a desert perspective, as von Hirsch describes the fundamental principle of punishment in terms of blameworthiness, which involves two distinct concepts: (a) the harm caused by the offence committed; and (b) the culpability of the offender (MacPherson, 2002). The Court further expressed that the principles of denunciation and deterrence would warrant a term of incarceration even if incarceration were not necessary to deter the accused from

similar conduct or satisfy needs for rehabilitation (R. v. Proulx, 2000). However, others have argued that it may no longer be acceptable to apply a severe sentence in the name of 'deterrence' if social science has shown that this concept does not really work (Campbell, 1999).

The Canadian purposes and principles of sentencing, enacted in 1996, encompass many of these justifications for punishment that were discussed in the previous sections of this Chapter. Specifically, the legislation is written as follows:

Purpose

718. 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.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (Government of Canada, 1996, p. s. 718)

The principles and purposes in general encapsulate both utilitarian justifications by way of the adherence to rehabilitation, incapacitation and deterrence, while still maintaining a strong sense of retribution. Again, this retribution can be seen in the repetition of the just deserts approach, seen in both the imposition of 'just sanctions' and the notion of proportionality as cited as the fundamental purpose in 718.1. An additional principle that also appears to work its way into the Canadian vision is the true notion of denunciation. Pure denunciation, as touted in 718(a), is neither retributive nor utilitarian. Denunciation does not require any suffering on the part of the offender (Walker, 1969). Rather, it can be thought of more as a societal ritual from which to publically admonish the behaviour. The fine distinction is that it does not require any outcome on the part of the offender (utility), nor does it require any suffering justified by the finding of guilt (retribution). Denunciation truly is an end in itself.

Denunciation, although an old concept in the history of punishment, more recently has tended to form a third branch of justification for punishment – that of communicative or 'expressive' justifications. While considered fundamentally separate from utilitarian or retributive justifications, communicative justifications are often seen as having aspects of both deserts and deterrence. The champion for this approach, Duff (2001 [2008]), claims that the comprehensive theory of punishment he advances satisfies both retributivists concerns and utilitarian (or consequentialist) concerns about the justifications of punishment. To appease the retributivists, Duff (2001 [2008]) argues communicative theories focus on and are justified by the relationship of the punishment to the crime for which it is

imposed. For the utilitarians, Duff argues that communicative theories seek to be justified by the manifestation of good (benefit) from the punishment itself. While this discussion of denunciation does little more than muddy the waters on our appreciation of the rationale behind our purposes and principles of sentencing, the foregoing should highlight just how difficult a job the judiciary has in deciding a proper punishment if they are to attempt to weigh and balance all the conflicting aims of sentencing as outlined in the legislation.

Although the principle purpose of sentencing as noted in the legislation is proportionality, s. 718.2 elaborates on ways in which sentences should or could be modified by taking into account particular characteristics of an offence or the offender:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - i) evidence that the offence was motivated by bias, prejudice or hate based on the race, nationality, colour, religion, sex, age, mental or physical disability or sexual orientation of the victim, or
 - ii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victimshall be deemed to be aggravating circumstances;
- 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. (Government of Canada, 1996, p. s. 718)

In this 'modifying' section of the purposes and principles of sentencing, the legislation states those factors that may warrant overriding (at least to a certain extent) the proportionality principle. Most notably in subsection (e), which specifically guides the judiciary in seeking non-custodial sanctions for aboriginal offenders². However, as is evident from the wording of the legislation, neither section specifically outlines how or if an offender's prior record may be used to modify their sentence beyond which proportionality principles would limit.

As has been discussed throughout this chapter, the rationales behind our criminal law and the justifications for such laws and for the imposition of punishments are nuanced and varying. Throughout history, the pendulum has swung from several of the purposes and principles of punishment since outlined by legislation, which may be the reason behind included so many differing and seemingly incompatible justifications and guiding premises for punishment. When looking at the principles and considering the true nature of both the retributive and utilitarian aspects of the legislation, it is difficult to ascertain whether or not this piece of law was either a) not well thought out in terms of

² This special consideration in the literature was in response to the overrepresentation of aboriginal offenders in the prison system (Street Crime Working Group, 2005).

actual guidance to the judiciary, or b) it was made conflicting and broad on purpose in order to absolve the government of responsibility in these most difficult legal and philosophical debates. Regardless of the intended effect of Section 718, judges appear to be left on their own to wade through these principles. This becomes particularly salient when considering a unique group of offenders such as the chronic offenders. If the fundamental purpose of sentencing is to provide a proportional sentence, how does our system of punishment accomplish other purposes such as protection of the public, rehabilitation, or incapacitation? As will become clear as this research unfolds, our current legislation does an exceedingly poor job of addressing the unique needs of this population – both in terms of the public’s well being, and their own.

3: A BRIEF HISTORY OF PUNISHMENT IN CANADA

[I]mposing punishment within the institution of law means the inflicting of pain, intended as pain. This is...[incompatible with] esteemed virtues such as kindness and forgiveness. To reconcile these incompatibilities, attempts are sometimes made to hide the basic character of punishment. In cases where hiding is not possible, all sorts of reasons for intentional infliction of pain are given.... Attempts to change the law-breaker create problems of justice. Attempts to inflict only a just measure of pain [to each criminal act] create rigid systems insensitive to individual needs. It is as if societies in their struggle with penal theories and practices oscillate between attempts to solve some unsolvable dilemmas. (Christie, 1981, p. 5)

3.1 Sentencing Decisions, Disparity and Reform in the 1960s and 1970s

For several decades, trends in sentencing have been examined, with a keen eye on assessing disparity – at both the regional, and individual levels. Much variation in sentences from province to province in the 1960s appeared to occur from normative practices such as attaching a particular type of sentence to a particular type of crime, or in seeing a custodial sentence for a particular crime type in one province and a non-custodial sentence for the same crime type in another province (Jaffary, 1963). In other instances, the development of programs, such as probation, led to heavier utilization in those provinces where the program had been well established for many years, over those provinces where it was either in its infancy or had not yet been instituted (Jaffary, 1963). Other notable variations came from external and internal sources, such as the

recognition of the state of the penitentiary system, which resulted in many judges sentencing individuals to a federal institution to avoid the provincial jails (Jaffary, 1963); or the discretion that came from the wide breadth of discretion that the laws at the time afforded the judiciary (Cartwright, 1964). At the time, Canada was without a clear statement of the purpose and principles of sentencing, and as such, it was felt that the personal background and experience of each judge may unduly contribute to significant variation of sentencing (Cartwright, 1964).

This failure on the part of the legislature to produce judicial guidance for sentencing continued to be felt into the 1970s (Hogarth, 1971), and it was argued that the judges had an even more difficult time with balancing the aims of sentencing from the previous decade, as the ideology appeared to shift from punishment to control, but without any research or scholastic support to unpack issues of deterrence or rehabilitation that was required in a control model (Hogarth, 1971). During this time, magistrates in Ontario agreed that crime prevention was the primary purpose and goal of sentencing; however, few agreed on the ways to achieve this. Principles discussed included the importance of individual and general deterrence, but a limited importance placed on incapacitation and punishment (Hogarth, 1971). Even in the 1970s, most judges interviewed by Hogarth in this work asserted that they would like the increased ability to use community-based sanctions over institutional sanctions. Despite agreement on the purpose of sentencing and the desire to use alternative sanctions, the judiciary, without formal guidance, continued to show wide disparity in their decisions surrounding sentencing (Hogarth, 1971).

In 1974, the Law Reform Commission attempted to address this issue, and acknowledged the difficulty put on the judiciary and their responsibility to make decisions without any rational sentencing policy (Law Reform Commission of Canada, 1974). Their overarching purpose, however, appeared to be a discussion of the underpinnings of the criminal law surrounding punishment. Specifically, the issues of rehabilitation and deterrence were addressed. Although both were seen as important as an ideology, the Commission noted the relative ineffectiveness of both approaches. The lack of proven results from treatment programs was used in this argument against rehabilitation, as was the lack of research that could prove that deterrence actually worked, short of increasing the certainty of punishment (Law Reform Commission of Canada, 1974).

Two years after the Law Reform Commission published their report, they undertook another work with recommendations for policy reform regarding sentencing. The contributors were legal professionals, some of whom would go on to serve on the Supreme Court of Canada. What emerged as the largest concern for both the judiciary and the public was information and education regarding sentencing. Among the recommendations was a call for a reorganization of data collection and dissemination methods of crime and sentencing statistics. This directive was urged as, "[t]he state of statistics and information on the nature of crime and the administration of justice in Canada is simply deplorable. ... The public, legislators, administrators and judges are largely at the mercy of hunches in assessing the total picture of crime, and are

forced to rely on their personal or work experience." (Hartt, Lamer et al. 1976: 52)

A lack of information was also noted in the sentencing stage with regards to the condition of the offender and any community services available at the time of sentencing. This recommendation was in line with the sentiment of judicial restraint on ordering custodial sentences, and it was further expressed that judges should have to give written reasons for why a sentence of imprisonment should be imposed (Hartt, Lamer, Mohr, & Forest, 1976). This restraint on imprisonment should be outlined in legislation stating that it should be used only as a last resort, and should only be used to achieve principles of separation, denunciation of highly reprehensible behaviour and penalty for those who wilfully refuse to comply with conditions set forth in other sentences (Hartt, Lamer et al. 1976: 65) This report essentially called for a completely new legislative scheme with regards to sentencing.

This interest in sentencing prompted several reviews of the reality of punishment in Canada during the 1970s, often surrounding disparity of sentences. It is interesting to note that the overall incarceration rate around this period appeared to be dropping for many provinces in Canada. Many offences, such as theft, showed a relative decrease in the proportion incarcerated, with a subsequent increase in the use of fines and probation. However, some offences, such as robbery, remained relatively stable in the 1970s (Scalon & Beattie, 1979). Among the studies aimed at investigating the nuances of sentences, was a statistical review of incarceration, sentencing and recidivism for a group of first-time offenders in 1967. Regarding recidivism, an interesting observation

emerged: The non-violent property offenders who had been imprisoned were more likely to be convicted of a second offence than those who received a non-custodial sentence. This was an important finding, as the review also found that nearly one in five first-time offenders were sentenced to prison, often for a non-violent offence (Barnard & Tennenhouse, 1976). Other notable observations were made with homicide sentences, whereby female offenders were likely to serve far less time than their male counterparts, and sentence lengths in general showed significant disparity, particularly for manslaughter (Reed & Bleszynski, 1976). Part of the evident disparity during this time was said to occur with the practice of using either consecutive or concurrent sentences, which appeared to be highly dependent upon the total overall sentence that the individual judge felt was appropriate. Again, the lack of legislated guidelines was problematic as there was no direction for judges in this arena of sentencing (Ortego, 1977). Perhaps more disturbingly, research in this decade also shed light on an apparent source of disparity operating 'outside' the judiciary, that of pre-sentence reports and their impact on the final disposition of the judiciary. Through content analysis, 95 pre-sentence reports on male offenders convicted of a single offence of Break & Enter³ in Halifax in 1977 were examined. The impetus for this inquiry was concern over how much influence these pre-sentence reports had on the judiciary, as critics saw them as "representing a vehicle through which extra-legal information about an offender may be introduced into the judicial decision-making process" (Waters, 1979, p. 9). It was found that indeed judges relied most

³ At that time, this offence was known as "Break, Enter and Theft"

heavily on legal factors when determining sentences (which was somewhat contrary to Hogarth's 1971 findings); however, there was a correlation found between judicial dispositions and the 'tone' of the pre-sentence report. This was considered problematic and it was suggested that pre-sentence reports may be a source of unwarranted disparity because, [they] are not requested following every criminal conviction; information contained in the reports is not utilized in a consistent manner by the judiciary; and finally, the aspect of the reports found to be the most significant in influencing judicial decisions (tone) is a function of the Probation Officer's subjective impressions of the offender" (Waters, 1979: p. 64).

3.2 Sentencing Decisions, Disparity and Reform in the 1980s

Sentencing research was plentiful in the 1980s, and again tackled issues surrounding what *was* happening, and what *should* be happening. Acknowledging the pendulum swing towards rehabilitation in this decade, some works criticized the emphasis of the rehabilitative ideal without appropriate incorporation into the justice system. Statements such as, "does a prison ward become a rehabilitation center by putting a sign on a cage which reads 'rehabilitation center?'" (Mueller, 1980, p. 14), reflect the sentiment that although the trend was towards rehabilitation, its implementation had largely failed. In addition to advocates for increasing a therapeutic approach to justice (Culliton, 1980), others affirmed the need to decriminalize and divert offenders in order to cut costs and reserve the formal court process for those that had committed the most serious offences (Mohr, 1980). The increased use of alternative sanctions was seen as a viable avenue for transformation of the court and corrections

system. However, bringing back the arguments that began in the 1960s and 1970s, again the ideals of rehabilitation, deterrence and incapacitation were criticized as not being viable purposes or principles for the criminal law (Jobson, 1980). These assertions were based on research that demonstrated the ineffectiveness of these approaches, particularly deterrence (Cousineau, 1988). Unlike Mohr (1980), some were opposed to alternative sanctions, as they espoused the danger lay in widening the net for many offenders, instead of replacing custodial sanctions (Jobson, 1980), a trend that was later seen by LaPrairie in 1996.

Many researchers not only discussed the overarching issue behind disparity, but also examined what factors led to disparity in sentences. Unlike Hogarth (1971), Brantingham (1985) found that case facts and prior record proved to be the best predictors of sentences, far better predictors than judicial characteristics” (Brantingham 1985: 281). Analyzing several thousand real cases and sentencing decisions, this study, conducted alongside the then-Dean of the Law School at the University of British Columbia, found that 70 percent of sentence-length variation could be explained by only a few variables – most notably, prior convictions, whether weapons were involved, and the length of the individual’s criminal career. Overall, her findings suggested that sentences were generally steady and followed the case law (Brantingham, 1985). Using simulated cases, a slightly different pattern emerged for Palys and Divorski (1986), who found that “... differential subscription to legal objectives was the most potent predictor of sentence severity, followed closely by the differential

importance accorded various case 'facts'" (357). An important conclusion reached by this research was that a great deal of the disparity in sentencing could be attributed to disagreement among judges as to the legal objectives of sentencing in any particular case. Again, the discussion turned to the need for legislated statements of sentencing principles, as it was thought to ameliorate this issue (Palys & Divorski, 1986).

Again, many of these reviews led to the further discussion of sentencing reform, noting that "Canada's current sentencing laws and classification schemes are archaic and inadequate" (Jobson & Ferguson, 1987, p. 1). Like other reviews, the historical examination of sentencing trends showed observable cycles in the stated principal purposes of sentencing moving from retribution to rehabilitation and back to retribution (and arguably back to a rehabilitation-focused approach following the mid-1990s reforms). Espousing a primary purpose of 'just deserts' in sentencing, Jobson and Ferguson (1987) asserted this would encourage proportionality in sentencing with respect to the gravity of the offence committed, reduce disparity, and encourage restraint in custodial sentences. Taking this even further, it was also proposed that a system of 'benchmarks' be established, which would set realistic standards for types of offences, thereby reducing some of the difficulties associated with the unrealistic maximum penalties currently set for most offences. Perhaps most notably, however, was the strong advocacy for the establishment of a permanent

Sentencing Commission in Canada, which would serve to clarify and strengthen sentencing purposes for criminal offences (Jobson and Ferguson, 1987).

Discussions surrounding ideology and sentencing principles were often closely intertwined with research on sentencing disparity. However, not all research felt that disparity was unwarranted; rather, some felt uniformity in sentencing should be viewed as undesirable, as that would indicate that the courts were not dealing with the individual needs of the offender (Hall, 1980). This was the hallmark of many who espoused a more holistic approach to justice (Culliton, 1980; Hall, 1980; Mueller, 1980). However, this advocacy for individualized justice did not exclude the need to reduce or eliminate unwarranted disparity within the sentencing process. Some felt this could be accomplished by way of legislated sentencing principles (Palys and Divorski, 1986), while others supported leaving the decisions on appropriate 'ranges' to the Courts of Appeal to clarify, and the development of a matrix that would include these ranges and be available to sentencing judges (Vining & Dean, 1980). This approach was echoed by Benzvy-Miller in a 1988 examination of aggravating and mitigating factors in sentencing. The existence of consistent and recurring patterns was used as justification for the preparation of a formal sentencing guideline system, guided by appellate court decisions (Benzvy-Miller, 1988). Despite this advocacy for appellate court guidance in establishing sentencing guidelines, there emerged two key issues.

The first was the impact such a guideline system would have on plea bargains, or vice versa. It was recognized that the current system, which affords

a wide berth for discretion in sentencing, lent itself to the creation of such 'deals'. The development of a guideline system then, might impact the ability of the actors within the system to have something to bargain with, or in the opposite viewpoint, may allow the actors within the system to maintain the *status quo* and reject such guidelines by using the plea bargaining system (Verdun-Jones & Hatch, 1988). Secondly, there was some resistance on the part of the lower courts who saw this movement as limiting their discretion to respond to individual offenders with the maximum flexibility (Young, 1988). In reality, only 18 percent of lower court sentencing decisions even mentioned principles outlined by appellate courts, and only 7 percent actually referred to the higher courts' ranges. Again, the discussion returned to the need for legislated sentencing principles which would outline what factors should be considered when sentencing, and could serve to address issues in disparity arising from the differing importance placed on competing purposes of sentencing by both trial and appellate courts (Young, 1988).

Shortly following the publication of Jobson and Ferguson's article in 1987, the report of the Canadian Sentencing Commission was published. Not surprisingly, the Commission's recommendations echoed many of the thoughts that had previously been expressed by academics and justice professionals in the past. Many structural problems were outlined in sentencing including the absence of policy on guiding principles of sentencing, unrealistically high maximum penalties, problematic minimum penalties, inadequate guidance from Courts of Appeal, and a lack of information on sentencing for policy makers and

judges (Archambault, *Sentencing Reform: A Canadian Approach*, 1987). A number of guiding principles were outlined after a comprehensive examination of the then current system. The first was that the role of Parliament should govern sentencing by way of legislated principles. The purpose of sentencing should be the imposition of just sentences, as opposed to a juggling match between the five current purposes. The sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender, and maximum penalties should be rewritten to more closely resemble current practice without restraining discretion. Sentences of imprisonment should be reserved for the most serious offences, and no one should be imprisoned for the inability to pay a fine. The judiciary should also receive guidelines on sentence length and disposition, while maintaining their autonomy and discretion to choose an appropriate sentence for a particular circumstance. Finally, the Commission advocated a system of 'real time' whereby the sentence prescribed by the court and the actual time carried out by the correctional authorities would not be so disparate. The Commission went on to criticize three common purposes of sentencing, those being deterrence, rehabilitation and incapacitation. Deterrence and rehabilitation were rejected as guiding principles in sentencing, due to the dearth of research that actually showed any empirical justification in terms of the effectiveness of either approach. Incapacitation was rejected as well, noting that the utilization of such a principle as a crime-control measure would necessitate locking up far too many people. Again, restraint in attaching custodial sentences was advocated for, and community-based sanctions were supported as being the most appropriate for

the majority of offences (Canadian Sentencing Commission, 1987). Following this, the Daubney Committee (Daubney, 1988) also released its findings following a year-long cross-Canada series of hearings. Similar to the Sentencing Commission's report, they too advocated for a legislated statement of purposes and principles of sentencing and increased use of community sanctions. However, they did depart in some areas; for instance, while both the 1987 Commission and the Daubney report advocated for a sentencing guideline system, the latter asserted that this should be purely advisory in nature (at least at first). Furthermore, the Daubney report advocated for parole reform instead of proposing its abolishment (Daubney, 1988).

Near the end of the decade, Roberts (1988) provided a in important review of the literature on sentencing in Canada. His review included the many debates in the previous literature surrounding what purposes and principles should guide sentencing in Canada, and what the evidence was for the effectiveness (or ineffectiveness) of each. The lack of evidence surrounding the effectiveness of deterrence, incapacitation or rehabilitation was noted as a particular difficulty in establishing what *should* be the guiding principle (Roberts, 1988). From this summary review, it would appear that the most pressing issues at hand were what principles should be followed in sentencing an offender, and what other issues may serve to increase or decrease disparity in sentencing.

3.3 Brave New World: 1996

The beginning of the 1990s saw the emergence of literature aimed at responding to and discussing the Sentencing Commission's 1987 report. The *Canadian Journal of Criminology* dedicated a special issue to sentencing in July of 1990. Some of the issues discussed surrounded the Committee's recommendations regarding parole (Benzvy-Miller & Cole, 1990), legislation reform, alternative sentencing (Doob, 1990), and the ideology of sentencing (Gabor, 1990). Again, the familiar topics surrounding disparity continued to emerge, but the 1990s saw a greater proliferation of nationwide sentencing trend analysis, with close examination of types of sentences throughout the country, as well as prison sentence lengths for particular offences (Birkenmayer & Besserer, 1997; Turner, 1993).

Of particular importance during the early years of the 1990s were those discussions surrounding the ideology of sentencing and legislation changes in response to the Canadian Sentencing Commission's 1987 report. It was acknowledged by then Minister of Justice Kim Campbell, that the policies surrounding sentencing to date had been a product of piecemeal legislation, and had remained unchanged for over a century. She agreed with the Sentencing Commission's recommendations that reform was sorely needed, particularly in the areas of a legislated purposes and principles of sentencing. Stating that reforms were currently underway for future implementation, Minister Campbell affirmed that these reforms would act to reduce the reliance on incarceration and reduce disparity and confusion when it came to individual sentences (Campbell,

1990). Von Hirsch acknowledged that the recommendations of the Sentencing Commission, being closely aligned to a just deserts scheme, did have the potential to produce sentences that could be seen as more predictable and fair (von Hirsch, 1990). However, other elements surrounding disparity were also addressed, such as the Commission's recommendation to abolish full parole. This recommendation was justified on the basis that the common action was for judges to anticipate the actions of the parole board, and incorporate those expectations into their sentence. Undoubtedly this reality would impact the ability of the general public to see sentencing as fair and predictable, and without sufficient information about the offender's situation post-sentence, this could translate into additional unwarranted disparity (or at least the impression of it). In order to offset this, it was recommended that the parole system be better integrated with the sentencing system while both adhering to the purposes and principles of sentencing (Benzvy-Miller and Cole, 1990).

Perhaps in reaction to the Sentencing Commission's report in 1987, the Solicitor General of Canada released a report setting out, among other things, their recommendation for a statement of principles and purposes for sentencing. In it they stated, "[t]he fundamental purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society through the imposition of just sanctions" (Solicitor General Canada, 1990: 16). The principles of denunciation, deterrence, separation and rehabilitation were stated as essential to the sentencing process, but above all, proportionality and restraint were proffered to ensure sentences were the least onerous alternative and incarceration was only

resorted to in cases where protection of the public was at stake or another sanction was not appropriate (Solicitor General of Canada, 1990). Doing little to settle the debate among what purposes should be adhered to (and, against the advice of the Sentencing Commission in 1987), these recommendations would closely align themselves with the legislation that came into law in the mid-1990s.

Despite the recommendations of the Sentencing Commission and the Solicitor General, the reality was that Canada was still without a cohesive and congruent sentencing system. Similar criticisms were echoed from past decades, including the lack of legislated guiding principles, unrealistically high maximum penalties, the existence of mandatory minimum penalties that restricted judicial discretion, and a dearth of information about sentencing practice (Archambault, 1991). Again, these flaws were asserted to be responsible for the majority of disparity which emerged in sentencing, as judges were at their discretion to weigh whatever principles they felt to be relevant in the particular case (this appeared to be a criticism even following the legislation change. See: Quigley, 1996). Agreeing with Minister Campbell (1990) that the legislated reform up to this point had been piecemeal, Judge Archambault went even further to call for a complete overhaul of the Criminal Code, and not just the policies surrounding sentencing (Archambault, 1991).

What then followed in this decade was a proliferation of statistical analyses all aimed at examining sentencing trends. Earlier decades had noticed the lack of research surrounding what the reality of sentencing was, so the 1990s began to fill in those gaps with a substantial body of research. It was felt that

these statistics could provide additional 'tools' at the disposal of judges to better inform their decisions, and better ensure those who we send to prison should really be there in the first place (Campbell, 1999). Of particular note during this period were two national sentencing studies, undertaken by Turner in 1993 and Birkenmayer and Besserer in 1997. Turner's (1993) study examined provincial court sentences for five provinces and one territory between 1991 and 1992. It found that imprisonment was utilized overall in 30 percent of cases, and alternative sanctions such as fines or community service in 40 percent of cases. The use of probation was the most serious sentence in 27 percent of cases, nearly matching the usage of incarceration. However, this observation varied considerably depending on the offence type, as would be expected as the severity of the offence increased. Serious offences such as robbery and sexual assault were given a prison term over 80 percent of the time; however, these were generally limited to less than 2 years in 97 percent of cases. Turner (1993) also found that the median sentence length for all prison convictions was 30 days, with 80 percent of sentences running 8 months or less. As expected, maximum penalties were rarely, if ever, imposed used. Although much of the focus was on national observations, the evidence for considerable regional variation was also explored. It was found that the proportion of cases sentenced to prison, as well as the length of time that offenders were sentenced to prison, varied considerably across the country (Turner, 1993).

The follow up study to Turner's (1993) work was published in 1997, and although employing a similar methodology and focus, it included three additional

jurisdictions, additional sanctions, and a longer study period (Birkenmayer and Besserer, 1997). Similar to Turner (1993), Birkenmayer and Besserer (1997) found that approximately 26 percent of cases were receiving a prison sentence, with more serious offences receiving incarceration at a higher proportion. Also similarly, regional variation continued to be observed, with jurisdictions that showed higher incarceration rates, tending to have lower average prison sentences. For the most part, the most common offences that were examined were property offences, constituting 30 percent of all cases. On average, as was found in 1993, sentences tended to be short, with 82 percent of cases having a prison term of 3 months or less, and only 4 percent of cases being subject to a term of incarceration of over a year. Again, maximums were far above the reality of what the offence would actually garner in the courtroom, although there was some variation between serious property and violent offences (Birkenmayer and Besserer, 1997).

Additional reviews conducted during this decade examined sentencing on a more micro scale, or according to a particular offence type, such as Allison's 1991 examination of sexual assault sentencing post-reforms (Allison, 1991), and Lowman's 1991 work examining sentencing outcomes for prostitutes and their customers (Lowman, 1991). Coates (1996) examined sentence lengths for 84 sexual assault cases in BC, and found that most garnered an incarceration term of 2 years or less, with significant variation noted depending on prior record of the accused, relationship to the victim, and the age of the victim.

Despite the positive movement towards a more open proliferation of sentencing data and national trends, Roberts (1995), in reviewing Turner's (1993) study argued that until statistics became more widely available from superior courts, examinations of provincial court trends cannot have the necessary weight placed on them⁴. As sentences in superior courts, due to the more serious nature of the cases heard at this level, were longer than for provincial courts, thereby throwing off the average or median trends. Despite the current limitations, it was felt that the movement was in the right direction of producing an "adequate sentencing information system in this country" (Roberts, 1995, p. 196).

In July of 1995, Bill C-41 was passed and was proclaimed law in September 1996. Among other changes, it set out a statement of purposes and principles of sentencing in s. 718 of the Criminal Code (1995). The new section was nearly identical to the recommendations put forward by the Solicitor General of Canada in 1990, and stated the fundamental purpose of sentencing as contributing to a just, safe and peaceful society by imposing sanctions adhering to objectives of denunciation, deterrence, separation, rehabilitation, reparation and responsibility on the part of the offender. The fundamental principle of sentencing, set out in s. 718.1 was that, "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Other principles included recognition of variation in sentencing due to aggravating or mitigating factors, proportionality to similar sentences, avoidance of undue harshness in consecutive sentences, custodial restraint if other non-custodial

⁴ The availability of sentencing statistics on both a national and regional scale for both provincial and superior courts began to be regularly available to the public via Statistics Canada shortly before the publication of Roberts (2005) article.

sanctions would be appropriate, and consideration of all other alternatives other than incarceration, especially for aboriginal offenders (1995: 718.1). A new sanction was also introduced with this legislation - that of the *conditional sentence*. This allowed judges to order that sentences of less than two years be carried out in the community if they were satisfied it would not pose a risk to the public. This sanction, however, was not permitted for offences where there was a required minimum sentence of imprisonment⁵ (1995: 742.1). This legislation prompted a plethora of research surrounding what this meant for Canadian sentencing, and what this new sentence's impact would be on the incarceration landscape.

Research following the change in legislation focused intently on discussing the Parliamentary direction on sentencing principles. Quigley (1996) again discussed the notions of retribution vis-à-vis a just-deserts approach. Specifically, the aim of this work was to recognize that although judicial restraint was advocated for in terms of limiting custodial sentences, with the notion of 'proportionality' being closely tied to the appropriate incarceration length, the creation of a contradiction in the legislation is clear. According to Quigley (1996), until non-custodial sentences were seen as comparable to prison sentences, the historic over-reliance on prison sentences would undoubtedly continue. This was recognized as well by Brodeur (1999), as sentencing amendments since 1987, in his interpretation, had focused too heavily on incarceration. Again, this comes back to the issues of disparity, and while the new legislation did outline the

⁵ For example, homicide, firearms-related offences, child prostitution, betting, pool-making, and impaired driving.

purposes and principles that the judiciary is to follow, it was still with judges to juggle these principles while adhering to proportionality (Doob, 1997). One way to circumvent this apparent flaw in the legislation was the imposition of sentencing guidelines, as supported by several reviews in earlier years (Roberts, 1998). Without these clear guidelines, it was felt that the statements of purposes and principles must then be forceful and unequivocal – neither of which characterized the new legislation (Roberts, 1998).

While Roberts (1998) supported a legislated guideline system⁶, having a non-legislated database guideline system was also thought to be a viable alternative. It was thought that using computerized systems would give judges the ability to access sentence types and lengths from similar cases by entering particular data about the offence (Tata, Wilson, & Hutton, 1996). However, after examining the pilot system rolled out by Doob and Park in the early 1980s, they found judges did not readily use the system. It appeared that judges had little interest in current court practices, and looked only to the Courts of Appeal for guidance, as the system adhered to institutional authority. Other criticisms were that the system did not have sufficient judicial involvement and consultation, and therefore, the information provided to judges was not felt to be particularly helpful. Also, the system was extremely costly, which, paired with judicial reluctance, equated to a bad investment (Tata, Wilson, & Hutton, 1996). Interestingly, however, was a later report that showed that judges themselves felt there was unwarranted disparity within the system (Roberts, 1999). Using a

⁶ Although also considered and advocated for by the Canadian Sentencing Commission since its inception in 1984, there remained considerable opposition to formal sentencing guidelines on the part of the judiciary (von Hirsch, 1989)

nation-wide survey of judges, over 60 percent agreed with this sentiment; however, it was clear from the earlier works noted above, their willingness to support an advisory sentencing scheme was limited. Despite this, Roberts (1999) continued to advocate for a system of sentencing guidelines, even if purely advisory in nature.

Despite the new legislation, Doob (1999) argued “little of substance changed” (349). Although for many years a legislated statement of sentencing principles was advocated for, the new legislation was felt to be the most obvious weakness of sentencing structure in this country (Doob, 1999). He argued that the overall purpose was vague, the aggravating and mitigating factors were lengthy and confusing as to priority, and past criminal record as an aggravating factor was ignored completely. While he admitted it was difficult to illustrate a more usable purpose and principle for sentencing, the continued lack of concise direction obviously contributes to on-going disparity (Doob, 1999).

Much of the remaining work in this decade focused intently on the new sentence created out of the 1996 legislation – the conditional sentence (for review, see North, 2000; and Pollard, 2003).

3.4 2000s

While the discussion surrounding conditional sentences continued to dominate the literature, other policy issues were also discussed during the early years of 2000. Policy considerations surrounding mandatory minimum sentences and ‘three strikes’ legislation continued as issues with intense debate as to the

preventative, fiscal and social consequences of such penalties. Gabor and Crutcher (2002) discussed not only the realities of such policies, but also the ideology behind this type of legislation. Although outlining how mandatory minimums were felt to have a significant deterrent effect on the prospective offending population, Gabor and Crutcher again reiterated that only increasing certainty of punishment, not severity, has been shown to effect deterrence. Sentencing schemes that only serve to increase the punishment of the offender, they argued, were therefore not an effective deterrent. Add to this the recognition that such schemes do not fit well within the ideology of Canadian sentencing – that being a just deserts scheme – and again, it was argued that increasing punishment upon subsequent offences violated the presumption of Canadian sentencing, which holds the proportionality element of just deserts as paramount (Gabor and Crutcher, 2002).

The extreme end of mandatory minimum sentences, the “three strikes” law, was also cautioned against. Although Canadian legislation did not outline any guidelines espousing a life term of imprisonment upon a third offence (save for homicide), showing the ineffectiveness of this approach was likely felt to be a pre-emptive strike against the consideration of any legislation that may resemble such U.S. laws implemented in certain states. Using a Canadian sample of offenders, Burt (2000) found that of those offenders who committed three ‘strike’ offences, approximately 30 percent of them did not offend past this point. This finding was used to argue that instead of reaping crime prevention benefits, such a legislative change would undoubtedly serve to increase the prison population

and thereby increase costs to taxpayers without a subsequent benefit coming from saving future offending (Burt, 2000)⁷.

Despite a few forays into other sentencing issues, conditional sentencing discussions dominated the literature landscape in this beginning of this decade, from both academics and government agencies. Although many of the similar debates emerged in the literature surrounding purposes and principles of sentencing, these were now directed towards how (and if) those purposes could be accomplished with the replacement of a prison sentence with house arrest. Lending fuel to the discussion, two key cases emerged in 1999 and 2000 with respect to conditional sentences - *R. v. Gladue* [(1999), 133 CCC (3d) 385 (SCC)] and *R. v. Proulx* [(2000), 140 CCC (3d) 449 (SCC)]. *R. v. Gladue*, overall, clarified the court's emphasis on limiting the use of imprisonment in general, and specifically for aboriginal offenders (see: Manson and Healy, 2000), in effect also clarifying that proportionality (in some circumstances) would not be the primary consideration.

3.5 Commentary

Of particular note from this brief review are the major shifts in sentencing policy in Canada since the 1970s. Prior to the enactment of Bill C-41, much of the discussion surrounding sentencing focused on the difficulty placed on judges in terms of establishing appropriate sentences for each offence and offender. As

⁷ This issue became more relevant in later years, as the Conservative government proposed Bills akin to a 'three strikes' policy, focusing on the reverse onus on three-time violent or sexual offenders to argue for why they should not be deemed a Dangerous Offender, and held indefinitely in prison. (<http://www.cbc.ca/news/canada/story/2006/09/20/toews-bill.html>).

there was no legislated statement of principle or overarching purpose at the time, it was felt judges had to juggle each of the traditional approaches to sentencing in order to reach their decisions. This lack of direction from government was felt to contribute to undue and perhaps unnecessary disparity regionally and even between judges. It was felt that the primary method of addressing this shortcoming was to establish clear guidelines for sentencing and to legislate the purposes and principles. However, what was produced in the 1996 legislation was neither as clear nor as streamlined as many had hoped. Instead of choosing a general direction, the legislators merely wrote in the major principles and purposes of sentencing already at work in the decision-making process of judges, while providing little, if any, guidance on how to appropriately choose between them (see Ashworth, 1993). Although proportionality was written as the foremost purpose, many felt that this legislation did little to address the inefficiencies and vagueness within the current system. Adding to this was the creation of the new sanction – the conditional sentence. Created to reduce prison populations by allowing some offenders to serve their custodial sentence in the community, this again proved problematic for the judiciary. If taken at face value, this new sanction was difficult to distinguish from a term of probation, for both the public and the judiciary. If, however, it was made to look and feel more onerous, then issues abounded upon a breach of such conditions, which could arguably be seen as going beyond what the limits of proportionality would suppose.

Although the discussions surrounding the theoretical basis for sentencing seemed to quiet in the journal literature (however, see new works by Ashworth,

2009), these issues have not gone away. What has not been seen in any significant number, however, is a continued discussion of individualized sentencing and the ever-expanding number of mandatory minimum sentences in Canada. This turns the issue, then, towards a discussion of how prior record should be used in sentencing decisions. As many mandatory minimum sentences are now being proposed which would see a significant increase in prison time upon multiple offences for the same crime type, it is important to address how these policies may or may not adhere to our legislated policies and principles of proportionality and custodial restraint. Nowhere does this become more pertinent than in the discussion of sentencing chronic offenders, which the foregoing chapters will endeavour to explore.

4: THE CHRONIC OFFENDER

The discussion to this point has focused on sentencing in Canada, with only a cursory reference to chronic offenders. At this point, however, the discussion will begin to focus on an in-depth examination of the chronic offender paradigm and its historical and theoretical roots. While a thorough discussion of the theory and propositions of the chronic offender literature may appear to have little utility to the study of the sentences that have been imposed upon them by the judiciary throughout their career, it will become evident that an appreciation for the nuances of the chronic offender's career significantly impacts policy, particularly for sentencing. This intersection between the two streams of this dissertation – sentencing and chronic offenders – will be further expanded in Chapter 5, which begins to dissect the past and future implications of policies that politicians and legislators either have taken or are considering that must be taken into account for this unique group.

Therefore, in order to gain a greater appreciation for the difficulty in creating policy or official responses to address chronic offenders, this chapter will endeavour to introduce the reader to the history and major theoretical propositions for the development of this subset of the criminal population.

4.1 History of the Chronic Offender Paradigm

The systematic examination of the criminal careers of offenders is most commonly linked to the historic work of Sheldon and Eleanor Glueck in the 1930s. They were particularly interested in the correlates of delinquency and features of the modern day criminal career literature such as, age of onset, career length and desistance. Their work, although influential, was considered broad and relatively unsophisticated (Petersilia, 1980). The work in the criminal career paradigm gained greater notice with the publication of the results from the Philadelphia Cohort study by Wolfgang, Figlio and Sellin (1972). This study followed 9,945 males up to young adulthood in Philadelphia to assess criminality and offending in the cohort. This work was monumental for the criminal career approach, as one of the primary findings was that six percent of the individuals in the cohort accounted for over 50 percent of all delinquency reported. This led the researchers to coin the term “chronic offenders”, and identify this group as those offenders within the cohort that have five or more police contacts. In total, they found that this ‘chronic’ group accounted for 63 percent of all index offences, 71 percent of the murders, 73 percent of the rapes, 82 percent of the robberies, and 69 percent of the aggravated assaults.

This research opened the doors to several other longitudinal research projects that aimed to examine the phenomenon of chronic offending within the general offending context. These studies from the 1970s included the RAND Corporation’s Habitual Criminals Program (led by various researchers at different stages), the Racine Wisconsin birth cohort study (led by Shannon), and

Carnegie-Mellon's Research Program on Incapacitation (led by Blumstein). An excellent review of the initial results as they were available at the time is presented by Petersilia (1980), while a more current review was conducted by Piquero, Farrington, & Blumstein (2003).

Sheldon and Eleanor Glueck

This landmark study compared the criminal activity of 500 delinquent and 500 non-delinquent boys in Massachusetts in the 1930s. These two groups were matched according to demographics and intelligence, and were followed up from 14-25 and 32. The objective was to study the correlates of onset of criminal behaviour, the persistence of that behaviour, and the desistence (if any) from offending. They found that there was a strong negative relationship between age and crime, and early onset was key to a lengthy and persistent criminal career. Ultimately, they determined that the best predictor of future antisocial behaviour was past antisocial behaviour, which was good evidence in favour of the stability postulate. They also commented on their observations regarding the social dimensions of persistent criminality. Generally, they asserted that families with lax discipline combined with erratic/threatening punishment, poor supervision and weak emotional ties between parent and child generated the highest probability of persistent delinquency. Their data was later taken on by Sampson and Laub in the late 1980s to conduct more sophisticated statistical analysis on.

