

Was Stephen Harper Really Tough on Crime? A Systems and Symbolic Action Analysis

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By

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ABSTRACT

In 2006, the Hon. Stephen Harper, PC became the Prime Minister of Canada after winning an election campaign in which his Conservative Party of Canada promised to get tough on crime. Over the terms of the three Harper administrations, 81 of the 399 government bills introduced in Parliament contained measures explicitly intended to increase the severity in the punishment of criminal acts. Using both descriptive and multiple regression techniques, this dissertation analyses Statistics Canada incarceration and court sentencing data to assess the substantive effect of the Harper administrations' legislative changes. It is concluded that there was some toughening of criminal sanctions in Canada during this period, particularly for the offences of drug trafficking, production and importation. However, the toughening of sanctions was modest and left Canada's incarceration rates stable. Judged against both government and opposition rhetoric, the carceral experience in the United States and a constructed ideal type of a tough on crime government, the substantive toughening of Canada's criminal justice system during the Harper administrations was muted. The systems theory developed by Niklas Luhmann informs an analysis of judicial decisions and provincial government prosecution policies that concludes a federal political regime has limitations on its ability to impose substantive changes in the outcomes of Canada's criminal justice system. The theories of symbolic action developed by Murray Edelman informs an analysis of the legislative and fiscal record of the Harper administrations to argue that much of the criminal justice program of the Harper administrations was symbolic. It appeared to be designed to generate acquiescence to the Conservative government rather than to effect a substantive toughening in the outcomes of the criminal justice system. The muted substantive effect of the Harper administration's tough on crime program resulted from both systemic limitations on the federal government's powers and a lack of serious intent by government actors.

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List of Abbreviations

CACC	Canadian Association of Crown Counsel
CANSIM	Canadian Socio-Economic Information Management System
CPC	Conservative Party of Canada
CSC	Correctional Service Canada
CSI	Crime Severity Index
ICCS	Integrated Criminal Court Survey
LEEP	Law Enforcement Education Program
MMP	Mandatory minimum penalties
MP	Member of Parliament
NDP	New Democratic Party of Canada
PBO	Parliamentary Budget Officer
RCMP	Royal Canadian Mounted Police
SCC	Supreme Court of Canada
UCR	Uniform Crime Reporting Survey

1. Introduction

A spectre is haunting Canadian criminology: the spectre of American incarceration rates. Many in the Canadian criminology establishment have entered into a holy alliance to exorcise this spectre: academic researchers, prisoner rights groups, criminal defence lawyers, and members of the media. In short—many of those involved in the exercise of shaping policy and opinion on issues of crime and justice have decried the possible importation of “American-style mass incarceration.”

There are real reasons to be concerned. Until 1974, Canada and the United States had similar and relatively stable incarceration rates. Beginning in 1974, the paths diverged. Canada’s incarceration rates remained relatively stable. In the United States, despite a similar trajectory for officially reported crime rates, incarceration rates soared exponentially—doubling, redoubling, and then doubling again before finally levelling off for the past half-decade. Today, incarceration rates in the United States are roughly eight times those in Canada. This had a profoundly destabilizing effect on some communities. American incarceration rates may have reached a level where they have a causal influence on increasing crime rates.¹

The fear that incarceration rates would begin to follow the example set in in the United States became more acute on February 6, 2006. Stephen Harper was sworn in as Canada’s 22nd Prime Minister. The Conservative Party of Canada’s (CPC) election platform had vowed that “a Conservative government will protect Canadians, ensure effective and appropriate justice is administered to criminals, and secure our country’s borders.”² The prescription for providing protection and ensuring safety was presented in punitive terms. A Conservative government would get tough on crime and criminals. In introducing specific measures, the platform stated:

A Conservative government will protect our communities from crime by insisting on tougher sentences for serious and repeat crime and by tightening parole. We will ensure

truth in sentencing and put an end to the Liberal revolving door justice system. The drug, gang, and gun-related crimes plaguing our communities must be met by clear mandatory minimum prison sentences and an end to sentences being served at home. Parole must be a privilege to be earned, not a right to be demanded.³

Of the 183 specific platform commitments, 59 promised tough action on crime. More specific commitments were made about punishing criminals than were made about improving Canada's economy, health, and social services systems combined. The only mention of youth in the platform was in the section dealing with crime. Conservatives promised that new criminal offences would be created, more people would be sent to jail, and convicted criminals would stay in jail longer. Of the 59 crime commitments in the Conservatives' platform, only five were not based on increasing sanctions.⁴

The Conservatives' preoccupation with getting tough on crime was not forgotten on assuming office. During Harper's three terms as prime minister between 2006 and 2015, 81 of the 399 government bills were wholly or largely composed of tough-on-crime provisions. The administrations' legislative agenda was supported by private members' bills. During these three Parliaments, 149 of the 311 private members' bills put forward by Conservative MPs called for tough-on-crime measures. Fifteen were passed into law.⁵

As demonstrated in chapter 2 of this dissertation, this veritable avalanche of tough-on-crime legislation convinced many observers that Canada's justice system was being fundamentally transformed into a punishment system—that Canada was implementing “American-style mass incarceration.” However, despite the preoccupation with punitive legislation by the Harper administrations, incarceration rates remained stable. In chapter 5, I argue that there was only a muted change in the volume of incarceration in Canada while Stephen Harper was Prime Minister. The major exception to a relative lack of incarceration effect during this period was in the treatment of those convicted of drug trafficking, importation, or production. At first sight, there appears to be a disjunction between the legislative agenda of the Harper Conservative administrations and the substantive result. It raises the question as to whether these administrations did, in fact, get tough on crime.

1.1. Definition of “Tough on Crime”

Members of the Harper administrations explicitly defined their approach to criminal justice policy as being “tough on crime.” They used this self-definition to differentiate themselves from their Liberal party predecessors in government and the members of the parliamentary Opposition by describing them as “soft on crime.” The Harper administrations’ characterization of their own criminal justice policies was widely accepted, even though its political opponents resisted the accompanying characterization of themselves being “soft.” Given the centrality of the concept of “tough on crime” in the political discourse and in this dissertation, a precise definition of the term is required.

Contrary to the bifurcated conceptual categories of “tough” and “soft” used by the members of the Harper administrations, I use the terms as relative points on a spectrum. Toughness or softness are relational rather than absolute. Policies and actions can be tougher and softer than other policies and actions. This immediately raises the issue of the appropriate comparators, which are considered in more detail in chapter 4.

In defining toughness, I have adopted Black’s observation that “law is a quantifiable variable.”⁶ So too with toughness. The greater the sanction that is imposed in response to an act, the tougher the legislation, policy, or decision that resulted in the imposition of the sanction. Toughness can be increased by imposing sanctions on acts that were previously not deemed worthy of sanction, and toughness can be decreased by restricting the range of actions for which sanctions are imposed. Toughness can also be increased by increasing the sanctions imposed for a specified act and decreased by reducing the sanctions for the same act. One problem that arises is the comparability of different sanctions,⁷ which can include a reprimand, public humiliation, fine, non-carceral restrictions on liberty, incarceration, the infliction of physical pain, and execution.