Philadelphia Birth Cohort Studies

Wolfgang, Figlio and Sellin published the results from their first study in 1972's *Delinquency in a Birth Cohort*. The first study followed nearly 10,000 males who were born in Philadelphia in 1945, and lived in the city at a minimum between the ages of 10 and 18. Specifically, they found that 6 percent of the boys in the cohort were responsible for 52 percent of all the delinquency. They also found that the earlier the onset of criminality, the more serious and persistent the ongoing criminality was for this cohort, and specialization for only one type of offence was markedly rare in this cohort. The second study, led by Tracy, Wolfgang and Figlio, focused on a cohort from 1958 that included over 13,000 males and 14,000 females. The results from this cohort were similar in terms of the existence of the small, overly delinquent subgroup of 'chronic offenders'. However, the 1958 cohort was found to be involved in more serious forms of delinquency and crime when compared to the 1945 cohort. Upon following just under 1000 of the cohort up to age 30, they found support for the continuity of offending over time, as approximately 50 percent of their 'chronic' juveniles showed arrest rates into adulthood (between 18 and 30), whereas only 18 percent of the juveniles with no arrests in their youth went on to have an arrest in adulthood (Wolfgang, Figlio, & Sellin, 1972; Tracy, Wolfgang, & Figlio, 1990).

Cambridge Study in Delinquent Development

This study, led then by West, followed 411 males born in London between 1952 and 1953. This study has continued on under Farrington, and has interviewed the participants numerous times well into their 40s. The 'chronic' group in this cohort encompassed 6 percent of the youth, who were responsible for half of the serious and/or violent offences. In addition to examining criminality over the life course, this study went further into examining predictive and risk factors, and came up with a set of childhood factors that were shown to predict criminality. These included the existence of impulsivity and low intelligence on the part of the child, which were exacerbated by their social environment such that familial criminality, broken homes and poor parental supervision were all postulated to be instrumental in the development of antisocial behaviour (West, 1969; West & Farrington, 1973).

Racine Birth Cohorts

This study, led by Lyle Shannon and colleagues, examined three birth cohorts selected from Racine, Wisconsin, between 1942 and 1955. These three cohorts encompassed 1,352, 2,099 and 2,676 participants in each group respectively. Although focusing on risk factors associated with delinquency and criminal careers over time, Shannon and his colleagues were able to follow these cohorts well into adulthood (up to the age of 30 for the 1942 cohort). As with other studies, their results also found that a small percentage of the cohort was responsible for the majority of criminal and delinquent offences (Shannon, 1988).

Dunedin Multidisciplinary Health and Human Development Study

This cohort study, led by Terrie Moffitt and Avshalom Caspi, followed more than 1000 children born in Dunedin, New Zealand, between 1972 and 1973. A great deal of research was collected, and used to identify the early factors seen to be relevant in an individual becoming a *life course persistent offender* (Moffitt's conceptualization of the chronic offender).

National Youth Survey

Launched in 1976 by Elliott and his colleagues, this prospective longitudinal cohort study focused on 1,725 youths in North America, drawn from seven separate cohorts between 1959 and 1965. Their results indicated that seven percent of their sample could be termed 'chronic' offenders, and committed the vast majority of the crimes. Serious career offenders (or chronic offenders) in this study were identified as those individuals who committed at least three Index offences in a single year. An additional important finding from this study was that only two percent of the serious career offenders were identified using official reports, thereby demonstrating the difference in using self-report data vs. official police or court statistics to measure 'chronicity' (Elliott, Huizinga, & Ageton, 1985).

Program of Research on the Causes and Correlates of Delinquency

In the mid-1980s, the Office of Juvenile Justice and Delinquency Prevention funded three prospective longitudinal studies, aimed at investigating the causes and correlates of delinquency in youth. The Denver Youth Study, led by David Huizinga, examined a sample of 1527 high-risk youth; the Pittsburgh Youth Study, directed by Rolf Loeber, Magda Stouthamer-Loeber, and David Farrington, examined 1517 young males in public school; and the Rochester Youth Development Study, directed by Terence P. Thornberry, focused on 1,000 youths from high-crime neighbourhoods. All three studies found that a small percentage, between 14 and 17 percent, of their study sample was responsible for over two-thirds of the criminal violence committed (Office of Juvenile Justice and Delinquency Prevention, 1986).

Peterborough Adolescent and Young Adult Development Study (PADS+)

A recent study out of the United Kingdom was initiated in 2002 and led by Per-Olof H Wikström, and randomly sampled 1,957 boys and girls between the ages of 14 and 15 as of 2000. Examining many lifestyle and other risk factors, the initial findings separated three main groups of adolescent offenders, each with particularly lifestyle and individual risks, and resultant offending patterns. The initial findings also found support for versatility in offending patterns for the high volume offenders, Further interviews and follow ups are scheduled for 2012 (Wikstrom & Butterworth, 2006)

In general, all the early criminal career studies presented results that fit within the same themes – there was a relatively small subset of the population that could be deemed ‘chronic’, this group was responsible for a disproportionate number of offences, and this group in general was responsible for the most serious offences. With these general observations came the need to theoretically explain this unique subset of offenders and attempt to determine why their offending appeared to be so disproportionate as compared to average offenders in the general population.

4.2 Theoretical Development

The development of a theoretical construct to explain chronic offenders was considered paramount to continuing work in this area, as researchers were beginning to create typologies and test methods to identify aspects of the criminal career. “As with most methodological questions in the behavioral sciences, these issues cannot be adequately resolved independent of theories about the causes of the behavior in question, because every empirical classification technique presumes the appropriateness of the elements pertinent to the identification of similarities and differences (Gottfredson, 2005, p. 47).” Although not an exclusive list of all theories relating to chronic offending, three of the most cited works will be discussed.

4.2.1 Moffitt

A prevailing classification scheme akin to the criminal career paradigm is Moffitt's (1993) taxonomy that parcelled offenders into one of two criminal trajectories. The first, called *adolescent limited* offenders, focus their offending behaviour in the adolescent years, and exhibit antisocial and criminal behaviour that symbolize adult privilege. This group's offences, according to Moffitt, would be limited to acts such as smoking, vandalism, alcohol and drug use, minor theft, and status offences. The cause of their offending behaviour could be linked to developmental immaturity, resulting in the modelling of deviant or antisocial peers. This group was thought to explain much of the age-crime curve (explained later), and would generally desist from offending and deviance in their late teens or early twenties. The second group in Moffitt's taxonomy, however, displayed offending behaviour more akin to what is considered the 'chronic' offender. This group she termed the *Life Course Persistent Offender*. The cause of their behaviour could be linked to neuropsychological deficits, linked with disadvantaged familial environments and lower socioeconomic status. The result of this was a group of offenders that started offending earlier, committed more serious offences more often, and were unlikely to desist from offending. For Moffitt, the ability to predict the trajectory of an individual into either of these groups depended heavily on the age of onset of criminal activity, whereby those initiating their offending earlier were at a much higher risk of following the Life-Course Persistent offending trajectory (Moffitt, 1993).

4.2.2 Sampson & Laub

In the age-graded theory of informal social control, Sampson and Laub (1993) emphasized the importance of an individual's pro-social societal bonds in explaining why some individuals may commit crimes and others appear to be protected against it. They found that commitment to social institutions, such as marriage, have a positive effect on an individual's ability to desist from offending, or avoid offending in the first instance. Similarly, other social institutions, such as the military, act in the same manner by solidifying the pro-social bonds that the individual has. However, participation in crime and deviance may weaken or sever these bonds to society, and the informal social controls that they exhibited will no longer protect the individual. Changing life events, therefore, are thought to be the driving force behind offending, and are marked by changes to the informal social control structure and thus, changes in offending participation, frequency, and duration.

4.2.3 Gottfredson & Hirschi

For Gottfredson and Hirschi (1990), the essential element in whether or not an individual will offend is their level of self-control. This population heterogeneity position posits that all else – including age – will be invariant with crime, and only the individual's level of self-control will dictate offending behaviour. An individual's self-control is a constant trait throughout the life course, and only consistent and fair parental discipline will teach children to keep it in check. They do not deny that some offenders will offend at higher rates than others; however, this is due to the level of self-control being on a spectrum from

low to high. As individuals age, their ability to regulate their self-control mechanisms becomes stronger, and eventually all offenders will desist from offending in time. This perspective does not see the “chronics” as a unique subset or a qualitatively different group of offenders, but rather, a demonstration of those individuals with low self-control.

4.3 Identification of Chronics

The issue of identifying chronic offenders is both conceptual and methodological. Putting aside the theoretical disagreements as to whether this group actually exists (Blumstein & Moitra, 1980), classification schemes abound that seek to isolate this unique subset for further study. In 1972, Wolfgang defined his ‘chronic’ group as those who had five or more police contacts up to age 18 (Wolfgang, Figlio, & Sellin, 1972). Since that time, many definitions have been used to separate this group from the general offender population in order to better understand their unique trajectories or ‘criminal careers’. The difficulty is that a definition is rarely agreed upon for this subpopulation. Some of the more relevant questions include, how many offences should classify an offender as ‘chronic’? Should this be measured over the life span, or in a shorter period of time? Should it only be those that show a persistent offending propensity, as undoubtedly those are the ones who would pose the most harm? None of these questions have been answered to any acceptable level, as even a cursory review of the research can show. “Undoubtedly, the “group” question is one of the most salient in modern developmental criminology” (Sampson & Laub, 2005, p. 19). This becomes relevant to the current discussion when considering policies

intended to interrupt or stop the offending of this group. If a group of chronic offenders can be identified, and their career length determined, then incapacitation strategies have the opportunity to gain greater effectiveness and efficiency. If the 'group' is too large, it may include some offenders not properly identified as chronic, who will naturally desist from crime. Inclusion of those individuals in an incapacitation scheme may waste resources if the interventions remain in place beyond the time which they cease offending.

The identification of members of the group, or those considered 'chronic', differs between researchers. As noted, early on Wolfgang established this cut-off at 5 police contacts, but ongoing research has demonstrated a wide disparity in the size of this group, often depending on whether a sample of offenders were used, or estimates from the general population or cohort. Much of the more well-known research has argued this group is anywhere from 2 percent (Kyvsgaard, 2003), 6 percent (Wolfgang, Figlio, & Sellin, 1972), 7 percent (Dunford & Elliott, 1984), 18 percent (Blumstein, Farrington, & Moitra, 1985), to 32 percent of official offenders (Wolfgang, Thornberry, & Figlio, 1987). Their estimated impact on society, in terms of their offending frequency, was also disparate among researchers, and varied from being responsible for 1/3 of all offences (Kyvsgaard, 2003), to 81 percent of all index (indictable in Canada) arrests (Wolfgang, Thornberry, & Figlio, 1987), although this concept (λ) will be examined further below. Additional classifications have also been made to distinguish between high-rate offenders and persistent offenders, thus creating two sub-classes of chronic offenders. Persistent offenders are considered those

that offend over a long period of time, while high-rate offenders (much as the name espouses) have a high offending frequency per year. These groups may or may not be mutually exclusive – not all high-rate offenders will continue to do so for a long period of time, and not all long-term offenders will offend at a high rate (Chaiken & Chaiken, 1996).

Where this leaves us is realistically in no better position than before. The cut point for defining a class chronic offender is arbitrary (i.e., five or more arrests), this group represents a varying percentage of the total population and offender population, and are responsible for varying levels of offences. Add to that the desire to further classify these offenders according to their offending frequency or their career length, and the only thing that is clear is that the definition is unclear. Does this bring into question whether this group actually exists? Farrington (1987) provides some perspective into the confusion by espousing that “the key theoretical and policy issue is not whether a small proportion of offenders account for a large proportion of offenses (to some extent, this is inevitable) but whether the high-rate offenders, however defined, can be predicted in advance” (Farrington, 1987, p. 62). Again, as one of the goals of this prediction is to assess selective incapacitation strategies, it is important in the calculation to ascertain just how many crimes would be ‘saved’ if these chronics were not able to commit offences during their criminal careers. This aspect of the equation developed into the search for valid lambda (λ) estimates in order to know just how ‘chronic’ these chronics were.

4.4 Frequency of Offending

The criminal career paradigm is concerned not only with identifying a particular group of chronic offenders, but also with estimating how often this group offends on average. This estimate of offending frequency, called lambda (λ), is measured by the number of crimes committed per year by an offender, minus time spent incapacitated – normally by prison. Al Blumstein is credited with the initial conception of lambda, although it was not initially used for assessing incapacitation policies or other applications of the criminal career approach. These early estimates of λ were made without considering time incarcerated, and have since been modified to include this feature. This modification resulted from the observation that without the inclusion of incarceration time into lambda, the calculation would likely underestimate the true offending frequency (Blumstein & Cohen, 1987; Farabee, Joshi, & Anglin, 2001; Laub & Sampson, 2003), a result which replication studies have found to be true (Horney & Marshall, 1991). This is critical as those who have the highest rates of criminal offending are likely those who have been incarcerated (Piquero, Blumstein, Brame, Haapanen, Mulvey, & Nagin, 2001). Similarly, an estimate of each individual's crime rate cannot be calculated by simply dividing the total number of measured offences by the number of measured offenders, as this will lead to an *overestimation* of the true rate due to the possibility of some offenders having committed no offences in the study or follow up period (Farrington, 1987).

Some studies have found the average estimates ranged from 2 to 4 violent crimes per year and 5 to 10 property crimes per year for active offenders

(Blumstein, Cohen, Roth, & Visher, 1986), although other estimates have been much higher. The RAND Survey found that among their sample, the incarcerated offenders had an average yearly offence rate of about 20 offences per year – 4 violent and 16 property (Petersilia, 1980). However, these rates were shown to depend heavily on crime type. For example, the average number of burglaries was between 76 and 118, robberies between 41 and 61, and theft between 142 and 209. The largest estimate was seen for drug dealing, which was found to be between 880 and 1300 per active year. However, all of these varied by sample – both in location, and level of custody (i.e., prison or jail) (Piquero & Blumstein, 2007). Seeking to refine the RAND methodology, Horney & Marshall examined over 900 inmates and sought to establish lambda estimates using detailed interviews. They found that offending was intermittent during “active months” and varied considerably for low, medium and high rate offenders. This variability was also present for different types of crime, with some offenders maintaining more constant offending patterns when involved in drug offences as compared to burglary offences (for instance) (Horney & Marshall, 1991).

Self-reported offending frequencies have been found to differ substantially from official lambda estimates – in some cases over ten times higher in self-reports (Farrington, Jolliffe, Hawkins, Catalano, Hill, & Kosterman, 2003). This may be due in part to the sample, however, as Blumstein (2002) noted that if self-reports of incarcerated populations are used for lambda estimates, this may effectively *overinflate* the general offender population’s lambda estimate as those offenders who are incarcerated are presumably the ones who commit more

crimes, which contributes to them being in prison. This assertion was supported in a recent study that found offenders who are incarcerated have an offending rate over 50 times higher than the average street criminal (Canela-Cacho, Blumstein, & Cohen, 1997). In general, self-reports may have important implications for the calculation of lambda, as estimates using police or criminal justice contacts may significantly undercount offending frequency. A recent self-report study out of Toronto supports this assertion, as it was found that less than half (42 percent) of the study youth's delinquent behaviour ever went discovered by parents, teachers or police (Savoie, 2006)

Some estimates of offending frequency have also noticed a difference between violent and non-violent offenders; in particular, it was found that violent offenders tended to commit more crimes than non-violent offenders, leading the authors to argue that the difference between the two types of offenders may be quantitative rather than qualitative (Piquero, 2000). Generalists, or those who commit both property and personal crimes, have also been found to offend at higher rates – from 3 to 5 times more (Spelman, 1994). This leads into issues of specialization, which will be discussed separately.

Overall, the general finding is that the earlier the onset, the higher lambda estimates are, the more serious the offending is, and the longer the criminal career (Blumstein, Farrington, & Moitra, 1985; Dean, Brame, & Piquero, 1996; Farrington, 1983; Nagin, Farrington, & Moffitt, 1995). While this finding is important, it was also noted that 62 percent of offenders with extensive criminal careers were not initially arrested until adulthood (deLisi, 2006). However, the

distribution of lambda appears to be highly skewed (Chaiken & Chaiken, 1982), as only a handful of offenders commit more than 100 crimes per year (Blumstein, Cohen, Roth, & Visher, 1986), and although this high-rate group is particularly prolific, the vast majority of subjects in many studies not included in the high-rate group only ever commit a single offence (Kvsvgaard, 2003).

4.5 Specialization

Work in the criminal career area focuses on classifying from broad categories down to distinct groupings. From first identifying a sub-group of offenders determined to be chronics, research went on to define just how 'chronic' these chronics were and assessing their offending frequency to identify the 'worst of the worst'. At the same time, there was a desire to further classify the types of offending these chronics were engaged in – were these sophisticated violent offenders, disorganized property offenders, or vice versa? The classification could be crucial to develop criminal justice policy as, "if offending were versatile, decriminalization of status offenses would not necessarily prevent status offenders from being dealt with by the juvenile court (for other offenses), and the incarceration of serious violent offenders would not be very effective in preventing serious (or non-serious) violent offenses. On the other hand, if offending were more specialized, then knowledge about earlier types of offenses would help official to predict later offense types and help criminal and/or juvenile justice decision-making (Piquero, Paternoster, Mazerolle, Brame, & Dean, 1999). Therefore, the desire to establish whether all offenders, and chronic offenders specifically, were specialized was brought to the fore.

Much of the research has pointed towards general versatility in offending behaviour, and a recognition that offenders tend to commit a wide variety of crimes without specializing in one area (deLisi, 2005; Piquero, 2000; Simon, 1997; Sullivan, McGloin, Pratt, & Piquero, 2006). This may be particularly true of chronic or high-rate offenders, as the mix of offences has been found to increase with offending activity (Petersilia, 1980), and has even been found for those such as sex offenders who are expected to show the most offending specificity (Miethe, Olson, & Mitchell, 2006). The natural assumption is that offenders, as they age and become more experienced, will settle into a more specialized offending pattern (Blumstein, Cohen, Roth, & Visher, 1986; Petersilia, 1980). Despite the intuitive appeal of this assumption, in general, this has not been found to be the case. Unfortunately, research in this area is fraught with difficulty, and specialization is arguably not well defined, methodologically operationalized, or theoretically constructed (see Guerette, Stenius, & McGloin, 2005), resulting in extremely varied conclusions.

This issue becomes salient for sentencing policy, particularly when considering amendments or additions to the criminal code that address incorrigible offenders and their offending preference. As referred to earlier in this work, Canada currently has only two options for the indeterminate incapacitation of chronic offenders – these being the designation of a Long Term Offender, and the Dangerous Offender. Both of these designations are only available to those offenders who show a pattern of serious violent and/or sexual offending, and are thus, not an option for offenders who show a similar pattern for property offences.

If legislation is considered to address certain types of offenders based on their offending preference, then the research behind specialization may be extremely important to consider. If serious violent offenders show a pattern of 'settling' into less serious offending later on in their career, the motivation behind protecting the public from them should change. This would also apply to chronic property offenders if a similar piece of legislation were introduced to 'deal' with these offenders. If their offending patterns and preference for property crimes remains constant throughout their career, then legislation based on the offence type holds greater validity. If, however, there is little substantial variation in offending, then writing in specific redresses for the 'chronic property offender' may not be deemed appropriate.

4.6 Desistance

A thorough discussion of desistance is crucial to bring the chronic paradigm together with sentencing principles and policies, as desistance is always referred to when discussing the possible ramifications of selective incapacitation, three strikes policies, mandatory minimum sentences and other sentencing policies aimed at reducing crime (discussed further in Chapter 5). The desistance process is arguably the least understood and the most understudied aspect of the criminal career paradigm, and the age-crime relationship that desistance is based on is "easily qualified as the most difficult fact in the field" (Hirschi & Gottfredson, 1983, p. 553). The existence of research appears to be increasing in recent years, possibly due to the influence of the criminal careers approach (Brame, Bushway, & Paternoster, 2003; Kazemian,

2007; Laub & Sampson, 2001; Sampson & Laub, 2003). Part of the prior absence in the literature may have been due in part to the difficulty with both defining and measuring the phenomenon. The definition of desistance is variable at best, haphazard at worst, and measuring the existence of a concept that is marked by the absence of the activity under examination is exceedingly difficult.

4.6.1 Origin of Desistance Perspective

4.6.1.1 Age and Crime

All the above perspectives are based on the same timeless observation – that is, the relationship between age and crime. The age-crime curve is one of the most well known trends in criminological literature. The aggregate age-crime curve is calculated by dividing the total number of arrests of individuals in a particular age bracket by the total individuals in the population in that age bracket (Farrington, 1986). This produces the familiar trend of a sharp increase in arrest rates in the early teen years, followed by a uni-modal peak in the late teens/early twenties, and a steady decrease thereafter. This association of criminal offending and age has sparked interest in the causes and correlates with both onset of offending, and desistance from offending. While knowledge about desistance is far more limited than other aspects of the criminal career approach (Brame, Bushway, & Paternoster, 2003; Farrington, 2007), it is considered an important aspect of understanding the criminal career.

Despite the apparent simplicity of the pattern, the age-crime curve generated much debate in the late 1980s with respect to the causes of the curve. In particular, Gottfredson and Hirschi (1990) and Blumstein et al. (1986) were at

the head of two camps on either side of the argument surrounding whether this trend held for individual level data, or whether this was simply a function of aggregating very disparate individual offending frequencies. Gottfredson and Hirschi (1990) contended that the relationship between age and crime was invariant – the same patterns would be seen for individual level data as were seen with aggregate level data. Blumstein et al. (1986) on the other hand, contended that the age-crime curve was heavily dependent upon each individual's offending frequency (better known as lambda λ), and the change in the pattern was due to a lower participation rate. This initiated investigation into prevalence vs. incidence.

4.6.1.2 Prevalence vs. Incidence

There still does not appear to be any agreement on what is pushing the age-crime curve in the literature, as research continues to report differing results and viewpoints insofar as whether they exhibit the trend for prevalence (i.e., the number of people engaged in crime) or incidence (the number of crimes committed per person) – also known as 'participation' and 'frequency' (Blumstein & Cohen, 1987). Some argue it is the former, and the peak in crime between the ages of 15 to 18 generally reflects a peak in prevalence, not in incidence (Farrington, 1983), and there is simply a higher proportion of offenders among this age groups than other age groups (Blumstein & Cohen, 1979).

Some argue that the aggregate age-crime curve is not the same as the individual age-crime curve, although certain trajectory groups may be identified (Blokland, Nagin, & Nieuwbeerta, 2005). For formerly serious persistent

delinquents, Laub & Sampson (2003) found there was much variability in patterns of offending during adulthood, although desistance was the norm. However, much like the aggregate age-crime curve, this sample on the whole saw a peak in the late teenage years, followed by the classic decline. As is characteristic, the RAND survey found criminality began at about age 14, increased until the early 20s and then tended to decline thereafter until age 30, when the majority of careers terminated; however, they also found that offence rates varied significantly with age (Petersilia, 1980).

There appears to be some disagreement with the interpretation of the offending peaks displayed in the typical age-crime curve, as some argue that individuals who remain active in offending tend to do so at a relatively stable rate across various periods of the life course (Blumstein, Cohen, Roth, & Visher, 1986). Laub and Sampson (2001) tended to disagree in part, and despite recognizing that desistance is the norm, they concede that the incidence of offending does not necessarily decline. Rather, it may even increase with age for certain types of criminal activity and subgroups of offenders (Laub & Sampson, 2001). Still other studies have found the existence of both, whereby the aggregate age-crime curve was a product of both the high rate of youthful participation in crime, and the high activity level of the young offenders (Kivsgaard, 2003).

Despite conflicting evidence, some remain unconvinced of the necessity of arguing this point. "Research strongly implies that the warning that the aggregate age-crime curve may mislead because it combines prevalence with incidence

seems to be a false alarm” (Gottfredson, 2005, p. 53). However, it is important that this is resolved, as the ramifications for policy could be substantial. For instance, if statistics show that there is high participation rates with a low incidence rate, then prevention programs would be the most applicable policy alternative. If, however, statistics show that there is low participation but with relatively high frequency, then treatment programs or incapacitation policies would be of greater effect (Blumstein & Cohen, 1987; Blumstein, Cohen, & Farrington, 1988). It is this latter points that becomes crucially instructive for the discussion on policy alternatives or interventions with chronic offenders, particularly with respect to any consideration of selective incapacitation schemes or sentencing enhancements based on prior record.

4.6.2 Methodological Issues

4.6.2.1 Definition of Desistance

As a phenomenon, desistance is generally thought of as the termination of an offending career. As an operational definition in the research, there is considerable variability, with desistance being measured as “decreases in the underlying frequency, variety, or seriousness of offending” (Farrington, 2007, p. 125). The disagreements in the operational definition may be driven primarily by the difficulty in measuring desistance, since it involves the lack of a particular phenomenon – offending (Brame, Bushway, & Paternoster, 2003). Laub & Sampson (2001) argue that desistance should not be confused with termination, whereby an offender stops criminal activity altogether. Rather, “desistance, by contrast, is the causal process that *supports* the termination of offending (p. 11).

Still, static definitions have been used to study the phenomenon of desisting amongst offenders, and included labelling an individual a desister if he or she self-reported committing offenses prior to age 18, but then committed no offences after that age (Nagin & Tremblay, 2005; Piquero, Moffitt, & Wright, 2007). Others measure termination as the last convicted offence (Kazemian & Farrington, 2006), or the absence of any offending in the previous year (Warr, 1998). Loeber and LeBlanc (1990) expanded the singular notion of desistance to encapsulate four separate processes. They noted that desistance could indicate a deceleration, or slowing down in the frequency of offending; a decrease in the variety of offending, a reduction in the seriousness of offending, and a fourth category which was applied to those who remained at a steady level of seriousness without escalation. Similarly, recent research has used some of these typologies to denote desistance – specifically, a decrease in offence specialization and frequency (Morizot & Le Blanc, 2007).

Kazemian (2007) recently provided a summary of many of the operational definitions of desistance that have been used in prior research. Many studies have followed up for three years with offenders, others for only a year. Determining whether an offender has actually desisted or is simply on hiatus is difficult given the necessity of long term follow ups to establish the age at termination (Farrington, 1986). This hurdle has arguably only been cleared by Laub and Sampson (2003), who followed the cohort to age 70.

An interesting new perspective has recently emerged in the literature which argues against the contemporary definitions of desistance. As all

definitions, either static or dynamic, rely on evidence regarding the absence of offending (either by self-report or official statistics), an important underlying construct may be missed – that being a subjective assessment of behaviour. “For those whose activities have escaped the attention of law enforcement, it makes little sense to base desistance measures on the continued absence of a criminal record. Instead, a model that emphasizes behavioural changes, or subjective assessments of movement away from crime, provides a more meaningful reference point” (Massoglia & Uggen, 2007, p. 91).

4.6.2.2 Desistance as a Process

Researchers increasingly appear to favour the operationalization of desistance as a process unfolding gradually over time rather than an abrupt change in status from offender to non-offender (Bushway, Brame, & Paternoster, 1999; Kazemian, 2007; Morizot & Le Blanc, 2007). This process view of desistance takes into account varying time lags between offenses, thus preventing confusion between termination and a finding of a temporary cessation of offending activity. To this end, Morizot and Le Blanc (2007) define desistance as “the dynamic process characterized by a progressive decline in offending versatility” (p. 50). As it is unlikely that offenders suddenly desist from offending, it is argued that definitions of termination may mask the ‘process’ of offending and result in lost opportunities for intervention and support to complete the desistance process (Kazemian, 2007). This was confirmed by Ezel (2007) who found that “among this sample of high-rate, serious offenders, desistance from

crime is best characterized as a gradual reduction in offending rather than an abrupt transition to termination” (Ezel, 2007, p. 43).

4.6.2.3 Research Design

Desistance research tends to measure the phenomenon in one of three ways. The first is highlighted by the use of official records and the comparison of biological or social variables to the trajectories of offenders (Loeber & LeBlanc, 1990). The shortcomings of such approaches are the same for all research using official statistics – that being the possible bias of the criminal justice system, and the recognized under-representation of actual behaviour. The second approach utilizes interviews with offenders to obtain rich detail about their behaviour and movement away from crime (Laub and Sampson, 2003). Although some researchers have voiced concerns about relying on self-report studies due to the belief that offenders will routinely lie or use deception in their responses, if considered and controlled for, this does not jeopardize the validity of this data collection technique (Mills, Loza, & Kroner, 2003). More often, the details contained therein are invaluable; however, the generalizability of the sample of interviewees is a methodological issue. The third approach uses surveys to examine behaviour and desistance over time (Warr, 1998). This approach results in greater generalizability than the interview method; however, does not capture the richness of data and nuance that that particular method can provide.

In general, studies of desistance aim to estimate the proportion of the population of interest who have desisted. To do this, researchers will often use one of three operational definitions to measure the phenomenon. The first is

strict behaviour desistance, whereby the population is marked on whether they re-offend during a predetermined follow up period. The second is approximately desistance, whereby individuals are labelled 'desisters' if their offending frequency falls beneath a certain low threshold. The third category is a split population method, which counts individuals as desisters or persisters such as in the first category, but also takes into account the uncertainty associated with studying termination during a finite period of time (Brame, Bushway, & Paternoster, 2003). Using all three methods on the same data, the researchers in this particular study found that all methods gave different results. The split population method, however, achieved the most reliable measure of 'true desistance', which was found to be 36 percent for the Philadelphia cohort.

This brings up the recognition that the operational definition and the data collection method matter greatly in desistance (and all) research, as different methods or definitions can produce different results. An empirical analysis of the causes of desistance could lead to different conclusions depending on the definition of desistance used by the researcher (Brame, Bushway, & Paternoster, 2003). A more recent study used a multi-definitional and multi-methods approach to assess desistance and found that desistance was the norm once offenders reached age 30, with 85 percent of the sample considered desisters as measured by arrest. However, when measured by self-reported behaviour, only 65 percent of the same sample identified themselves as having desisted. This finding again provides support for the underreporting bias in official statistics (Massoglia & Uggen, 2007). Similarly, Laub and Sampson (2001) found that

official records estimated that 62 percent of delinquents desisted from crime; however, using self-report data, only 11 percent of the sample desisted by age 30.

While prospective longitudinal studies may provide the best tracking of the criminal career, and thus, the desistance process, cross-sectional studies are not useless in this enterprise. However, care should be taken to accept the limitations of the approach. For instance, if 'termination' was measured as the last convicted offence, then results found can only be extended to official criminal careers, rather than actual criminal careers (Kazemian & Farrington, 2006). Similarly, cross-sectional data may be used to measure 'temporary non-offending' – a more appropriate term that denotes the limitation of the approach. This data is helpful to identify the variables that may trigger desistance, but is not useful in the explanation of desistance efforts (Kazemian, 2007).

Rather than use just one approach, it is advocated that future research needs to combine approaches in order to produce the best result. It is important to utilize both self-report and official statistics, and gain an accurate measure of offending at each age for, ideally, the entire life span taking into account death and incarceration. Again, this proposes that the prospective longitudinal research design is the most beneficial (Farrington, 2007). It is further advocated that research needs to extend beyond the current follow-up years in order to provide a better understanding of the process of desistance (Ezel, 2007).

4.6.2.4 False Desistance

Of particular concern in desistance research is the notion of false desistance, whereby an offender is considered to have ended their offending career, when in actuality they have not. The variability of offending may lead to determinations of false desistance, as offenders are likely to offend at different rates at different times (Kazemian, 2007). For instance, Horney and Marshall (1991) found that the offending activities of the majority of the offenders fit the intermittent model of offending, and being active during the entire study period was an exception rather than the norm. They found offenders do not simply switch between 'active' and 'non-active', but vary between (1) inactive, (2) low rate, (3) medium rate, and (4) high rates of offending. If periods of inactivity are of sufficient length, these offenders could possibly be classified as 'desisters', then go on to exhibit high rates of offending at later time periods.

This, again, brings up the methodological difficulty with measuring this phenomenon, as it is certain that offending has terminated only when an individual dies. Obviously, using death as the only end point in a criminal career is not helpful in terms of studying the phenomenon, which is why operational definitions are created. What is clear, however, is that the length of follow-up can directly affect any findings of desistance or false desistance – if studies do not follow up for a sufficiently long period of time, it is unlikely any desistance will actually constitute true desistance. Due to logistic and other constraints, most studies will only follow individuals up to a particular age – often to the point where the age-crime curve begins to descend (Farrington, 2007) The result is that most

studies only follow up into the individuals' twenties, while only a few going past their thirties. "This right-hand censoring problem – i.e., that individuals are only followed until a particular age and are thus missing information on criminal activity occurring after that period – complicates researchers' abilities to truly identify individuals who have desisted because they may be incapacitated or are on holiday" (Piquero, Brame, & Lynam, 2004, p. 347).

Another issue is that true desistance may not always be voluntary. Those who continue with a criminal lifestyle tend to encounter far more high-risk situations than the average person, and therefore, have been shown to have a much higher risk of exiting the offender pool by death (Laub & Sampson, 2001). In particular, high-rate criminal offenders may die earlier and more violently than their counterparts, which could result in findings of false desistance (Reiss, 1988). Although not sufficient to fully explain the termination rates, this was supported by Blumstein & Cohen (1987), as they found death rates among parolees were two to three times as high as general population rates.

4.6.2.5 Findings of Support for Desistance Perspectives

Research into desistance has examined what factors may influence an offender's decision to exit the criminal realm, either by choice or by duress. The examination of the correlates of desistance may provide useful insights into the onset of offending, as it has been found that often the risk factors for offending are the opposite of the correlates of desistance (Armstrong & Britt, 2002; Loeber & Le Blanc, 1990). If this is found to be the case, this could have significant implications: "Theoretically, if different dimensions of criminal careers share

similar causal processes, specific theories of participation, frequency, and desistance may be irrelevant, and more general theories of crime would be in order. However, if the causal processes are unique, then dimension-specific and typological theories may be more relevant” (Piquero, Moffitt, & Wright, 2007, p. 76).

4.6.2.6 Population Heterogeneity

Aging, or maturation, tends to be the strongest correlate with desistance from offending (RAND, 1987; Shover & Thompson, 1992), as the age-crime curve clearly shows a steady decline in offending for older age groups. Other studies have also found support for Gottfredson and Hirschi’s (1990) model. Variables relating to levels of disinhibition, such as egotism, callous hostility, impulsiveness, authority opposition and societal scepticism, were all considered in line with constructs of low self control. These variables were shown to significantly hinder and predict desistance in the sample (Morizot & Le Blanc, 2007).

More support for Gottfredson and Hirschi’s (1990) theory came from Moffitt herself in a recent work. The objective was to directly test self-control on all aspects of the criminal career – participation, frequency, persistence and desistance. Self-control was significantly associated with all of these aspects, and perhaps most importantly, was able to distinguish between desisters and persisters, with desisters exhibited higher levels of self-control (Piquero, Moffitt, & Wright, 2007).

4.6.2.7 State Dependence

Other factors that have been found to be influential include 'life events', whereby it is hypothesized that the commitment to a crime-free lifestyle is strengthened by the bonds the individual has to society. This appears to be especially pronounced for life events such as marriage and steady employment (Laub & Sampson, 2001). One of the strongest correlates of desistance across four typologies, and support for the state dependence perspective, was found to be "relationship quality". The researchers (Massoglia and Uggen, 2007) found that a quality relationship increases the odds of subjective desistance (whereby the offender deems himself as moving towards desistance) by 72 percent, reference group desistance (whereby the offender deems himself as desisting in comparison to his peers) by 89 percent, behavioural desistance (self-report) by 102 percent, and official desistance (official records) by more than 250 percent. "The estimate for relationship quality is thus the strongest in magnitude and the most consistent predictor across the measures of desistance considered in our analysis" (Massoglia & Uggen, 2007, p. 98).

Based on data from various longitudinal studies, Loeber and Le Blanc (1990) suggested the following turning points as impactful on an individual's desistance process. They stated that the likelihood of desistance from crime increases with (a) reduced involvement with antisocial friends and the establishment of friendships with pro-social individuals (see also Piquero, Brezina, & Turner, 2005); (b) marriage or other conjugal relationship, particularly if the partner is not deviant; (c) parenthood, especially if the parent is involved in

the childrearing; (d) the individual moving out of the city; (e) regular employment; (f) enlistment in the armed forces; and finally, (g) dropping out of school, but only if followed by entering the job market (Loeber & LeBlanc, 1990).

These life events, however, are not always static and can elicit change in either direction – from offending to desistance or vice versa. These changes in life circumstances, such as employment, marriage and substance abuse can alter the direction of offending trajectories (Piquero, Brame, Mazerolle, & Haapanen, 2002), and being divorced, for instance, can boost offending behaviour (Blokland & Nieuwbeerta, 2005). These changes, in combination of persistent individual differences, are related to crime over the life course.

How these turning points affect the trajectory of offending in general and desistance specifically, include psychological and structural change to the offenders lives. These correlates, such as marriage, the military, reform school and neighbourhood change all work to provide a point of dissection (or “knifing off”) between the past and the present; provide supervision, monitoring and opportunities for social support and growth; bring structure to activities; and, provide an opportunity for identity transformation (Sampson & Laub, 2003; Sampson & Laub, 2005). However, subsequent research has cautioned that it is not simply the effect of marriage, per se, on desistance, but rather the effect that life event has on peer associations. Instead of psychological or personal changes, Warr (1998) suggested that marriage takes away from the amount of time an offender has to spend with peers, and therefore, lowers the opportunities for offending. It is furthered argued that these life events, such that they provide

this 'knifing-off', should be viewed on a continuum rather than a strict amputation: "[f]or instance, a new spouse may impede one's ability to go to one's favored drinking establishments on a Friday night, but marriage does not sever this possibility completely or permanently" (Maruna & Roy, 2007, p. 120).

Interestingly, other studies have found that the correlates such as fatherhood and college education showed no effect on desistance. Contrary to Sampson and Laub (2003), military service was not found to have any effect on desistance either (Rand, 1987). The effects of these correlates appears to continually change as the research emerges (Morizot & Le Blanc, 2007), however, as even Sampson and Laub have modified their position on the effect of marriage and now do not view it as a static turning point, but rather as a potential causal force that operates dynamically (Sampson & Laub, 2005). Moderate support was found for social control variables akin to those espoused by Laub and Sampson (1993), although these were primarily age-dependent. For instance, employment was a significant predictor of desistance, but only emerging adulthood. Affiliation with pro-social friends was also found to be significant, but this effect was only exhibited in adolescence (Morizot & Le Blanc, 2007).

These impacts on trajectories of offending are seen not just in the aggregate, but in the individual as well. Notably, Blokland & Nieuwbeerta (2005) found that even when controlling for trajectory group membership, certain life events substantially changed the conviction rates for individuals. Examining marriage, those even in a low-rate trajectory group saw their rate of conviction

increase upon separation by 44 percent compared to when they were married. The effect of separation following a marriage also left them 4 percent more likely to garner a conviction as compared to when they were single (Blokland & Nieuwbeerta, 2005). The measurement of social bonds may require some adjustment to the changing values of contemporary society. For instance, past studies have found that marriage has a greater crime-inhibiting effect when compared to cohabitation with a partner (Farrington & West, 1995). However, cohabitation has become a more frequent occurrence and individuals tend to marry at older ages; the same is true for pregnancy outside of wedlock (Kazemian, 2007).

Some research has expressly showed support for state dependence while forwarding evidence that rejects population heterogeneity, such as the work of Bushway et al. (1999), who found that their models did not find any evidence that stable individual differences were the primary source of variation in offending and desistance over the life span; rather, they conclude that some kind of state dependence process is at work (Bushway, Brame, & Paternoster, 1999). Ezel (2007) also came to a similar conclusion, as his results indicated that events in early adulthood played a more important role in prediction of risk in later adulthood, rather than individual differences that were identifiable in the juvenile years.

4.6.2.8 Dual Taxonomy

While the age-crime curve generally foretells a pattern of desistance for all individuals, an attempt was made to ascertain whether there is a distinct offender

group whose rates of crime remain stable with increasing age. Despite earlier suppositions that this should be true (Laub & Sampson, 2001), the research did not support this hypothesis and found that “desistance processes are at work even among active offenders and predicted life-course persisters” (Sampson & Laub, 2003, p. 301). This conclusion was also reached in work done the year prior, which called into question the existence of Moffitt’s LCP group, as the evidence pointed towards a trajectory of desistance for all offenders under study (Piquero, Brame, Mazerolle, & Haapanen, 2002). The implication of this has moved some to the offensive against Moffitt, stating, “all these data provide a strong refutation to Moffitt’s (1993) typology, predicting as it does that age is unrelated to offending for highly active offenders. It now seems that we can safely dispense with the notion of the ‘lifecourse persisters’ in our theories of criminality” (Gottfredson, 2005, p. 53). These findings tend to support Gottfredson and Hirschi’s (1990) contention that the age affect is invariant – regardless of individual differences, all offenders will commit fewer crimes as they age. For those proponents of the criminal career approach, this finding contradicted a widely-held assumption regarding chronic offenders and desistance.

The evidence appears to support the notion that aging out of crime is still considered the norm, with even the most active offenders desisting or reducing their offending at a certain point (Blokland & Nieuwbeerta, 2005). However, although the rates of overall desistance are high – as much as 92 percent of the sample population (Piquero, Blumstein, Brame, Haapanen, Mulvey, & Nagin,

2001), that still leaves a small percentage that may not be on the trajectory to desistance. Notably, this study found that 7.2 percent of the population did not appear to be on a trajectory towards zero offences, and asserted that this was the only obvious class of non-desisters in their sample. This finding was also supported by a recent study that identified a small group of persistent offenders, making up less than 2 percent of the sampled population, whose offending trajectory remain relatively flat, at about 2 to 2.5 convictions per year from age 30 onward (Blokland & Nieuwbeerta, 2005).

4.6.3 Policy Ramifications for Findings of Desistance

4.6.3.1 Career Length

Even though most of the evidence points to desistance, proponents of the criminal career approach argue that high-rate offenders, due to their distinctiveness from the average offender, do not follow the same desistance curve. Rather, this group is typified by a stable rate of offending and a lack of desistance from crime (Moffitt, 1993). If this is the case, then this finding may have significant policy considerations when it comes to sentencing these offenders, as traditional aims of specific deterrence and rehabilitation are unlikely to show any effect, and incapacitation, therefore, may be considered as the only viable option. In an effort to quantify this lack of desistance, research has turned to measuring the length of criminal careers for both the chronic and non-chronic populations. Residual career length (RCL) refers to the remaining number of years in criminal careers until the last offence, whereas residual number of

offences (RNO) specifies the remaining number of offences in criminal careers (Kazemian & Farrington, 2006).

The general finding is that most criminal careers are relatively short, particularly for property offenders (Cohen, 1983), and are usually about five years for young offenders who become involved in index offences (Farrington, 1986). However, other theories anticipate that those offenders beginning earliest tend also to offend more frequently and for longer periods of time (Piquero, Brame, & Lynam, 2004). While this finding may argue against lengthy stays of incarceration for younger offenders, the opposite may also be true.

Along with the finding of relatively short careers (Dunford & Elliott, 1984), comes the discovery that offenders in their thirties pose a much longer risk than those in their twenties. Notably, the residual career length for those still active in their thirties is ten years, as opposed to the five years for those in their twenties (Blumstein, 1983). Individuals who remain active in offending tend to do so at a relatively stable rate across various periods of the life course (Farrington, 1986). Although this is a small subset, again, it demonstrates that for these chronic offenders, it is the length of their careers as well as the frequency of their offending that impacts society (Blumstein, Cohen, Roth, & Visher, 1986).

Using the age-crime curve as a guide, the relationship between the age of the offender and the probability of desistance may be expected to show a positive correlation, whereby desistance increases with increasing age. However, this was found not to be the case. Instead, it was the oldest and the youngest offenders who had the highest rates of desistance. Those offenders in

the middle of the age curve showed the lowest rates of desistance (Kyvsgaard, 2003). This finding concerning the youngest offenders complements the findings of the average career length being relatively short for young offenders. This was confirmed by Spelman (1994), who found that those in the first five years of their criminal career were much more likely to drop out of crime than older offenders. Similar to the U-shaped desistance curve found by Kyvsgaard (2003), Spelman (1994) also found that the dropout rate levelled off, rising again only after the twentieth year as an active offender.

4.6.3.2 Sentence Lengths

The ability to estimate criminal career lengths could have significant ramifications for sentencing policy. As prison populations continue to grow and the expense of housing inmates increases exponentially, more and more the discussion turns to more effective and efficient use of the current resources. This has spurred discussions of selective incapacitation policies and other sentencing policies to find the best outcome for both the system and the public's sense of justice. Of particular relevance is the finding that criminal careers are relatively short. If the objective is to gain efficiency in the system, then this finding could support a policy which limits the duration of penal sentences in order not to waste prison capacity on individuals who are not likely to offend again (Blumstein, 1982; in Piquero et al., 2004: p. 413)

It is argued, however, that desistance is unduly influenced by looking at the aggregate age-crime curve. According to the normal presentation of the curve, there is a sharp decline at age 30 in the number of active offenders. This

translates into the belief that long sentences and incarceration past age 30 would be a waste of resources, or even a sentiment that incapacitation at all will have no effect on reducing the crime rate (Gottfredson, 2005). While this may be true on the aggregate level, there is a small contingent of offenders that do remain active, and their career length only begins to decline into their 40s (Blumstein & Cohen, 1987), which may suggest that some incapacitation may be of use. This conundrum will emerge with greater clarity as this research unfolds and the population subset is examined in detail.

4.7 Implications of Desistance, Specialization and Lambda on Policy

Research on desistance is likely the most important to consider when discussing any sort of incapacitation scheme. As asserted by many in this field, imprisonment beyond the point in which the offender would be likely to re-offend would not be cost-effective, nor produce any positive effects for the community as the offender would have not offended even if free. This brings in the issue of criminal lambda, and how we can estimate exactly what the 'savings' would be on crime should these offenders be incarcerated for lengthy periods of time. Regardless of the debates over whether or not we can predict desistance or know exactly how much crime each offender commits over time, any discussions in this area inevitably lead to a conversation surrounding the policy options for dealing with this population. For the most part, these include finding some sort of incapacitation scheme that will maximize the benefit and minimize the cost to society. However, too often policies are motivated by fear, 'common' sense,

supposition or assumptions. Despite the warnings and objections of many in this field, legislation continues to be passed that is assumed to confront the offending problem caused by chronic offenders. Too often, unfortunately, are these policies misguided and poorly planned out, resulting not in the crime savings that were envisioned, but in astronomical costs and draconian measures. The objective, therefore, of Chapter 5 will be to illustrate and further discuss some of these policy options that either have been enacted, or are advocated as they postulate to address the chronic offender issue successfully.

5: POLICIES RELATING TO SENTENCING CHRONIC OFFENDERS

The public's mood seems to stem from the notion that criminal offenders, particularly repeat offenders, are the dregs of our society and, in the view of some, not members of our society at all. The offenders need to be "dealt with" by a form of strict control. The infliction of pain is the automatic response. Imprisonment is the only salvation for a safe society, a magic bullet as it were. The corollary of course is this: If only those judges--I heard them referred to the other day by a member of the public who telephoned a radio talk show as "senile old buggers"--would "get with it" and sentence offenders to long stiff terms of imprisonment we would end up with the safe and peaceful society we all so desperately want (The Honourable E.D. Bayda, 1996, p. 5).

The above quote, while mildly humorous in its tone, actually highlights the difficult reality facing our judges today with respect to chronic offenders. Too often the public reacts to this group of offenders with a knee-jerk call for increased imprisonment, without adequate contemplation or consideration of the costs and benefits of such an approach. In Canada, our sentencing decisions are placed much more in the hands of judges exercising their own discretion and experience than some other countries, notably the United States. We typically do not see, at this point in history at least, a proliferation of legislation aimed at 'tightening up' sentencing and removing that discretion from the hands of judges, save for the Conservative government's removal of the informal practice of granting a two-for-one time served credit upon sentencing for those offenders denied bail prior to trial (Bill C-25: Truth in Sentencing Act, 2009). This restraint

in modifying judicial discretion is perhaps best highlighted by our current refusal to approve any 'three strikes' legislation, or a strict layout of sentencing guidelines, or even a massive proliferation of mandatory minimum sentences. These policy schemes, whether well-intentioned or driven by political motives, have often been subject to critical assessments of their effectiveness in the scientific literature, with many reviews demonstrating differing levels of 'success'. Some have shown little effect, and others have been touted as having a negative social impact. Canadian legislators, however, have certainly not completely shied away from examining these possibilities, and have enacted legislation in an attempt to stem the tide of criminal offending. One policy scheme we have made some use of is the mandatory minimum sentence. Although the most common mandatory minimum penalties are well-known (e.g., for murder), there are actually upwards of 40 offences where minimums are already in effect (Raaflaub, 2006).

The question becomes, however, who should ultimately be deciding punishment for those who contravene our laws? In particular, are legislators required to or do they have a moral duty to step in and enact policies specifically aimed at these problematic populations, or should politicians remove themselves from the decision making and leave the discretion with the Courts? Arguably, legislation comes when faith in the ability of the courts and the judiciary to respond to public pressure or fear, or a particularly rampant crime problem, falters. Perhaps this is acceptable, as we insist overall that the judiciary is bound to the limits imposed upon them by the current sentencing legislation and by our

criminal law, and thus, legislators can be in a unique position to take responsibility when needed without compromising the integrity of the judicial role. On the other hand, perhaps legislators feel that policy must be enacted to balance the judiciary and bring fairness into a sentencing process that is not viewed as effective to curb offending. Regardless of the true intention (and in all likelihood it is a bit of both), these questions raise two separate issues particularly for the Canadian context. As our fundamental principle of sentencing does not direct judges to take prior offending into account in any step-up type of scheme over their 'career', how are they to reconcile the needs of the chronic offender with the current constraints on their punishment options? How, in a just deserts system such as in Canada, can prior record be considered without compromising proportionality? This theoretical consideration will start the current chapter's discussion. What leads from this, then, is a discussion of what legislative policies have been posited to 'deal' with the chronic offenders. If the judiciary is relatively constrained by our just deserts approach, inasmuch as they can consider prior record, will we then see a move towards incapacitation schemes that circumvent this discretion? The second half of this chapter will focus on a discussion of these policies and legislative options, and the possible pitfalls associated with each.

5.1 The Role of Prior Record in Sentencing

The difficulty, as outlined above, is that on the face of it, a system of increasing punishments in tandem with one's criminal record would appear to be

contrary to the tenets of just deserts (MacPherson, 2002; Young, 1997). This philosophical argument will therefore be discussed in terms of an interpretation of von Hirsch's arguments for this existence of this sentencing practice. As von Hirsch is arguably the foremost deserts scholar, his interpretation is highly relevant to our current conundrum. Interestingly, this has not been discussed at length in the criminal career literature, as very little attention has been paid to examining what sentences chronic offenders are actually getting – instead of just postulating what they *should* be getting.

von Hirsch, while continuing his commitment to a deserts approach, argues that increasing punishment for an extensive record may not *necessarily* negate any principle of proportionality. As proportionality is the primary sentencing principle in Canadian legislation, this proposition would undoubtedly be most appealing to those looking for a 'loophole' for chronic offenders short of creating any sort of 'strikes' policy. However, von Hirsch views deserts as combining both the elements of the actual offence, as well as the culpability of the offender. This is echoed in our Canadian legislation. To that end, rather than advocating for a premium for 'bad behaviour' and an extensive record, von Hirsch would say that only a discount could be argued for under a deserts scheme which was grounded in proportionality, as the culpability of first time offenders may be in doubt. As it becomes more difficult to argue that a chronic offender holds a similar culpability as a first-time offender, they are no longer eligible for this 'discount'. Similarly, von Hirsch would also be staunchly against a selective incapacitation scheme based on future predicted behaviour, as a defining

premise of his deserts principle is to base punishment only on the current offence, and not any supposed future possible behaviour (MacPherson, 2002). However, numerous commentators and those within the judicial system have consistently held that a long record of offences is considered an aggravating factor in a sentence (Brantingham, 1985).

MacPherson (2005) further highlights von Hirsch's position by examining the principles of harm and culpability, which according to the theory, are entirely relevant to an offender's 'desert'. The primary question that is asked is whether a lengthy record makes the current offence any more or less harmful to the current victim. Both agree that it does not add to the harm, as a victim's living-standard does not suffer exponentially with each prior offence committed against someone else. Therefore, as culpability remains relatively constant following the first offence, and the harm is not increased with subsequent offences, von Hirsch would argue that a system of increasing penalties would not be viable under a deserts scheme (MacPherson, 2002). To further this argument, the following illustration argues against using an offender's prior record as a rationale for increased punishment, as to do so would ultimately result in punishing the offender multiple times for the same offence.

Any time one creates a theory that considers prior record as anything other than a mitigating factor in sentencing, it looks as though society is punishing the offender again for his first offence. This is what I will refer to as the "double punishment trap." Essentially, the fact of recidivism alone cannot morally justify increased punishment. I agree with this assertion. Therefore, the question becomes what is it about the recidivist offending (other than the fact of recidivism) that justifies the increased punishment (MacPherson, 2002, p. 8:56).

This assertion is also supported using traditional Kantian philosophies on retribution, whereby "[A] man is not to be twice punished for the same offence, and it does not in the least follow that a subsequent sentence must be heavier than the sentence which preceded it" (R. v. Griffiths (1932), 23 Cr.App.R. (Eng.) 153 at 156 (A.C.); in Young, 1997).

Although perhaps the most salient to the discussion of whether prior record factors into a deserts-based sentencing approach, other theorists and academics have argued over the relevance of prior record. Some agree with von Hirsch for the most part, such as George P. Fletcher, while others vehemently defend the use of prior record in their approaches, such as James Q. Wilson. These theories, along with the propositions of one of the more well-known Canadian sentencing researchers, Julian V. Roberts (now in the UK), will be briefly outlined below.

George P. Fletcher agrees with von Hirsch insofar as a sentence should be based on an offenders' desert – both the harm of his actions, and the culpability he had at the time of the offence (Dubber, 1990). However, according to Fletcher, this should have no bearing – positively or negatively – on sentencing at all. In terms of culpability, Fletcher would argue that establishing culpability (as demonstrated by the increase of prior convictions) beyond which is required for the conviction of the current offence, does not make sense (Dubber, 1990). James Q. Wilson, on the other hand, appears to argue for the incorporation of prior record into sentencing purely to further his proposed selective incapacitation

approach. Wilson views the inclusion of prior record as very important to his theory, which advocates a selective incapacitation scheme. Although Wilson admits that not all recidivists will continue to be high-risk offenders, he does advocate that the criminal justice system can base this risk, along with other factors he identifies as salient, as justification for incapacitating that population seen as having the greatest capacity to cause the most harm in the future (Dubber, 1990).

Other desert theorists echo caution towards the inclusion of prior record in sentencing. Morris (1974) strictly adhered to the notion that, "No sanction should be imposed greater than that which is 'deserved' for the last crime, or series of crimes" being sentenced (Frase, 1997). While not advocating for punishment for future crimes (as a deserts-based approach is in direct conflict with), Morris (1974) did argue that the judiciary is well within their power to impose the maximum punishment the offender deserves, with the offender's prior record available to justify such an imposition (Morris, 1992, in Frase, 1997). This argument would appear to run a slippery slope into the more typical discussion concerning the use of prior record, by appealing to individual deterrence justifications. For those offenders who apparently do not 'get the message' with previous convictions, it is thought that special, or individual, deterrence may justify increasing the current sentencing severity in order to make a statement on the behaviour and impact the defendant. However well-intentioned, these justifications arguable move steadily past the desert-based approach advocated

by von Hirsch by specifically using prior record to justify increased punishment beyond the limited 'discount' available to first-time offenders.

Julian V. Roberts appears to occupy more of a middle ground with von Hirsch. Although he, like von Hirsch, advocates for a desert-based rationale for punishment, he does argue that a guideline system, such as in the United States, has the advantage of producing fairness and helping to ensure consistency in decisions surrounding sentencing. The creation of a sentencing grid, according to Roberts, also allows for more clarity in judicial decisions, and more equitable application of the defendant's criminal history. Although guideline systems in all countries tend to utilize both desert and utilitarian goals as justifications for the recidivist premium, Roberts (1997) argues that this recidivist premium is inconsistent with a true desert-based theory of sentencing. It is on this point that Roberts returns to advocate for von Hirsch's position, stating that a desert-based system would only permit a very limited discount for first-time offenders, or for those with very short or very old criminal records. In order to bypass this classic view of desert-based sentencing, the guideline developers appear to modify these assumptions to not extend the culpability of the offender beyond what von Hirsch would prescribe for second and onwards offenders. Rather than permitting only a limited discount for first-time offenders, as prescribed by their presumed limited culpability, the framers of sentencing guidelines instead extend culpability beyond the first offence in order to become justification for harsher sanctions as the criminal career progresses. This is clearly contrary to a true deserts approach, which would not agree that culpability increases in tandem

with an offender's criminal history. These guideline systems, in addition to apparently modifying the classical desert-based justification for punishments, also arguably ignore the subtleties and sophistication involved in judicial reasoning. For example, rather than examining the nuances of an offender's criminal record and perhaps considering the time since last conviction, most guideline systems simply rely on the raw number of convictions over a set period of time in determining at what 'step' to place the offender on the punishment scale. According to Roberts (1997), this blanket inclusion of an offender's criminal record in sentencing can be detrimental in numerous ways. In spite of creating clarity and predictability in sentencing, this scheme does not allow an offender to escape their prior offending, and does not give consideration to those who desist for lengthy periods of time or show movement towards desistance or rehabilitation, as it is retributive in nature and intent (Roberts, 1997).

Keeping these perspectives in mind, the discussion will now turn to various sentencing approaches that either have remained largely theoretical, or have been instituted in various jurisdictions. Each approach, largely due to somewhat differing aims, has different ramifications for the chronic offender population. Sentencing guidelines may offer the softest approach for dealing with parity in sentencing and the maintenance of a just deserts approach, while still having the ability to incorporate an offender's prior record into the decision. Incapacitation schemes, although for the most part still largely theoretical, seek to address the chronic offender population, particularly in the case of selective incapacitation. Other sentencing schemes, such as mandatory minimums, have

moved from the theoretical to the reality, but with differing application and success in achieving crime reduction goals. These are discussed vis-a-vis the chronic offender population, and the ramifications for Canadian sentencing legislation.

5.2 Sentencing Guidelines

The justification for sentencing guidelines tends to be either to encourage uniformity in sentencing in order to reduce disparity (a just deserts aim), and/or to encourage predictability in sentencing (a deterrence aim). Although it may be argued that Canada has 'unspoken' sentencing guidelines in terms of the lengths of sentence that a judge may reasonably apply without fear of overturn upon appeal, there are no legislated guidelines for judges to follow, save for the maximum penalties as set out in the *Criminal Code* and those offences that carry mandatory minimum penalties. However, many States in the U.S. have experimented with a guideline structure for their sentencing, for many of the same reasons. Evaluations conducted have shown differing results in the actual amount of disparity that these reforms have resulted in, and scholars differ on whether the overall objective should be the elimination of disparity.

Developed by an independent sentencing commission, in 1978, Minnesota became the first jurisdiction to implement a system of legally binding sentencing guidelines. These guidelines, brought about initially to reduce disparity by limiting judicial and correctional discretion, served as a model for subsequent states who chose to follow this legislative lead. These guidelines also made their way into the American Bar Association and Model Penal Code sentencing

standards (American Bar Association 1994, pp. xxi-xxv; Reitz 2003, pp. 50-63; in Frase, 2005). The primary focus of the commission was on just desert principles, although this did not translate as strongly into the resultant legislation. Utilitarian principles were also afforded a strong presence in the legislation, and the commission's model became modified over time, and came to more closely resemble a retributive model, whereby offence severity and offender culpability occasionally set limits on severity, but were rather broad (Frase, 2005).

As with mandatory minimum sentences, sentencing guidelines have been subject to the same manipulations seen on the part of prosecutors and the judiciary. Findings indicate that widespread charging and plea bargaining concessions are in play, even in jurisdictions such as Minnesota who has arguably seen the most success with a sentencing guideline system (Frase, 2005). Regional variations also appear prominent, as evidenced in a review in Minnesota (in Frase, 2005). Research estimates put the 'departure rate' (the percentage of cases that deviated either above or below the prescribed guideline) at between 10-42 percent across 10 jurisdictions. In general, departure rates were more prominently seen in reducing prison sentences, ranging up to 26 percent of cases compared to a upwards departure rate in only 10 percent of cases. These departure rates in Minnesota appeared to increase over time, presumably due to the shift in punitiveness with subsequent iterations and modifications of the guideline legislation. Prosecutorial decisions, as well, appeared to be sensitive to guideline systems, as the evaluation also noted that charge bargaining increased following the implementation of guidelines,

indicating the prosecution's participation in the manipulation of such guidelines (Frase, 2005).

Kramer and Ulmer (1996), faced with a similar question of whether this type of legislation actually accomplishes what it sets out to do, sought to examine how these guidelines address concerns of disparity reduction in reality. They agreed that although the objective is to eliminate or reduce this disparity, often courts use their discretion in sentencing and depart from guideline recommendations (as seen by the Minnesota experience above); however, most guideline systems require that the judiciary provide explanations for any departures (Frase, 2005). These deviations, therefore, become a potential source of disparity, undermining the objective of putting guidelines in place. Their findings indicate that although offence type and criminal history form the basis for most sentencing decisions, often deviations from prescribed guidelines are evident in sentencing decisions. Their findings indicated that extralegal differences such as gender, race or the existence of a guilty plea may be a significant source of deviation from the guideline recommendations.

Similarly, Lacasse and Payne (1999) also found that the implementation of sentencing guidelines had the opposite effect to that intended, insofar as the guidelines had failed to reduce sentencing disparity due to individual judges. In fact, their examination showed that the amount of variation between judges actually increased following sentencing reforms instituting a system of sentencing guidelines. They attributed this post-reform increase in variation to the introduction of 'errors' that may be introduced in the judge's assessment of an

appropriate sentence post-reform. As the guideline system requires judges to separately evaluate a sentence based on a series of criteria, small variations in how these criteria are assessed at each stage of the assessment process may result in higher variations due to the accumulation of these small 'errors' or variations.

Overall, it would appear that a guideline system does not necessarily meet the expectations afforded to it, in terms of reducing disparity or manipulation of the system. Therefore, the benefits must be carefully weighed in such a system, as if the outcomes are not guaranteed, then limiting discretion of the judiciary and moving away from our traditional approaches of judicial independence may not be a fair trade off in Canada. Of note to this discussion is the recent change in the US, following the decision in *United States v. Booker* [543 U.S. 220 (2005)], which essentially struck down the mandatory nature of the Federal Sentencing Guidelines. This return of discretionary power to judges in criminal sentences signalled a marked change in policy in the US, and may provide further backdrop for discussions about the future direction of Canadian policy.

5.3 Incapacitation in General

Just like general and specific deterrence, incapacitation schemes are modelled along the lines of both general and specific approaches. General incapacitation approaches attempt to ascertain the impact that incapacitation (or incarceration) may have on the aggregate crime rate. These approaches do not specifically separate the impact of incapacitation and deterrence, but rather, captures them together. Generally, these studies have looked at changes in

policy that may lead to increased incarceration, and measure the pre- and post-effects. An issue that has been brought up with such an approach, however, is the omission of confounding variables that may either prompt the policy change (and thus, impact the deterrence level on their own), or changes in attitude post-policy change, which may again, impact crime levels through avenues other than incarceration. Although researchers in this area generally do not make any secret that incapacitation and deterrence are not separated, the results can only be taken therefore as tentatively supporting these general incapacitation schemes (Piquero & Blumstein, 2007). In general, it has been noted, however, that while such schemes may impact the crime rate overall, they often do so at considerable cost and incredibly inflated prison populations. Therefore, policy makers and legislative bodies have not appeared to wholly embrace the approaches espoused by the general incapacitation approaches. However, the recognition of the enormous cost and social implications of such schemes have become intertwined with the criminal career approach and early on embarked upon a more directed and nuanced approach to incapacitation, that being the selective incapacitation approach. As the majority of criminal career and chronic offender policy is now prominently focused on this approach over a more general approach, this will be given significantly more attention here.

5.4 Selective Incapacitation

An important aspect of the criminal career paradigm concerns prediction and policy. The research in this area is concerned with not only identifying the small group of offenders that offend at disproportionately high rates, but to be

able to prospectively identify them (Piquero, Blumstein, Brame, Haapanen, Mulvey, & Nagin, 2001) in order to intervene with treatment or incapacitation strategies. The argument is that the identification and prosecution of these most troublesome offenders would result in substantial decreases in crime (Cohen, 1983), if incapacitation strategies can be enlisted at optimal times in these offenders' careers (Blumstein, 1983; Blumstein & Cohen, 1987; Cohen, 1983; deLisi, 2005; Petersilia, 1980). This selective incapacitation approach arose out of the recognition that the more well-known collective incapacitation approach was not deemed practical or efficient, as most estimates pointed to the necessity of substantially increasing prison populations in order to realize even small measures of crime reduction (Blumstein, Cohen, Roth, & Visher, 1986; Spelman, 1994). Although a sentencing-specific scheme such as this has not been instituted in Canada, undoubtedly our country is not isolated from the motivations for instituting such a policy such as crime control and the desire for punishment. Therefore, the experience of other systems and the philosophical arguments are relevant if a selective incapacitation scheme – in any iteration – is to be explored.

5.4.1 Timing of Incapacitation

Knowledge of offenders' career length is thought to be one of the most important areas to inform incapacitation decisions, particularly for the purposes of policy (Piquero, Farrington, & Blumstein, 2003). The crime prevention benefits from incapacitation can only be realized if these strategies can identify those career criminals before they have completed much, or all, of their career. For the general offender population, incarceration after 30 years old may not be overly

efficient (Francis, Soothill, & Fligelstone, 2004), as offending tends to decrease dramatically after this point. What is not well known, however, is how long the residual career may be for those who continue offending beyond this point (Kazemian & Farrington, 2006). Although these chronic offenders may have significantly longer careers (Blumstein, 1983), if the general finding is one of eventual desistance or 'slowing down', then incapacitation strategies need to be instituted before these offenders reach the burnout stage (Blumstein & Cohen, 1987; Petersilia, 1980). Farrington (1986) disagrees with the assertion that incarceration over 30 would likely be inefficient, as he argues that "the greatest residual length of criminal careers, and hence the greatest potential incapacitative effect, may be between ages thirty and forty, not at the peak age" (186). Cohen (1983) asserts a similar sentiment, as her findings on residual criminal career length indicate that those who persist in index crimes into their thirties may be relatively rare, but they appear to have the longest expected remaining careers. This adheres to a common idea in the criminal career approach; namely, that this distinctive group of high-rate offenders tend to offend at relatively stable rates over their 'career', and generally do not desist from crime (Laub & Sampson, 2001).

5.4.2 False Positives

Although it is exceedingly tempting to assume that simply by incapacitating the small number of chronic offenders a vast reduction in crime will occur, this has simply not been found to be the case, and in some opinions, selective incapacitation actually performs worse than collective incapacitation

(Mathiesen, 1998). Advocacy for selective incapacitation rests on the idea that prospective identification of high-rate offenders early in their career is possible; however, “no convincing evidence exists that this is possible” (Auerhahn, 1999, p. 726). Results from many studies estimating the crime prevention effect of selective incapacitation strategies have been less than positive, save for one estimation that found the strategy to reduce crime by four to eight percent (Spelman, 1994). However, this finding is the exception, and not the rule. Most findings of limited utility are due primarily to issues concerning the accuracy of prediction and are marred with high false positive rates (Blumstein, Farrington, & Moitra, 1985; Chaiken & Chaiken, 1982), as many of the offenders identified for selective incapacitation end up not repeating their offences. Often, this stems from inaccurate prediction models involving retrospective, not prospective, identification of chronic offenders (Blumstein, Farrington, & Moitra, 1985; Farrington, 1987; Kyvsgaard, 2003). The Greenwood & Abrahamse (1982) report represents one of the most detailed selective incapacitation proposals to date; however, it only demonstrates a 51 percent success rate for correctly classifying offenders. Subsequent re-analysis of the RAND data using that methodology showed an even higher false-positive rate – up to 55 percent (Auerhahn, 1999). A re-analysis of Wolfgang’s (1972) data was also tested against nine incapacitation schemes, none of which were deemed successful and most of which increased the prison population by more than 30 times (Bernard & Ritti, 1991).

In some ways, the process of selective incapacitation may arguably already be in use, particularly by parole boards who utilize the Salient Factor Score (SFS) to assess the chances of recidivism for inmates. Results from a review found that the SFS was generally effective at identifying career criminals. The review estimated that the use of the SFS saved 20 arrests out of 371 in the sample period – or about 5 percent (Janus, 1985). A critical issue comes from the recognition that more often than not, offenders are not ‘randomly’ assigned to these treatment groups – rather, their behaviour dictates in which direction they will head within the criminal justice system, and the subsequent treatment and testing they will be exposed to. Therefore, selective incapacitation schemes that rely upon these risk assessments cannot accurately predict behaviour beyond vague assumptions and the compounding sentiments of the police, judges, and parole boards. This in turn generates misleading estimates and has only served to reinforce the desire of researchers to find an accurate assessment tool (Bushway & Smith, 2007). To further clarify this position, it is also recognized that an offender is not ‘free’ within the system in terms of their past behaviour being devoid of influence on their experience with the system. One cannot remove the impact of their past risk assessments and subsequent treatments on their current assessment, and therefore, it is difficult to distinguish the effects of past criminal history on recidivism such as in Gottfredson and Gottfredson (1994) and Andrews et al. (2006) (Bushway & Smith, 2007, p. 383).

5.4.3 Ethical Issues

Selective incapacitation depends on the prospective identification of those offenders who are deemed to be the highest risk and with the highest estimated amount of offending behaviour in their future. However, strategies are open to inevitable inequities (Chaiken & Rolph, 1980). Proponents of this approach advocate that this prospective identification needs to be done early enough to realize the incapacitative benefits of such a scheme. This generally has resulted in looking for correlates of offending and recidivism in youth. Typically, those identified as the highest risk are socially and intellectually deficient, are often the product of poor homes with a large number of siblings, and are raised in an environment that lacks proper supervision, care and discipline. What this could perceivably result in is an incapacitation scheme that targets offenders nearly exclusively from lower socioeconomic backgrounds, which would understandably not be tolerated by many as an appropriate system of justice (West & Farrington, 1973), and the use of extralegal criteria in offender identification makes this policy at odds with provisions in legislation for equity (Tracy & Kempf-Leonard, 1996).

5.4.4 Legal Issues

The concept of selective incapacitation, by its nature, seeks to imprison those who are identified as *future* persistent or chronic offenders. Even if risk assessment tools were honed and predictive measures highly reliable with low to zero false positive rates, there continues to be the issue of whether such a scheme is legally ethical. The overriding concept behind punishment, in Canada

at least, is that sentences adhere to a just deserts scheme and must “be proportionate to the gravity of the offence and the degree of responsibility of the offender” (Bill C-41, 1995). Selective incapacitation punishes offenders not for the offence they have committed, but for the offences they *might* commit in the future, which contradicts proportionality and raises philosophical and legal challenges (Blumstein, 1983; Blumstein, 2002). Desert theorists would likely agree with von Hirsch (in Farrington, 1987) that “the imprisonment of an offender for a disproportionately long time because it is predicted that he will commit offenses at high rates in the community is repugnant essentially because the punishment is undeserved” (Farrington, 1987, p. 90). This element of legal philosophy has been discussed previously, and will not be repeated here.

5.4.5 Incapacitation Schemes

Despite what we know now, and arguably what we knew then, there have been attempts to find a reliable prediction scheme that balanced the cost-benefits of imprisoning a small cohort of offenders. The most famous being the Greenwood scale, which as mentioned, only saw a 51% accuracy rate. Others have attempted to use sophisticated computer modelling or other techniques to measure effects in an artificial environment. Avi-Itzhak and Shinnar’s (1973; Shinnar and Shinnar 1975; cited in Piquero and Blumstein, 2007) steady-state model assumed that the larger proportion of time in an offender’s career was spent in custody, the fewer crimes he would be able to commit on the general public. This model had numerous assumptions, some of which were problematic and contrary to what we know today. A key assumption of their model was that

there existed a finite population of offenders who commit crimes at a steady state when free. Beyond the obvious issues with those assumptions, their key inputs also made sweeping assumptions. Their model estimated the amount of crime 'saved', based on a steady rate of offending, a likelihood ratio of the chances of being caught, the likelihood of receiving a prison sentence, the average time spent in prison, and the average duration of a criminal career. As is discussed throughout this work, these assumptions continue to be debated and to date there is no agreement in the literature as to how best to proceed. As such, these assumptions cannot be presumed valid for this model. However, this model was the base for future growth and expanded models by both Greenwood (1982) and Reiss (1988), which incorporated further information on offence rate distributions and co-offending (Piquero & Blumstein, 2007).

Some decades later, Bernard and Ritti (1991) designed a rolling cohort method that sought to estimate the incapacitative effect of such policies using observed data. Using a sample of the data available from the Philadelphia birth cohort, they were able to simulate the implementation of a policy and count the number and type of offences recorded after the subjects had been incapacitated. They found that imprisoning a youth after his second arrest until his 18th birthday resulted in a 25 percent decrease in all reported crimes and a 35 percent decrease in serious crimes. This result was also confirmed by a Swedish birth cohort study, which demonstrated that imprisoning every recidivist for two years would reduce crime in the cohort by 28 percent. Despite the apparent successes of these studies, the impacts on society were severe, and resulted in the

observation that prison populations would increase by as much as 22 times under such a policy (Blokland & Nieuwbeerta, 2007). In addition to the obvious issues of the inflated prison population was the observation that many of these selective incapacitation schemes may actually overstate the positive impacts, as many were based on incarcerated samples. Analyses using an average number of inmates overstates the crime reduction as most of the high rate offenders are already incapacitated. Therefore, any further increases in imprisonment will largely affect lower-rate offenders, thereby diminishing the positive effects of the policy (Canela-Cacho et al. 1997, in Piquero & Blumstein, 2007)

There are still too many unknowns regarding the amount of crime actually averted by imprisoning an offender for a specified amount of time. Although there are estimates, overall, there is no conclusive evidence regarding the relationship between past and future crime (Blumstein, 1983), the length of criminal careers, and the effect of incarceration on career length, seriousness or specialization (Chaiken & Rolph, 1980). Although we may be able to predict how much crime we could 'save' if we were able to predict the future, the reality is that when we attempt to construct such a scheme, we come face to face with the unknowns of human behaviour and the chronic offenders' paradigm.

This debate is aptly summed up by Auerhahn (1999):

The seductive simplicity of selective incapacitation leads otherwise conscientious researchers to conclude that it works, despite the total lack of evidence to support such a conclusion. It is such a marvelous idea; it simply has to work! The problem is, unfortunately, that it doesn't. The obstacle to realizing this seemingly perfect solution to crime prevention lies in the prospective identification of this offender pool. We simply cannot do it with any reliable accuracy (Auerhahn, 1999, p. 727).

5.5 Mandatory Minimum Sentences

The sole proponents of mandatory minimum sentencing in Canada appear to be politicians whose positions on the advantages of these laws are without a clear basis in either research or policy (*Sheehy, 2001, p. 262*).

The use of selective and general incapacitation schemes to reduce the crime rate has been studied largely in theory or using predictive modelling techniques. In general, large-scale overhauls of the system using this type of approach have not taken hold in Canada or the US. However, what has proliferated for many offences is the mandatory minimum sentence. In general, legislators and policy makers espouse a system of mandatory minimums under three primary justifications. First, these penalties will ensure that everyone who commits a particular offence will be punished with an identifiable minimum, ensuring even-handedness. Second, such systems allow for a greater comfort in knowing the justice will be done, a sentiment that sits particularly well with members of the public. And thirdly, mandatory minimums are justified along the grounds that they serve to prevent crime by ensuring that a punishment is certain, and therefore, a deterrent to offenders. Unfortunately, as demonstrated

by countless reviews and summed eloquently by Tonry (2009), “the insuperable difficulty with all these claims is that centuries of evidence show them to be untrue” (p. 67).

Although not espousing to reduce the crime rate in the same way as incapacitation schemes, mandatory minimums attach a relatively harsher penalty to crimes we strongly wish to suppress. This harsher penalty is believed to act as an additional deterrence (Tonry, 2009) for committing this type of criminal activity, and therefore, may drive down the crime rate, if only even for that particular type of crime. The discussion of mandatory minimum sentences at the present time has few direct links with discussions of chronic offenders; however, as many mandatory penalties now carry a “step up” structure for subsequent offences or specify minimum sentences to be imposed on people who have prior felony convictions (Tonry, 2009), this may bring this particular sentencing policy back to the chronic offender in hopes of curbing the behaviour.

Canada’s historical use of mandatory minimums in general has been limited, and has been typically used for drinking and driving offences, offences involving a firearm, and for 1st and 2nd degree murder. Although the crime preventative effect of mandatory minimums has been touted as minimal (Tonry, 1996), mandatory minimums are a salient issue when discussing chronic offenders and the capacity of these policies to reduce the impact these offenders have. It is very likely that a mandatory minimum policy, which may only pass as legislation in cases of serious offences, would have little impact on this particular group’s offending rates, as they are typified by many low-level offences that

would not likely be appropriate for such a scheme. However, as stated, as 'step-up' schemes become more common, this focus may move back to the chronic offender as more and more of this group get caught in the mandatory minimum net.

More than two decades ago, the Canadian Sentencing Commission (1987), advocated the abolition of mandatory minimum sentences, in favour of more presumptive sentencing guidelines that would allow the judiciary to depart from the guidelines if it was appropriate to do so. The Commission stated that mandatory minimums would effectively end the accused's incentives to plead guilty in return for a lesser sentence, which would have deleterious effects on case processing and court workloads. The Commission also advocated for abolishment as they felt mandatory minimum sentences would result in prosecutorial manipulation of charging systems, unduly harsh punishments, and would negatively infringe on judicial discretion (Gabor, 2001). Despite this learned Commission's recommendation, by 1999 in Canada, the *Criminal Code* had 29 offences that carried a mandatory minimum sentence, with 19 of those being created in 1995 with the passing of new firearms legislation in Bill C-68 (Mirza, 2001). By 2007, this number had risen again to 40, with numerous others being considered (Fish, 2008). Looking at the Bills presented before parliament over a 10-year span presents a picture of the precipice that we appear to be treading upon. Although most of these proposed Bills were not passed, it is not unthinkable to imagine a time where public support for the criminal justice system and faith in the system to provide protection of the public falls to such a low that

legislators take the dramatic step of approving bills such as these. In order to provide some context for this discussion, the bills introduced in the 1990s are presented in Table 1 for reference (from Crutcher, 2001).

Table 1: Bills Introduced for Stepping up Sentences

Year	Minimum Sentence	Offence	Bill
1995	25 years	Third conviction for a violent offence	C-301
1996	7 years	Impaired driving causing death	C-201
	5 years	Aggravated procuring and living off the avails of child prostitution	C-27
1999	2 years	Breaking and entering a dwelling house	C-475
	2 years	Second and subsequent convictions of breaking and entering a dwelling house	C-219
	5 years	Sexual interference or invitation to sexual touching of children under the age of 14	C-504
	10 years	Using a firearm during the commission of an offence	C-516
	20 years	Discharging a firearm during the commission of an offence	C-516
	25 years	Discharging a firearm during the commission of an offence that results in the wounding, maiming, or disfiguring of anyone not involved in the offence	C-516
	10 years	Using a firearm during the commission of an offence	C-484
	20 years	Discharging a firearm during the commission of an offence	C-484
	25 years	Discharging a firearm during the commission of an offence and injuring anyone not involved in the offence	C-484
	Life	Third conviction for a violent offence	C-265
2000	4 years	Second and subsequent convictions	C-426
	10 years	Using a firearm during the commission of an offence	C-441
	20 years	Discharging a firearm during the commission of an offence	C-441
	25 years	Discharging a firearm during the commission of an offence that results in the wounding, maiming or disfiguring of anyone not involved in the offence	C-441
2001	2 years	Sexual touching of persons under 14 years of age	C-208
	2 years	Invitation to sexual touching of persons under 14 years of age	C-208
	4 years	Theft of a motor vehicle	C-250
	1 year	Trafficking in a controlled substance within 500 metres of a school	C-255
	2 years	Breaking and entering a dwelling house	C-290
	Life	Second conviction for a violent offence	C-291

As is shown in numerous proposals above, mandatory minimums are not just for the one-time offence, but may also apply in cases where an offender commits the same offence more than once, such as Bill C-291 proposed in 2001 (above). Typically Canada's 'step up' minimums are in place for only a limited number of offences such as drinking and driving, which see punishments

escalate upon the 2nd and 3rd offence. However, homicide also carries an escalating minimum, as a 2nd-time offender must serve a minimum of 25 years in prison, even if he/she is convicted of 2nd degree murder (Roberts, 1997). This trend of punishing repeat offenders for committing the same offence again appears to be growing, and is now appearing in many private members' Bills to quell the tide presumably of chronic property offenders as well as repeat violent offenders. This consideration of mandatory minimum sentences must be embarked upon soberly and with significantly examination and research as, particularly for property offences, they may only serve to push the incarceration rate up (Brodeur, 1999).