Thus far in the 21st century, the Canadian justice system has removed corporal and capital punishments from the range of acceptable sanctions. The members of the Harper administrations did not change or propose to change this restriction on the range of sanctions available to the justice system. This effectively removes the problem of attempting to give comparative ranking

to the punitive effect of corporal and carceral punishments. While the comparability of punishments such as humiliation, non-carceral restrictions on liberty, and fines present problems of assessing which is the harshest, incarceration itself is the most complete restriction on an individual's liberty available in the absence of capital punishment. Further, incarceration is quantifiable with a simple numerical measure of the days, months, or years an individual is deprived of liberty. From this, an operational definition of "toughness" can be stated as any legislation, policy, or decision that increases the aggregate time incarcerated for criminal acts. More toughness means more jail, and less toughness means less jail.

Excluded from this definition is any evaluation of the conditions experienced when an individual is incarcerated. Effectively, this definition positions a sentence in a jail or prison as the punishment, rather than conceptualizing the jail or prison as a place to be punished. Changes in the conditions of incarceration (such as the quality of food, comfort of cells, crowding, availability of recreational activities, use of solitary confinement, and so on) are beyond the scope of this dissertation. There are two reasons for this exclusion. The first is jurisdictional. The majority of prisoners in Canada are in jails operated by provincial governments. Decisions affecting the conditions of confinement are therefore beyond the powers of a federal government administration. The second reason is operational. Any attempt to assess the conditions of confinement, over time, in dozens of correctional facilities across Canada would be a major research project in its own right – one which has been conducted with aplomb in recent years.⁸ For these two reasons, toughness will therefore be measured on a quantitative basis, with the numbers of people incarcerated and the length of time they are behind bars serving as operational measures of toughness.

1.2. Importance of the Issues Examined

Criminal justice policy is central to the well-being of citizens living in the 21st Century. On the one hand, people need the ability to conduct their daily lives with a reasonable degree of certainty that they will not be victimized by force or fraud. On the other hand, the state's power to punish necessarily inflicts hardship on individuals.⁹ When pursued past some (difficult to establish) level of toughness, imposition of criminal sanctions appears to have the effect of

undermining, rather than reinforcing, the functionality of communities and the well-being of its members.¹⁰ Incarceration also has a fiscal cost to government. In the fiscal year 2015-2016, the mean cost of keeping a prisoner in a federal prison was \$103,295. Provincial spending per inmate ranged from \$51,830 in Alberta to \$100,010 in Prince Edward Island.¹¹ The assessment of what the “right” level of toughness toward crime and most appropriate levels of incarceration are beyond the scope of this dissertation. However, a fuller understanding of the processes that produce specific criminal justice system results can help shape the formation of policies that produce the normative and pragmatic results desired by those entrusted with the task of forming these policies.

Examination the Harper administrations’ criminal justice policies results in an exploration of some of the fundamental questions of sociology, such as:

- What are the constraints on the ability of individuals to freely pursue their goals?
- How do the interaction of individuals and the systems they operate come together to produce a verifiable social fact?
- What are the basis of, and limitations on, the exercise of power?
- How do different systems interact in a dynamic fashion?

Finally, it should be noted that the analysis of this dissertation has the potential to indirectly contribute to an important debate occurring in the United States. In that country, incarceration rates increased dramatically in the years following 1974. This increase was sustained both during periods of rising and falling crime rates. It was not the result of any single legislative act nor any single governmental administration. In the past decade, efforts to reverse these increases have been made, but with only modest success. These developments have spawned a massive effort at explanation. The example of the Harper administrations provides the basis for an interesting comparative study. In the United States, the increase in incarceration occurred without an articulate policy objective. In Canada, for a decade, the federal government explicitly announced its intention to increase the utilization of carceral responses to crime, but incarceration rates remained stable. I hope that the detailed examination of this failure to achieve

these stated political objectives can be used as a case study to assist with the understanding of the American criminal justice system as well as the Canadian.

1.3. What was Known About the Harper Administrations' Criminal Justice Policies

As is demonstrated in chapter 2, the existing literature on the Harper administrations' tough-on-crime program is fairly sparse. Further, much of it is deeply flawed in that it conflates the political rhetoric of the Members of Parliament from the CPC with substantive result. The most important analysis comes in a series of articles by Webster and Doob¹² who argued that increases in incarceration rates are driven by risk factors such as a punitive culture, primacy of utilitarian objectives in sentencing, and the systemic organization of political institutions that create a "prisoner's dilemma" for political actors that drives them to increasingly punitive positions. Counteracting these risk factors are protective factors. Webster and Doob argue that in Canada these include a culture of restraint in the use of incarceration, the insulation of justice decision-makers from immediate and direct political pressure, and a division of authority that allows both levels of government to avoid direct blame for repugnant criminal acts. They argued that the interplay between these factors produced relatively stable incarceration rates but that future results are indeterminate. In this dissertation, I build on the basic insight by Webster and Doob that the substantive results of the criminal justice policies are indeterminate in advance and are the result of the ongoing dynamic activity in both the political and justice systems.

1.4. Research Questions

This dissertation represents an attempt to provide answers to two interdependent research questions:

1. Given the volume of tough-on-crime legislation, why did the Harper administrations have a muted substantive impact on incarceration rates?
2. Given the modest substantive effect, why did the Harper administrations continue to make tough-on-crime legislation a cornerstone of its political agenda?

1.5. Approach to the Study

In order to build on the insights of Webster and Doob, I begin by conceptualizing the implementation of the Harper administrations' tough-on-crime program as a series of acts that result in the passage and implementation of legislation. The systems theories of Niklas Luhmann are drawn upon to explore how these legislative acts did not always produce the results predicted. The insights of Murray Edelman on the nature of symbolic action were drawn upon to explore the possibility of a contradiction between the overall stated goals of the members of the Harper administrations and the objectives of unit actions taken as part of the fulfilment of the overall tough-on-crime program.

The methodological approach employed in this dissertation was necessarily eclectic. Consistent with the advice of Becker, a quantitative approach was taken to establish the parameters of what must be explained while a more qualitative approach was taken to examine the processes that produced these results.¹³

To examine the substantive results of the operation of the criminal justice system, I primarily relied upon Statistics Canada CANSIM series data tables to document trends in incarceration rates and sentencing patterns. These were presented in the form of graphs to allow the reader to identify changes and differences both temporally and jurisdictionally.

To examine the processes, I began with the legislative record. Utilizing the parliamentary website, I examined what laws were introduced, what they stipulated and how they proceeded (or not) through the legislative process. In this analysis, allocation of time was used as a measure of commitment by both government and opposition members. I then turned to the legislative debate. For legislators, the primary focus was on statements made in second reading speeches (debate in principle) as recorded in *Hansard*. Arguments and justifications were coded and counted using NVivo 11 to measure the intensity of arguments being made. The testimony of witnesses before parliamentary committees were examined to evaluate who was supporting or opposing particular legislative initiatives and the arguments being made. In order to evaluate the processes by which the courts interpreted and implemented the legislation being passed, the written rulings produced by the judiciary in response to specific cases were analyzed. These

cases were selected by a combination of keyword searches using the Canadian Legal Information Institute repository of cases and snowball sampling from cited precedents. The decisions were coded and counted to measure the justifications for decisions.

Media articles, election platforms, government reports and discussion papers, government accountability documents and policy directives were also used to provide further evidence.

1.6. Structure of the Dissertation

Chapter 2 examines the extant literature on Canadian incarceration rates and the criminal justice policies of the Harper administrations.