A primary issue many legal and sentencing scholars have found with respect to mandatory minimum sentences is the recognition that the imposition of such schemes may violate the principle of proportionality if parliament affixes the minimum level beyond which the judiciary may normally assign (Fish, 2008). Mandatory minimums also may compel judges to affix sentences that they may not necessarily agree with, or that they feel encroaches on their discretionary use of judicial restraint. Despite having the appeal of promising certainty and at times increasing severity in sentencing, the impositions on judicial discretion, matched with the violations of numerous sentencing principles, most notably proportionality, may be an unacceptable compromise (Fish, 2008; in Roberts, 1997). Proportionality may not be the only principle which is at risk with a system of mandatory minimum penalties. Deterrence, too, may not be in line with the tenets of a minimums system.

Classical theorists and deterrence advocates argue that in order for deterrence to occur, punishment must be certain, swift and appropriately severe. Although the appeal of mandatory minimums may come from advocates of increasing severity in order to deter, the reality is that the first two requirements of deterrence remain untouched by a system of increasing severity or mandatory minimums (Roberts, 1997; Gabor & Crutcher, 2002). One only has to look at police clearance rates to see that certainty of punishment is at best only a likely probability for some crimes, and at worst, a significant improbability for others. In 2008, police in British Columbia cleared approximately one in four *Criminal Code* offences. Violent crimes showed the highest percentage of cleared offences, and police cleared over half of the homicides in the province. However, only 8 percent of break and enter offences were cleared in 2008, with 7 percent leading to a charge (Police Services Division, 2008). Although these statistics may deter some offenders, it is not unreasonable to argue that the principle of certainty of punishment is not existent in most cases.

The swiftness with which offenders are punished is also questionable, as the average time to trial for a summary offence in 2004 stood at 12 months, despite a standard set by the Chief Judge of 6 months (Main Street Criminal Procedure Committee, 2005). Armed with this information, it becomes much more difficult to justify mandatory minimum sentences on the grounds of bolstering deterrence in sentencing, as clearly two of the three mandatory requirements for deterrence efficacy are not arguably in play (Sheehy, 2001). Three National Academy of Sciences panels reached the same conclusion that

the deterrence effects of mandatory minimum sentences is minimal or non-existent (Blumstein, Cohen, and Nagin 1978; Blumstein, Cohen, Roth, and Visher 1986; Reiss and Roth 1993; in Tonry, 2006), as has every major survey of the evidence (Cook 1980; Nagin 1998, 1999; von Hirsch et al., 1999; Doob and Webster, 2003; in Tonry, 2006). Couple this with the recognition that in many cases, mandatory minimums serve to increase trial rates (Tonry, 2009), thereby increasing workloads and case processing times, and the justification on deterrent grounds becomes even weaker (Tonry, 1992).

Mandatory minimum sentences, although advocated for some crime prevention rationales (such as deterrence), may have more to do with political motives than with the reality that they either deter, reduce or prevent crime (Gabor & Crutcher, 2002). Many Canadian scholars have made this assertion with particular reference to the mandatory minimum sentences legislated for firearms offences (Doob, 1999; Roberts, 1999). These policies, driven by political motives, appear to often echo public outcries for increasing punishments, despite being devoid of any academic or statistical backing that they accomplish any of the goals the public or politicians are seeking. Despite the existence of a government-authored report stating the ineffectiveness of mandatory minimum penalties, legislators chose to ignore their own researchers when drafting legislation surrounding the required minimums for firearms offences (Roberts, 1999). Notwithstanding the recognition that following the legislated minimums the use of firearms in the commission of offences did appear to drop slightly, the use of other weapons increased (Gabor & Crutcher, 2002). If the objective is to

reduce violent crime, then, the success of this venture may be refuted. Doob (1999) concludes that,

Part of Parliament's problem in approaching sentencing sensibly is that few public officials are willing to state clearly what is undoubtedly true about sentencing: variation in sentencing has little, if any, impact on levels of crime. So until we are truthful about what sentencing can, and cannot, accomplish, there does not seem to be any hope for a sensible structure or serious progress (Doob, 1999: 361).

Mandatory minimums may also incite manipulation both on the part of the judiciary and the prosecution, possibly due in part to the dislike and opposition to such a system by the majority of judges and others working within the justice system (Tonry, 1992; Tonry, 2009). The prosecution, stripped of the ability to bargain effectively for a reduced sentence if the defendant pleads guilty, may now turn to charge modification in order to incite a guilty plea (Gabor & Crutcher, 2002), or other methods to circumvent mandatory sentence laws. This may see some offenders avoiding the mandatory minimum sentence, as their actual charge under the *Criminal Code* may then be modified to one that does not carry such a stipulation, or the prosecution may choose not to submit such charges at all. Examinations of this possibility have found that this failure to file charges for weapons offence 'enhancements' occurred in 45 percent of cases where it would have been appropriate (Tonry, 2009). In some cases, as part of a plea agreement, the prosecution may also merely chose not to apply a mandatory minimum rather than change the actual charge (Ulmer, Kurlychek, & Kramer, 2007).

The existence of the mandatory minimums may also serve to punish those who insist on not pleading guilty more severely than those who choose to plead guilty before trial. This was found to be the case in some U.S. States, whereby offenders who went to trial were more likely to receive the mandatory minimum than offenders who plead guilty before trial (Ulmer, Kurlychek, & Kramer, 2007). Prosecutors may also use these mandatory minimums to incite a guilty plea, as many defendants who pled guilty have found they did not end up being subject to the mandatory minimum, or were subsequently sentenced below the mandatory minimum to which they were expecting. In other scenarios, in exchange for a guilty plea, often prosecutors would also drop the portion of the charge carrying the mandatory minimum 'enhancement' (Tonry, 2009). In the same way, mandatory minimums may not reduce judicial sentencing disparity as once thought, due to some judges exercising what little flexibility and discretion they have left under such schemes, or evading their application entirely (Tonry, 2009). Similarly to prosecutors manipulating the system to avoid the mandatory minimum (Tonry, 1992), judges too have been found to not use the mandatory minimum as an "add-on" (as is prescribed by firearms offence mandatory minimum legislation in Canada), but will not prescribe a sentence any longer for a particular offence over and above the one year minimum (Gabor & Crutcher, 2002).

The opposition to mandatory minimum penalties is strong within the academic community, as well as the legal community. Although judges must refrain from making political statements publicly, the legal community is not

officially bound by such limitations. The strong opposition was voiced by members of the National Association of Women Lawyers:

NAWL [National Association of Women Lawyers] supports abolition of mandatory minimum prison sentences because they are ineffective; they do not achieve deterrence nor do they highlight the seriousness of the offence; they are contrary to principles of fundamental justice and equality; they constitute cruel and unusual punishment, and lead to arbitrary' imprisonment; they conflict with purposes and fundamental principles of sentencing set out in the *Criminal Code*: they undermine public accountability and increase the power of the Crown; they reduce the number of plea bargains and thereby increase the demands on court time; they intensify systemic racism; and they create pressure for an upward increase in the length of sentences of imprisonment. In sum, mandatory prison sentences cannot be justified and should not be tolerated in a free and democratic society. (Cote, Majury, and Sheehy 2001; in Gabor, 2001: 387)

5.5.1 Three Strikes Legislation

Although mandatory minimums are generally envisioned as much more akin to the proposals outlined in the preceding section, 'three strikes' legislation represents the mandatory minimum at its most severe. Typically, these policies dictate that a person who has been previously convicted of two offences that fall within the prescribed list, must be sentenced to a prison term of 25 years or more upon a third conviction (Tonry, 2009). A discussion surrounding sentencing policies aimed at repeat offenders naturally leads into an examination of the so-termed 'three strikes' legislation. Although undoubtedly three strikes is tenuous at best based on the evaluations done thus far (Ashworth, 1995) and the astronomical cost, a policy based on '30 strikes' reserved for a very specific subset of the chronic offender population may appeal to some. Despite this

possibility, many critics stand united against any such policy, stating that does not allow for discretion, proportionality and mercy, and as such, is out of line with Canadian legislation and sentencing law. Although Canada does not have a policy that resembles three strikes, similar legislation has been proposed in Parliament - once in 1995, and again in 2000 (Mirza, 2001).

Although the first 'three strikes' law was enacted in Washington State in 1993, California has been a leader in this area, and in 1994 instituted one of the broadest, toughest and most rigorously applied three strikes law (Stolzenberg & D'Alessio, 1997) as a result of public panic (Vitiello, 1997). This legislation caught offenders who had committed a broad range of offences, from stealing monetary amounts of less than \$10, to stealing food (Gendreau, Goggin, & Cullen, 1999). The three strikes legislation was essentially based on the assumption that certain prison terms, particularly those which would see an offender in jail for 25 years to life following a third felony, would work to deter offenders (Gendreau, Goggin, & Cullen, 1999) and subsequently lower the crime rate. Although some evaluations that evaluated crime rates over time seemed to espouse that the policy had worked, many noticed that a decrease in the crime rate was already underway when the legislation was implemented (Gabor, 2001). For the majority of studies, the deterrent effect, similar to findings in studies of other mandatory minimum policies, was found to be minimal or non-existent. The table below, taken from Tonry (2009), summarizes the findings of the deterrent effect of various three strikes policies:

Table 2: California Three Strikes: Effects on Reduced Crime Rates

<i>Authors</i>	<i>Method</i>	<i>Deterrent Effect</i>
Schiraldi and Ambrosio (1997)	Yes/no three-strike state comparisons	None
Stolzenberg and D'Alessio (1997)	Time series: 10 largest California cities	None
Males and Macallair (1999)	California age group comparisons	None
	California county comparisons	None
Chen (2000, 2008)	Time series: 50 states	None
	Time series: California	Not significant
Austin et al. (2000)	California county comparisons	None
	Yes/no three-strike state comparisons	None
Caulkins (2001)	National econometric model	None
Marvell and Moody (2001)	Time series: 50 states	None: increased murder rates
Moody, Marvell, and Kaminski (2003)	Time series: 50 states	None: increased murder rates
Zimring et al. (2001)	California county comparisons	None
	California age group comparisons	None
Shepherd (2002)	California econometric model	Yes
Ehlers et al. (2004)	California county comparisons	None
	Yes/no three-strike state comparisons	None
Kovandzic et al. (2004)	Model: U.S. cities	None: increased murder rates
Justice Policy Institute (2004)	Yes/no three-strike state comparisons	None
Tonry (2004)	Time series: 10 most populous states	None
Legislative Analyst's Office, California (2005)	California county comparisons	None

(p. 98)

Many also criticized the legislation for being excessively broad, as it was found that upwards of 85 percent of those caught in the three strikes net were non-violent and/or drug offenders. As the cost of imprisoning an offender could be upwards of \$40-\$50,000 per year, there was some question whether ensnaring high volume, low-level property offenders was cost-effective (Tonry, 2006). The criticisms of costs of such legislation came not just from the base costs of having to house offenders for life come their third felony. Research also found that due to the possibility of facing life in prison upon their third offence, offenders were far less likely to plead guilty before trial. This dramatically

increased the number of cases making it to trial, and severely impacted the costs associated with prosecutions (Gabor, 2001). Incarcerating offenders for life has numerous financial drawbacks beyond simple housing. Although these offenders will be incapacitated from committing offences (and arguably would then not cost the system more money from those offences 'saved'), the cost of incarcerating so many offenders quickly offsets these savings (Kovandzic, Sloane III, & Vieraitis, 2004). In addition, older offenders cost far more to incarcerate – some estimates put the costs up to three times as high for geriatric prisoners. These lifetime costs cannot be justified by the presumed 'savings' of their inability to offend, as research has shown the dramatic drop-off in offending of individuals nearing 30 years of age. Therefore, the 'savings' that are envisioned are actually non-existent after a certain point in the offender's life, and are even less justifiable vis-à-vis the cost of imprisonment (Vitiello, 1997). It is unlikely that with all the information and research conducted on the U.S. experience that Canada will ever institute a policy that resembles a three-strike system; however, some sort of strike system may yet become an attractive option for addressing the issue of chronic or long-term offenders.

5.6 Discussion

The preceding discussion has served to highlight both the theoretical and logistical difficulties surrounding the implementation or consideration of various sentencing schemes to address chronic offenders (among other goals). The theoretical difficulty comes from Canada's adherence to a just deserts model, espousing proportionality above all other sentencing principles. This effectively limits the judiciary's ability to use an offender's previous record in a way to increase their current sentence, as it is contrary to the tenets of our current system of sentencing. Despite this, there is clearly still a push to move to a more punitive system, as evidenced by the plethora of Bills coming before Parliament that seek to attach severe step-ups for subsequent offences or habitual offenders (see Table 1). Although contrary to our current legislation as it relates to sentencing, that does not negate the possibility of these Bills coming to fruition. Canada has instituted numerous mandatory minimum laws, and has even considered a three-strikes system at two times in history. The seduction of such schemes comes with the promise of curbing offending behaviour and ensuring safety. However, even if these claims were reliable, often they come at substantial cost as in the case of mandatory minimum penalties. There is also no guarantee that the system will not reject any sort of imposition. Time and time again, research has found that the internal manipulation of the system is readily apparent when legislation takes discretion away from those working within the system. Therefore, the discussion of whether any of the aforementioned sentencing schemes should be brought in to 'deal with' the chronic offender

population must be carefully contemplated. If these schemes cannot show a reduction in disparity and offending over time, an adherence to our Canadian focus on proportionality, and a limit to internal manipulation, then it is likely they will only serve to placate public fears with no impact on actual public safety.

6: RESEARCH QUESTION AND METHODS

Insight implies detecting and uncovering underlying structure in the data. ... the real insight and "feel" for a data set comes as the analyst judiciously probes and explores the various subtleties of the data (*Filliben & Heckert, accessed 2009*).

The objective of the current work is to analyze whether a marked step-up in sentence severity and/or length is seen with the growth of a chronic offender's criminal record. A sample of chronic offenders identified by the Vancouver Police Department's (VPD) Chronic Offenders Unit (COU) was used for this analysis. The criminal conviction history, as recorded on the Canadian Police Information Centre (CPIC) record for each offender was coded for offence committed and the type and length of the sentence handed down for each conviction event. In addition, police contact and charging data for five years was also coded for each offender within the sample to further explore offending patterns and prevalence in order to supplement the understanding of the nature of this group's offending patterns.

6.1 Approach: Exploratory Data Analysis

The preceding chapters have served to provide the requisite background for the issues surrounding chronic offenders and impact of their offending, issues surrounding sentencing for crime control, and specifically, sentencing of chronic offenders. At this point, it is logical to surmise that the present study sets out to

do one of two things: (1) to create a selective incapacitation scheme using the current data, or (2) to statistically confirm the relationship of prior record and sentencing severity. The reality is that current work seeks to answer neither question. That is due in large part to the recognition that much of our sentencing research on chronic offenders does not contemplate the actual reality. Rather, the concern is developing models for future incapacitation schemes, attempting to identify early warning signs for chronicity, or arguing for or against sentencing schemes such as three strikes, mandatory minimums, or sentencing guidelines. Through this process, the reality of what *is* was overlooked. There is nothing published on the actual sentences handed down for chronic offenders over their lifetime, particularly in Canada. In all fairness, this is likely due to the availability of data – even Statistics Canada had a difficult time matching criminal history to their cohort study of adolescents, which was the closest examination of individual sentencing patterns in Canada in recent years (Carrington, Matarazzo, & deSouza, 2005). Due to this dearth of research, the current study aims to fill in the gaps and provide the basis for future studies and future iterations and model building for confirmatory statistical tests. To that end, this study will focus almost entirely on the tenets of exploratory data analysis as a way to thoughtfully tread down the road towards building confirmatory models and the better, more applicable usage of hypothesis testing for this unique population's sentencing patterns. As judges become more and more open with their decisions⁸, it may be

⁸ In the past several years, the Provincial Court of British Columbia has begun posting some judicial decisions on a publicly available database (<http://www.provincialcourt.bc.ca/judgmentdatabase/index.html>). However, the discretion to post decisions remains at the

possible in the future to build explanatory models of judicial decision making with respect to chronic offenders, and to statistically support whether the criminal record plays a crucial role in the sentencing process. However, the focus at present is to isolate and identify the nature of these offenders' sentences, in order to explore sentencing scheme policy against the backdrop of this group.

The research question underlying the current work concerns proportionality; specifically, if judges are adhering to proportionality and our system of just deserts, then large increases in the severity and length of sentence should not be obvious along the criminal career, due inferentially to the length of criminal record. In other words, if we examine the criminal career of our chronic offenders and find, while holding all other variables as constant as possible, that the sentence appears to increase as the career progresses, then it may be reasonable to assert that the judiciary, despite the legislative guidance of proportionality, appears to place a great importance on prior criminal history when sentencing. However, if the severity of sentencing appears to be constant or with little obvious variation, then the opposite may be true – that judges place relatively little importance on criminal record in their sentencing decisions, whether by legislative limits, personal theoretical leanings, or delay in the full extent of an offender's record made available to the judge at the time of sentencing⁹.

behest of the judiciary themselves, and as such, this database does not represent a complete history of all judicial decisions made at the Provincial Court level.

⁹ As court backlogs have been a critical issue in the past several years in most jurisdictions in BC, it may take several months if not years, for an offender to be tried, convicted and sentenced (Supreme Court of British Columbia, 2009).

To answer this question definitively, however, implies an inferential or confirmatory statistical test. While it may seem simple enough to create a model wherein all dependent variables of an offence were controlled for in order to see the impact that prior record has on the length or severity of the current sentence, to venture down this road in the current work would be unwise. This approach is avoided for two primary reasons. First, the use of regressive techniques would assume normally distributed data – a characteristic that is not reliably present when assessing sentence length; and secondly, the common usage of sentence length to denote ‘seriousness’ of an offence would render much of the analysis tautological if used to create a ‘seriousness scale’. These difficulties are discussed below; however, the reader is encouraged to keep in mind that explanatory data analysis is not the final purpose of research. Exploratory data analysis has the ability to highlight trends, infer relationships, and better illuminate data to make the case for future model building and better inferential statistics. Put eloquently, “unless exploratory data analysis uncovers indications, usually quantitative ones, there is likely to be nothing for confirmatory data analysis to consider” (Tukey, 1977, p. 3).

Therefore, to sufficiently explore the data herein, and begin to propose some possible observations suitable for confirmatory analysis, some basic questions will guide us through these data. As we are concerned primarily with the impact of criminal record throughout a criminal career, our focus will be on the nature of the offences throughout the criminal career and the nature of the

sentences throughout the criminal career. To that end, the results will be broken up according to these large categories.

Exploratory data analysis is not simply graphic displays of the data – these are simply the methods that are often used to describe EDA. Rather, EDA is an approach that allows the data to reveal itself through an iterative feedback process. EDA differs from classical or confirmatory data analysis in some key ways, including the role of model building within the sequence of research events. In classical data analysis, the researcher uses the data to build the model on which to test the assumptions he or she has made. The analysis is conducted on the model, and conclusions are rendered following such analysis. In EDA, the analysis is rendered on the data itself, without a model being created. The results from the analysis shape the considerations to be used in future model building using the data and conclusions can then be reached with a deeper appreciation of the data that was fed into the model. Of course, in reality, research will often use mixed-methods or a combination of many approaches, so the above is more akin to an ideal form than a picture of a real-world distinction. As can be seen, EDA is significantly data focused, rather than being model-focused; therefore, EDA is more concerned with graphically displaying the data in the optimal way to understand its raw patterns than with significance tests (Filliben & Heckert, accessed 2009; Velleman & Hoaglin, 1981; Hoaglin, Mosteller, & Tukey, 1983).

A primary strength of EDA is that it makes use of all the available data, without the necessary loss of detail associated with the creation of models or

estimates. Along with the benefit of not losing data with EDA comes the additional benefit of the research not becoming a victim of violated or misapplied assumptions. As confirmatory techniques rely heavily on assumptions, this places a great deal of responsibility on the researcher to know what assumptions are present in each technique, and apply all the appropriate tests to the data to truly know whether these assumptions are being violated. EDA assists this process by first not subjecting the data to any assumptions, and second, allowing the researcher to examine the intricacies of the data with an eye to understanding the limitations it may hold down the line when attempting to apply confirmatory models. “The EDA approach of deliberately postponing the model selection until further along in the analysis has many rewards, not the least of which is the ultimate convergence to a much-improved model and the formulation of valid and supportable scientific and engineering conclusions” (Filliben & Heckert, accessed 2009; Velleman & Hoaglin, 1981; Hoaglin, Mosteller, & Tukey, 1983).

6.1.1 Level of Resolution

In reality, the current research will go forward with the EDA approach of intimately understanding and illuminating the data, but will also utilize more classical statistical techniques for summarizing the data in addition to graphically displaying it. In this way, the research will be reflexive and iterative, and will be in a better position to make inferences. The research will also seek to find the optimal level of display by moving from the highest level of detail using descriptive statistics and graphical plots, to lower levels of detail by binning and

aggregating in order to smooth out the visualization of the trend to better grasp the big picture of this group's sentencing patterns over time. Therefore, results will also be examined in their raw state without aggregation of prior offences or binning of offence types. For instance, the sentencing patterns for break and enter can be displayed using a line chart with the number of prior convictions represented by the x axis, and the number of days in prison represented by the y axis. A lower level of resolution would seek to smooth this representation by binning the prior offences into groups of five (for instance), and/or binning the length of custody into months rather than days. As higher levels of resolution are likely to cloud any observable trends, in general, the aggregated or binned results will be shown to allow for ease of inference.

6.2 Explorations of the Data

As mentioned, two broad categories will be used to frame the questions for this exploratory analysis. These include the nature of offending over the criminal career, and the nature of sentencing over the criminal career. However, a more intimate knowledge of the sample will be collected by exploring the demographics of the offenders in the present sample, and the key dates within their criminal career.

To examine the nature of offending over the criminal career, several questions will be posited and answered using the available data on sentencing patterns for the sample of chronic offenders. These include the examination of what types of offences this group commits throughout their career, which will lead into commentary regarding the severity of offending over the course of the

career; as well as the existence and prevalence of major groupings of offences over the career, including property, violent, drug, and administrative offences. The examination of sentencing will then be explored at different levels of resolution for both specific offences and groups of offences, such as property and violent crimes. The sentencing analysis will focus on the type of sanction imposed, the length of incarceration (if applicable), and the prevalence of pre-trial custody over the course of the offender's career.

As much as possible, the explorations above will endeavour to control for offence seriousness and level of prior record. The process of exploratory data analysis will also allow for flexibility in examining avenues outside the primary research questions. Even by simply going through the coding procedure, numerous questions arose suitable for exploration. For example, the nature of pre-trial custody and its impact on sentence length would not have been illuminated had the researcher not participated in the coding procedure and discovered just how the actual sentence was recorded when considering time-served credit (discussed below).

Pre-trial custody is an important aspect of sentence examination, as typically the time spent remanded should dictate the length of a particular prison sentence, with both not exceeding a proportionate range for the particular offence. Typically the credit for time served is a 2-for-1 calculation, and despite the Supreme Court advocating this ratio as 'reasonable' (Justice Renaud, 2004), this is not mandated or legislated in any official sense, despite being common practice. Due to this, the calculation of credit for remand may be impacted by

the seriousness of the offence, as judges are less likely to take into account time served credit for individuals facing a lengthy prison sentence, as the credit would not have a substantial effect on the resultant punishment (Nadin-Davis, 1982, pp. 155-157). Late in 2009, Royal Assent was given to legislation brought forward to abolish this 2-for-1 time served credit (Bill C-25: Truth in Sentencing Act, 2009). This will undoubtedly affect sentencing in the future; however, as this legislation was brought in after this study period, it does not impact the current research.

6.3 Data Sources and Coding Method

This study adopts a retrospective longitudinal approach to the study of the criminal careers of offenders under the supervision of the Chronic Offender Unit (COP) of the Vancouver Police Department (VPD). This longitudinal study examines the lifetime convictions of a sample of COP offenders and it incorporates five years of police contact data from the VPD. It is retrospective because the longitudinal data was collected in a single time period (2007 to 2008).

6.3.1 Population of Chronic Offenders

The VPD's Chronic Offender Unit started as a pilot program in 2004, in response to the recognition that there was a well-known group of offenders who persisted in committing offences year after year. Initially, the Unit used the common cut-off of five or more charges to denote 'chronicity' in their group; however, this yielded an unmanageable number of subjects within Vancouver. According to the VPD, using this threshold would have yielded offenders in the

thousands (Planning, Research & Audit Section, 2008). The Chronic Offender Unit then used the criterion of five convictions in the past four years as the threshold, but this too proved unmanageable¹⁰, with over 800 offenders meeting or exceeding that criteria in Vancouver. Again, the criteria was streamlined, and resulted in a group of just under 400 offenders (380 in 2008). The current requirements for a designation of a chronic offender state that an offender must meet one of the following three criteria: (1) a property criminal with 12 or more charges in the past 12 months; and/or, (2) an offender identified by the Operations Division¹¹ as a significant property offender; and/or, (3) a property criminal with a history of non-compliance with court orders (Chronic Offenders Program, 2007: 1). Each criterion is aimed at different operational goals of the Unit. The first identifies the most prolific and high-rate offenders, while the second criterion allows the Unit to begin monitoring those offenders that are considered “up and comers” by police on the street. The third criterion also allows for inclusion of those offenders who have shown an unwillingness to abide by court orders and limitations, who are constantly in breach of those conditions, and who are frequently coming into contact with police (Pitt-Payne & Pomeroy, 2007).

¹⁰ As the Chronic Offenders Unit began as a pilot program, there were only a handful of officers first assigned to this unit.

¹¹ In 2006, the VPD had an authorized strength of 1,214 sworn members, and 368 civilian members (VPD Annual Report 2006). Although some reorganizations have taken place over the past several years, currently the VPD consists of three primary Divisions. The Operations Division consists primarily of uniformed patrol operations; the Investigation Division encompasses numerous Sections and Units focused on investigations of major or specialized crimes; and the Support Services Division, which is focused on activities surrounding Human Resources, information Technology, and Communications (www.vpd.ca).

Before moving forward, it is important to touch upon the issue of group selection and the operational definition of a chronic offender. Those familiar with the chronic offender paradigm and resultant policy discussions surrounding sentencing may have concerns with using the above criteria to identify such a target group. This likely comes from one of two areas. First, the additional subjective criteria to catch the 'up and comers' allows uncertainty into the group in terms of maintaining any objective criteria. Second, if the objective is to identify this group and impede their future offending, then criticisms arise with respect to targeting and possibly increasing punishment for a group identified in this way. In particular, issues surrounding desistance, persistence and other salient features of the criminal career paradigm come into play (Doob & Webster, 2008). However, what should be stressed at this point is that the objective of assembling a group of chronic offenders was intended to identify those who should be dealt with from a case management approach, instead of simply the perceived *status quo* of the revolving door (Street Crime Working Group, 2005). The intention was not to identify this group in order to bring a 'three strikes' policy into effect specifically for them, nor was it to advocate for any other selective incapacitation scheme. The intention was to develop an offender management approach, as it "afford[ed] the Unit the ability to present the court, police, social services and academics with a comprehensive offender portfolio, creating opportunities to support, enforce and study" (Vancouver Police Department). This becomes essential to keep in mind for the current research, as the question is not, 'were the correct people chosen', but simply, in general, for those that

were chosen, what do their sentencing histories look like? In this way, the current work does not delve into the classic chronic offender questions as outlined in chapter 4; those of, identification, frequency and desistance. Rather, it should be approached as the springboard for policy discussions, as it is impossible to know where you should be going, without knowing where you currently are. Therefore, based on the Unit's criteria, a Master List of all offenders currently monitored by the COP was constructed and used for sampling purposes.

6.3.2 Sample

The sample used in the current analysis consists of two random samples of the 'active offenders' or non-super chronics as identified by the COP (n = 175); the entire population of those deemed "super chronics"¹² as they are a unique and small subset and may be worth analyzing separately (n = 26); and the entire population of female chronics (n = 23), as again, they may be a unique subset and may be worth analyzing separately. This resulted in a total sample of 224 offenders. However, through the coding process, it became apparent that not all offenders had a prolific criminal record, likely due to their inclusion in the chronic offenders' group by meeting criteria 2 or 3 or having the good fortune of rarely being convicted of charges that were laid. As the objective of the current research is to examine sentencing patterns for those whom show a consistent 'career' of offending, a further filter was deemed necessary. Although, as

¹² The term "super chronics" does not denote a particular threshold for offending, but rather, is a term used by the Chronic Offenders Unit to apply to particular offenders whom are particularly habitual or problematic.

discussed in previous chapters, the literature is replete with arbitrary cut-offs for chronic offending and the number of offences that would grant someone such a title, the cut-off for the current research was set at a minimum of five convictions over their career, as this is a well-accepted standard (Blumstein, Farrington, & Moitra, 1985; Wolfgang, Figlio, & Sellin, 1972). This filter eliminated 19 individuals who, as of the end of 2006, had fewer than five convictions, resulting in a final sample of 205 offenders out of the approximately 379 that were being monitored by the COU as of 2006 (Planning, Research & Audit Section, 2008). It should also be pointed out that this lack of criminal record may have come from the omissions in the CPIC database, which are discussed below. However, as the objective is to explore and not explain the data, this limitation does not significantly affect the objective of this research.

6.3.3 Data Sources

The data for this study comes from multiple sources; namely, the Vancouver Police Department's (VPD) jurisdiction-specific extract from the provincial Police Records Information Management Environment (PRIME)¹³, and the Canadian Police Information Centre (CPIC) database, both of which required a separate coding and/or retrieval procedure.

¹³ PRIME is now the province-wide records management environment for all police jurisdictions in British Columbia.

6.4 Canadian Police Information Centre (CPIC)

6.4.1 Description

The CPIC database was created in 1966 as a national repository of information relating to offenders who are of interest to police agencies who are part of the network. CPIC is used by police agencies for a range of purposes, including posting of warrants on particular individuals, relaying messages regarding offences or stolen property so that outside jurisdictions are aware of any new situations, and noting any particular conditions or limitations an offender may be under with respect to parole or probation. CPIC also contains the criminal record of an accused, regardless of where or when in Canada a conviction occurred; however, it is limited to Canadian convictions only. This criminal record is known as an offender's "Level II", and will note the date, location, offences convicted, and outcomes of those convictions for all offenders. The end of the Level II will also note charges that were withdrawn or dismissed, where an offender was acquitted or a stay of proceedings was ordered, although it is not possible to know definitively within what conviction set these charges were taken from.

6.4.2 Coding Procedure

Coding of the CPIC database was a very time-consuming process, and necessitated the creation of many 'coding rules', surrounding in particular the identification and coding of the Most Serious Offence (MSO), the Most Serious Sentence (MSS), and the length of custody. The CPIC record begins with the date of conviction, the court location, then includes all offences that the individual

was convicted of, and the sentences handed down for each. At times, the offences are listed in order of seriousness, but this is not always the case. All offences in each conviction set were coded, as this would be more reliable in assessing the gravity of the entire conviction rather than simply relying on the MSO. A list of all variables coded from CPIC is outlined in Appendix A. Coding of the Most Serious Offence involved the assessment of the particular offences noted on each conviction set, then the rank ordering of these offences according to seriousness. As often the judiciary will hand down the more severe sentence to the most serious offence within the set, the length of conviction (or type) could also be used to reliably rank the offences according to seriousness. The Most Serious Sentence also involved a ranking procedure if more than one type of sentence was ordered for a conviction set. For instance, if a judge sentenced an offender to a stay in prison followed by a term of probation, the prison sentence would be deemed the Most Serious Sentence, while the probation would be included as an additional sentence in the database. These coding rules are further explained below.

6.4.2.1 Most Serious Offence (MSO)

The rules for determining the MSO in a particular conviction set were as follows: (1) violent offences are the most serious in a conviction set; (2) If there is no violent offence (or more than 1 violent crime), the offence with the most serious conviction outcome is considered the MSO; (3) In the cases where there is an administrative offence (such as a breach or fail to appear) and other substantive offences, the substantive offences are always considered to be more

serious than administrative offences; (4) In cases where there are several offences that all receive the same sentence (e.g., one day) in a conviction set, the general seriousness scale outlined by Tracy and Kempf-Leonard (1996) was utilized which ordered offences in seriousness (with the exception of violence, which is always considered the most serious). The magnitude of seriousness from greatest to least serious was as follows: (1) Major violence, (2) Major property, (3) Weapons offences, (4) Major drugs, (5) Major other, (6) Minor violence, (7) Minor property, (8) Minor drugs, (9) Other minor, and (10) Administrative offences¹⁴.

6.4.2.2 Most Serious Sentence (MSS)

The rules for determining the most serious sentence followed the scale whereby 'seriousness' denoted the most impact on an offender's freedom, i.e., custodial sentences such as prison and Conditional Sentence orders would be more serious than non-custodial sentences. In order from most serious to least serious, these were: (1) Custody; (2) Conditional Sentence orders; (3) Probation; (4) Suspended sentences; (5) Fines; (6) Prohibitions; (7) Restitution and compensation; (8) Conditional discharges; and, (9) Absolute discharges.

¹⁴ In 2004, Statistics Canada was tasked with the creation of a new Crime Severity Index, which was to provide a better indication of changes in the nature and severity of offending beyond which the traditional crime rate could explain. The chosen method for determining the 'severity' of a particular offence was to use the incarceration rate and mean sentence length for a particular crime as a way to infer the relative seriousness of that crime. This measure began to be used in 2009 (Wallace, Turner, Matarazzo, & Babyak, 2009)

6.4.2.3 Length of Custody

Determining the length of custody also involved some 'rules', as often the CPIC record would assign differing sentence lengths to separate offences within a conviction set, which left the determination of exactly how long an offender was being sentenced to prison as ambiguous. There were two primary issues associated with this – the first being the existence of concurrent or consecutive sentences, and the second being the existence of a sentence “concurrent to sentence serving”. The first issue of concurrent vs. consecutive sentences involved discussions with a Crown Counsel, CPIC experts, and VPD CPIC records management personnel. From these discussions, it was determined that the judiciary will not place sentences as consecutive without expressly stating as such on CPIC. Therefore, if a particular conviction set noted that custodial time for multiple offences was to be served consecutively, these lengths were added together to obtain the true custody length. Often the CPIC record would also note the converse – that sentence lengths were to be served concurrently. In cases such as these, only the longest sentence length would be recorded, as all other would be negated by being served concurrently to the lengthiest custodial time noted. However, still in other instances, there was no notation with respect to whether sentences were being served concurrently or consecutively, particularly in cases where it was noted (for instance), “30 days on each charge”. This was previously thought to signify consecutive sentences, but after discussions with CPIC transcriptionists and others involved in the process, it was determined that in all cases, unless it expressly stated that sentences were consecutive, concurrent custodial lengths were the reality.

The second difficulty came with the notations of “concurrent to sentence serving”. In these cases, the offender was likely still serving a previous sentence for a prior offence, and the judge then sentenced the new offence to be served concurrently with whatever time they had remaining. Due to this, the calculation of custody time in cases such as this required the determination of how much time was remaining in the previous sentence, then how much net time would be leftover for the new sentence. In an example scenario, ‘Offender A’ was sentenced to four months in prison on June 1st. On July 1st, that same offender was sentenced for a different offence, to two months in prison, *concurrent to sentence serving*. As technically that offender would be serving time on their previous offence for 3 months beyond the current sentencing hearing date, the new sentence would in effect not result in any new time, as they would be ‘let out’ for the new offence a full month before the previous sentence. Although this calculation does not take into account early release or parole decisions, it was deemed more appropriate than a procedure that did not attempt to correct for this situation, as the judge clearly would be cognizant of the fact that the 2nd sentence would net little or no new time, and would therefore be a better representation of the intentions of sentencing.

For operational purposes, one of the two approaches needed to guide the coding to ensure that the data represented the reality as much as possible. As the rules surrounding early release are outside of judicial control, it is reasonable to assume that the judge would have no say in whether the individual was released from their previous sentence early or not. As the sentences were noted

as “concurrent to sentence serving”, it is also reasonable to assume that the accused was not released from custody at the time of sentencing, and would have therefore still been serving their previous sentence. Therefore, the judge would have been cognizant that by ordering their sentence as “concurrent to sentence serving”, they were in effect shortening or even nullifying the new sentence, based on the matter at hand. Due to these observations and assumptions, the resultant sentence was therefore reduced by the amount of time remaining on the previous sentence, to better emulate what may have been in the judge’s mind or their intended incarceration time.

6.4.2.4 Length of Pre-Trial Custody (Remand)

The length of time spent in pre-trial custody was coded separately from the custody length. This was noted on the CPIC record as “time served credit”. In some cases, however, no actual time was noted for pre-trial custody stays, but rather “Time Served” was the only notation on CPIC. In these cases, a value of 9999 was used which would allow for the dichotomous variable creation of “Remand Y/N”. However, in calculations of the typical length of remand and other descriptive analysis, these “Time Served” convictions were excluded as there would be no reliable way to ascertain exactly how long that offender had spent in remand. A limitation of the notation for time served credit, however, is that it is unclear whether this represents a two-for-one credit, or the actual days spent in pre-trial. The assumption is that this represents the actual days spent in pre-trial custody based on the existence of odd numbers of days noted. For instance, if the assumption was that this represented two-for-one credit, then a

notation of “35 days time served credit” would actually represent 17.5 days in custody. Noting a half day in custody is unlikely, as even with a partial day or merely hours, the record is noted as a full day in custody.

6.4.3 Limitations

The CPIC database is often thought of as containing all criminal convictions for every offender, linked through their fingerprint identifier (FPS number). However, for strict summary offences, fingerprints are not obtained, and therefore, that information is not recorded on CPIC. Some police members put this omission at approximately 25 percent of all convictions for property offenders, or those who commit mostly low-level offences. As the objective will be looking at aggregate sentencing patterns, however, this is an acceptable limitation.

6.5 Police Records Information Management Environment (PRIME)

6.5.1 Description

Although now province-wide, the PRIME system has been used as the primary records management system of the VPD since mid-2001. PRIME contains all information pertaining to an offence, including the case synopsis, any associated individuals (whether suspects or otherwise), and links to multiple other tables with additional information about the offender, the location involved, any vehicles involved, or other relevant information. PRIME also contains all information pertaining to the Computer-Aided Dispatch information, which is not

utilized in the current study. Information from two tables was utilized for this study – the “Persons” table, which contains information about a particular offender, and the “GO” table, which contains information about a particular offence. These two tables are linked, which allows for information to be queried out that pertains only to particular offenders.

6.5.2 Coding Procedure

The procedure for obtaining all the relevant PRIME information on each person within the chronic offender sample involved the use of the Master List, and an MS AccessTM database linked to the “Persons” and “GO” (general occurrence) tables in PRIME. The Master List was imported into Access, and linked to the “Persons” table via the surname, given name, and date of birth to ensure the correct individual was queried. The Persons table also contains the relevant GO incident numbers that the individual was involved with, which were queried out as well in this first stage. The second stage involved linking the first table to the GO table, and querying out all the relevant offence information based on the GO incident numbers associated to each individual. As the Persons and GO tables separated by year due to their size, this process was repeated for each year between 2002 and the end of 2006. Once queried, the separate queries were then joined into a Master table that could be sorted according to each individual, and would contain all their offences within PRIME for that time period. The variables queried out of the PRIME database are outlined in Appendix A. Briefly, these include the date, time, and location of offence, as well

as the primary UCR code (offence type), and secondary UCR code, and the person's role in the event (i.e., suspect, charged, chargeable, etc.)

6.5.3 Limitations

There are several limitations to the PRIME data. Of course, all police databases are limited insofar as they cannot capture all the criminal activity of each individual, due to the fact that only those offences brought to the attention of police are ever recorded. As a suspect is not identified in every case, the number of actual events a particular individual is linked to will not be any means represent their offending history in its entirety. However, as that is a limitation for all official data, it does not cancel out its worth.