Chapter 3 provides a theoretical basis to inform the empirical study. The process of activity as a series of end-directed acts is defined. The systems theory of Niklas Luhmann as a way of explaining the limited ability of political actors to achieve their end and the theories of symbolic action developed by Murray Edelman as a way of dealing with the possibility of a disconnection of ends in the various unit acts and the overall ends of a political program are explored.

Chapter 4 outlines the major methodological issues dealt with in this dissertation. This includes an articulation of the comparators used to evaluate the legislative initiatives of the Harper administrations and summarizes the strengths and weaknesses of the major data sources used.

Chapter 5 is designed to establish the central empirical claim of this dissertation, namely that the legislative initiatives of the Harper administrations had at best a modest effect on substantively toughening Canada's criminal justice system. Incarceration rates were relatively stable when measured against population and increased slightly when measured against recorded criminal offence. With the notable exception of drug trafficking, importation, and production offences, there was little change in the treatment of those convicted by the courts.

Chapter 6 examines Bill C-10 or the *Safe Streets and Communities Act* in detail. This particular bill was chosen because it has been described as the culmination of the Harper administrations' criminal justice policies.

Chapter 7 examines the record of the Harper administrations from a theoretical perspective explicitly informed by Luhmann. In this chapter, I argue that one reason for the muted substantive effect of the Harper administrations' tough-on-crime legislative program was systematic limitations of the powers of a Canadian federal government to directly determine the treatment of criminals.

Chapter 8 is explicitly informed by the theories of symbolic action developed by Edelman. I examine the justice policies of the Harper administrations to argue that in some cases the substantive impact of legislative initiatives did not appear to be the most important priority. Instead, the members of the Harper administrations used their power to introduce legislation to maintain the centrality of safety from criminal activity as a central political issue even during a period of a sustained drop in reported crime rates. I postulate that one objective of the legislation was to create and maintain acquiescence to their rule. Symbolism often trumped substance.

Chapter 9 summarizes the empirical evidence and tests the theoretical framework against this evidence. Key theoretical, political and policy conclusions are drawn.

Chapter 10 serves as an epilogue. It consists of a brief overview of the criminal justice policies of the Trudeau administration from its assumption in office in the fall of 2015 through to the end of 2017.

¹ Todd R. Clear, "Backfire: When Incarceration Increases Crime," *Journal of the Oklahoma Criminal Justice Research Consortium* 3 (1996): 1-10; Jeffrey Fagan, "Crime, Law and the Community: Dynamics of Incarceration in New York City," in *The Future of Imprisonment*, ed. Michael Tonry (New York: Oxford University Press, 2004), 27-59; Tomislav Kovandzic and Lynne Vieraitis, "The Effects of County-Level Prison Population on Crime Rates," *Criminology and Public Policy* 5, no. 2 (2006): 213-244; Steven Levitt, "The Effects of Prison Population Size on Crime Rates: Evidence from Prison Over-Crowding Litigation," *Quarterly Review of Economics* 111, no. 2 (1996): 319-351; Raymond V. Liedka, Anne Morrison Piehl, and Bert Useem, "The Crime Control Effects of Incarceration: Does Scale Matter?" *Criminology and Public Policy* 5, no. 2 (2005): 245-276.

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- ² Conservative Party of Canada, *Stand Up for Canada: Conservative Party of Canada Federal Election Platform 2006*. (Ottawa: CPC, 2006), 22.
- ³ Conservative Party of Canada, *Stand Up for Canada*, 22.
- ⁴ Conservative Party of Canada, *Stand Up for Canada*, 22-28
- ⁵ Compiled from Canada, Parliament of Canada, *LEGISinfo*, <http://www.parl.gc.ca/LegisInfo/Home.aspx?Language=E&Mode=1&ParliamentSession=42-1>.
- ⁶ Donald Black, *The Behavior of Law* (New York: Academic Press, 1976), 3.
- ⁷ Michael Tonry, ed., *Thinking about Punishment: Penal Policy Across Space, Time and Discipline* (Farnham, UK: Ashgate, 2009), 417-444.
- ⁸ Michael Weinrath, *Behind the Walls: Inmates and Correctional Officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016); Rose Ricciardelli, *Surviving Incarceration: Inside Canadian Prisons* (Waterloo, ON: Wilfred Laurier University Press, 2014).
- ⁹ David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008).
- ¹⁰ Alice Goffman, *On the Run: Fugitive Life in an American City* (London, UK: Picador, 2015); Mary Pattillo, David Weiman, and Bruce Western, eds., *Imprisoning America: The Social Effects of Mass Incarceration* (New York: Russell Sage, 2004).
- ¹¹ Canada, Statistics Canada, *Adult Correctional Services Operating Expenditures for Provincial, Territorial and Federal Programs*, CANSIM 251-0058.
- ¹² Cheryl Marie Webster and Anthony N. Doob, "Punitive Trends and Stable Imprisonment Rates in Canada," *Crime and Justice* 36, no. 1 (2007); Anthony N. Doob and Cheryl Marie Webster, "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate," *Law and Society Review* 40, no. 2 (2006), 325-368; Cheryl Marie Webster and Anthony N. Doob, "Maintaining our Balance: Trends in Imprisonment Policies in Canada," in *Canadian Criminal Justice Policy: Contemporary Perspectives*, ed. Karim Ismaili, Jane B. Sprott, and Kim Varma (Don Mills, ON: Oxford University Press: 2012), 102; Anthony N. Doob and Cheryl Marie Webster, "The Harper Revolution in Criminal Justice Policy ... and What Comes Next," *Policy Options* 36, no. 3 (2015): 24-31.
- ¹³ Howard S. Becker, *Evidence* (Chicago: University of Chicago Press, 2017), 19-35.

2. Review of Literature on Incarceration Rates and the Harper Administrations' Justice Policies

This chapter reviews the literature on Canadian incarceration rates and the criminal justice policies of the Harper administration. Prior to the 1970's, Canada's incarceration rates were similar to those in the United States. Over the next two and a half decades, there were dramatic increases in incarceration in the United States while incarceration rates remained stable in Canada. Despite the stated tough on crime objectives of the Harper administration, this Canadian stability continued. This chapter examines the literature on the role of criminal justice policy in the Canadian political debate during this period, the literature on individual legislative acts and the summative literature on the impact of the Harper administration on the criminal justice system.

2.1. Analysis of Canadian Incarceration Trends

The Canadian political and academic debate over the Harper administrations' tough-on-crime program was conducted against the backdrop of the experience of the United States. As late as 1990, Lipset argued that Canada's cultural history of more deference to authority resulted in Canada having a more punitive orientation than existed south of the 49th parallel. On the other hand, he documented an increase in the number of police personnel in the United States while police numbers in Canada remained stable. Lipset argued that the Canadian symbolic and ideological commitment to social order reduced crime in an economical way.¹ At this time, the primary focus of comparison between the two countries was centred on crime rates rather than punitive outcomes.² Until the early 1970s, incarceration rates in both Canada and the United

States were similar enough that disputes about rates focused on definitions and counting methodologies.³

A year before the start of a three decade-long increase in American incarceration rates, Blumstein and Cohen argued that incarceration rates were governed by a homeostatic process that produced a level of incarceration sufficient to maintain social stability independently of crime rates.⁴ The focus of sociological and criminological research turned from explaining American stability to explaining American growth in incarceration rates. Fifteen years after theorizing about societal mechanisms that produced stability in incarceration rates, Blumstein was describing the level of incarceration as “out of control”⁵ with his theoretical construct “sunk if not into complete oblivion at least into that limbo where theories which no longer seem relevant to current concerns or contemporary developments have their habitation.”⁶ For the past quarter century, American treatments of crime and punishment have been directed toward explaining high levels of incarceration.

The volume of this literature is immense.⁷ In part, this is due to the stark reality that the United States has been transformed from the land of the free to the home of the incarcerated. There is also a supply-side explanation for the volume of this literature as the growth in the carceral system has been accompanied by a growth in criminology departments at universities as a result of the demand for training of police and corrections staff.⁸ The Canadian stability in incarceration rates has attracted much less attention. This is probably the result of the fact that the meaning of a dog not barking is less obvious than that of a barking dog even when the significance is similar.⁹ The exploration of processes creating stability largely disappeared as a result of the change in the American reality. Stability must still be explained where it does exist. As Webster and Doob put it:

In some sense, there is no need to explain Canada’s unchanging imprisonment rate. Few social scientists spend much time exploring the reasons for the absence of change. However, particularly in light of the increases in the use of punishment in countries such as the United States and England and the high social, opportunity, and economic costs associated with rising levels of incarceration, the Canadian case takes on additional relevance. Explanations for Canada’s stability may shed important light on the growth of punishment in other nations and potential strategies for countering this trend.¹⁰

Studies of incarceration rates in Canada often focus on differential rates within Canada, with primary attention to racial identity.¹¹ The general finding is that Indigenous and black Canadians are incarcerated at higher rates than are white Canadians. This finding is consistent with analysis of the American experience, but the focus on internally differential rates tends to make overall stability unproblematic.¹²

Just prior to the beginning of the long-term rise in American incarceration rates, debate focused on quantifying the question of which side of the border had higher incarceration rates. Hogarth argued that Canadian incarceration rates were approximately 20 percent higher than in the United States¹³ while Waller and Chan noted the regional variation in the United States to show that Canadian rates were lower than in rural northern states but higher than more urbanized and southern states.¹⁴ The differences that did exist were relatively trivial by today's standards and there was a corresponding relative indifference to the cause of the variations.

By the middle of the 21st century's first decade, the difference in incarceration rates between the two countries was dramatic. The only comprehensive treatments were offered by Webster and Doob who argue that increases in incarceration rates are driven by risk factors such as a punitive culture, primacy of utilitarian objectives in sentencing, and the structural organization of political institutions that create a "prisoner's dilemma" for political actors that drives them to increasingly punitive positions. Counteracting these risk factors are protective factors. Webster and Doob argue that in Canada these include a culture of restraint in the use of incarceration, the insulation of justice decision-makers from immediate and direct political pressure, and a division of authority that allows both levels of government to avoid direct blame for repugnant criminal acts.¹⁵ Webster and Doob argue that in Canada up to this point (2006–07) the protective factors had been sufficient to restrain the ever-present risk factors. However, they argue that this situation is conditional and that Canada's record of relative restraint in the use of incarceration could not be assumed to be permanent. Writing at the beginning of the Harper administrations' term in office they warn, "it would seem that Canada is currently experiencing a rise in (the strength of) one of its risk factors at the same time as a decline in several of its protective factors."¹⁶

Implicit in the Webster and Doob analysis is a sense that, in the realm of justice policy, direct and unfettered democracy leads to higher incarceration rates. Against the backdrop of a culture oriented toward punitive responses to crime, the actors such as politicians, prosecutors, and judges must be insulated from public discontent arising from “soft” treatment of those convicted if more draconian responses are to be avoided. If nothing else, there must be an air of plausible deniability for direct responsibility. For example, Webster and Doob discuss how the separation of responsibility for the passage of criminal law and the administration of justice allows the federal Parliament to pass laws with high, rarely imposed, maximum sentences that help immunize federal politicians from blame for any individual lenient sentence. At the same time, the recourse to filing an appeal provides a convenient and effective response to provincial officials in the event of a controversially “soft” sentence in a high profile case. These mechanisms, along with the requirement for time-consuming consultations between levels of government that arise from the division of responsibility, has the result of “virtually (albeit not entirely) eliminating the possibility of introducing quick-fix politically motivated legislation in response to unusual circumstances that arise from isolated cases.”¹⁷ Another aspect of the implicit distrust of responses to crime driven by public opinion is the role of expert opinion. Webster and Doob disapprovingly note that the platform commitments of all major national political parties in the 2006 federal election contained calls “for harsher policies and practices [that] were clearly designed without the benefit of advice from those knowledgeable on criminal justice policy.”¹⁸

Webster and Doob revisited their analysis approximately halfway through the Harper administrations’ terms in office. While reaffirming the finding of stability in incarceration rates, they warned that “several signs of change exist on the Canadian horizon, particularly within the political realm.” They conclude, “The simple maintenance of the status quo in imprisonment rates should—in our opinion—be viewed as a notable accomplishment.”¹⁹

2.2. Literature About the Justice Record of the Harper Administrations

My discussion of the literature about the justice policies of the Harper administrations is divided into three components. The first places the election of the Harper administration into a

general political context and framework. The second examines analysis of particular legislative and policy initiatives. The final component examines summative analysis of the Harper administrations' record as a whole.

The chapters that follow this summary of the literature are implicitly critical of some of the key conclusions reached in much of this literature. Quite simply, I reach a different conclusion about the impact of the legislative initiatives and policies of the Harper administrations. However, I feel it important to put my differences in context. Those whose findings I challenge were often working in the realm of foresight and prediction. They were attempting to predict the results of government initiatives. I am working in the realm of hindsight and reporting. This task is much easier. As Webster and Doob note in their 2007 treatment of Canadian incarceration rates, "it seems that those who focus exclusively on the harsh language of the law or on public statements about it appear to incorrectly equate language designed to sound harsh with actual treatment."²⁰ During the period in which the initial evaluations of the Harper administrations' policies were being evaluated, researchers had little actual empirical evidence save the "harsh language of the law or on public statements about it." Further, much of the analysis of the Harper administrations was produced in the context of a profound ethical and pragmatic objection to the stated objectives of the legislative initiatives. As such, much of this work is an exemplar of public sociology²¹ using sociological expertise to intervene in public debates to advance the cause of social justice. I believe one individual needs special recognition for this despite the dangers of inadvertently downgrading the contributions of others who are also worthy. Anthony Doob appeared as an individual six times before House of Commons committees²² and three times before Senate committees²³ to explain that harsher punitive measures did not necessarily reduce crime or improve public safety. While I sometimes challenge his conclusions and those of other researchers, I do so with the appreciation that their efforts helped to prevent their predictions from being fully realized.