6.6 Indicator Variables: Offence Seriousness

Although aggregating and binning the number of prior offences and the length of a particular sentence are relatively straightforward, doing the same for offence type becomes significantly more difficult. Numerous research studies have examined the creation of a 'seriousness scale', dating as far back as the 1970s when Wolfgang presented his 'vignettes' of offence seriousness, up to the present day Statistics Canada technique of using a complex weighting mechanism incorporating the proportion sentenced to prison for a particular offence, as well as the length of the prison terms. However, the most popular and widely used technique is to separate offences into large groupings of crime types, based on the most serious offence. It is here where the problem arises with the current study, as while it is primarily exploratory in nature, comparisons

can be made between crime types to begin to envision the judiciary's decision making. However, if the comparisons are not alike, then they are meaningless. Therefore, although a complicated regression model that would necessitate a ratio-level, reliable offence seriousness scale is not constructed, there remains the necessity of comparing apples to apples.

The simplest way to achieve this standardized comparison is to maintain a very high level of resolution in displaying the results. However, as mentioned before, this may obscure general trends or be so 'busy' that the true nature of the data is lost in the detail. Therefore, it is necessary to aggregate and bin to smooth out some of the noise and see the true nature of the data. In some cases, this would be necessary for crime type as well, in order to see long-term trends for generally similar offences. The difficulty comes with how to bin these crime types. A ratio-level offence seriousness scale would be ideal, which would incorporate not only the most serious sentence, but could be weighted for additional offences under each conviction set. However, after examining the available research, this does not seem to be possible with any reliability.

Typically, seriousness scales have been constructed which place offences together in categories ranging from the least serious to the most serious, as was used by Tracy and Kempf-Leonard (1996, p. 69), who rated offences according to a 9 point seriousness scale (ranging from 1 for administrative offences to 9 for major violence offences). Similarly, Ulmer, Kurlychek, & Kramer's (2007) offense gravity score (OGS), ranged from 1 as the least serious, to 14 as the most serious. Statistics Canada recently developed a crime severity

index, albeit for the slightly different purpose of measuring the relative severity of crime over time in certain jurisdictions. In determining the relative 'weight' that each type of offence would receive in the total severity score, Statistics Canada used both the incarceration rate for the type of offence, as well as the mean prison sentence length. The incarceration rate was then multiplied by the average sentence length to arrive at the final seriousness weight for each type of offence (Wallace, Turner, Matarazzo, & Babyak, 2009). The Statistics Canada severity index should rightly be considered the most objective and reliable severity rating scheme developed thus far by a Working Group of respected members of police departments and Universities. However, as the purpose would be to control for offence seriousness while examining sentence severity, using a scale which was constructed using sentence length would be entirely tautological.

As a reliable ratio-level scheme cannot reasonably be constructed that would incorporate not only the most serious offence but also any included offences, the current research will approach this in a very exploratory way. The focus will be on keeping the level of resolution high at the outset, and examining sentences over time for individual offence types, then continuing the exploration into binned categories with singular and multiple offences and types. These binned categories, while noting all the shortcomings discussed above, will be the categories used for the preliminary data coding to ensure consistency. While the argument can be made that these broad categories remove far too much of the detail of each offence to allow for comparisons between offences (i.e., it is likely

not very helpful to discover that sentences for theft offences were lower than for break and enter, even though both are property offences), the stepping up in resolution will allow the research to assess this loss of detail at every iteration and discuss the ramifications. Therefore, the objective, as with the other variables under scrutiny, will be to not lose any detail in the process while endeavouring to produce the most visually instructive outcome for further iterations of the research.

7: ARE SENTENCES INCREASING IN SEVERITY VIS-A-VIS AN INCREASING CRIMINAL RECORD?

7.1 Positivism vs. Realism

Based on previous research examining the nature of judicial decision making to adhere to a positivist or realist approach (Pollard, 2003), the primary research question explores whether the judiciary will be more likely to adhere to a legal positivist approach and follow the legislation as it is set out. This will necessitate, therefore, adherence to the principle of proportionality with respect to the type of offence, regardless of the extent of the offender's criminal record. It is not out of the realm of possibility that due to the length of some of these offenders' careers that they may have come across the same judge during numerous sentencing hearings (particularly in Vancouver where most cases were sentenced). This might tempt the reader to assume that the judiciary, upon seeing the same offender time and again, would resort to a more apathetic viewpoint and therefore adjust sentences to fit their personal feelings about the offender. This possibility does not alter the primary research question, however, as the positivist approach will assert that even in such challenging circumstances, proportionality will continue to be of utmost importance.

In order to answer this question, several aspects of the sentencing history of this group of chronic offenders will be assessed. The majority of the analysis will focus on descriptive statistics and the inferences that can be drawn from

those results. The reason for this is that delving down the road of explanatory statistics is not appropriate in many cases. The data shows basic attributes of each sentence, such as type of offence, number of included offences, the location, and the length and type of sentence. However, as judicial sentencing is thought of as more of an art than a science (Campbell, 1999), numerous other variables likely can and do come into play with any particular judge. As an example, even the location of the court may influence sentencing severity and length, as shown by Kinney (2007), and earlier an examination of judicial disparity by Brantingham (1985). In Kinney's (2007) work, the smaller jurisdictions across BC in general reacted more harshly to offences than larger jurisdictions. This may represent the human side of sentencing, whereby those judges that view hundreds of serious and repeat offenders day after day may become disillusioned with the ability of sentencing to effect change in these individuals. Coupled with the recognition that custodial sentences are costly and that parole and release are decisions outside of judicial control, their willingness to impose harsh or lengthy punishments on offenders may be weakened. If this is the reality, then it is very likely this may be at play in Vancouver, as this is the jurisdiction that shows one of the largest caseloads in the province (Supreme Court of British Columbia, 2009; Ministry of Attorney General, 2010) and one of the highest offence rates for certain offences in the province (Police Services Division, 2011). Many British Columbians, however, feel that sentencing is far too lenient when compared to other provinces (Doob & Webster, 2008). This is particularly pertinent for chronic offenders, as these individuals comprise the

group that causes the most societal harm in terms of the cost of their property crimes, the victims of their property and violent crimes, and the dollars spent on their arrest, prosecution, custody, and post-release contacts with the criminal justice system.

The purposes and principles of sentencing were enacted in 1996 (Bill C-41, 1995) to allow judges the ability to balance those principles in arriving at a judgment. Aspects such as deterrence, rehabilitation, denunciation and retribution all underscored the underlying principle of proportionality. Unlike the *Habitual Offenders Act*, which was enacted in 1947 but repealed in 1977 (Canadian Criminal Justice Association, 2007), the new legislation did not outline any specific caveats for those with extensive criminal records, outside of violent and/or sexual offenders¹⁵. Therefore, there remained little in the official legislation that would allow judges to go beyond the sentencing principles as spelled out, even for chronic (or prolific) property offenders. This raises the question then that once an offender gets to their 20th conviction (for instance), are the principles of deterrence, rehabilitation and protection of society really being adhered to? Arguably not; however, the framers of the legislation left little room for the judiciary to consider prior record. Unlike sentencing schemes in the U.S. (see Chapter 5), the use of prior record to increase the sentence is not explicitly outlined in the legislation. Although leniency is the norm often for the first offence, there is no wording in the legislation that expressly allows increasing the

¹⁵ Although habitual offenders may be subject to *Dangerous Offender* or *Long Term Offender* designations which outline far longer and possibly indeterminate prison sentences, these designations (s. 753 and 753.1 in the *Criminal Code of Canada*), are reserved for repeat violent and/or sexual offenders and thus do not often apply to a group such as these chronic offenders, who 'specialize' in property or less-serious offences.

sentence beyond that which would be reasonable under proportionality based rules solely on an offender's prior record. In this way, prior record is thought of more as an aggravating factor in sentencing rather than a sole determinate of length and severity (MacPherson, 2002).

However, as the judiciary is afforded a wide berth when it comes to sentencing, it may be that they in fact do consider the prior record when sentencing an offender, and increase the sentence while still adhering to proportionality. That is the objective of this research – to begin to assess whether this phenomenon can be seen in the sentencing patterns of these chronic offenders. If judges are adhering to proportionality, then sentence severity should remain relatively constant for the same offences throughout the conviction history. The notion of 'severity' will attempt to encompass the many areas by which severity can be assessed, and not simply based on the length of time in incarceration. To that end, this assessment of 'severity' includes sentence length, sentence type (custodial vs. non-custodial) and existence of pre-trial incarceration. Quite simply, if judges are adhering to the proportionality principle, sentence lengths for similar offences should remain relatively constant, the ratio of incarceration to other sentencing outcomes for similar offences should also remain constant, and the use of pre-trial incarceration should remain constant for similar offences.

7.2 The Vancouver Chronic Offenders

The final sample consisted of 25 super chronic offenders, and 180 active targets¹⁶. The overall sample included one female super chronic offender, and 16 female active targets. As of 2006, the average age of the super chronics was approximately 36 years old with a 37-year spread between the oldest and the youngest offender. Similarly, the average age of the active targets was also 36 in 2006, but with a much larger spread of 47 years between the oldest and the youngest offender. This is likely due to the additional criteria for inclusion set by the VPD, insofar as 'up and comers' may be admitted into the group without having yet accrued a significant criminal record. This may result in a disproportionate number of younger active targets who are admitted into the group at the beginning of their conviction history.

Table 3: Age of Chronics within Sample

	Age as of 2006	
	Super Chronics	Active Targets
<i>N</i>	(25)	(180)
Mean	36	36
Median	34	36
Youngest	21	19
Oldest	58	66

Not surprisingly as this is a Vancouver sample, the majority of convictions occurred in Vancouver. However, this was not exclusive, as the sample did show

¹⁶ The designation of an offender as a 'super chronic' is largely subjective on the part of the Chronic Offenders Unit, and used primarily as a flag on certain offenders for increased scrutiny. Active Targets denotes those offenders which meet the criteria for inclusion in the chronic offenders group, but have not been designated as 'super chronics'.

some relative ‘travel’ in their offending patterns, and did not always start out as (nor stay) Vancouver-specific offenders.

Table 4: Location of Convictions

Location	% of Convictions
Vancouver	60%
Lower Mainland ¹⁷	14%
British Columbia	6%
Outside BC	21%

7.2.1 How Chronic is Chronic?

Not all offences lead to arrest, and not all arrests lead to charges, and not all charges lead to convictions. Although the focus of this work uses a minimum number of convictions as a cut-off point, it is instructive to view the prolific nature of the offence patterns before they show up in the court record. To that end, the following analysis examines this sample of chronic offenders’ contacts with police in Vancouver over the 2002-2006 time span to better understand the extent of their criminal activity¹⁸.

Between the time periods of 2002-2006 (five years), this sample of chronic offenders accumulated over 7,000 contacts with Vancouver Police as recorded in the Police Records Information Management Environment (PRIME).

¹⁷ This includes all Lower Mainland municipalities East to Chilliwack, but excluding Vancouver.

¹⁸ One ‘active target’ was not captured within PRIME, likely due to a coding error either on the databases or by the researchers. It is felt that this limitation does not impact the results significantly and only results in a 0.5% error for the ‘active targets’ results, and a 0.49% error overall for the entire sample. Therefore, the exploration of the RMS data will be conducted on the 204 members within the sample.

Table 5: Contacts in PRIME

Group	N of Incidents (2002-2006)	Mean Incidents per Offender (2002-2006)	Mean Convictions per Offender (2002- 2006)	Mean Convicted Offences per Offender (2002-2006)
SC (N = 25)	1,293	31	11	22
AT (N = 179)	5,791	52	9	18
Grand Total	7,084		1,919	3,737

Not all contacts within that time frame represent offences, however, as approximately 22 percent of the contacts indicated that some member of the sample group was a suspect in an offence, but was not charged or chargeable. As is shown, the majority of incidents during this time period resulted in someone either being charged or deemed chargeable but not charged, which equates to the super chronics having on average 36 chargeable offences within the five year time frame, and the active targets having an average of over 22 chargeable offences within the time frame.

Table 6: PRIME Offences and Roles (2002-2006)

Role in Incident	SC (N = 25)	AT (N = 179)	Grand Total	% of total
Charged (all)¹⁹	633	3,057	3,690	52%
Chargeable²⁰	284	920	1,204	17%
Suspect (all)	283	1,243	1,526	22%
Checked	63	443	506	7%
Subject	24	78	102	1%
Passenger-Driver	6	50	56	1%
Grand Total	1,293	5,791	7,084	

¹⁹ "all" denotes both adult and youth offenders

²⁰ "Chargeable" refers to offences whereby the police have sufficient evidence to recommend charges to Crown Counsel, but a formal charge is not laid by Crown.

By examining only those convictions occurring in Vancouver courts within the 2002-2006 timeframe, a very rudimentary examination of how many offences lead to convictions can be examined. There are numerous limitations to this approach; however, as the court processing data that would allow for the following of a charge through to case resolution is not included in this analysis. However, a rough estimation can be made. The table below sets out the information for Vancouver only. As is shown in Table 7, this group was charged or chargeable in 4,894 incidents between 2002 and 2006. During that time, this group was convicted of 3,160 offences within 1,635 conviction events within Vancouver, representing approximately 86 percent of their charged incidents. This ratio was slightly lower for the Super Chronicles.

Table 7: Vancouver specific Convictions and Offences

Vancouver Only	SC	AT	Total convictions (2002 and 2006)
Convictions	237	1,398	1,635
Convicted Offences	482	2,678	3,160
Charged Offences	633	3,057	3,690
Chargeable Offences	284	920	1,204
<i>% of Charged Incidents leading to Conviction (all convicted offences)</i>	76%	88%	86%

Again, this comparison must be taken with caution, as the case processing information is not included herein. The PRIME incidents as coded here are based on the MSO, while the number of convicted offences includes all included convictions within a particular conviction set. Although the conviction sets occurred in Vancouver courts, it is possible that additional charges were waived

to Vancouver from other jurisdictions, and therefore, not all of the convicted offences within each conviction set may represent Vancouver-specific offences. In addition, the convictions noted on the criminal records during this time frame may represent offences which occurred prior to or after the time limits imposed. Regardless of the precise number, it is clear that these chronic offenders are committing offences far beyond what their criminal record shows.

To bring this further into perspective, all contacts and convictions for the sample were joined chronologically for the period between 2002 and 2006. As is shown below, the sheer volume of this sample’s use of the criminal justice system during those five years alone is immense:

Table 8: Role Counts (2002-2006)

	Charged- Chargeable	Convicted	Checked	Driver- Passenger	Suspect	Subject	Grand Total
Super Chronics	917	272	63	6	283	24	1,565
Active Targets	3,977	1,647	443	50	1,243	78	7,438
Grand Total	4,894	1,919	506	56	1,526	102	9,003

As the group size for the super chronics and the active targets is different and therefore lends differing totals to these figures, the average number per member gives a better indication. The average convictions and charged/chargeable contacts, which added with the additional ‘roles’ as in Table 8, means that the super chronics, between 2002 and 2006 had an average of 63 criminal justice contacts (police and courts), while the active targets between 2002 and 2006 had an average of 42 criminal justice contacts. To better

visualize this impact, the following graphic shows the number of both charged and chargeable incidents that this group amassed as a whole in 2004:

Figure 1: Charged and Chargeable Incidents in 2004 (all)



Further perspective on their impact on the criminal justice system can be gained by examining their criminal conviction history, as much of the above analysis was limited to only five years. The average career length for this sample of chronics (to 2006) spanned 16 years, with 50 percent of the sample having received their first conviction by 1990. By the end of 2006, this group had amassed on average 24 convictions each encompassing 45 individual convicted charges²¹. The most prolific offender, however, had accumulated 82 convictions by 2006, encompassing 161 separate charges over an almost 50-year career period, while the second most prolific had accumulated 73 convictions and nearly 180 convicted offences.

Table 9: Number of Convictions, Charges and Career Length of Sample

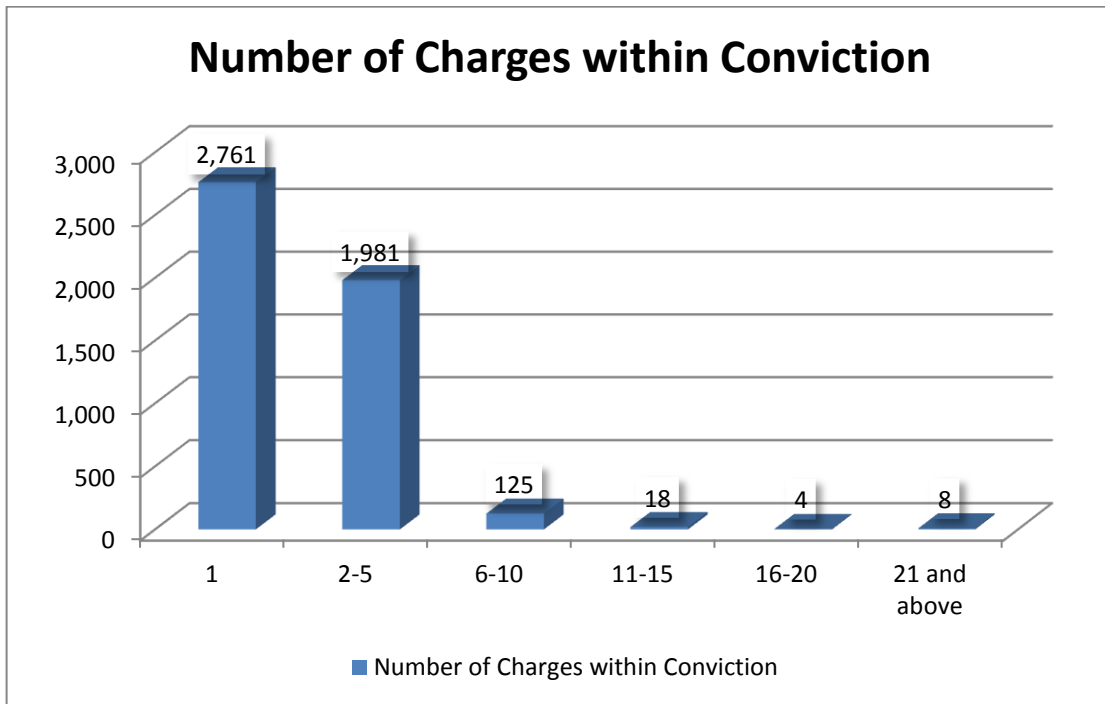
		1st Conviction	Last Conviction (2006 unless noted)	Total Convictions	Total Convicted Charges	Career Length (to 2006)
N	<i>Valid</i>	205	205	205	205	205
Mean		1989		24	45	16
Median		1990		21	36	16
Mode		1991		18	32	21
Minimum		1957	1999	5	7	
Maximum		2006		82	179	

By the end of 2006, this group of offenders had criminal convictions spanning on average 16 years and totalling 4,897 convictions. While some had just started (the 'up and comers'), others were well entrenched in the criminal lifestyle with over two decades of convictions.

²¹ As there can be many charges within a conviction set, these numbers are presented separately for clarity.

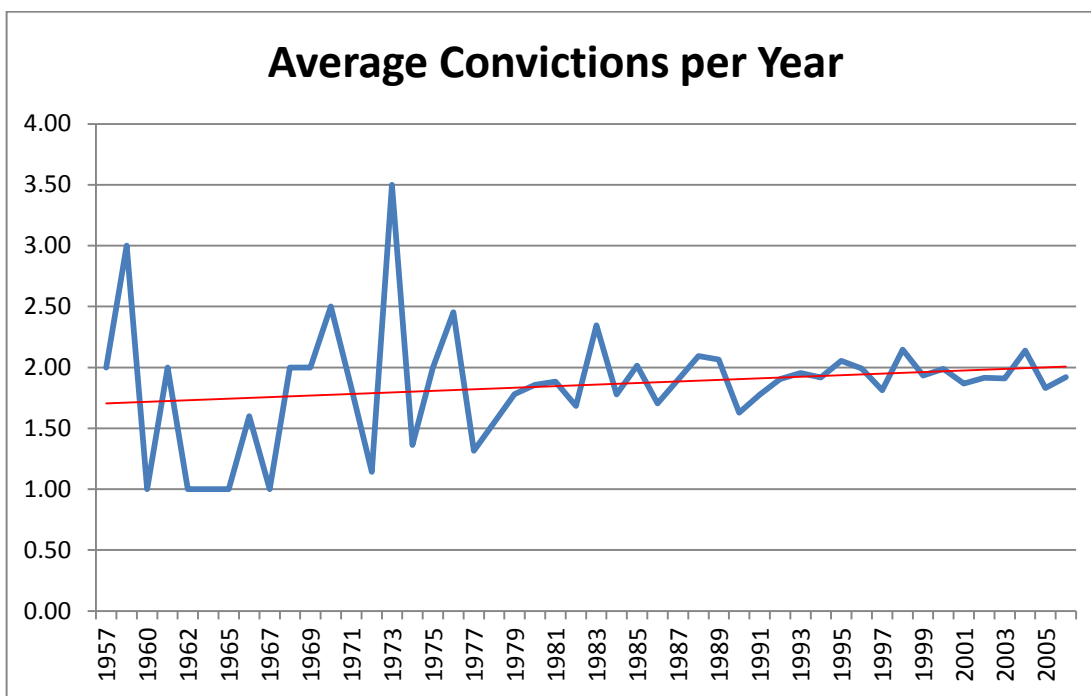
For the most part, the analysis has focused on the conviction set, which is representative of the Most Serious Offence within a particular conviction. However, as was shown in Figure 2, it is possible to have more than one guilty verdict for more than one offence within a single conviction set. This necessitates the division between “Total Convictions” and “Total Convicted Charges” as shown above in Table 9. More often than not, these offenders would go before the judge with only a single charge, as in over 56 percent of the cases. However, a small percentage were sentenced for multiple offences within the same conviction, which contributes to the *Total Convicted Charges* referenced above in Table 9. In six percent of cases, judges had to give out a sentence for five offences or more in a single decision. In only 1 percent of cases did judges have to decide an appropriate sentence for offenders found guilty of 10 or more offences. In one particular case, the offender was sentenced for 41 offences in total, more than likely for previously unsolved offences for which he or she pled guilty to or was linked to in the course of the investigation.

Figure 2: Charges within Convictions



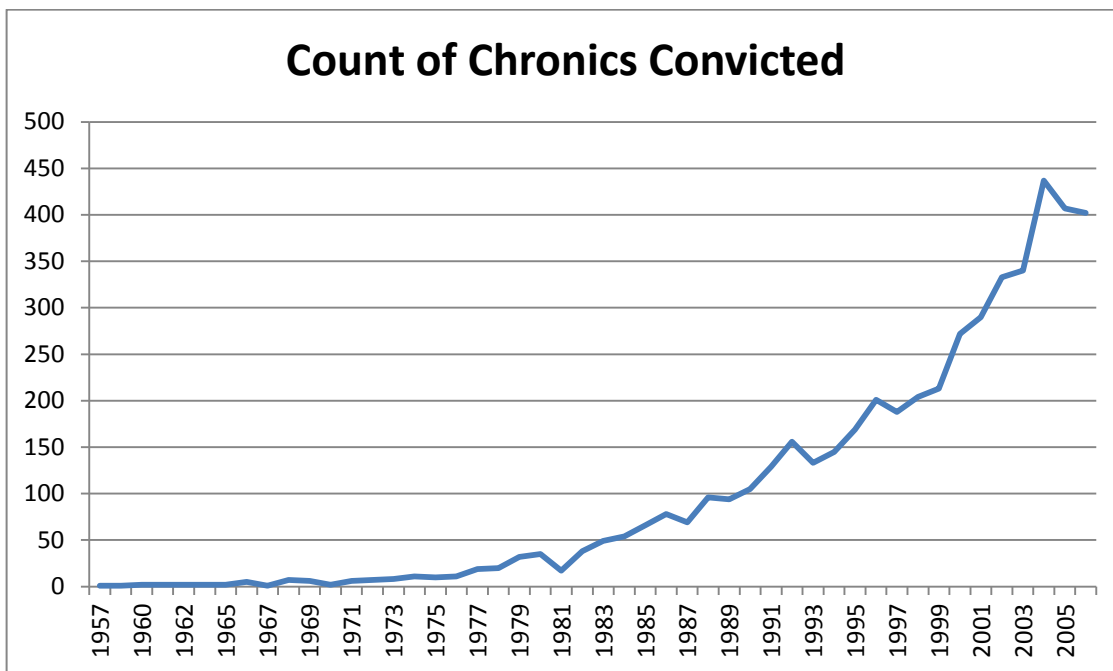
All together, since 1957, this group of 205 offenders was convicted 4,897 times for 9,474 offences. The top 10 offenders alone (approximately 5 percent of the sample) were responsible for 664 convictions representing 1,417 offences, and all had over 50 convictions and over 100 convicted offences each.

Figure 3: Average Convictions per Year



On average, this group was in court twice per year, as noted in Figure 3 above. Their impact on the court system, as a group, increased over time as more individuals were ‘admitted’ to the chronic offender’s group. Although this particular sample’s criminal records range back several decades, this is only for a small percentage of this sample. Therefore, the steady rise in the number of chronics convicted per year does not necessarily indicate that these offenders are getting ‘worse’ or more abundant; rather, it is again simply a function of how many offenders were admitted into the group in the early 2000s when the Chronic Offenders’ Program was initiated, and how many of those had amassed a lengthy criminal history by that point. Due to this artificial influx of members, this group’s impact was felt more significantly in the late 1990s into the 2000s:

Figure 4: Chronics Convictions per Year



The foregoing has served to illustrate the extensive nature of this group’s criminal offending to provide some scope to the discussion. As is clearly demonstrated, this group on average moves far beyond the classic cut-off of five convictions, contacts or arrests over the span of their career (Farrington, 1979). What is also important to examine, however, is the nature of their criminal offending and not simply the number of times they have offended. To that end, the types of crimes this group committed over their conviction history will be examined in the foregoing section.

7.2.2 Conviction History Specialities

As is shown clearly by their criminal records and the sample of PRIME data, these offenders more often than not focus on committing property offences, with a large proportion of so termed ‘other’ offences. Caution should be taken

with comparing the two datasets, as UCR definitions do not always translate directly to *Criminal Code* definitions, and vice versa, nor does the Vancouver contact data necessarily reflect the conviction history of this entire group.

Table 10: Chargeable Offence Types (2002-2006 in PRIME)

Role:	Charged or Chargeable (all)	
<i>Offence Category (UCR)</i>	<i># of Incidents</i>	<i>% of total</i>
Property	2,428	50%
Other	1,298	27%
Drugs	514	11%
Violent	348	7%
Other Provincial Statutes	182	4%
Miscellaneous/Other	116	2%
Breach	8	0%
Grand Total	4,894	100%

In terms of convictions, this group’s criminal history reads similarly to their police contact records, with property offences such as *Theft Under*²² and *Break and Enter* dominating their activities. In all, this sample committed over 136 different offence types over their conviction history. Although a complete list of every one is not overly instructive, the top ten offence types are shown below:

²² This includes the varying monetary levels of the “Theft Under” offence, which has steadily increased over the years in the Criminal Code to its current level of \$5,000 as the cut-off between *Theft Under* and *Theft Over*.

Table 11: Top 10 Most Frequent Offence Type (convictions on CPIC)

Offence Type (Primary Offence)	N	% of Top 10	% of Total
Theft Under ²³	1,407	41%	29%
Break & Enter	508	15%	10%
Fail to Comply w/ Probation	375	11%	8%
Assault (<i>Level I</i>)	225	7%	5%
Possession of Stolen Property (Over)	189	6%	4%
Possession of Stolen Property (Under)	169	5%	3%
Narcotics Possession	143	4%	3%
Drug Trafficking	137	4%	3%
Drug Possession	126	4%	3%
Robbery	118	3%	2%
Total Top 10	3,397		
Total Convictions	4,897		

The top ten offences account for nearly 70 percent of the total offences convicted, demonstrating a relatively narrow range of the majority of offending. As is evident, this group's offending is dominated by *Theft Under* offences, encompassing nearly 30 percent of the total convicted offences, and over 40 percent of the top ten convicted offences. Administrative offences are also prominent, demonstrated by the large proportion of breaches of probation. Although violence is not overly prominent in the group's offending patterns, it is not altogether absent. Simple assaults are present in the top ten offences, as well as robberies, although these violent offences contribute only five percent and two percent respectively to the overall total offences for which this group had been convicted. This is notable as well due to the coding scheme of the conviction data, wherein violent offences would have taken precedence over any non-violent offence as the Most Serious Offence should they have been

²³ Although the 'over' and 'under' monetary limits in the Criminal Code have increased throughout the years, these will simply be termed without those monetary limits for ease of display.

sentenced together. This is important to keep in mind throughout, as the more minor the offences, the more likelihood that their true existence in the dataset is obscured by the necessity of coding the most serious offence. These minor offences may also be dropped by Crown during the charge approval process or plea bargaining process, and may be relatively more difficult to solve by police, and therefore may never reach the official criminal record. Therefore, the conviction data may be most reflective of their true offending for violent offences, but may represent a slight undercount of their offending for less serious property offences. This, however, is not the case for serious property offences such as break and enter, as they would be coded more often as the most serious offence if a violent offence was not included in the conviction set. This limitation, despite being present, is not of major concern, as the majority of convictions (as noted previously), involved only a single offence.

While it is clear that the majority of offences contained in the official records for this group focus on property offences such as *Theft Under*, the notion of whether they 'specialize' is not necessarily supported in the classical sense. While they may commit Theft Under the most often over other types of offences, the majority of offenders in this sample have been convicted across a range of offence categories. The following represents the number of chronics within this sample that have been convicted (either as a primary offence or as a secondary or tertiary offence within a conviction set) across offence type categories:

Table 12: Participation in Offence Categories

At Least One	N	% of Total	More Than One	N	% of Total
Violent	153	75%	Violent	115	56%
Property	203	99%	Property	198	97%
Drugs	150	73%	Drugs	119	58%
Administrative	192	94%	Administrative	168	82%
Other	172	84%	Other	152	74%

Table 13: Convictions Spanning Across all Categories

Convictions in 1 category	2	1%
Convictions in 2 categories	9	4%
Convictions in 3 categories	30	15%
Convictions in 4 categories	60	29%
Convictions in 5 categories	104	51%

As over half of the offenders within this sample have convictions in all five categories of offences, with a small percentage “specializing” in only one or two offence types, the image of the professional auto thief or house burglar does not fit well for most offenders within this sample.

This analysis supports several conclusions. First, this group of chronic offenders has accumulated an enormous number of police contacts and convictions – much more than the classic cut-off of five or more convictions. The second conclusion is that on the whole, these offenders have been offending over a long period of time, and well beyond what would be considered the ‘desistance’ point for most offenders (Laub & Sampson, 2001). Third, these offenders commit property offences most often, and have criminal records dominated by *Break and Enter* and *Theft Under* offences. This creates a picture of a long-term offender, who is generally older, and who is not committing serious acts of violence as their primary offence the majority of the time. Sentencing,

then, becomes a difficult venture for this type of offender. Typically, sentences for such lower-level property offences are short, regardless of the maximum penalty outlined in the *Criminal Code*²⁴. For instance, the median number of days sentenced to custody for Theft offences in Canada has held constant at 30 days in Canada between 2002 and 2007. The median sentence length for Break & Enter offences in Canada rose from 150 days in 2002 to 280 days between 2004 and 2006, then dropped to 260 days in 2007 (Marth, 2008).

However, as is the point of this work, whether or not the judiciary will increase the severity of their sentences in tandem with their ever-increasing criminal record remains to be seen. This will be explored in the following section.

7.3 Questions of Proportionality

The discussion now turns to the three primary questions to be explored in order to assess whether it appears the judiciary are adhering to proportionality in sentencing. As noted, the key aspect of this analysis is severity, insofar as according to proportionality, the sentence severity should remain relatively constant over the conviction history regardless of the number of previous convictions, as the current offence should be the primary consideration. This does not, however, rely on complete uniformity across the conviction history. Undoubtedly the judiciary takes into account previous record when assessing protection of the public and deterrence (other sentencing principles); however,

²⁴ For example, the maximum penalty for a Break and Enter is defined as life in prison in the *Criminal Code*; however, the more common length has been around five to six months historically (Marth, 2008).

this variation should still necessitate the current offence sentence be kept in line with previous sentences.

7.3.1 Offence Severity over the Conviction History

The primary difficulty in the current work is the need to compare ‘apples to apples’. What is meant by this is that, when it comes to sentencing, comparison of severity or length by certain offences or offence classes has limitations. Understandably, case facts in terms of severity and type of offending may vary, even within offence categories. The issue of seriousness and the ranking therein has been, and remains, a significant hurdle when conducting sentencing research (see Brantingham, 1985). In addition to case-specific elements, judicial characteristics may vary in terms of consistency and their individual adherence to exercising leniency or incorporating aggravating or mitigating circumstances into their sentencing determination. The recognition that offender characteristics may also vary, primarily in terms of their criminal history, is the overarching objective of this work. Despite these inherent limitations, the foregoing analysis will serve as a point of inference for the conclusion of whether the prior criminal history of this chronic offenders sample appears to influence sentencing severity as that record increases.

The primary issue in determining sentence severity concerns determining offence severity. As mentioned in previous chapters, an indicator variable denoting offence seriousness, for this particular objective, would have been replete with tautological errors, and thus, was not constructed. Therefore, offence severity will rely more on the broad categorizations of offences to infer

whether these offenders are committing proportionally more serious offences over time, or whether their offence severity appears to remain relatively constant. Once a clearer picture of this reality is gained, then the analysis can go on to explore whether the severity of sentencing appears to keep in tandem with the general trend.

A high-level way of exploring offence severity is to examine the most serious offence group over the course of the conviction history. As the PRIME data only shows a snapshot of the years 2002-2006, this analysis will rely solely on the CPIC data, as it encompasses the criminal conviction history in its entirety. The number of convicted offences in each of the ‘severity’ categories is shown below:

Table 14: Most Serious Offence Categories

MSO	N	%
Major Violence	241	5%
Minor Violence	334	7%
Major Property	958	20%
Minor Property	1,916	39%
Admin-Breach-Other	747	15%
Drugs	536	11%
Vehicle-Driving	165	3%
Total	4,897	100

Using these categories allows for the examination of these offence groupings over the conviction history, as show below:

Table 15: Offence Severity over Conviction History

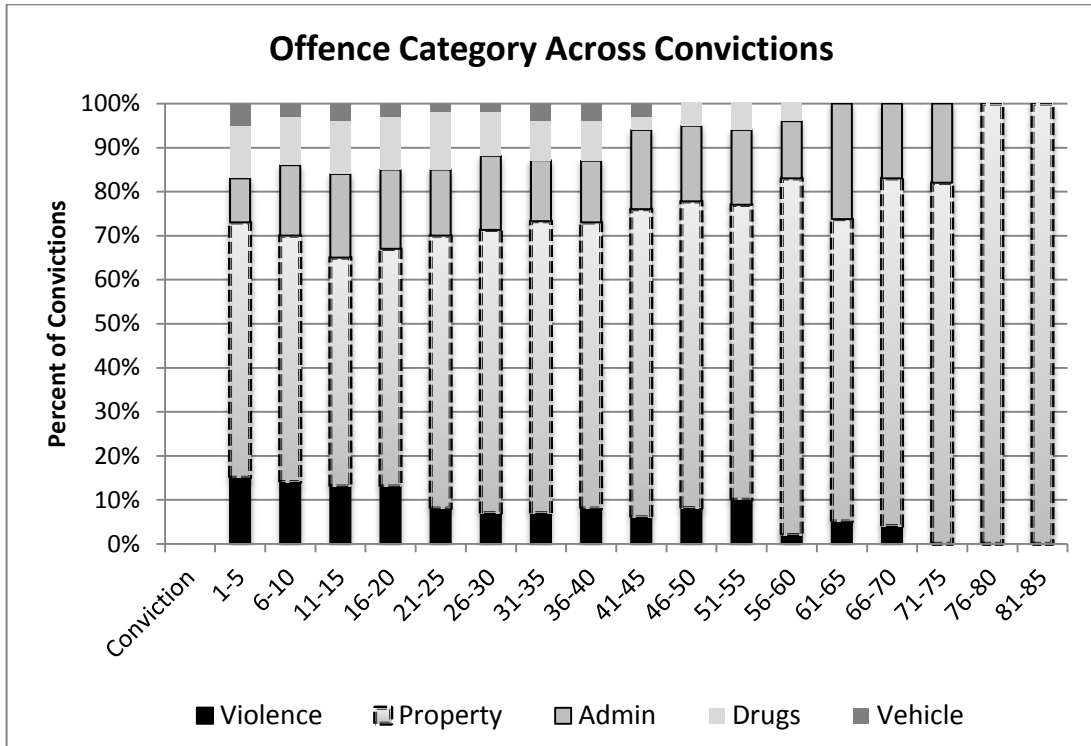
Conv	Maj V		Min V		Maj P		Min P		Admin-Breach		Drugs		Vehicle		N
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	
1-5	68	7	89	9	263	26	330	32	100	10	123	12	52	5	1025
6-10	57	6	74	8	209	23	307	33	145	16	103	11	32	3	927
11-15	47	6	53	7	130	17	264	35	144	19	94	12	31	4	763
16-20	29	5	47	8	110	18	220	36	108	18	75	12	18	3	607
21-25	13	3	22	5	96	21	186	41	69	15	59	13	9	2	454
26-30	13	4	10	3	47	14	168	51	56	17	32	10	6	2	332
31-35	4	2	11	5	40	18	109	49	31	14	21	9	8	4	224
36-40	3	2	10	6	18	11	84	54	22	14	14	9	6	4	157
41-45	1	1	6	5	10	8	73	61	22	18	4	3	3	3	119
46-50	3	3	5	5	10	10	58	59	17	17	5	5	-	-	98
51-55	3	5	3	5	7	11	35	56	11	17	4	6	-	-	63
56-60	-	-	1	2	4	8	35	73	6	13	2	4	-	-	48
61-65	-	-	2	5	5	13	21	55	10	26	-	-	-	-	38
66-70	-	-	1	4	4	17	15	63	4	17	-	-	-	-	24
71-75	-	-	-	-	4	36	5	45	2	18	-	-	-	-	11
76-80	-	-	-	-	1	20	4	80	-	-	-	-	-	-	5
81-85	-	-	-	-	-	-	2	100	-	-	-	-	-	-	2
Total		5%		7%		20%		39%		15%		11%		3%	4,897

Aggregating the categories of violence and property allows an easier interpretation of the mix of offending across the conviction history:

Table 16: Aggregated Categories - Offence Severity Across the Conviction History

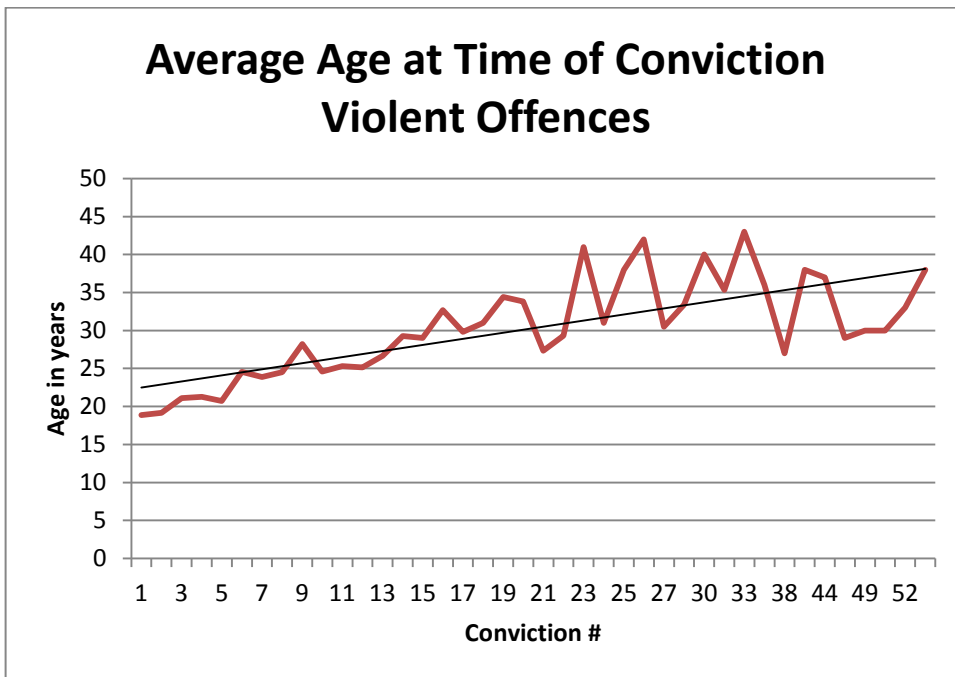
Conviction	Violence %	Property %	Admin %	Drugs %	Vehicle %
1-5	15%	58%	10%	12%	5%
6-10	14%	56%	16%	11%	3%
11-15	13%	52%	19%	12%	4%
16-20	13%	54%	18%	12%	3%
21-25	8%	62%	15%	13%	2%
26-30	7%	65%	17%	10%	2%
31-35	7%	67%	14%	9%	4%
36-40	8%	65%	14%	9%	4%
41-45	6%	70%	18%	3%	3%
46-50	8%	69%	17%	5%	0%
51-55	10%	67%	17%	6%	0%
56-60	2%	81%	13%	4%	0%
61-65	5%	68%	26%	0%	0%
66-70	4%	79%	17%	0%	0%
71-75	0%	82%	18%	0%	0%
76-80	0%	100%	0%	0%	0%
81-85	0%	100%	0%	0%	0%

Figure 5: Aggregated Categories - Offence Severity Across the Conviction History



As is shown above, the mix of offence types does vary as the criminal record increases. Although major property offences (led by *Break and Enters*) figure more prominent in the earlier convictions than in later convictions, minor property offences figure far more prominently in the offending landscape than any other offence category across all convictions. Major violent offences, while rare, figure more prominently between the 1st and 20th conviction, showing a similar trend to minor violent offences, which make up 9 percent of the 1st to 5th convictions, but only 5 percent on average of conviction sets after the 21st conviction. This is also a function of age, as is shown below for the violent offences:

Figure 6: Average Age at Time of Conviction (Violent Offences)



While it would be erroneous to make any hard and fast conclusions based on these broad categories, on the whole, property offences dominate this group's convicted offences, with minor property offences quickly leading the way as the most common offence.