The dominant finding in the literature on the Harper administrations' tough-on-crime policies is that they represented a transformative break with previous Canadian justice policies. Writing from a sympathetic political perspective, Kheiriddin said "the Conservative government sought to transform the Canadian justice system" and succeeded to the extent that it

“significantly impacted not only individuals involved with in the criminal justice system, but the larger relationship between executive, legislative and political branches of government.”²⁴ In summing up the record of the Harper administrations, Doob and Webster argue that prior to Harper’s election a “broad consensus existed on the principles that should govern criminal justice reform.”²⁵ The Harper administrations’ rupture with past policy is described as fundamental and revolutionary. There is a shared assumption about the significance and direction of the changes. Both observers also share a belief that the long-term effect of the changes still has an indeterminate outcome dependent upon whether successor administrations reinforce or reverse Harper’s legislative program and both express optimism that a pragmatic, evidence-based analysis of the justice system will support their respective diagnosis of the efficacy of the Harper era changes. Despite their argument that the Harper administrations’ presided over a fundamental shift in Canada’s criminal justice polices, Doob and Webster again confirm the stability of Canadian incarceration rates.²⁶ Others allege more transformative short-term effects by asserting that incarceration rates increased during the Harper administrations’ terms in office²⁷ or fail to present evidence about trends in incarceration such that intent is conflated with result.²⁸ Others are predictive. Newell asserts “a massive policy shift toward the expansion of the Canadian prison system”.²⁹ Analysis of intent or prediction of outcomes can be useful. However, just as a weather forecast cannot be conflated with a weather report, intent or prediction must be compared against actual results.

2.2.1. Literature on the Political Context of the Harper Administrations’ Tough-on-Crime Policies

The creation, electoral rise, and election of a reconstituted Conservative party under the leadership of Stephen Harper generated attention, both academic and journalistic.³⁰ These studies identify a tough-on-crime position as a major component of the appeal for electoral support made by the Conservative Party of Canada, but do not address the substance of the issue in detail. Nonetheless, there is convergence on a few key points directly relevant to this dissertation.

Of direct relevance to the argument by Doob and Webster that the policies of the Harper administrations represented a rupture with an existing consensus, the analysts of the political

emergence of the Harper-led Conservative party place the historical roots of the tough-on-crime policies within the Reform Party that had emerged in Alberta and supplanted the legacy Conservative Party in western Canada. “Tough on crime” was part of a package of populist protest measures against elite-driven policy agendas. Other elements of the Reform Party’s western populist appeals had been constitutional reform focused on the Senate as a mechanism for regional democratic expression and issues seen as moral choices such as opposition to abortion and same-sex sexual expression. In his efforts to expand the appeal of his party beyond the Reform Party’s regional base, Harper jettisoned the constitutional and morally based appeals while imposing a higher level of message discipline to ensure that these issues could not be made salient by his political foes. In a real sense, “tough on crime” was all that remained of the Reform Party’s populism. Aggressive promotion of this policy direction was described as the major policy victory of the remnants of the Reform Party. It should also be noted that this populism was rooted in a belief that common sense and citizens’ perceptions should be accorded primacy over elite expert opinion.

The other key contextual factor influencing the centrality of the tough-on-crime approach of the Conservative party prior to the 2006 election was the “Sponsorship Scandal” arising from the Chrétien Liberal administrations’ efforts to raise the profile of the federal government in Quebec. As the program sank into a quagmire of royal commission and criminal investigations, the moral authority of the federal government was weakened. Harper’s Conservatives portrayed political corruption and moral lassitude as symptoms of the same disease that produced “soft-on-crime” criminal justice policies. In this sense, the democratic reform and criminal justice components of the Conservative Party of Canada’s 2006 platform and appeal for electoral support were intrinsically linked in a general critique of a perceived moral decay in Canadian society.

2.2.2. Literature on Individual Tough-On-Crime Legislative Initiatives

The 2009 passage of Bill C-25 or the *Truth in Sentencing Act* generated more academic analysis than any other single tough-on-crime legislation passed by the Harper administration. The bill legislatively limited the amount of credit given for time served in remand custody prior

to conviction and sentencing. The legislation was passed in the context of a decade and a half of rapidly increasing rates of remand custody.³¹ During this period of growth, one explanation offered by politicians and justice system administrators was that those criminally accused were manipulating the system in order to secure advantage from enriched credit for time served in pre-conviction custody.³² This causal attribution was rejected by most prisoners,³³ inmate advocates, criminal defence lawyers, and professional criminologists.³⁴ Inmate advocates justified enhanced credit on the grounds of the differential intensity of punishment because of differential conditions in pre-conviction and post-conviction custody. The academic critique focused on the negligible impact the legislation would have on crime or remand rates, and on the workings of interrelated policies and laws that would cause differential treatment in the total length of incarceration depending upon whether an accused had been held in remand or released on bail prior to conviction and sentencing. This evidence-based and logical critique of Bill C-25 was ignored by parliamentarians. In the analysis that followed, the legislation was described as “the product of apathy and indifference on the part of many parliamentarians and, at worst, a wilful blindness rooted in political expediency”³⁵ and as “irrational.”³⁶ Blame for ignoring evidence and a disregard for sound public policy was thus attributed to some combination of incompetence and political expediency on the part of the government. This analysis fails to explain some key issues that will be explored later in this dissertation including the unanimous support from elected parliamentarians, the broader scope of the legislation than that promised Conservative platform, and the role of provincial governments in proposing and promoting the legislation.

Analysis of other individual legislative initiatives includes the expansion of powers for private citizens making arrests,³⁷ imposing sanctions on cyberbullying,³⁸ speech promoting terrorism,³⁹ the release of those found not guilty for reasons of insanity,⁴⁰ and prostitution.⁴¹ These legislative initiatives are described as being politically motivated responses to high profile events or, in the case of the prostitution legislation, a Supreme Court ruling. In each case, controversy was transformed into punitive sanctions despite either the rareness of the action being subjected to legislative sanction and/or the existence of expert opinion questioning the efficacy of the legislation. In a discussion of changes to parole eligibility for those convicted of murder,⁴² Manson summarizes the passage of the punitive legislation that affected very few individuals as being based on mobilizing the views of victims of criminal acts, an “indifference

to empirical data and the opinion of experts,” the attachment of labels “superficially, speciously and without scrutiny,” and the active support or indifference of opposition parties in Parliament.⁴³

The operation of Canada’s prison system also received attention. In a critique of the 2007 policy paper *A Roadmap to Strengthening Public Safety*. Jackson and Stewart argue that the government policy paper represents an abandonment of evidence-driven policy development and the replacement of a rehabilitative orientation with a punitive one.⁴⁴ Piché argues that a major expansion of prison capacity formed an essential part of the Harper administrations’ justice policies.⁴⁵ These two studies combine to establish the framework of analysis of the operation of the prison system during the Harper era.

The abandonment of evidence-based decision-making and the occurrence of a punitive rather than a rehabilitative orientation within the context of expansion of carceral capacity form the underlying assumptions of studies into the experiences faced by prisoners and corrections workers⁴⁶ and operational decisions such as the closing of prison farms by the Correctional Service of Canada (CSC).⁴⁷ While the studies focusing on the political elements of prison policy and administration point to an increasingly punitive approach, countervailing pressures have been identified. Kerr traces the history of a punitive protocol on long-term solitary confinement implemented by the CSC in 2003, which was quietly abandoned in 2011 following legal challenges and public controversy.⁴⁸ In this case, a punitive measure implemented prior to the inauguration of the Harper administration was modified through a process in which the primary fields of contention were legal, administrative policy, and the media rather than political.

2.2.3. Summative Analysis of the Harper Administrations’ Tough-On-Crime Record

As noted earlier, there is a virtual consensus in the summative literature on the Harper administrations’ justice policies that they represented a tough-on-crime approach. This is seen to represent a transformative shift in Canada’s justice policies from a rehabilitative orientation to a punitive one. All focus on both the rhetoric of Conservative officials and the volume of tough-on-crime laws proposed and passed. All attribute primary motivations as a populist appeal for electoral support and a conception of those who violate criminal law as dangerous others.

The first point of divide in the literature is between those who treat the stated objectives of the Harper administrations as achieved result and those who do not. Those who take the first position either misstate or misinterpret the empirical evidence on incarceration numbers⁴⁹ or simply ignore the issue of empirical results.⁵⁰ This body of literature has value and applicability in some areas. For example, Weinrath's examination of the CSC is a perceptive and valuable study of the operations of prisons in Canada. However, with respect to the research problems this dissertation is examining, the combination of the empirical error and a simplistic assumption of unity between the stated objective and ultimate result make this body of literature irrelevant. It is important to note that in making this critique, I am not referring to those who attempted to predict the results of the Harper administrations' program early in its tenure. Nobody has a good crystal ball, and predictions that the government would succeed in meeting its stated objectives were not unreasonable. To repeat these predictions as accomplished fact a decade later is less tenable.

Those authors whose work is grounded in the empirical reality that Canadian incarceration rates were relatively stable during the Harper administrations' tenure in office provide much more interesting analysis.

Zinger examines the impact of the Harper administrations' tough-on-crime rhetoric and legislative initiatives on the internal operations of the CSC.⁵¹ He argues that CSC management used a punitive political climate and projections of increased prison numbers to increase budgets and create even more control-oriented operations within Canada's prisons. CSC budgets almost doubled in the first half the Harper administrations' tenure before being partially scaled back when "the expected influx of new prisoners with the coming into force of the *Truth in Sentencing Act* (2009) and other crime bills failed to materialize."⁵² However, even with the budget correction, CSC management emerged from the exercise with a net gain in resources. At the same time, the CSC cut programs aimed at rehabilitation or integration into society and increased measures designed to control inmate activity. This aligned with a tough-on-crime political program by making prisons more punitive both in substance and perception. As a result, the political tough-on-crime mandate resulted in a qualitative rather than a quantitative toughening.

Webster and Doob provide a summative analysis of the Harper era that must be read in the context of their earlier work. As noted above, at the start of the Harper administrations' tenure, they explained the stability in Canada's incarceration rates in terms of the balance between risk and protective factors.⁵³ At the mid-point of the Harper era, they report that risk factors in the form of the political orientation of the government have increased, but that the protective factors have thus far prevented a major increase in incarceration rates.⁵⁴ In their summative analysis at the end of the era, they stress a profound shift in fundamental orientation, saying "the policy elite in Canada has taken the position that those who commit offences are inherently 'bad' people and qualitatively different from 'ordinary law abiding Canadians.'"⁵⁵ Webster and Doob further report that "the Conservative government has introduced unprecedentedly harsh criminal justice legislation characterized by a greater use of imprisonment, increased reduction in judicial discretion, and a more punitive philosophy of corrections."⁵⁶ At the same time, "the relative stability of Canadian imprisonment rates suggests that it has largely been able to resist the wider forces compelling other countries toward more punitive responses to crime."⁵⁷ Webster and Doob rightly identify this as a conundrum in need of explanation. The role of the political opposition in Parliament is discounted with the observation that most punitive legislative initiatives received implicit or explicit support from other parties.⁵⁸ Primary attribution for the stability in incarceration rates is given to the protective factors discussed above. However, they also suggest that much of the tough-on-crime legislation was primarily symbolic⁵⁹ and appeared to be an attempt to form public opinion rather than simply to follow it.⁶⁰ They speculate that the broader objective of the tough-on-crime legislative agenda may have been part of a larger project to reinforce conservative values related to individual responsibility in all aspects of life.⁶¹

Webster and Doob present the outcomes of the Harper administrations' tough-on-crime program as still being contingent and indeterminate. They clearly hope for failure on moral, ethical, and pragmatic grounds. Kheiriddin, on the other hand, is clearly supportive of the stated objectives of the Harper administration.⁶² Despite this, she agrees with Webster and Doob's analysis of both the nature of the rupture with the past and the indeterminacy of outcome.

2.3. Limitations of the Literature on Canadian Incarceration Rates During the Harper Era

The review of literature on the results of the Harper administrations' criminal justice policies is necessarily fairly short. In comparison to the analysis of the increases in American incarceration rates, there has been very little explanation of the stability in Canadian incarceration rates, even during the almost decade-long tenure of an administration which was explicitly attempting to increase the use of carceral response to crime. Some of the literature that does exist is intrinsically flawed because it does not recognize the empirical fact of stability. As a result, effort is wasted in attempting to explain the non-existent.

The most sophisticated efforts to explain Canadian incarceration rates occurs in the trilogy by Webster and Doob.⁶³ Their analysis suggests that elite, technically-informed administrators of the criminal justice system managed to thwart populist demands for increased use of carceral sanction. They also suggest that some of the criminal justice proposals of the Harper administration were symbolic in nature and primarily designed to mobilize political support for the governing party. This analysis is a very useful starting point. It leads to questions about the institutional locations and means by which the policy objectives of the governmental political administration are resisted. The analysis also implicitly calls for a further examination of the nature of political symbolism in the formation of criminal justice policies.

In an article published at the end of the Harper administrations' tenure, Doob and Webster present contradictory messages. On the one hand, on the basis of an analysis of rhetorical statements, they proclaim that a fundamental rupture has occurred in Canadian criminal justice policy.⁶⁴ At the same time, they join Kheiriddin in arguing that the results are indeterminate.⁶⁵ Both these arguments share a common problem in assuming the fact of a rupture. As Doob and Webster had noted in their earlier work, changes in substantive result were in fact relatively small. If there was indeed a rupture in political and policy discourse, why did this fail to be accompanied by a rupture in substantive results? If the results are indeed indeterminate, then the changes could produce either continued stability or future substantive changes in the processing of criminal cases in a way that leads to increased incarceration rates.

But is this in fact the case? If the actions of the Harper administration were indeed largely symbolic, is it not likely that substantively unchanged systems are more likely to produce substantively similar results?

The balance of this dissertation will attempt to build on both the insights and lacunae of the Webster and Doob arguments. To explore the nature of the “protective factors” that may have helped prevent a transformation of political intent into more incarcerated Canadians, we will examine the interaction of the Canadian system of making political decisions and the systems of administering criminal prosecutions and adjudicating cases. We will also examine whether the legislative program of the Harper administrations was, in fact, largely symbolic in nature. If it was, the nature and results of the symbolic actions must be explained. To begin this analysis we now turn to the systems theory of Niklas Luhmann and the theories of symbolic action developed by Murray Edelman.

¹ Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990), 90-116. See also John Hagan, “Comparing Crime and Criminalization in Canada and the U.S.A.” *Canadian Journal of Sociology* 14, no. 3 (1989): 361-371.

² Hagan, “Comparing Crime,” 361–371; Rhonda Lenton, “Homicide in Canada and the U.S.A.: A Critique of the Hagan Thesis,” *Canadian Journal of Sociology* 14, no. 2 (1989): 163-178; John Hagan, *The Disreputable Pleasures: Crime and Deviance in Canada, 2nd ed.*, (Toronto: McGraw-Hill Ryerson, 1984).

³ Irvin Waller and Janet Chan, “Prison Use: A Canadian and International Comparison,” *Criminal Law Quarterly* 17, no. 1 (1974): 47-71; John Hogarth, *Sentencing as a Human Process* (Toronto, University of Toronto Press, 1971), 41.