Using the PRIME data as a reference point, it can also be recognized that the majority of offences near the end of the study period (up to 2006) were for *Theft Under (minor property)*, *Break and Enter (major property)* and *Fail to Comply with Probation (admin)*. As was shown in Table 11, these three offences made up nearly 50 percent of all charged or chargeable offences for this group between 2002 and 2006. Save for *Break and Enter*, the other two offences can be considered relatively minor, and not liable to exorbitantly harsh sentencing. Viewed another way using the broader categorizations, the progression of offending over the course of the conviction history can be further illuminated:

Table 17: Seriousness Scale (Convictions)

- 1 Major Violence
- 2 Minor Violence
- 3 Major Property
- 4 Minor Property
- 5 Admin-Breach-Other
- 6 Drugs
- 7 Vehicle-Driving

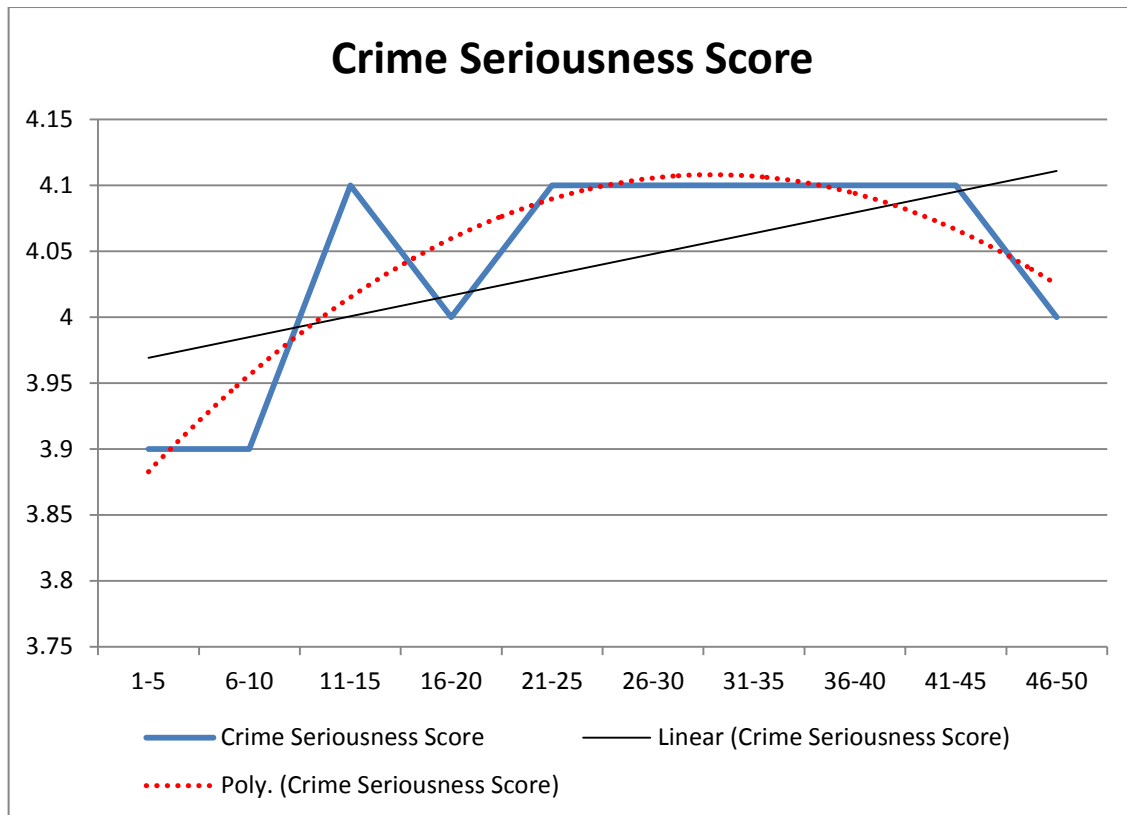
Table 18: Seriousness over the Course of the Conviction History

Conviction #	N	Range (inclusive)	Mean Seriousness	Std Dev
1-5	1,025	1 to 7	3.9	1.5
6-10	927	1 to 7	3.9	1.4
11-15	763	1 to 7	4.1	1.4
16-20	607	1 to 7	4.0	1.4
21-25	454	1 to 7	4.1	1.2
26-30	332	1 to 7	4.1	1.2
31-35	224	1 to 7	4.1	1.2
36-40	157	1 to 7	4.1	1.2
41-45	119	1 to 7	4.1	0.9
46-50	98	1 to 6	4.0	1.0
51-55	63	1 to 6	4.0	1.1
56-60	48	2 to 6	4.1	0.7
61-65	38	2 to 5	4.0	0.8
66-70	24	2 to 5	3.9	0.7
71-75	11	3 to 5	3.8	0.8
76-80	5	3 to 4	3.8	0.4
81-85	2	4 to 4	4.0	-
Grand Total	4,897		4.0	1.3

The difficulty with trying to assess seriousness over the course of this sample's conviction history is the clustering on minor property crimes throughout the range of convictions. As shown above, the average 'seriousness' score for offending throughout the conviction history for this sample stayed very close to a 4.0, which represents minor property. It therefore is nearly impossible to discern very much movement either away from serious offending or towards it over the conviction history. With lower numbers of offenders accumulating more than 50 convictions on their criminal record, the subsequent movement is not reliable. Examining the 1st to 50th conviction ranges, however, demonstrates the stability in offending seriousness, with a very slight decrease in seriousness following the 10th conviction. The trend towards more serious offending after the 60th conviction is not a reliable comparator, as again, the low numbers in these

categories carry more influence over the results and leave them too sensitive to outliers. Figure 7 shows this slight decrease in offence seriousness from the 1st to 50th conviction, keeping in mind that lower numbers denote more serious offences:

Figure 7: Crime Seriousness (conviction 1-50)



To attempt to further gain a more solid grasp on whether or not the severity of offending is stable across the conviction history, a third analysis was conducted using the PRIME UCR²⁵ codes found in the VPD database. During the coding process, each conviction and subsequent offence under the Criminal Code was designated with the appropriate UCR code found in PRIME. Briefly,

²⁵ Uniform Crime Reporting

these UCR codes assign a numeric code to every type of offence according to its relative severity within each grouping. The 1000's are assigned to violent crimes, with Murder having the first code in the series, following down the line to sexual assaults (1300s), physical assaults (1400s), to robberies (1600s). Similarly, property offences are assigned the 2000 codes, with break and enters having the first codes in the series, and so on. The designation of these codes is very similar to the categorization scheme used in the foregoing sections; however, using the specific UCR code allows for more detailed analysis. The limitation of this approach, unfortunately, is that the UCR codes and the convicted Criminal Code offences are not an absolute fit. As UCR codes were designed for a police purpose, in some instances they carry more detail that is easily identifiable than the *Criminal Code* sections do. For instance, motor vehicle theft is a useful distinction to make in police databases to immediately discern greater detail about an offence. However, when charged, the offender will be subject to the *Criminal Code* offence of Theft Over (or Theft Under depending on the value of the vehicle). In this way, the use of the UCR coding as a severity measure has to be taken with some caution due to the subjective nature of the reverse-engineering of the UCR code definitions from the *Criminal Code* convictions. Despite these limitations, as a way to further highlight severity over the conviction history, these UCR codes are useful. When the correlation between the UCR code severity and the conviction number (representing the progression of the conviction history) was conducted, it was found to be a significant negative, although very weak, relationship. However, when age is controlled for, the

significance of this relationship drops off. In all likelihood, the best way to subjectively assess severity is to look at the predominant categorical assignments as was done above.

As is clear, major and minor violent offences have relatively little to contribute to this sample's criminal record, and are even less prominent the more convictions are accumulated. What continues to be prominent, however, are convictions for Minor Property offences. Therefore, we can examine sentencing severity through this lens to see whether custody appears to increase in tandem with a growing criminal record, despite the stability of offence severity from the first to the last conviction in the study period.

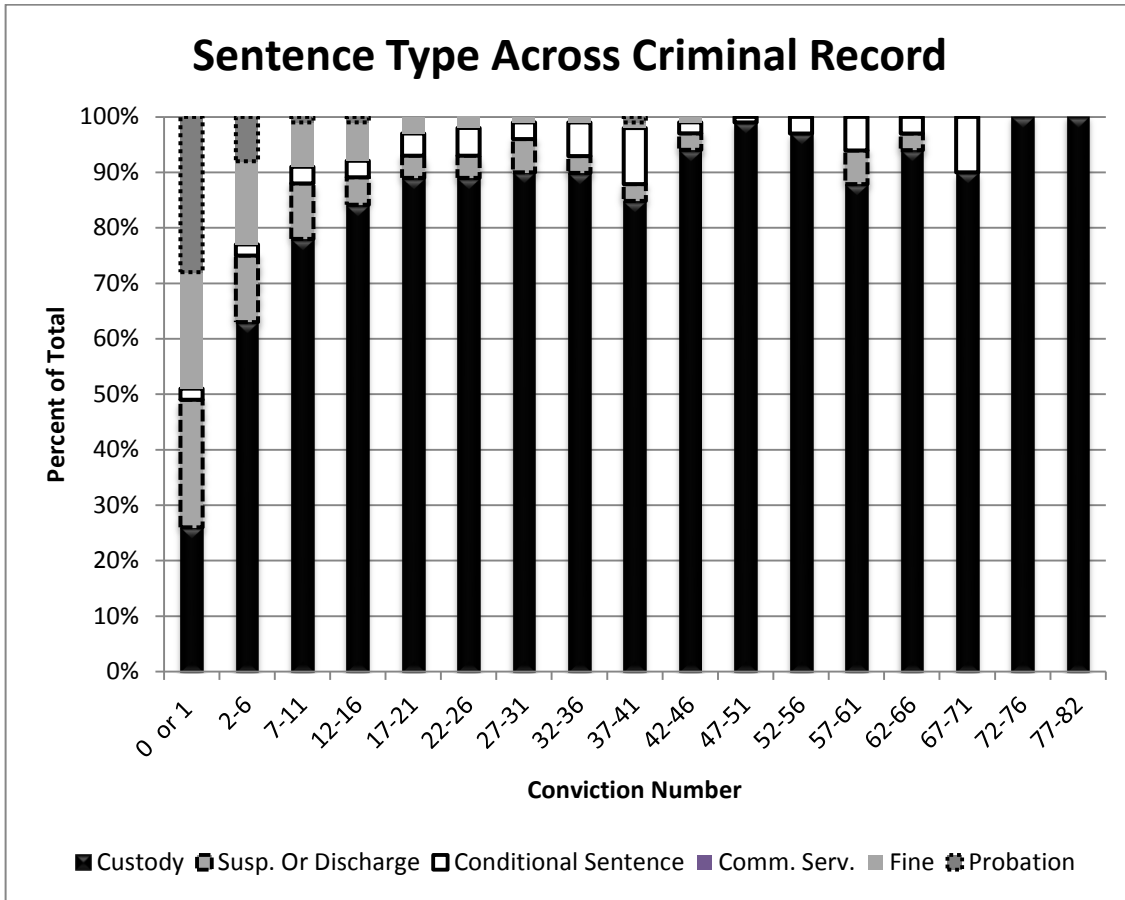
7.3.2 Type of Sentence

Although sentence length is typically used to assess 'severity', other aspects of the sentencing process are equally viable to explore, such as whether a term of custody was imposed on the offender, or whether they received more lenient or diversionary sentences for their offences. Clearly, if the judiciary is willing to impose only probation or a conditional sentence on the chronic offender group but then steadily increases the proportion of cases receiving custody, then it can be asserted that they are imposing more severity in their sentencing as the conviction history progresses.

Table 19: Sentence Type (MSS) Severity across Conviction History

# of Priors	Custody	Susp. Or Discharge	Conditional Sentence	Comm. Serv.	Fine	Probation	Row Total
0 or 1	26%	23%	2%	0%	21%	28%	100%
2-6	63%	12%	2%	0%	15%	8%	100%
7-11	78%	10%	3%	0%	8%	1%	100%
12-16	85%	5%	3%	0%	7%	1%	100%
17-21	89%	4%	4%	0%	3%	0%	100%
22-26	89%	4%	5%	0%	2%	0%	100%
27-31	90%	6%	3%	0%	1%	0%	100%
32-36	89%	3%	6%	0%	1%	0%	100%
37-41	84%	3%	10%	0%	1%	1%	100%
42-46	95%	3%	2%	0%	1%	0%	100%
47-51	99%	0%	1%	0%	0%	0%	100%
52-56	97%	0%	3%	0%	0%	0%	100%
57-61	87%	6%	6%	0%	0%	0%	100%
62-66	94%	3%	3%	0%	0%	0%	100%
67-71	90%	0%	10%	0%	0%	0%	100%
72-76	100%	0%	0%	0%	0%	0%	100%
77-82	100%	0%	0%	0%	0%	0%	100%

Figure 8: Sentence Type (MSS) Severity across Conviction History



What is seen by the above table and figure is that the judiciary does in fact appear to follow the just deserts model of granting leniency for the first offence (see Chapter 2), With 28 percent of first convictions receiving probation and only 26 percent receiving custody, this adherence to leniency for first-time offenders is clear within this group’s criminal history. This is likely due to nearly half of the offenders being disposed of in Youth Court for their first offence, where leniency

is likely far more of the norm²⁶. While this appears in lockstep with a trend of leniency, it is interesting to note that the Law Reform Commission in 1976 commented that the fact that one in five first-time offenders were receiving a prison sentence was “depressing” (Hartt, Lamer, Mohr, & Forest, 1976). The fact that for this group of offenders the proportion was one in four is interesting.

However, this first offence leniency quickly changes following the first conviction, as probation drops off as the Most Serious Sentence and custody increases nearly three-fold, despite nearly one-third of the second and third convictions being sentenced in Youth Court. This supports the drop-off in leniency beyond the first offence, regardless of whether the offender is present in Youth or Adult court. When these offenders have amassed seven or more convictions, nearly three-quarters are sentenced to a term of custody, regardless of the offence type. This recognition appears to support the notion then that the judiciary does appear to increase the severity of sentences for this offender group, regardless of the apparent stability or decrease in their offence severity over time. Although speculative, this is likely due in large part to the growing criminal record which each offender finds behind them when faced with the sentencing judge in court. This finding is also significant when compared to Canadian trends on the whole, as in general from 2006 to 2007, the percentage of guilty cases sentenced to prison was approximately 35 percent for *Criminal*

²⁶ Comparisons between Youth Court and Adult Court are not reliable for this analysis, as not all Youth convictions are recorded on the CPIC record. Therefore, those convictions in Youth Court will be treated similarly to those in Adult Court, as if they remain on the CPIC record, then they would also be made available to the judge at sentencing and could therefore influence the sentencing outcome.

Code offences, and approximately 41 percent for property offences (Marth, 2008).

Using the most prominent offences within each category, the increase in severity in terms of type of sentence can be further explored with reference to national averages. Overall in Canada in 2008, prison sentences were ordered for offenders found guilty of Robbery 76 percent of the time (ACCS Survey, 2008). In comparison, this group of chronic offenders received prison 67 percent of the time for their first Robbery offence. However, for offenders committing Robbery who had accumulated between two and five convictions (of any type), this percentage rose to nearly 90 percent. Those being sentenced for Robbery with over 12 convictions saw prison 94 percent of the time, and after accumulating 17 convictions, this group was sentenced to prison for Robbery 100 percent of the time from then on out.

For minor violent offences, the most common offence was simple Assault (Assault level 1). In Canada, common assaults were sentenced to prison 15 percent of the time in 2008. However, for this group of chronic offenders, upon a first offence (with no prior record), they were sentenced to prison 25 percent of the time. Upon being sentenced for a common assault with even a short criminal record (e.g., between 2 and 6 convictions on the criminal record), this percentage being sentenced to prison jumped to over 60 percent of cases and steadily rose as the criminal record grew to between 80-90 percent of cases.

A similar pattern emerged for Break & Enter offences, which saw only 38 percent of first-time offenders within this group being sentenced to prison,

compared to 57 percent nationally. However, upon being sentenced for subsequent Break & Enters with a growing criminal record, this group of offenders generally saw prison sentences between 80-95 percent of the time.

For theft²⁷, approximately 40 percent of cases were sentenced to prison in Canada; however, for this group of offenders, their first conviction for theft would garner only an 8 percent imprisonment rate. This proportion, however, would rise to a nearly 60 percent imprisonment rate for offenders sentenced for Theft with between 2 and 6 convictions on their record, and would rise to and remain between 80-90 percent of cases as the criminal histories grew.

What appears clear is that the judiciary is far more hesitant to attach a non-custodial sentence to offenders who come before them with lengthy criminal records, regardless of the type of offence.

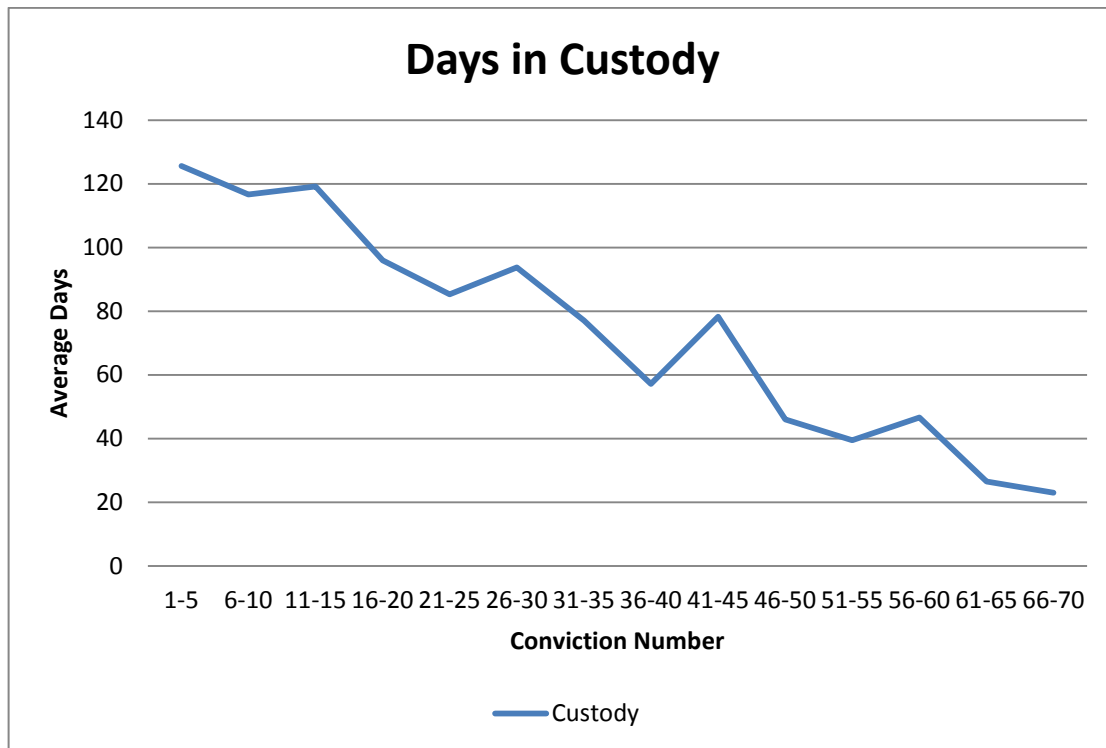
7.3.3 Length of Sentence

Along with whether a term of custody was ordered or not, an important factor in examining 'severity' is also how long that offender was sentenced to custody. Understandably, a longer term of imprisonment is considered more severe than a shorter term and may denote whether the judiciary appears willing to go beyond the boundaries of proportionality for these chronic offenders. As a starting point, Figure 9 shows the overall trend in custody (n = 3,859) for these offenders throughout their conviction career. Again, as the offenders reaching

²⁷ The ACCS survey did not separate Theft Under with Theft Over, and therefore the categories will be aggregated for the chronic group in this example for continuity of comparison.

over 70 convictions were few, the analysis only examines up to the 70th conviction for this group.

Figure 9: Days in Custody and Pre-Trial Custody over the Conviction History



Although it may be tempting to assert that the sentence severity, in terms of length of custody, is decreasing significantly for these offenders over their conviction history, several issues need to be kept in mind. The first is that relatively few offences were sentenced to custody at the beginning of the conviction history; therefore, those that were, were likely more serious and would have denoted a long prison sentence. Also, as the existence of major violent offences drops off early in the conviction history, the sentence length overall would also decrease. Third, the use of the average may be too sensitive to extreme values, which could possibly explain some of the variation as well. What is likely more instructive, as comparisons should only be made on 'like' offences,

is to examine custody lengths for similar offences across the conviction history. To that end, median sentence lengths for the offence categories across the conviction history will provide a more appropriate tool for interpretation.

Table 20: Median Sentence Lengths across Offence Categories

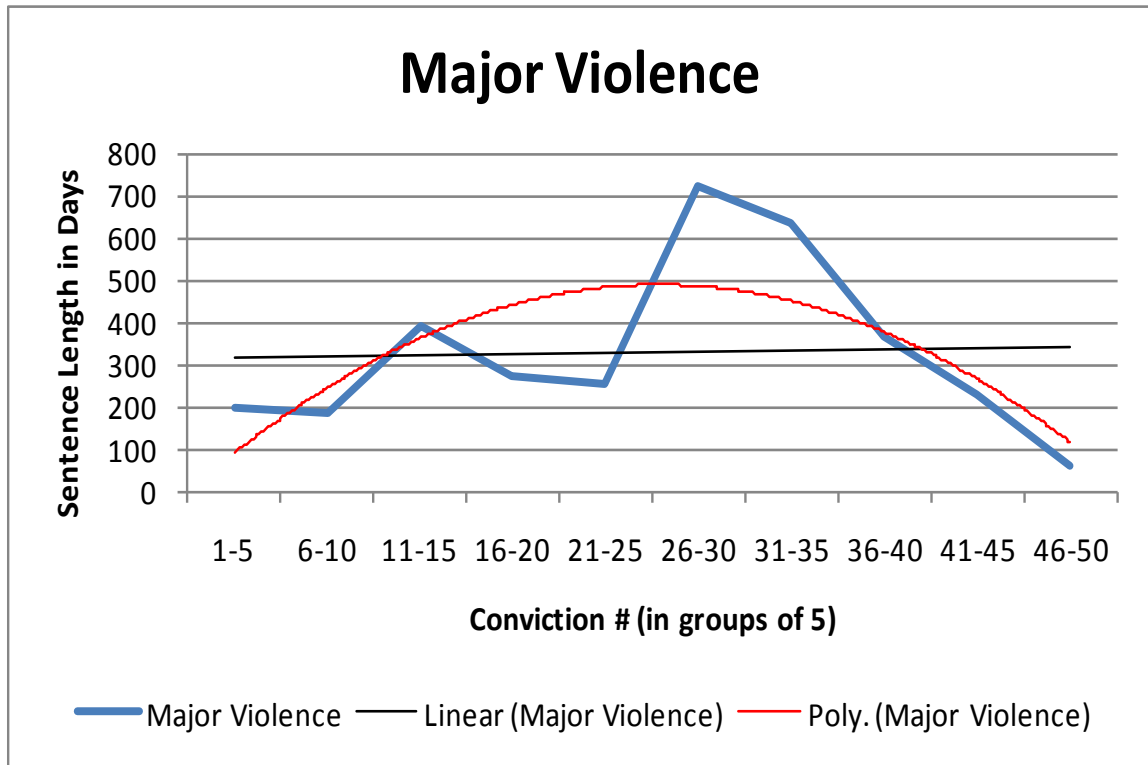
MED Conv #	Maj. V		Min. V		Maj. P		Min. P		A-B-O		Drugs	
	M	n	M	n	M	n	M	n	M	n	M	n
1-5	198	56	30	46	91	162	14	153	10	66	10	57
6-10	183	47	30	48	122	182	19	230	7	117	14	65
11-15	395	43	30	43	122	112	21	215	10	127	5	79
16-20	274	27	45	44	90	103	30	193	14	95	30	66
21-25	257	12	30	19	122	87	30	163	8	66	10	51
26-30	725	12	53	10	122	42	30	152	7	53	1	27
31-35	635	4	30	9	60	33	30	92	1	30	30	19
36-40	365	3	43	9	91	13	26	74	7	19	10	13
41-45	227	1	425	4	91	10	45	67	30	19	2	4
46-50	60	3	60	5	106	10	21	57	5	17	1	5

** offences past the 50th conviction are not shown, as their low numbers run the risk of producing skewed results that may interfere with the overall interpretation of the trends. Therefore, this cut-off was felt necessary.*

7.3.3.1 Major Violent Offences

Major Violent offences show the most variability across the conviction history, most likely due to the wide latitude that judges are afforded with these offences, for which the maximum punishments may be up to life imprisonment. In general, however, the median sentence ranged from approximately six months to two years (up to conviction number 30 only).

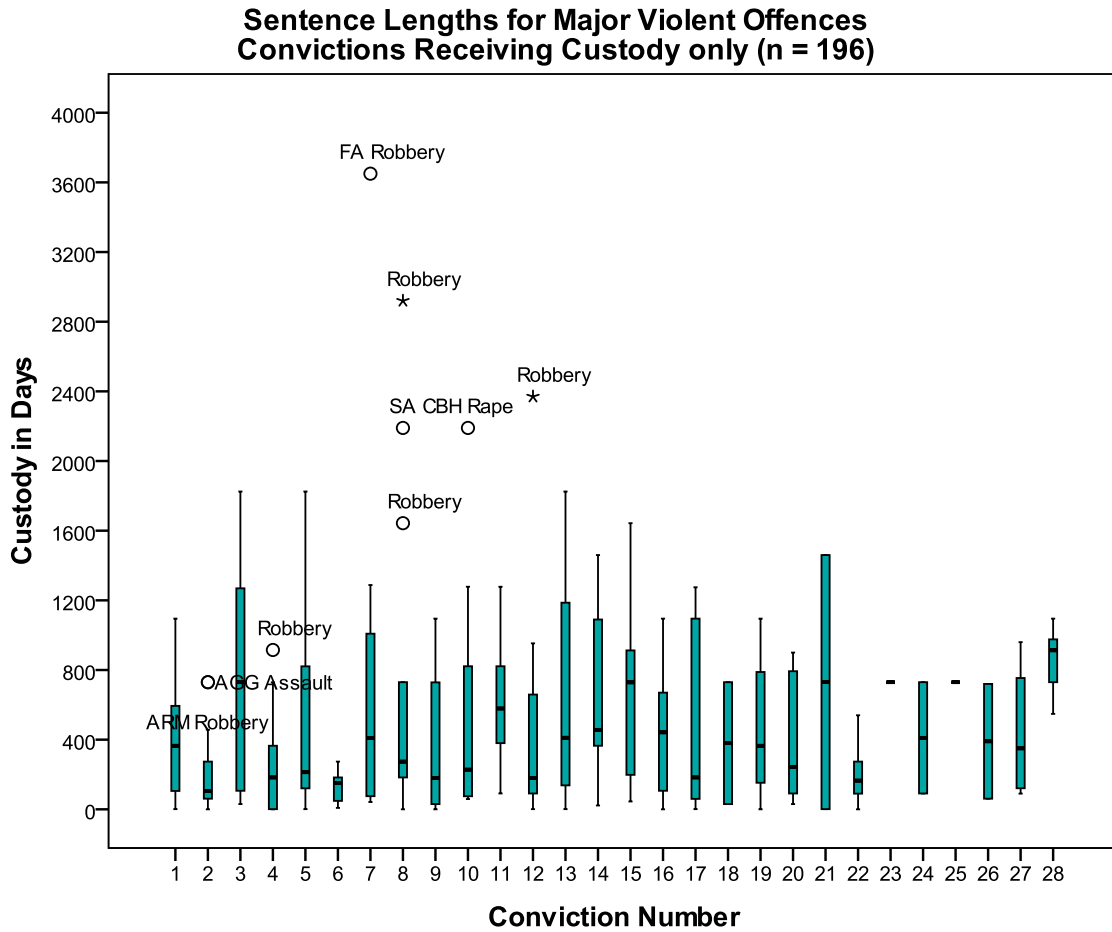
Figure 10: Major Violent Conviction Sentence Lengths



Using up to the 50th conviction for a major violent offence demonstrates the curvilinear trend in the median sentence lengths; however, the number of convictions garnered after the 30th drops significantly (12 to 3), so the downwards trend following the 30th conviction needs to be taken with caution.

Shown another way, the box plots present a more holistic view of the trends in lengths of sentences, while highlighting those exemplary sentences:

Figure 11: Sentence Lengths for Major Violent Offences

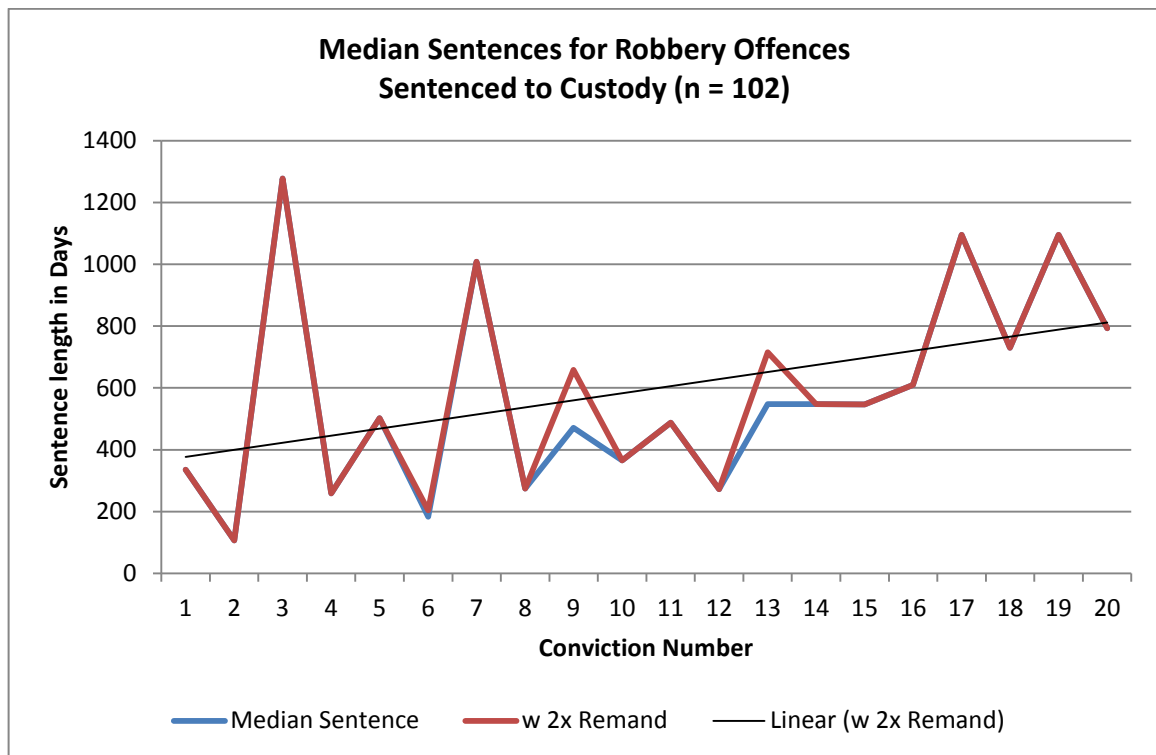


As can be better seen in this graph, the exemplary sentences for major violence offences tend to occur (for this group) nearer to the beginning of the conviction history than the end. Due to the low numbers of occurrences in later convictions, in order to better display the boxplots, only conviction 1 through 28 are shown. These exemplary sentences appear to have more to do with the nature of the offence, rather than the length of the criminal record. Most offences that occur outside of the normal range are for Robbery, Sexual Assault, and Aggravated Assault, although these offences were not limited to the initial convictions. Therefore, it is reasonable to assume that in these particular

instances, the nature of the offence or the harm done to the victim was such that the judge felt a lengthier sentence was warranted. Overall, sentences tend to be for under three years, regardless of how long the conviction history was for these individuals.

In order to see these lengths through an even finer resolution, the most common major violent offence was separated from the data for exploration – that being Robbery (including attempts).

Figure 12: Median Sentences for Robbery Offences Sentenced to Custody



By examining only one offence type under Major Violence, a much more significant trend emerges with respect to sentence lengths, even when considering time spent in pre-trial. Overall, the median sentence lengths for the first and second convictions are much lower than the national median

(2006/2007) of 540 days (Marth, 2008). However, this quickly reaches the national median after the first few convictions, and hovers approximately one year greater than the 540-day national median after the offender had accumulated approximately 15 convictions. Although this particular analysis only captures the first half of Figure 10, the upward trend seen during the same points during the conviction history are similar. However, as Robbery offences are relatively sparse after the 20th conviction, the downward trend seen in the second half of the conviction history in Figure 10 may be due to an increase in the number of slightly less serious violent offences bringing down the median sentence length. While the overall linear trend does appear to be increasing with the growing criminal history, when assessed as to the statistical correlation, the relationship between conviction number and length of sentence in days was not significant at the 0.05 level for Robbery convictions sentenced to custody ($r = 0.141$, $p = 0.185$).

7.3.3.2 Minor Violent Offences

Despite an anomaly in Minor Violent offences with those who had accumulated between 41 and 45 offences (threats and assault convictions), in general these offences saw ranges between 30 and 60 days throughout the conviction history, and demonstrated a slight upwards trend in sentence length as convictions were accumulated.

Figure 13: Minor Violent Conviction Sentence Lengths

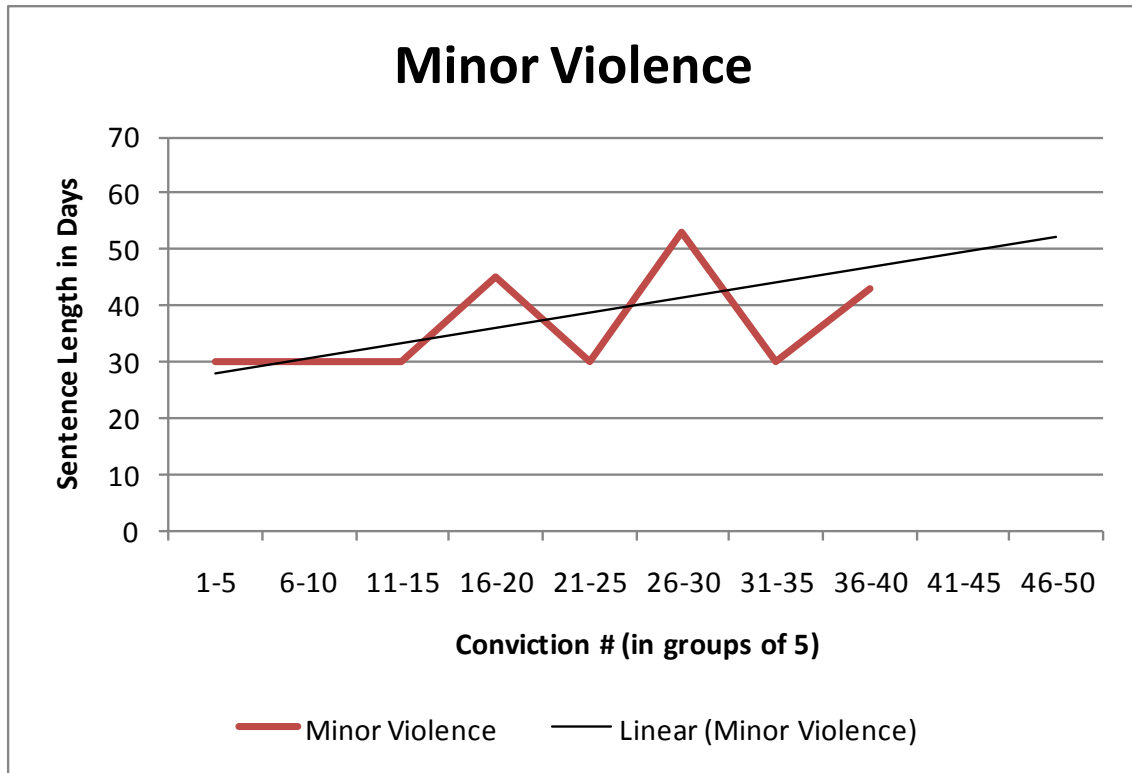
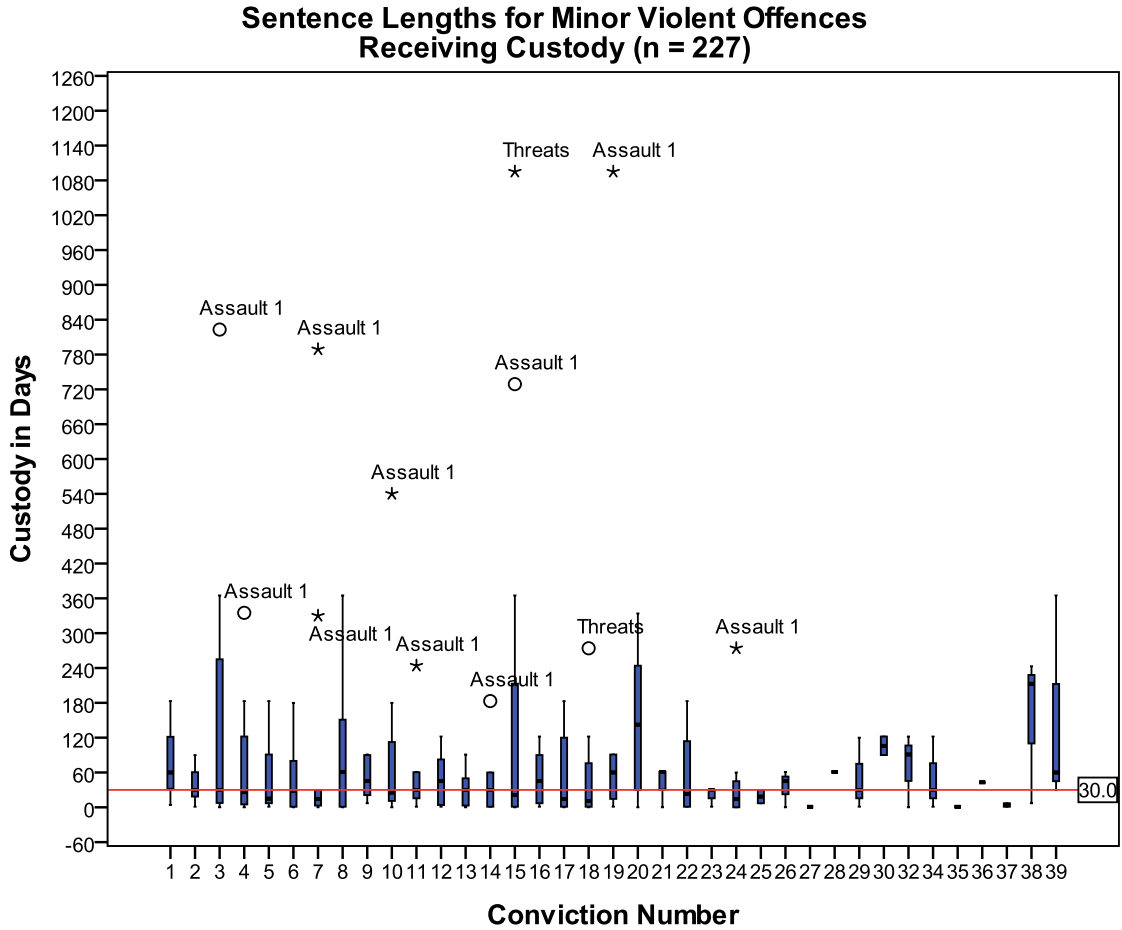


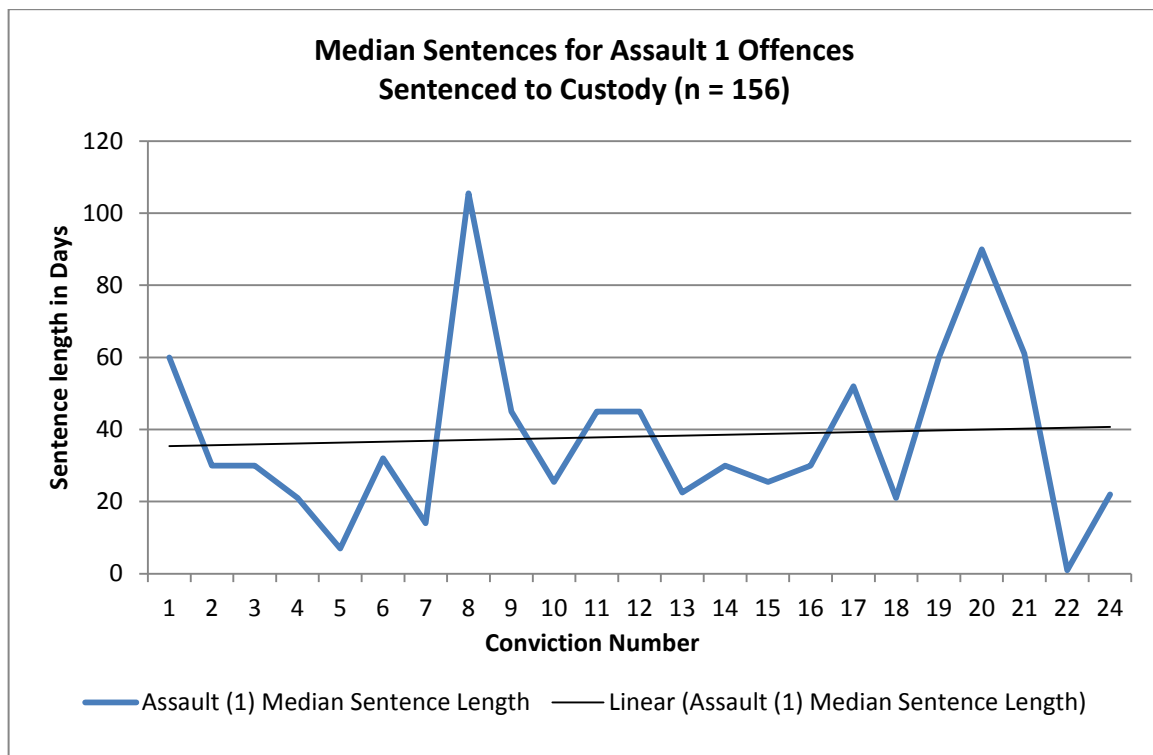
Figure 14: Sentence Lengths for Minor Violent Offences



For the exemplary sentences for minor violent offences, there was no discernable pattern in terms of the year of conviction, the city of conviction, whether the offender was held in pre-trial, or the type of offence. Again, it would appear that at certain times for certain offences, the sentencing judge is willing to apply lengthier sentences, likely due to the harm imposed by the offence. Overall, it is difficult to discern a significant level of ‘step-up’ as the criminal history grows for minor violent offences, despite perhaps a slightly upwards trend shown in Figure 13.

Again, using a finer lens, the most common offence in this category, Assault Level 1 (or Common Assault) can be examined. As is shown, up to the 24th conviction, the median sentence lengths tend to hover around 40 days, with noticeable spikes around the 8th and 20th conviction. Unusually large jumps overall for minor violent offences do not appear to be present, although the variability that is present in all sentencing trends makes firm conclusions difficult. With a national median of 30 days for common assault (Marth, 2008), the overall median for this group rising to approximately 40 days arguably does not demonstrate a significant step-up in sentence length. Again, the linear correlation between the length of custody and the number of convictions for Assault 1 convictions was not significant at the 0.05 level ($r = -0.021$, $p = 0.775$).

Figure 15: Median Sentences for Assault (I) Offences Sentenced to Custody



7.3.3.3 Major Property Offences

Major Property offences, despite some (i.e., Break and Enter) carrying severe maximum penalties, generally stayed within the two to four month range, and demonstrated a slight downwards trend in the length of sentence as the conviction history went on.

Figure 16: Major Property Conviction Sentence Lengths

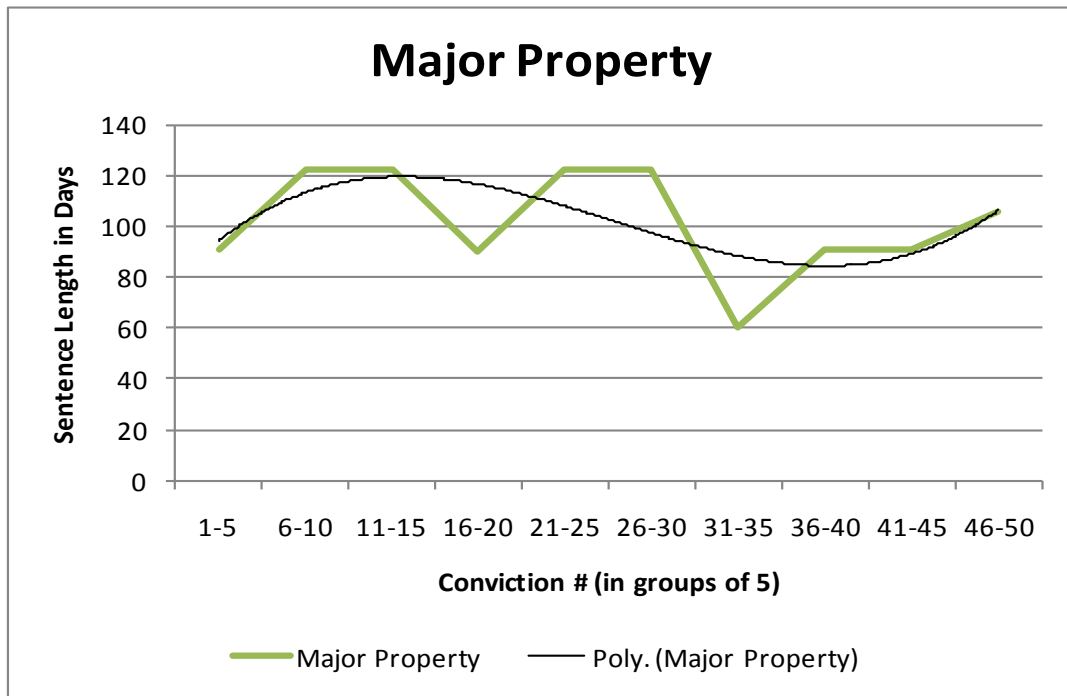
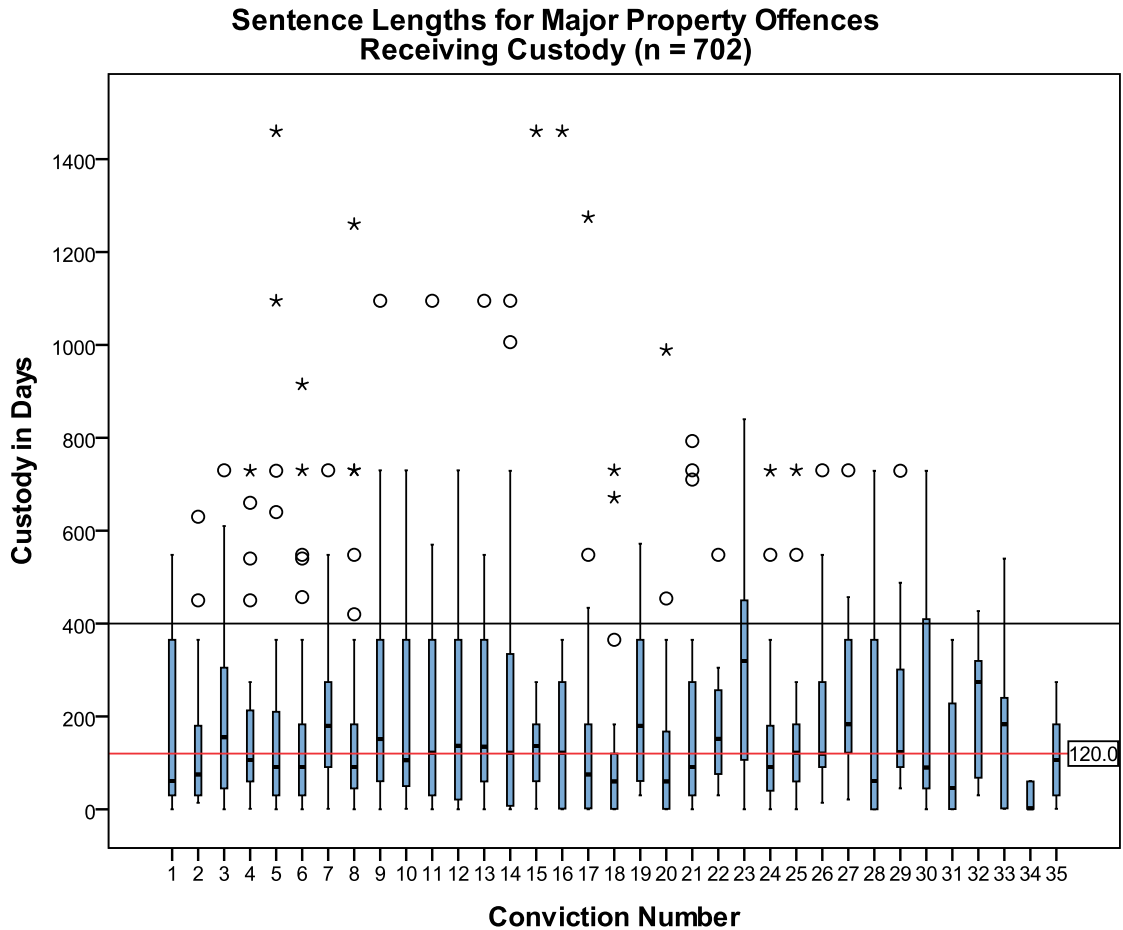


Figure 17: Sentence Lengths for Major Property Offences



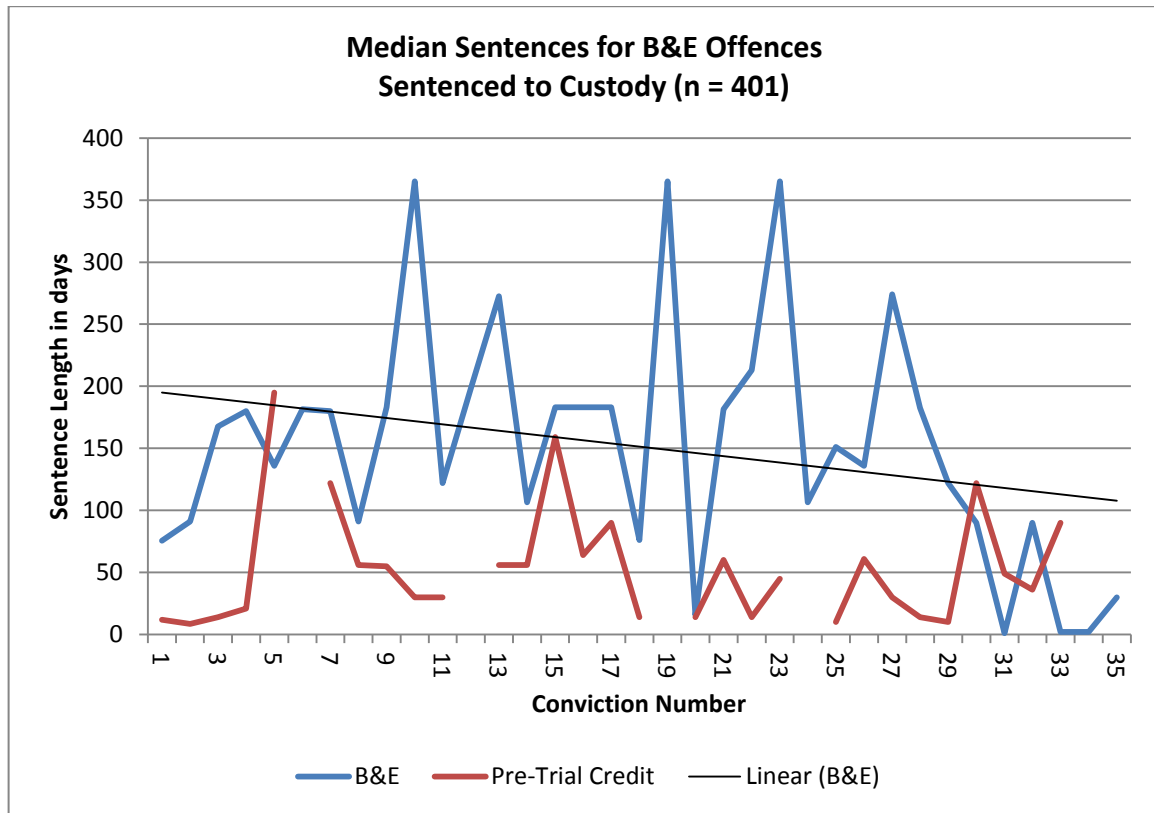
The trends for major property offences, when viewed under a more detailed resolution, seem to point to two observations. The first being that there are a significant number of exemplary sentences outside the usual range. As the vast majority of offences in this category are *Break & Enter*, and this offence has a maximum statutory range of up to life in prison, this result may not be overly surprising. Although *Theft Over* offences also figure prominently, the majority of exemplary sentences are for *Break and Enters*. As the judiciary are given significant discretion in the Criminal Code to affix sentences, this may contribute to some of the variability. However, what can also be seen is the relative stability

in terms of length for most of the sentences in this category. As can be expected, there is some variation; however, the median sentence lengths only surpass 200 days in a small number of cases. In general, the median sentence lengths hovers around 120 days, and in all but one conviction category, over half of the sentences are for less than 400 days. In addition, only 0.02 percent of convictions resulting in a sentence more than 2 years in prison. With the wide berth afforded to the judiciary for *Break and Enter* offences (which encompassed 60 percent of convictions in this category), a significant step up in sentence length could be several years, which is not seen save for a handful of convictions.

As *Break and Enters* are the most serious, and the most prominent, offence within the Major Property category, it is not unexpected that when separated from the rest of the offences, the median sentence lengths are higher than is seen in general in Figure 16 and Figure 17. Although the linear trendline appears to be decreasing with the increasing number of convictions, this is likely partially offset by the use of pre-trial custody for offenders committing this type of offence. Pre-trial credit was particularly prominent for *Break and Enter* offences, although not always for an extended period of time, as shown below. Again, median sentences above one year do not appear to be the norm, although as is shown in Figure 17, they are certainly not unheard of. What appears to be present in figure below is the existence of perhaps some initial leniency in terms of sentence severity for the first several convictions. It is not until approximately the 10th conviction that the median sentence lengths begin to touch one year.

This may show some initial leniency on the part of the judge, but the removal of that leniency once a pattern of chronicity is established. The overall median trendline for this type of offence appears to stay generally in line with the national median for Break & Enter, being 160 days (Marth, 2008). This trend, as discussed, appears to decrease after the 20th conviction, with some significantly high and low median sentence lengths.

Figure 18: Median Sentences for B&E Offences Sentenced to Custody



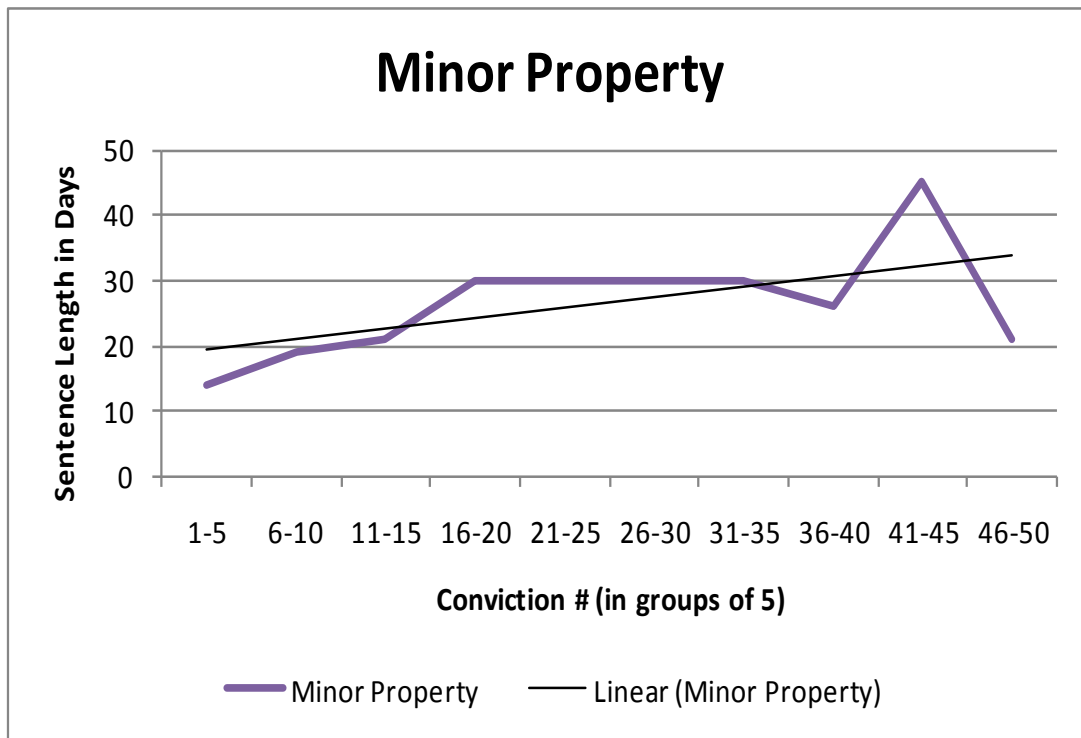
The linear relationship, although negative, was not found to be significant between the length of sentence and conviction number ($r = -0.77$, $p = 0.108$). What is also interesting to note is that no clear linear relationship was found even for those offenders who were sentenced for subsequent Break & Enters. If a judge was to sentence an offender for committing the same offence time and

again, it may be reasonable to expect a step-up in sentence length each time. However, this pattern did not emerge for these offenders, even when considering pre-trial custody. While some subsequent Break & Enter convictions would garner a lengthier sentence than the one prior, others would drop significantly (again, even when considering pre-trial custody) in time sentenced to incarceration. What this indicates is that the judiciary appear to be placing more importance on the nature of the offence than the offenders' criminal record.

7.3.3.4 Minor Property Offences

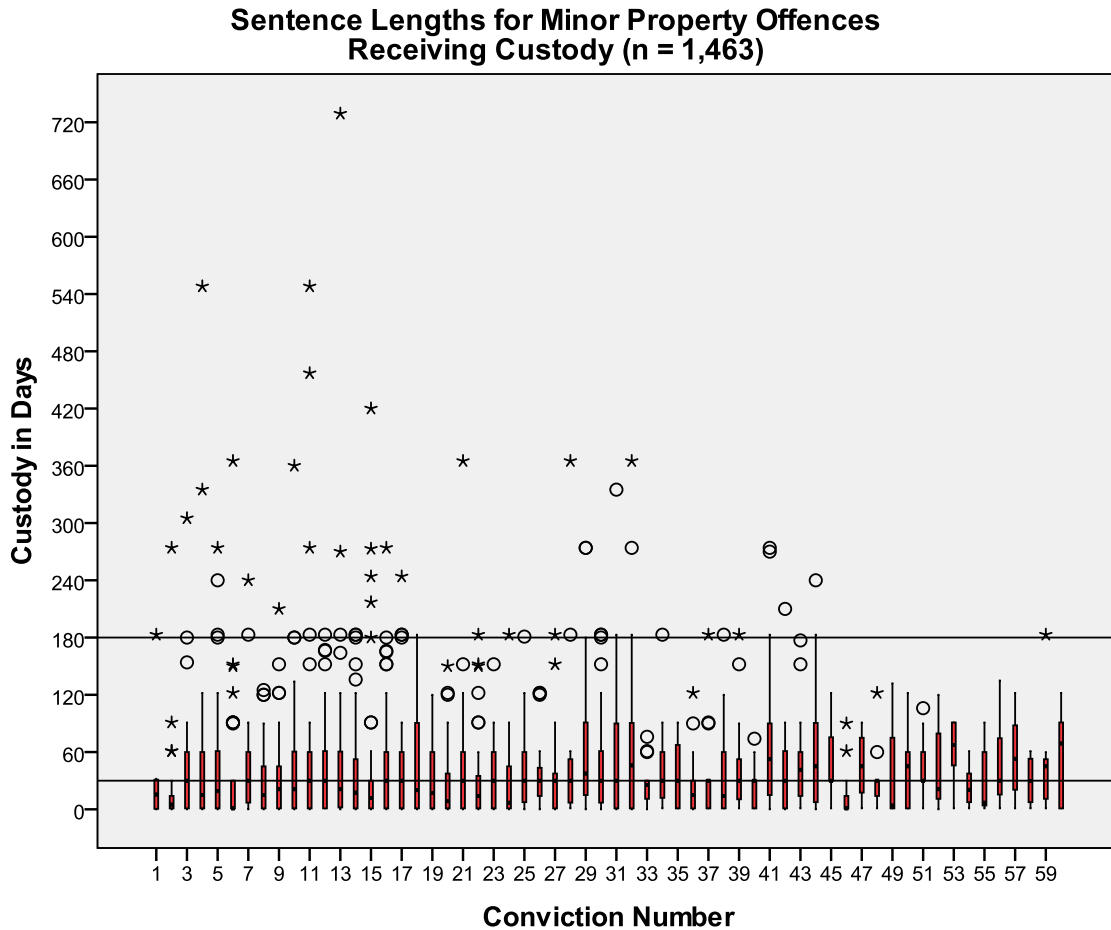
Minor Property offences, similarly, tended to also stay within a fairly tight range of between two to six weeks; however, sentence lengths for this offence group trended upwards as convictions were accumulated on offenders' records. This upwards trend was also evident in Administration (ABO) offences.

Figure 19: Minor Property Conviction Sentence Lengths



Looking at this category through a finer lens, the existence of numerous exemplary sentences is apparent:

Figure 20: Sentence Lengths for Minor Property Offences

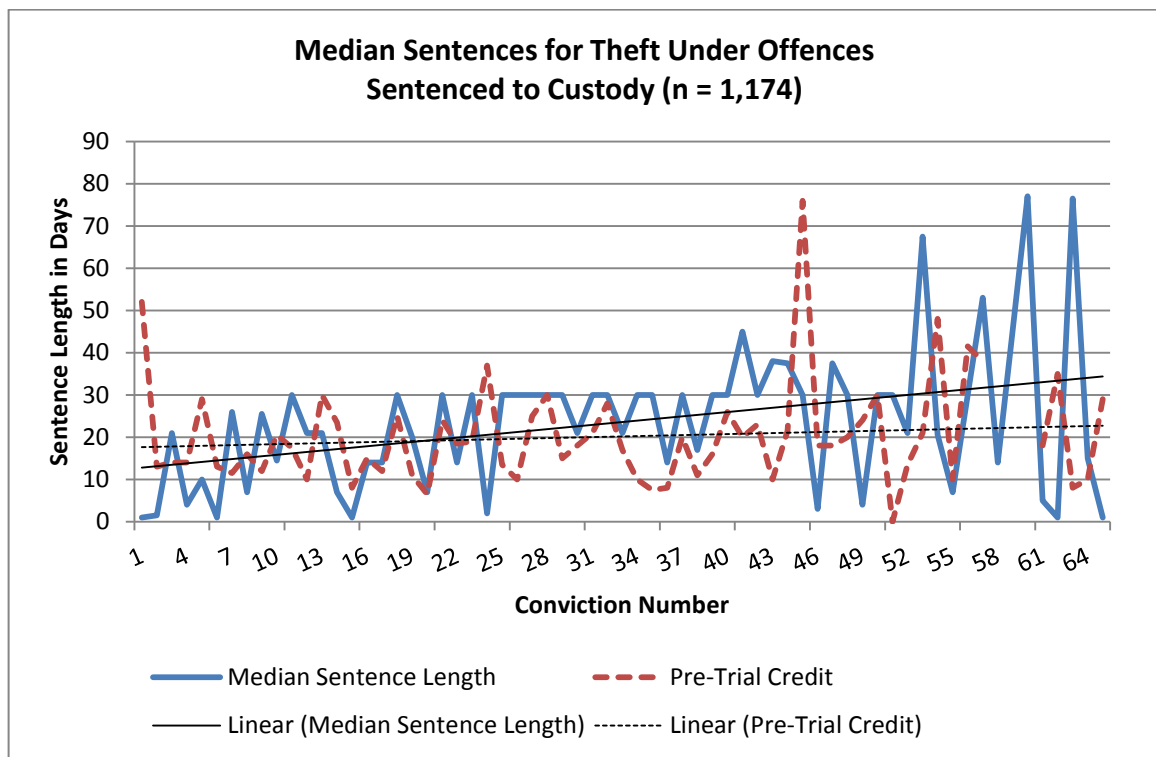


Again, the median sentence lengths throughout the conviction history appear to hover around the one month mark, which is akin to the national median of 30 days (Marth, 2008), although the slightly upward trend is visible, as the majority of sentences later on are more commonly up to 60 and 90 days. Overall, sentences beyond 180 days (6 months) are relatively rare for this type of offence. This is due in large part to the statutory maximum of six months in prison for many minor property offences, if proceeded by way of summary conviction. However, the incidence of prison sentences over six months may point to the observation that in several cases, Crown made the decision to

proceed by way of indictment, as is their prerogative in hybrid offences such as Theft Under. As the CPIC data does not contain information regarding the Crown’s decision, this can only be inferred from the resultant sentence lengths in this category. Future research using the JUSTIN (BC’s Justice Information System) may be able to highlight this Crown decision to bring another dimension to the notion of increasing severity with sentencing, as understandably, if Crown decides to proceed by way of indictment in hybrid offence cases, the judiciary has a much wider berth for setting the length of the sentence.

Exploring the most common offence in this category, Theft Under, gives a more clear upwards trend, particularly when considering pre-trial credit:

Figure 21: Median Sentences for Theft Under Offences Sentenced to Custody



Overall, there does appear to be a slightly upwards trend for minor property offences, particularly Theft Under, although if these offences are proceeded by way of summary conviction, the statutory maximum is six months in custody, which limits the 'step-up' available for offenders committing offences in this category. Notably, there was a weak positive relationship found between the length of sentence and conviction number, indicating that as the conviction number grew, so did sentence lengths ($r = 0.068$, $p = 0.022$). However, this was a very weak relationship and did not explain a great deal of the variation in sentence lengths.

7.3.3.5 Discussion of Sentence Lengths

This lack of conclusive evidence around the existence of significantly increasing punishment as the conviction history progresses may suggest that the judiciary in general keep within the prescribed guidelines of proportionality for offences when sentencing, regardless of the extent of the previous criminal record (with the exception of the first conviction). Proportionality in this sense can be thought of as consistency, as despite some minor trends upwards for some offence groups and down for others, the median sentence lengths tended to remain within a relatively small range for most offences, although often limited by statutory maximums for less serious offences. This speaks to the judiciary keeping within consistent ranges for the particular severity of the offence, despite a growing criminal record. Obviously this may not hold true for all judges at all times, as evidenced by the existence of exemplary sentences in particular cases. However, based on the aggregate data, a doubling or tripling of sentence length

as a result of a growing criminal record does not appear to be the norm in most cases, despite some upwards trending in particular offences such as Robbery and Theft Under. As a criminal record can act as an aggravating circumstance for sentencing, the existence of some upwards trends in certain offence categories can still be thought of as adhering to notions of proportionality. In general, the linear relationships between conviction number and length of custody were not found to be significant, save for a very weak, positive (albeit significant) relationship for Theft Under offences.

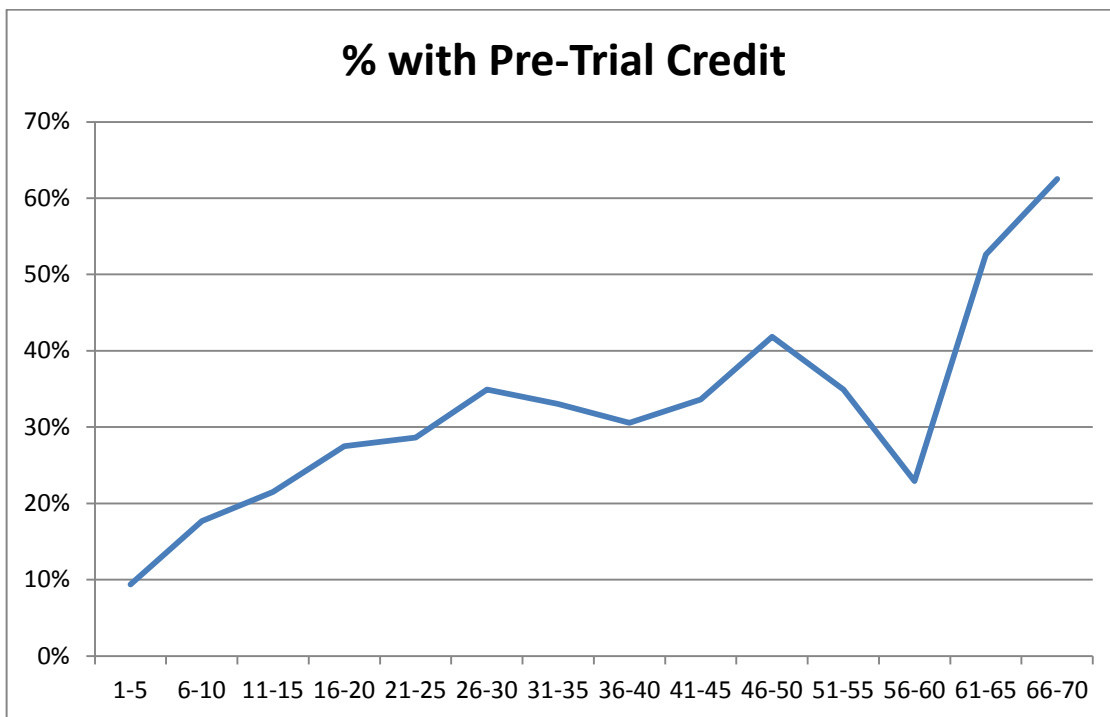
7.3.4 Pre-Trial Custody

As the third examination of ‘severity’, the use of pre-trial custody may allow inference on whether the judiciary is increasingly denying bail to offenders as they become more prolific, which can be considered more severe than allowing the individuals released on bail. This analysis carries the assumption that the judiciary will follow the general practice of granting ‘time served’ credit to those offenders who have been held in pre-trial custody, as noted on the CPIC criminal record²⁸, and will apply the practice of granting a two-for-one credit. Although more practice than legal doctrine, this double-time credit became established as general policy by the Supreme Court in 2000 (R. v. Wust, 2000).

By examining the percentage of cases where bail was denied across the conviction history, inferences can be made about the existence of this trend:

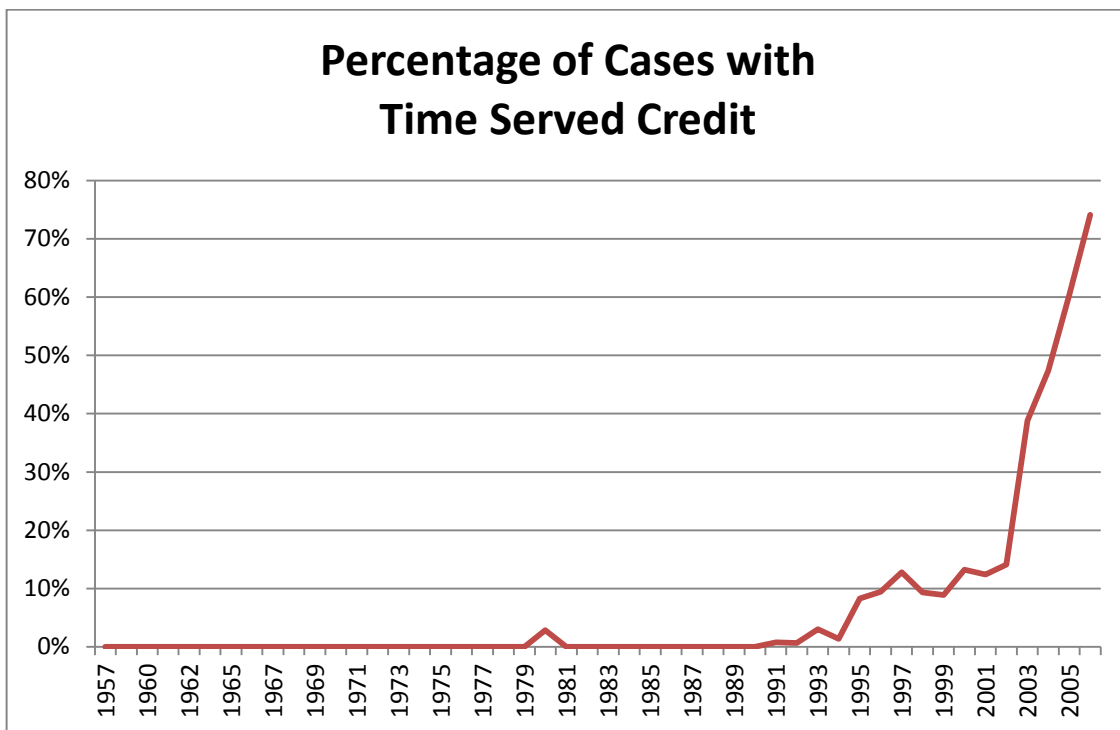
²⁸ Although the time served credit was general practice, in 2009, changes in legislation via the *Truth in Sentencing Act* limited this credit to one for one, rather than the common practice of two for one (Bill C-25: Truth in Sentencing Act, 2009).

Figure 22: Percentage of Cases with Pre-Trial Credit



From this, it appears that the judiciary is becoming more severe in their use of pre-trial custody, and are denying bail more often for this group of offenders as their conviction history progresses. However, this phenomenon may be more due to the evolution of case law and practice than of the criminal record. The practice of crediting time served to an offender (and noting it on CPIC) did not appear on many of these offenders' criminal records until the early 1990s, and it was not until after 1995 that this group of offenders began to receive time served credit in more than 10% of their convictions, as shown in Figure 23. It is worth noting, however, that this was a national-level trend and not limited to this sample of chronic offenders (Weinrath, 2009).

Figure 23: Percent of Cases with Time Served Credit



As can be seen above, an interesting phenomenon occurs in 2003, as the number of convictions with time served credit noted jumps 175 percent over the previous year. At that point, this moves steadily upwards to the high in 2006 of nearly 75 percent of convictions having some amount of pre-trial custody credit noted on their CPIC Level II. This trend appears to mirror the national trend overall, which saw the traditional proportion of 25 percent remand to 75 percent sentenced shift radically in 2006 to inmates sentenced to pre-trial custody outnumbering inmates serving provincial custody (Statistics Canada 2007b, in Weinrath, 2009).

There may be several reasons for this. As the majority of convictions after this time (2002) were disposed of in the Vancouver court, this may be a phenomenon unique to Vancouver; however, as the national trends mirror this

dramatic increase around the same time, it is doubtful this impact was limited to solely Vancouver courts. What is more likely, is that Vancouver sentencing hearings felt a similar rising of the pre-trial custody population as the nation did²⁹. Convictions during this period were sentenced in Vancouver 68 percent of the time during 2002, and rose steadily to 94 percent of the time in 2006. For those convictions being sentenced in Vancouver courts for this group, the proportion of cases with time served credit noted on the CPIC record jumped from 12 percent in 2002 to 46 percent in 2003, and then steadily climbed from 50 percent (2004), to 63 percent (2005), up to 76 percent (2006). In other Lower Mainland jurisdictions, the same group of offenders were receiving time served credit only between 41 and 47 percent of the time for convictions disposed of in their courtrooms during these few years. The existence of this time served credit may indicate that Vancouver judges are simply more likely to extend the credit to offenders who have been denied bail while other jurisdictions are not apt to apply the credit; however, it is unlikely this explains the trend in its entirety as this would contravene the general direction of the Supreme Court in 2000 if courts were *not* applying this credit. Another possible contributing factor that made the denial of bail more common for this group in Vancouver courts was the existence of the police group assigned to manage these chronic offenders. The Vancouver Police Department (VPD) began the Chronic Offenders program (COP) around 2004, mandated with 'offender management' strategies for dealing with these

²⁹ This increase in the number of individuals in pre-trial custody was also seen in other common law jurisdictions. In the UK, the number of people in pre-trial custody rose approximately 26 percent between 1990 and 2008 (Kalmthout, Knapen, & Morgenstern, 2009), and Australia's remand rate increased 70 percent between 1984 and 2007 (Ericson & Vinson, 2010).

individuals. One of their objectives was to present bail recommendations when a member of the chronic group was being assessed by the judge as to whether to be kept in custody prior to trial. Although it is impossible to say with any certainty whether this spike in pre-trial custody credit was due solely or in large part to the COP program, it is most certainly a contributing factor. Overall, it appears that the combination of increasing pre-trial nationally, with a specific increase in Vancouver pre-trial custody for this group due to the influence of the COP, led to an overwhelming majority of convictions being noted with pre-trial custody time served credit, demonstrating that they were held in remand. While this points to increasing severity on the part of the judiciary when dealing with this group, it is impossible to separate out whether this was due to the length of the offenders' criminal record, or simply a nation-wide trend with a complementary trend in Vancouver with the new Chronic Offenders Program.

7.3.5 Case Study Examinations

To obtain a better glimpse into the prolific nature of many of these offenders, the five most prolific offenders were explored in greater detail. These top five were selected using their total charged, chargeable, and convicted offences between 2002 and 2006 (five years in total). The average age as of 2006 for this group was 35, with the youngest offender being 25 and the oldest being 42. Three are noted as having a drug and/or alcohol addiction, and four of the five are also noted as being suicidal. The only offender not noted as being

suicidal was indicated as having a drug and alcohol addiction³⁰. All five are Canadian citizens, although two were born outside of Canada. Three are listed as Aboriginal offenders, and only one as Caucasian. All five are noted as being violent; however, none are known to be associated with a gang.

All together, this group of five offenders accumulated 544 offences during this period. It is important to note that this is likely an undercount of all offending during this time period, as although the CPIC incidents would not be limited by geographic boundaries within Canada, the PRIME 'charged' and 'chargeable' events were limited to the City of Vancouver incidents only.

Charged	322
Chargeable	77
Convicted	145
TOTAL	544

The types of offences committed were dominated by property offences, with numerous breach and drug related offences contributing to the overall total. Violent offences and robbery (separated from violent offences for clarity) were not predominant in this top five group's offending background from 2002-2006.