⁴ Alfred Blumstein and Jacqueline Cohen, “A Theory of the Stability of Punishment,” *Journal of Criminal Law and Criminology* 64, no. 1 (1973): 198-207; Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, “The Dynamics of a Homeostatic Punishment Process,” *Journal of Criminal Law and Criminology* 67, no. 2 (1976): 317-334.

⁵ Alfred Blumstein, “Prison Populations: A System Out of Control,” in *Crime and Justice: A Review of Research* (vol. 10) ed. Michael Tonry and Norval Morris (Chicago: University of Chicago Press, 1988).

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3. Systems and Symbolic Action Theories as a Framework for Analyzing the Record of the Harper Administrations

The literature examined in chapter 2 points to a disconnection between the stated objectives of the Harper administrations and actual substantive results. In particular, the series of articles by Webster and Doob argue that the rhetoric employed by members of the Harper administrations points to a fundamental rupture in Canadian criminal justice policy. Despite this, they acknowledge that incarceration rates remained relatively stable. They point to both “protective factors” and the possibility that some actions may have been symbolic in nature in order to explain the disconnection between rhetorical rupture and substantive stability. This dissertation builds on their insights. The purpose of this chapter is to outline the theoretical framework employed during the subsequent empirical examination of the actions and results of the Harper administrations in the area of criminal justice in order to address the questions:

1. Why did the Harper administrations have such little substantive impact on incarceration rates?
2. Given a modest substantive effect, why did the Harper administrations make tough-on-crime legislation a cornerstone of their political agenda?

Before taking up the theoretical approaches, we must first delineate an issue arising from different levels of analysis. As Parsons noted, this is an essential preparatory step in analysis. In his example, a bridge can be viewed as a collection of atoms or a single structural entity with a specific form and function.¹ In this study, we must look at both the atoms and the single entity. Unlike Parson’s bridge, the single entity is not a rigid and fixed structure. Instead it is a comprehensive political program that is dynamic. Measurement and description of this program

and its effects is therefore more complex than examining the structure of a bridge and counting the traffic flow over it. The equivalent of Parson's atoms are acts.

Parsons defines an act as having four essential elements: the act "implies an actor;" "the act must have an 'end,' a future state of affairs toward which the process of action is oriented;" "it must be initiated in a 'situation' of which the trends of development differ in one or more important respects from the state of affairs to which the actor is oriented, the end;" and in "a certain mode of relationship between these elements...there is a 'normative' orientation of action."² The primary act being examined in this dissertation is the passage of individual pieces of legislation which, when taken as a whole, comprise the administrations' criminal justice program. Passage of legislation consists of moving a written document through a chain of approval processes that result in the document achieving the status of a law, defined as "the body of rules, whether proceeding from formal enactment or custom, which a particular state or community recognizes as binding on its members or subjects."³ The single act of passing a piece of legislation consists of many individual acts, including drafting the legislation, introducing it into Parliament, placing it within the legislative calendar, speaking in favour or opposition to the legislation, referring the legislation to committee, voting (or refraining from voting) on the legislation and so on. If the legislation is passed, there must be many individual acts of enforcement and adjudication to transform the legislation into justice system outcomes. Parsons tends to assume that a series of acts will form a "single chain" of integrated by a single normatively established end goal.⁴ The final result of an action is seen as being the result of "a concrete end, concrete conditions, concrete means, and one or more norms governing the choice of the means to the end."⁵ This statement hints at the possibility of a multiplicity of potential outcomes rather than a single chain, since there is a choice of normatively governed potential means to achieve a desired end. Some of choices of means can be contradictory to the normatively chosen ends.⁶ Different actors involved can differ in their choices of both means and ends.⁷

The primary actor whose actions are under examination is the collective entity of the Conservative Members of Parliament who constituted Harper administrations in the Thirty-ninth, Fortieth and Forty-first Canadian Parliaments. In addition, the actions of Opposition Members of

Parliament, members of the judiciary, prosecutors and policy makers in provincial governments are also relevant to shaping the substantive outcomes of the legislation. These actors, and others, all engaged in discrete actions that combine to produce substantive outcomes in the state's response to criminal acts. In contrast to Parsons, the existence of a single chain of actions united by a commitment to a specified end goal and a common normative commitment to the means is not assumed. There are many cooks in the state's kitchen which makes the stew unpredictable. However, in rejecting analysis based on Parsons' single chain of actions, we are reluctant to surrender to an assertion of randomness of both action and outcome. In this case, the challenge is to find theoretical constructs that allow for the explanation of outcomes that are both systematic and indeterminate. We also do not wish to assume a linear relationship between the normative basis for decision-making for all of the discrete actions that constitute the act of passing legislation and, ultimately, the construction of a political program. The two theoretical constructs used to supplement Parson's conception of action that will be used to ground the analysis of the Harper administrations' criminal justice policies are the systems theory articulated by Niklas Luhmann and the theories of symbolic action developed by Murray Edelman.

3.1. Luhmann's Systems Framework

Luhmann's systems theory provides a functionalist explanation of the operation of a society while rejecting a conception of the society as a unified organism. Instead, a society is seen as comprising different systems that operate to achieve autopoiesis—that is, the ability to maintain system boundaries by functioning according to an internal logic and coding of operations.⁸

The implications of different systems operations can be seen by comparing operation of two related systems: the political and the legal. Luhmann argues the two systems are closely related and symbiotic, with the legal system legitimizing political power. This power, at the same time, provides the force that is available to enforce legal decisions if required.⁹ Each system forms part of the environment for the other, but the systems retain their distinctiveness. The legal system operates on the basis of the distinction between legal/illegal while the political system functions on the basis of "the distinction between superior power (authority) and those

subordinate (the governing/the governed)”.¹⁰ The political system deals with an issue by passing a law, which has the effect of moving the issue out of the political system. Once the political system deals with an issue by passing a law, interpretation moves into the realm of the legal system, which will process and dispose of the law using its own internal systems logic.¹¹ The issue also moves to other systems after the passage of legislation and becomes subject to the distinctions and coding operations of a range of other systems, such as the system of law (courts), enforcement (police) and perception shaping (media). As a result, the political system has limited ability to determine outcomes.¹²

Luhmann argues systems operate through communication and the processing of information, with different systems employing different communicative codes. If the first task of the system of law is the drawing, recording, and transmitting of distinctions to create a binary coding of acts as legal or illegal,¹³ the next step is more complicated. Once an act has been coded as illegal, to allow for expectations to be formed and fulfilled, equal cases must be treated equally and unequal cases unequally.¹⁴ To do this, the system of law functions self-referentially through a process of drawing factual distinctions in written rulings that both serve as justifications for the decision in the case at hand and provides a basis for comparison in future cases. In politics, however, the scope for agreement and disagreement is much greater. As soon as a decision is made, alternatives are available for presentation and debate. This congeals into a basis of opposition for all political decisions, resulting in a coding of the exercise of governmental power and opposition to this power.¹⁵ A legal decision thus “settles” a very narrowly defined point of controversy at least until another case with a different factual basis is presented. A political decision inevitably spawns a new, wider range of issues and debates.