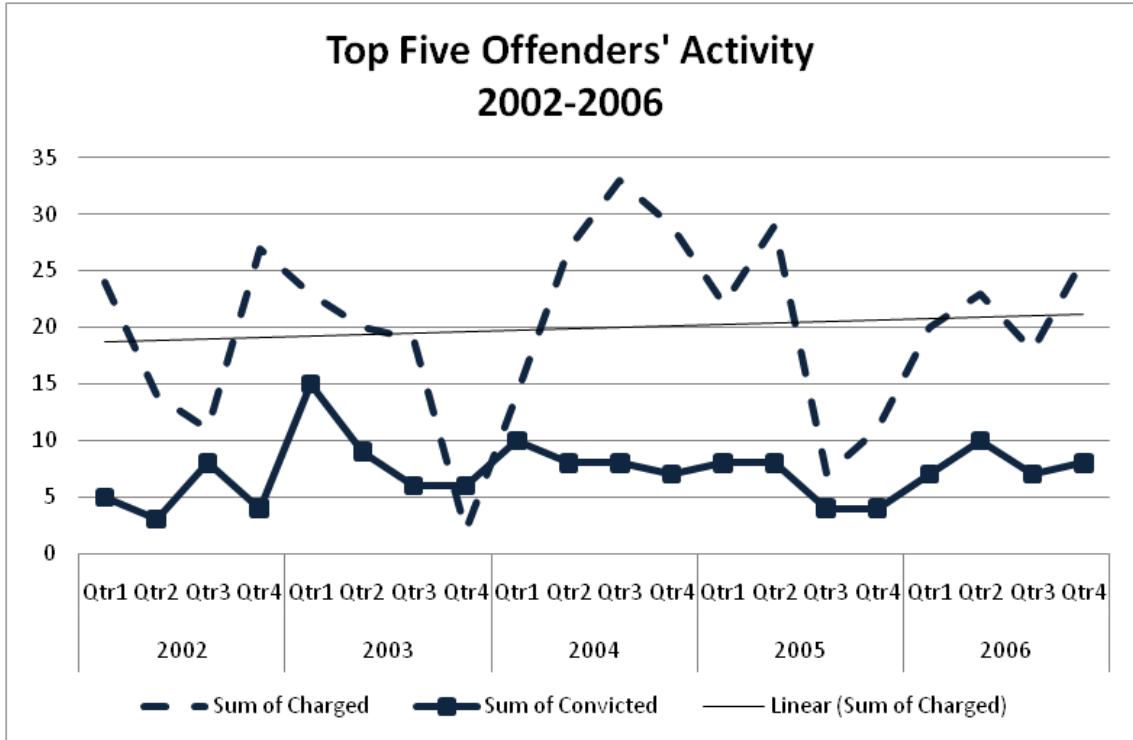
³⁰ It should be mentioned that these are not necessarily medical diagnoses, but more often subjective assessments from the police officers with whom these offenders have had contact.

Table 21: Top 5 Offenders - Offence Types

Offence Description	Count
Theft (including shoplifting and possession of stolen property)	369
Breach/Fail to Comply	62
Drug related	53
Other (miscellaneous)*	24
Break and Enter (including poss. of B&E instruments)	17
Assault	12
Robbery	7
TOTAL	544

** includes causing a disturbance, intoxication in a public place, indecent acts, and prostitution*

These offenders' charges and convictions over this five-year time span are shown below for visual ease. The total number of charges is undoubtedly sensitive to the convictions received for this group, as when incarcerated, it would be impossible to commit new offences outside the prison walls. This does not, however, mean that charges while in custody are not possible, as previous cases may be built while the offender is in custody, or approved by Crown some time after the offence.



To better grasp the consistent nature of this group's offending, the following chart plots these five's activity over the five year time period, using 2004 as the examination year (as it was the most 'prolific' between 2002 and 2006). Blue denotes at least one of these offenders was charged (or chargeable) with an offence on that day, red indicates that one of the five offenders was convicted that day, and purple denotes a day where there was a charged offence as well as a conviction for one of these five.

Figure 24: Top Five Offenders' Charges and Convictions over one year

January						
S	M	T	W	Th	F	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

February						
S	M	T	W	Th	F	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29						

March						
S	M	T	W	Th	F	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

April						
S	M	T	W	Th	F	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

May						
S	M	T	W	Th	F	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

June						
S	M	T	W	Th	F	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

July						
S	M	T	W	Th	F	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

August						
S	M	T	W	Th	F	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

September						
S	M	T	W	Th	F	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

October						
S	M	T	W	Th	F	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

November						
S	M	T	W	Th	F	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

December						
S	M	T	W	Th	F	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

As can be seen using this method of visualization, with as few as five offenders, the charges and convictions are numerous and constant. Undoubtedly these patterns will also be sensitive to police and court scheduling and demands, although the general pervasive nature of their offending is evident. This serves as a way to assist in grasping the impact these offenders have on the different facets of the criminal justice system, but is undoubtedly a small percentage of the overall time and personnel costs associated with their management. This calendar, for instance, does not take into account time spent in pre-trial custody, thereby not including the time of jail staff or transportation, or bail hearings. It also does not include time in custody following a sentence, which again, excludes corrections personnel and transport, as well as police officer testimony and judicial and courtroom time for the trial (if any) and sentencing hearing.

7.3.5.1 Highlight on One Offender

To look more closely, the following analysis traces the negative police contacts and convictions for the single offender with the highest number of offences between 2002 and 2006. As above, the most 'prolific' year for this individual was 2004, and as such, this year will be highlighted below.

During 2004, this individual accumulated 53 negative police contacts with the VPD, involving a charged or chargeable incident, a street check, or being noted as a suspect in an offence. Of those 53 negative contacts, only 2 involved street checks and 7 involved the individual as a suspect. The majority of contacts resulted in a charge or were chargeable. During this period, this

individual was convicted of 10 offences, garnering a total of 207 days in prison for those convictions that resulted in a period of incarceration.

January of 2004 saw this offender charged with three offences, but no convictions noted. February saw one conviction, resulting in a prison sentence of 61 days for a Theft Under. March saw no PRIME activity on this offender, undoubtedly as the term of imprisonment was in effect during this time. In April, this offender was charged with 10 offences and convicted of 1 offence³¹; although they received a suspended sentence with no new incarceration time. In May, 2 new charges were added to the offender's record, and 2 separate convictions were noted on CPIC, resulting in a prison sentence of 15 days for a Break & Enter, and 1 day for a Theft Under. June saw another charge noted on PRIME, as well as another conviction for Theft Under, which garnered another 61 day prison sentence. In July, this offender was charged or chargeable for six separate Theft offences, all under \$5000. Seven new charges and one new conviction were added in August, with a prison sentence of five days noted for the Theft Under conviction. September saw three new charges added, with one additional charge noted in October along with a conviction for Assault which received a 30 day prison sentence. In November, this offender was charged twice and convicted twice, resulting in a total prison sentence of 33 days (3 for failing to comply with a probation order, and 30 days for a Theft Under). By the end of December of 2004, this offender was again charged with seven new

³¹ It is important to reiterate that as the PRIME contacts are not able to be linked to the CPIC contacts, convictions noted do not necessarily represent convictions for the offences highlighted in PRIME and may come from other jurisdictions or other time frames.

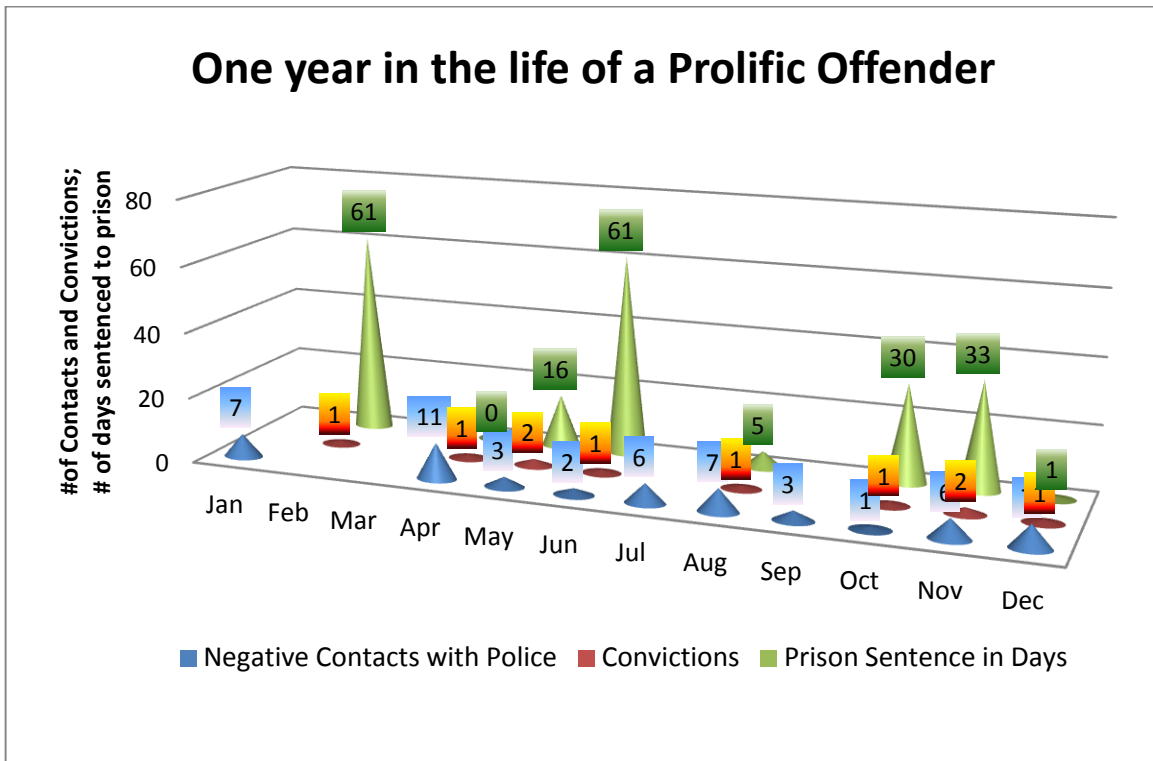
offences, and convicted for another failure to comply with a probation order, which received a 1-day prison sentence.

Table 22: A Year in the Life of One Offender

2004	Checked	Charged	Suspect	Convicted	Prison
Jan	1	3	3		
Feb				1	61
Mar					
Apr		10	1	1	0
May		2	1	2	16
Jun		1	1	1	61
Jul		6			
Aug		7		1	5
Sep		3			
Oct		1		1	30
Nov	1	4	1	2	33
Dec		7		1	1
<i>Grand Total</i>	2	44	7	10	207

Figure 25 visualizes the above table, noting the number of negative police contacts and convictions, as well as the number of days sentenced to prison:

Figure 25: A Year in the Life of One Offender



To further examine this offender’s year, three scenarios were calculated for how much time this particular offender may have spent incarcerated during 2004. The first scenario assumes that the time served credit noted on CPIC represents the actual days held in pre-trial custody, and also assumes the offender was released at one-third of their actual sentenced time. The second scenario makes the same assumption about pre-trial custody, but assumes the offender is released at two-thirds of their actual sentence. The third scenario assumes that the offender was not given any statutory release, and thus served their entire sentence.

Table 23: A Year of One Offender - Possible Incarceration Time

2004	Days Incarcerated	% of Year Incarcerated	Days Free
Pre-trial plus release at 1/3 of sentence	188	52%	177
Pre-trial plus release at 2/3 of sentence	232	64%	133
Pre-trial plus no early release	350	96%	15

As can be seen, a modest estimation is that this offender spent over half of 2004 incarcerated, either in pre-trial custody or in provincial jail. A worst-case scenario would have seen this offender incarcerated for nearly the entire year, although it is unlikely that this was the case given the number of charged and chargeable offences that were accumulated during this time. By looking at the possible release dates and the date of the next chargeable offence in PRIME, what is evident is that this offender at the very least was released at two-thirds of the sentence in all occurrences based on the next chargeable offence. However, with the periods of pre-trial custody taken into consideration, in all likelihood there were times when this offender was released at one-third of their sentence, as the next conviction would often denote a period in pre-trial longer than the offender would have been free had they been released at two-thirds of their sentence.

Table 24: Days from Release to Next Charge

2004 Conviction	1/3 release (days)	2/3 release (days)	Days from Conviction to Next Charge	Days from Release to Charge (1/3 release)	Days from Release to Charge (2/3 release)
1	21	41	17	-4	-24
3	5	11	10	5	-1
4	1	1	3	2	2
5	21	41	41	20	0
6	2	4	3	1	-1
7	10	21	21	11	0
8	1	3	10	9	7
9	10	21	21	11	0
10	1	1	1	0	0

Although it is not possible to know for certain whether this offender was released at one-third or two-thirds of their sentence, what is evident is that if the two-thirds release date is assumed, then in most cases this individual committed and was charged with another offence on the same day or within days of release.

The assumptions regarding time spent in pre-trial, whether the CPIC notations denote actual time vs. credited time, and the actual release dates of offenders are limiting in terms of coming to firm conclusions. Further research utilizing both the JUSTIN and Corrections databases may be able to highlight and further clarify this very important issue of the revolving door for these chronic offenders. As such, the foregoing serves to highlight the issue and explore some of the possible scenarios.

7.4 Discussion

To return to the original objective of assessing judicial decision patterns, several general inferences flow from this analysis. The first is that the judiciary does appear to become more severe as the offenders' records expand in terms of whether they sentence the offender to custody or not. Although this does fluctuate somewhat, the general trend appears to be one of leniency during the initial convictions, and increasing use of custodial sentences as the length of the criminal record increases. The second general observation comes by way of the length of the sentences that are affixed to specific groups of offences over the conviction history. Although some fluctuation is apparent (and not unexpected), overall the sentence lengths appear to remain relatively consistent throughout the conviction history in broad offence categories, despite growing criminal records. However, for certain offences, notably Robbery and Theft Under, the trend appears to increase with the accumulation of convictions, while for others, such as Break & Enter, the opposite trend appears. What is not seen in general is doubling or tripling of time in custody at regular intervals for all offences, so making firm conclusions as to whether a 'step up' in sentence lengths is a reality, on the whole becomes difficult due to the inconsistent nature of sentence lengths among offence types.

The third observation comes by the use of pre-trial custody, insofar as it would appear the judiciary is denying bail more often for these offenders as their conviction history increases. The difficulty with asserting a strong position on this phenomenon is that the existence of time served credit does not show up on the

CPIC Level II reports with any regularity until well into the late 1990s, and does appear to be more prominent in the Vancouver jurisdiction than other jurisdictions' courtrooms. This phenomenon, as discussed above, is more likely due to external factors present during that period, rather than the offenders' conviction history or its length.

Despite some limitations to the conclusions discussed herein, it would appear that the judiciary is becoming more severe in sentencing in some aspects (such as custody and the denial of bail), while in most instances adhering to general tenets of proportionality in terms of sentence length. Again, proportionality does not denote that the exact same sentence be handed down to each offender during their criminal history, as the nature of the offence and the allowance of the consideration of criminal record as an aggravating factor can reasonably come into play. The ability to treat a criminal record as an aggravating factor in sentencing and as a rationale for the denial of bail is likely is the cause of the increasing severity for many offenders. What is evident, however, is that regardless of the severity or length of prison sentence, for many individuals the offending remains constant and frequent during times out in the community. This raises issues of protection of the public, which may have to be more strongly considered in these cases.

8: POLICY RAMIFICATIONS

8.1 Summary of Results

The purpose of this thesis has been to examine whether there is inferential evidence that the judiciary is increasing the severity of sentences for this group of chronic offenders beyond that which would be deemed appropriate under our current purposes and principles of sentencing. To do this, three primary areas of 'severity' were assessed, being whether the offender was sentenced to prison, how long the incarceration sentence was, and whether they were held in pre-trial custody. Clearly, being sentenced to prison as opposed to other non-custodial options can be seen as more severe, and being held in pre-trial custody is also more severe than being granted bail. In addition, having a lengthier incarceration for a similar offence as the criminal record grows may be seen as evidence of increasing judicial severity. What has been shown, however, is that the results are mixed. For the most part, these offenders are being sentenced to a term of incarceration following their first offence, almost exclusively for all subsequent offences. This follows a just-deserts approach, whereby the 'degree of responsibility' acknowledgement in proportionality would only see a limited diversion for those first-time offenders as it would acknowledge that their responsibility may be somewhat less than someone who had committed multiple offences. However, once this diversion has been satisfied, the just deserts

paradigm does not propose that increasing the severity of a sentence should be ultimately tied to the growing criminal record.

In terms of sentence length, again, it is difficult to ascertain a blanket conclusion. For most offence groupings, the median incarceration length appears to stay within a realistic range, although significant variation both above and below the general median is seen throughout the criminal record. Some offence groupings, like major violence, follow a curvilinear trend, but this can be partly attributed to the lower numbers of sentences within this group, with long or short sentences severely affecting the trend. Some offences, however, showed a clear upwards trend, while others demonstrated a more downwards trend. Despite either a downward or upwards trend, what seems to be consistent is that the any step up is neither consistently applied, nor predictable based on the number of prior convictions.

The issue of pre-trial custody is also one where a clear conclusion remains elusive. While the increase in the use of such measures rose dramatically in the late 1990s for this group, this trend was also seen Canada-wide. While it appears that this group is particularly subject to being held without bail when sentenced in Vancouver, it is nearly impossible to disentangle this trend from the national trend. It is likely this is due in part to the work of the Chronic Offenders Program at the Vancouver Police Department, who advocate for the denial of bail for these offenders. While this would surely affect bail hearings following the creation of this program in the mid-2000s, it does not explain the earlier use both in Vancouver and across Canada. What can be taken from this, however, is that

the use of pre-trial custody does seem to be in action more often for these offenders, but does not appear to be inextricably linked to the development of their criminal record.

Therefore, it would appear that outside of the pre-trial custody issue, the judiciary appear to be following the tenets of both proportionality and just deserts even with this group of chronic offenders. Their limited use of non-custodial measures following a first conviction can be understood as more severe, but still sits within the theoretical confines of our just deserts approach in Canada. While some increase in severity is seen using the median sentence lengths, it is not necessarily unreasonable, if one were to remove the criminal record of the accused. Undoubtedly, there are some sentences within this group that have been much more severe than others. In certain cases, judges may find it appropriate to attach relatively lengthy criminal sentences based on the incorrigibility of the offender before them, or may wish to make an example of such an offender. These realities are replete in any sentencing research, and our aim here is not to assess the outliers, but rather, to assess where the middle ground rests.

8.2 Implications for Policy

What the foregoing results bring, however, is a turn towards a discussion of what this all means for the Canadian system and the ramifications for sentencing policy in particular. If the judiciary are following their legislated instructions as they appear to be doing for the most part, the next questions undoubtedly surround whether this is the desired path given the nature of these

offenders and the extent of their offending. The debates in this area seem to follow many paths, some of which have been discussed throughout this thesis. Many, upon glimpsing the extent of the chronic offenders' impact, would espouse stronger sentencing alternatives to 'deal' with this group. This is where we see discussions surrounding mandatory minimum sentences, three strikes, and sentencing guidelines come into play. The pitfalls and ramifications of such schemes have been discussed extensively in the literature, with a cost-benefit approach denying their efficacy in terms of cost savings to the taxpayer or deterrent effects on the offender. However, on the other side of the debate lie those that see this more as an issue of 'deservedness', and espouse that if someone just cannot seem to follow the rules of society, then they must be banished from it for longer and longer periods of time until they are able to reform.

The difficulty is, however, that Canada does not allow for such schemes in any standardized way outside of some mandatory minimum penalties. True, these have increased in previous years and are on the brink of becoming far more widespread, but at this time, sentencing guidelines and anything resembling three strikes has not passed into law. For some, then, this leads straight into the question of how we can protect society from these offenders without giving the judiciary any new tools for doing so. Protection of society is a purpose and principle within Canadian sentencing, but is trumped by proportionality, as all other principles are as well. Although we have built in some legislated options for dealing with chronic violent or sexual offenders, this modern

legislation has not allowed an opening for dealing with chronic property offenders.

The truth is this puts policy makers in a difficult position. Many Canadians are dissatisfied with sentences, particularly for those with lengthy records (Doob & Webster, 2008). Even in the early 1980s, the general public felt that sentences were too lenient (Doob & Roberts, *Social psychology, social attitudes, and attitudes toward sentencing*, 1984), and further research highlighted that this sentiment carried on well into the 1990s, and saw that the general public was up to two or three times more severe in their sentences than court actors (Tremblay and Cordeau, 1994). However, despite this sentiment echoing again into the 2000s (Roberts, Crutcher, & Verbrugge, 2007), numerous caveats have also been explored when examining public sentiment. Generally, these come by way of recognizing where the public receives their information regarding sentences, and how this translates into their views on sentencing as a whole. Given additional information, studies have found that the general public subsequently lowers their punitiveness, as often their viewpoints are based on sensational cases they have been exposed to via the media. When given information and a chance to rationally examine the aspects of a particular offence situation, the majority of the public give thoughtful and much less punitive sentences than when presented with a short description of the charge that was laid (Doob and Roberts, 1984; Stalans, 2002). However, when faced with opinion polls asking simplistic questions, their responses can be directly linked to the triggering of easily-retrieved memories, often based on sensational cases, stereotypical

beliefs, or biased opinions (Roberts, Crutcher, & Verbrugge, 2007). In this way, some public opinion polls merely pull out the general public's sentiments towards the most serious offender and most serious circumstance, not the 'typical' offender or circumstance (Stalans, 2002). What is interesting to note, however, is that although many continue to espouse that sentences are too lenient, a moderate percentage of Canadians actually saw a prison sentence as an ineffective way to reduce crime (Doob, 2000). Again, when presented with additional information about the eventual release of offenders, and the sheer cost of incarceration, support for prison among the general public decreased. So while at the same time they are advocating for sentences with more 'bite' (Roberts & Hough, 2002), they are not convinced of the deterrent or preventative power of prison in terms of crime control.

The danger here is when criminal justice policy becomes based on public opinions. As the pitfalls and inherent contradictions within the purview of the general public are evident in the literature, any policies that emerge from this will undoubtedly be unfair and/or ineffectual (Indermaur & Hough, 2002). The numerous studies pointing to the problems with the public's views on sentencing and the sheer amount of misinformation that guides many opinions, surely steers legislators away from adhering too closely to public sentiment in sentencing matters (Tremblay and Cordeau, 1994), although this is not guaranteed in any way.

However, what if public attitudes do guide sentencing policy? Despite a general undercurrent of dissatisfaction for the leniency of sentences, Canadians

overall have lacked the enthusiasm towards harsher sanctions, and the ‘tough on crime’ approach seen in the U.S. system (Doob & Webster, 2006). Coupled with the judiciary’s resistance to this approach as well, the average sentence lengths in Canada have not seen dramatic shifts. Another protective factor in the Canadian system not seen in the U.S. system is the structure of the legal/political system upon which it rests.

In particular, Canadian judges are shielded somewhat from the pressures of public opinion due to two important factors – the first being the system of judicial appointment vs. election (as in the US), and the separation of powers between the provinces and the federal government. As the provinces are not in a position to make criminal laws, local talk and dissatisfaction rarely influence the nation as a whole, and any changes require careful consideration by the federal government, generally based on broad consensus. In addition, politics (theoretically) should not enter the courtroom as judges are not elected on popular vote by the people, and are therefore not subject to removal upon a unpopular judgement before the next election. While assuming the complete lack of political interference in this process would be naive, by appointing prosecutors and judges, the Canadian system is far more shielded than the U.S. system in terms of public opinion swaying policy and law (Doob and Webster, 2006). While we may be in a better position to defend against populist public opinion when it comes to our punishment and sentencing systems, assuming this could never happen would be erroneous. Then the question once again returns to whether

prison is effective, and whether incapacitating chronic offenders would make any difference.

8.3 Incapacitation and Crime Reduction

Numerous studies have attempted to answer the question of whether prison results in anything positive in terms of crime reduction or control, and most have answered it in the negative. Of particular note is a meta-analysis of the correlations between recidivism and the length of prison sentences, and the use of community sanctions vs. prison and its effects on recidivism (Gendreau, Goggin, & Cullen, 1999). Examining 50 studies dating back to 1958 that involved over 330,000 offenders, they found that in general, the use of prison produced slight increases in recidivism. This trend held true for the length of sentence (longer sentences increased recidivism), and the use of prison over non-custodial options (those sentenced to prison showed more recidivism than those in community sanctions). Based on these findings, the authors espouse that prisons should not be used with the expectation of reducing criminal behaviour, as in reality, it tended to increase it. Coupled with the excessive cost of imprisoning someone, this option should be used for only the most incorrigible offenders that require incapacitation from the community for a reasonable period of time in order to exact retribution (Gendreau, Goggin, & Cullen, 1999).

Then this returns to the notion of selective incapacitation for chronic offenders. Although this has been discussed at length in preceding chapters of this thesis, current literature continues to critically examine attempts to quantify the cost savings associated with the incapacitation of only those most incorrigible

offenders (Piquero & Blumstein, 2007). While some critiques focus on the methods used by those seeking to purport cost-savings associated with such incapacitation schemes, the issue returns to one of whether these offenders can be prospectively identified before committing the majority of their offences. While some calculations have taken for granted a steady rate of offending among chronic groups, there is no indication that this will continue throughout the lifespan, and when this will cease. Therefore, estimates of savings for a particular year rely on the assumption that these offenders would have indeed committed those crimes in that year. In its simplest form, the costs of imprisoning a high-rate offender are often insignificant when compared to the costs associated with their offending. However, these cost savings will likely be swiftly ameliorated if these offenders are held beyond the time they would be offending, as their cost impact on society would approach zero, while their costs of incarceration would remain the same or increase. However, the objective of this work is not to assess whether this group of chronic offenders would be good candidates for a selective incapacitation approach, but rather, to focus on the realities of our Canadian legislation, and to highlight the debates in the literature with respect to alternate approaches. What cannot be asserted with any certainty is whether Canada would benefit from a selective incapacitation approach in terms of cost savings. As the majority of research in this area has been conducted on U.S. data, we are only able to make inferences as to whether it would be prudent here. Of particular note is that in using the U.S. data with selective incapacitation approaches, the amount of imprisonment needed is likely

higher due to the severe penal climate in that country (Blokland & Nieuwbeerta, 2005). Using data from other countries may show a slightly different pattern, particularly if the general trend is for short sentences and fewer instances of incarceration.

What is almost impossible to do is to disentangle discussions of sentencing policy with sentencing theory and principles. In one breath we can discuss an incapacitation scheme that would surely be cost-effective, but in the same breath issues surrounding the realities of such a scheme and their inability to fit within our current legislation emerge. The reality is that Canada, at least at the current time, has placed proportionality as per the gravity of the offence as the true guide for sentences in our country. The ramifications are that there are some offenders who will continue to offend repeatedly, while not being subject to increasing punishments or lengthier terms of incarceration based on their criminal record alone. It is not improbable, however, that the legislators may at some point in the future bow to public pressure to 'get tough' on these offenders, using the only weapon that seems to satisfy those who adhere to the stick – that of incarceration. When this occurs, undoubtedly there will be an eye to instituting a revision to the legislation allowing for special treatment of chronic property offenders – much like is seen with dangerous offenders or long-term supervision orders; or, an installation of a selective incapacitation scheme whereby the widespread use of mandatory minimum penalties pulls more and more offenders into the fold of incapacitation for longer periods of time. This is dangerous for many reasons. For one, the experience of the U.S. and the financial impact of

their sentencing policies should give everyone pause. States have had to endure severe deficits in order to support changes in imprisonment policies, particular in California with the three-strikes legislation. Sober, rational thought must preclude any consideration of policies that even vaguely resemble this. Second, the historic disconnect between academia and policy makers will be severely detrimental if the 'get tough' approach continues. By ignoring research on the impacts and ramifications, policy makers and legislators run the risk of instituting arbitrary, ineffectual, and often financially crippling policies. And with the announcement of \$155M for new prison beds under the Conservative government, the issues surrounding what prison can and cannot do must be debated at the highest levels. With a government that is basing this increase on the fact that *unreported* crime is still unnecessarily high, this conversation becomes crucial between academics and policy makers before the public feels the weight of such ill-informed policies.

While the foregoing has delved into the areas of local Canadian policy, again, it is difficult to discuss sentencing policies for chronic offenders without considering the overall policy agenda on crime of the current governments. This thesis was not to purport a way through this issue, nor a solution to what to do about chronic offenders. Rather, it is a humble beginning to establishing the reality of sentencing and imprisonment for this group, in the hopes of continuing the discussion of options going forward.

9: DATA ISSUES AND FUTURE RESEARCH

An issue that arose during this course of this research concerned scoring or record keeping of sentencing decisions. There has been some evidence to show that Vancouver displays some leniency in their sentencing patterns as compared to other regions within BC (Kinney, 2005), although this is largely hidden when examining sentencing on a provincial level, where national comparisons show far less disparity (Doob and Webster, 2009). However, what was discovered during the course of this research was that reporting to Statistics Canada may not be uniform in terms of the inclusion or exclusion of the pre-trial custody credit, and that few may understand the reality behind the statistic. For instance, if an individual is convicted, their CPIC Level II record will note their disposition, along with any time associated with it. What is also included is how much ‘time served’ credit they received. In some cases, this will result in a descriptor such as, *Prison 30 days with 10 days time served (20 days credit)*. The question becomes, does this mean the judge was sentencing this offender to *net* 10 days (30 days – 20 days time served), or will the records reflect only the 30 days, plus a dichotomous variable of “time served yes/no”? Or, did the judge incorporate the time served credit of 20 days before handing down the 30 day sentence (i.e., did he intend for the offender to be sentenced to 50 days in prison?) After numerous discussions with Crown Counsel and CPIC transcriptionists, there does not appear to be a consistent procedure. While the

current research took this at face value and coded the prison term at 30 days, and the pre-trial custody term at 10 days, this leads to questions of how this information is forwarded to Statistics Canada. If the judge forwards the 30 days to Statistics Canada, but with the time served credit of 20 days the offender is only serving 10, then their sentence on the books would be an overestimate of their time incarcerated. If, however, the judge incorporates the time served credit and notes the actual sentence as 10 days, then this will be a significant undercount of the sentence; or, if the judge intended on a 50-day sentence but records the net 30 days after the time served credit, again this will result in an undercount. As previous research has highlighted the issue of the one-day in prison phenomenon (Kinney, 2005; Pollard, 2004), these questions of data accuracy and quality are particularly salient.

If it is shown that Vancouver makes use of pre-trial custody more often, as appears to be the case for this group, this may present issues for comparing regional and national trends. As the speculation is that Vancouver is too lenient with offenders, it should be investigated to see whether this is merely a statistical or coding issue due to pre-trial custody credits. This arose with the one-day in prison issue, whereby offenders who were granted 'time served' would often have a one-day prison notation on their record. What this resulted in was a reporting to Statistics Canada of a prison term for that particular offence, but with only one day of associated prison time, and no notation of the length of time in pre-trial custody. This would be enveloped into sentences of less than 30 days for reporting purposes, obscuring the true nature of their term in custody.

However, another issue has been highlighted with respect to whether judges calculate the pre-trial custody before their prison determination, or after. For instance, if the courts are recording the final sentence length to Statistics Canada incorporating the time-served credit (i.e., intended 50 day sentence, minus time served of 20 days, equals a 30 day prison term on the books), then this term will be undoubtedly shorter than other regions that report only the initial prison term without the time served credit accounted for.

While the incorporation method would allow for a better indication of how much additional time was to be spent incarcerated, it may have the unintended result of showing Vancouver (or other areas) as far more lenient comparatively if they make use of remand more often, particularly if adhering to the two-for-one rule (despite it recently being discarded). However, if the latter method is the case whereby the length of prison term was reported to Statistics Canada without any time served credit incorporated, then the sentence lengths do not represent the reality of what that offender was to spend in additional incarcerated time. Neither situation is without pitfalls. Add to this the recognition that Statistics Canada does not record the length of pre-trial custody³², but rather, simply whether it was ordered or not, then the picture of sentencing becomes even further clouded. If in fact this pre-trial custody is being used in the calculation of the current prison term, then record keeping needs to be amended to incorporate

³² This is based on the reports from the Adult Criminal Court Survey (ACCS), and other sentencing reports in Canada that have made use of the Statistics Canada data, but have not indicated that any length of pre-trial custody or time served credit notation was available. If in fact this is collected, then it becomes a matter of incorporating this into the analysis. However, from discussions and experience, it would appear that this continues to be collected as "Remand, Yes/No".

that nuance. It would not be accurate to compare sentences across the country or region without incorporating the time served credit, as even if the judiciary is not including them in their calculation of the prison term, surely it would be instructive for seeing relatively how much time an offender spent in prison (save for any time lost to parole).

An example of this reality can be shown anecdotally in some *Reasons for Sentence*. In this particular case, numerous examples of this difficulty are highlighted:

December the 27th, 2006, Surrey Provincial Court, conviction for assault, jail time served credit for 14 days, jail one day, probation for one year. February the 26th, 2007, Surrey Provincial Court, breach of probation, uttering threats and a breach of undertaking; the fit and proper sentence I am told set by Judge Gulbransen was that he would have imposed 180 days - he gave credit for 180 days and sentenced Mr. Dhillon to one day plus probation. (*R. v. Dhillon, Reasons for Sentence, 2007 BCPC 0092*)

In the first case on December 27, 2006, the offender was sentenced to one day, although had spent 14 days in pre-trial custody. On the second case, the judge *would* have imposed 180 days, but as the offender had gained credit for those 180 days in pre-trial custody, the offender was sentenced to one day. Of particular note is that both of these instances appear to use the inclusion rule, i.e., the judges incorporated the time served before handing down a sentence. What the general public will see, however, is that this offender received one day for his assault, and one day for uttering threats.

This is also highlighted in *R. v. Lagimodiere*:

As to the length of the sentence, it's already been mentioned that your last robbery sentence was eight years. I don't believe, Mr. Lagimodiere, that I can logically impose anything less than that. I will give you credit for the time that you have been in custody. Roughly double time is usually given. I'll give in effect three years' credit. You're sentenced to imprisonment for a period of five years on each of the charges. Those sentences will be concurrent. I do ask that your criminal record reflect the fact that you have been in custody since August the 14th, 2003. (*R. v. Lagimodiere, Excerpt Reasons for Sentence*, 2005 BCPC 0134)

In this case, the judge was sentencing this offender to eight years in prison, but due to his time already spent in pre-trial custody, the sentence on the books resulted in five years.

And in another example,

[8] I am satisfied that it is appropriate to give Mr. Flanagan credit for six months time served. A sentence that would be in the range of two years, in my view, would have been the appropriate sentence. But recognizing that he has already served the equivalent of six months, the sentence here today is 18 months. (*R. v. Flanagan aka Gasztoni - Excerpt Reasons for Sentence*, 2004 BCPC 0234)

This case as well appears to use the incorporate rule, whereby the offender would have been sentenced to two years, but due to his time in pre-trial custody, was sentenced to 18 months.

While a thorough examination of this issue is outside of the scope of the current research, it should give pause when comparing sentence lengths regionally or nationally. Although the *Truth in Sentencing Act* has removed the two-for-one time served credit, offenders may still receive a one-for-one time

served credit. If they are spending weeks or months incarcerated in remand prior to trial, this may result in a “time served” notation on CPIC, and further in the Statistics Canada databases. When calculating, this would then translate into a zero or one-day prison term, when in reality this offender spent a far greater amount of time behind bars. With the increase in the use of remand nationally, this issue becomes crucial to remedy in the official statistics. As the judiciary are appearing to use the time served in remand to modify their final sentences, the fact that this is not captured in the databases is concerning. Unfortunately, what this results in is an inability to confidently compare sentences over time or across regions. With differing use of pre-trial custody and uncertainty over whether this is incorporated *a priori* into the final written sentence, the true amount of time in custody may be difficult to ascertain. Future research needs to both investigate this phenomenon, and incorporate the use of pre-trial custody into any sentencing investigations.

APPENDIX A: DATA FIELDS

Table 25: CPIC Data Fields

Data Field	Description
<i>Unique_ID</i>	Offender Identifying/Anonymizing Number
<i>SCAT</i>	Super Chronic Or Active Target
<i>OfforConv</i>	Offence Or Conviction
<i>DOBfalse</i>	Anonymized Date Of Birth
<i>Date_of_Conviction</i>	Date Of Conviction
<i>1st_Conviction</i>	Calculated Year Of 1st Conviction
<i>Convict#</i>	Conviction Number (1st, 2nd, 3rd, Etc.)
<i>Career_Convictions</i>	Calculated Total Number Of Convictions
<i>Career_Charges</i>	Calculated Total Number Of Convicted Offences
<i>Career Length</i>	Length Of Time From 1st To Last Conviction
<i>DaysSinceLastConviction</i>	Calculated Days Since Previous Conviction
<i>@#PreviousCharges</i>	Calculated # Of Charges Prior To Current Conviction
<i>AgeConvict</i>	Age At Conviction
<i>Location_of_Conviction</i>	Location Of Conviction
<i>Youth_Court</i>	Youth Or Adult Court
<i>CCC_Section_MSO</i>	Criminal Code Section (Most Serious Offence)
<i>Conviction_Outcome_#1</i>	Most Serious Sentence
<i>Remand_in_days</i>	# Of Days In Pre-Trial Custody (If Applicable)
<i>Custody_in_days</i>	# Of Days In Custody (If Applicable)
<i>Conviction_Outcome_#2</i>	Additional Sentence To Most Serious Sentence
<i>Probation_or_CS_Length_in_Days</i>	# Of Days On Probation Or Conditional Sentence (If
<i>Total_#_Conviction</i>	Total Convicted Offences Within Conviction Set
<i>Total_#_VO</i>	Total Violent Offences Within Conviction Set
<i>Total_#_PO</i>	Total Property Offences Within Conviction Set
<i>Total_#_DO</i>	Total Drug Offences Within Conviction Set
<i>Total_#_AO</i>	Total Administrative Offences Within Conviction Set
<i>Total_#_Other</i>	Total 'Other' Offences Within Conviction Set
<i>Offence_2</i>	Included Offence 2
<i>Offence_3</i>	Included Offence 3
<i>Offence_4</i>	Included Offence 4
<i>Offence_5</i>	Included Offence 5
<i>Offence_6</i>	Included Offence 6
<i>Offence_7</i>	Included Offence 7
<i>Offence_8</i>	Included Offence 8
<i>Offence_9</i>	Included Offence 9

Data Field	Description
<i>Offence_10</i>	Included Offence 10
<i>Offence_11</i>	Included Offence 11
<i>Offence_12</i>	Included Offence 12
<i>Offence_13</i>	Included Offence 13
<i>Offence_14</i>	Included Offence 14
<i>Offence_15</i>	Included Offence 15
<i>Offence_16</i>	Included Offence 16
<i>Offence_17</i>	Included Offence 17
<i>Offence_18</i>	Included Offence 18
<i>Offence_19</i>	Included Offence 19
<i>Offence_20</i>	Included Offence 20
<i>Offence_21</i>	Included Offence 21
<i>Offence_22</i>	Included Offence 22
<i>Offence_23</i>	Included Offence 23
<i>Offence_24</i>	Included Offence 24
<i>Offence_25</i>	Included Offence 25
<i>Offence_26</i>	Included Offence 26
<i>Offence_27</i>	Included Offence 27
<i>Offence_28</i>	Included Offence 28
<i>CaseID</i>	Unique Offender/Conviction Case Identifier

Table 26: PRIME Data Extract Fields

Data Field	Description
<i>ID</i>	Offender Identifying/Anonymizing Number
<i>Year</i>	Year of contact
<i>ROLE</i>	Role in contact (charged, suspect, street check, etc.)
<i>PERSONS_02</i>	RMS incident # from PERSONS table
<i>RMS_02_INC</i>	RMS Incident # from OCCURRENCE table
<i>FROMD</i>	Date of contact
<i>FROMTIME</i>	Time of contact
<i>RPTDATE</i>	Report date
<i>LOCTYPE</i>	Location type
<i>LOCATION_L</i>	Location description
<i>UCR1</i>	UCR primary code
<i>EXT1</i>	UCR primary extension
<i>UCR2</i>	UCR secondary code
<i>EXT2</i>	UCR secondary extension
<i>CATEGORY</i>	Primary Offence category
<i>DESCRIPTIO</i>	Primary Offence description
<i>LOCATION</i>	Address of Contact

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