The courts deal with specific real or hypothetical cases simply to decide whether an action is legal or not legal. In doing so, it converts facts into decisions. The political system processes issues—that is, problems that have come to command the attention in a manner compelling enough to force a decision. The objective of the decision is to “get problems out of the system”¹⁶ with the general effect of transferring it to other systems where outcomes are indeterminate. In the case of crime and a fear of crime, the political responses available to deal with a problem are to pass a law or allocate resources to enforcement systems. Once the political system has thus dealt with an issue by passing a law, “we do not know anything about the effects

of statutes after they have passed (unless special studies have been carried out or we have specific knowledge of the local milieu).”¹⁷

The legal system can only deal with issues presented as cases before it. The courts cannot seek cases. Instead, cases must be presented to it by actors within other systems. Once a case is brought into the legal system, the courts can pronounce an action or set of actions taken by one of the parties to the dispute to be legal or illegal. If an action is pronounced as illegal, sanctions can be imposed from a range of legally prescribed options. In general, the legal system does not make resource allocation decisions, except indirectly by mandating procedural requirements. The political system has more flexibility in response. It can proclaim rules in the form of legislation or regulation, confiscate or allocate resources, choose personnel to generate activity, or engage in communicative activity ranging from talk to symbolic acts.

Luhmann notes that the legal system is “very slow” since it is “held back by the need to demonstrate substantiation and accuracy.”¹⁸ The process of comparison of cases in search of differences results in slow incremental change. The courts also have restrictions on their ability to determine when they will deal with an issue since this is dependent upon parties in dispute placing cases before them for adjudication. Because the system of law deals with disputes and actions that have already occurred which diminishes a sense of temporal urgency.¹⁹ In politics, temporality is highly variable. Some problems present as issues that appear suddenly with a compelling case for immediate attention. Other problems present as issues that can be denied, obfuscated, delayed, or ignored. Political actors possess considerable discretion in deciding when to deal with issues, although there can be considerable political cost in misjudging temporal urgency by acting too quickly or too slowly.

In comparison to the system of law, Luhmann argues that “the political system operates on an altogether different terrain.”²⁰ Rather than simply adjudicating specific acts, the political system deals with problems. The actors in the political system have discretion about which problems generated by itself or other systems it will attempt to deal with in a political fashion. Decisions influence future events rather than rule on past actions. Because these problems have implications for the future, there are differential degrees of urgency for different problems.²¹ Because political acts attempt to influence future events and actions of many individuals,

institutions, and systems, there is an indeterminacy of result in any political action. Indeed, even retrospective analysis of the effects of political actions and decisions is very difficult.²² Because of these conditions on political actors, the history of politics

is a history of ‘talk,’ of strategic positioning, of operations under the schema of government and opposition, of negotiations, of public declarations of intention and the secondary intention of testing public opinion, etc. Politically the matter comes to rest with a symbolic act of legislation and the possibility of a mention in the success stories of the party or government.²³

For Luhmann, those acting in the political system are guided by the imperative of attempting to gain and hold power—that is, to be the superior authority rather than the subordinated. To do so, they identify problems and process them with legislative acts or resource allocation. Once processed, the goal is to credibly declare the problem to be solved or “to get the problem out of the system”²⁴ and claim political credit for so doing. However, the results of political actions are worked through on a case-by-case basis. As a result, these political decisions are indeterminate and ultimately unpredictable in substantive result.

In effect, Luhmann replaces Parsons’ single chain of actions that are united by common ends and a common normative commitment to means with multiple action chains. Each one has its own distinct imperatives. Within each action chain, there is some consistent shaping of results, and hence predictability. However, there is more indeterminacy of final result since there are more than one systems’ logics at play.

3.2. Edelman’s Theories of Symbolic Action

Edelman implicitly challenges Parsons’ conception of action by challenging the assumption of a necessary unity between the desired ends of individual actions in the action chain. Edelman argues that the ultimate end of actors in the political system is to generate some level of acquiescence to the political system itself.²⁵ For Edelman, the ultimate end of acquiescence is complicated by the indeterminate and unpredictable substantive results of political action. The primary focus of analysis moves from how government gives people “the things they want” to “the mechanisms through which politics influences what they want, what they fear, what they regard as possible, and even who they are.”²⁶ Actions by political actors can

thus be taken either for the end of achieving a substantive policy outcome or for the end of building and maintaining acquiescence.

Edelman argues that political leaders face two problems. The first is that most people have “no incentive to define joy, failure, or hope in terms of public affairs.”²⁷ In short, most people are indifferent to the passions that motivate political actors. The second constraint is that social issues tend to be intractable. There are no absolute solutions.²⁸ To mobilize and maintain political acquiescence, support, and involvement, the political actor seeks to create a series of spectacles²⁹ in which acts such as the introduction of legislation become symbols around which political mobilization can occur.³⁰ The creation of a successful spectacle is predicated upon the existence of interested spectators. Thus the challenge for political actors is to create and sustain an audience interested enough in the political process to allow for the acquiescence to be maintained.

For the purposes of this dissertation, three aspects of this approach are most relevant. First, like Luhmann, Edelman argues that political actors have a degree of choice in deciding what problems they will turn into political issues. With this, he argues that political actors do not simply respond to pre-existing public definitions of problems, but often actively create the perception of a circumstance as a problem that can then be solved. Second, he argues that acts are communicative symbols that are as important as words. Finally, he argues that there is an inverse correlation between the ability of a political actor to achieve specified substantive results and the importance placed on the communicative value of the act. I consider each of these propositions in turn.

Edelman argues that people living in a complex society experience a reality that is shaped by a vast array of influences. An individual experiences the world as “a complex of existential economic and social ties associated with a set of cognition.”³¹ A core task of someone aspiring to political leadership is to transform this multiplicity of influences into a small number of myths that can serve as a common framework to unify large numbers of individuals. These myths are stories that identify enemies or saviours and attribute a political causality to the negative aspects of people’s lives. Once a core organizing myth has been established into the political discourse,

the political leaders personify, intensify, and ritualize the myth-building discourse.³² From this perspective, “political issues” do not emerge spontaneously within the mass of the public, but are chosen for their potential capacity to create acquiescence to be ruled by a particular set of political actors. Some “damaging conditions” are selected to be defined as “social problems” worthy of attention and solution, while others are not.³³ There are inevitably conflicts among “leaders and oligarchies”³⁴ regarding which politically defined issue should be accorded primacy, since this is the key mechanism by which members of the public express a preference as to which leader or oligarchy it acquiesces to be dominated by. The creation of an issue becomes real in acquiescence.

If the practice of politics can be seen as a process of generating acquiescence through the selection and creation of public issues to be politically solved, Edelman argues that words are not enough as conveyors of meaning. Acts, whether or not they are substantively effective, convey meaning. Indeed, acts can speak louder than words. In the practice of politics, the act of passing legislation, allocating resources, or creating an administrative bureaucracy becomes a key component in defining an issue as important enough to serve as a basis upon which to grant acquiescence to being ruled.³⁵ In addition to serving as a mechanism for generating acquiescence, the political act may have substantive results. Indeed, Edelman argues, “Every instance of policy formulation involves a ‘mix’ of symbolic effect and rational reflection of interests in resources, though one or the other may be dominant in any particular case.”³⁶ This mixture of symbolic and substantive opens many possibilities. Edelman suggests, “It is not uncommon to give the rhetoric to one side and the decision to the other.”³⁷ The less important or successful the substantive results of the political act, the more important the symbolic attachment becomes.³⁸ The symbolic importance of an act in defining something as a public issue can even have the paradoxical effect in which substantive failure generates demand for an intensification of effort or resources devoted to the policies that are, objectively, failures.³⁹

3.3. Explanation and Theory Testing

In the balance of this dissertation, work of Luhmann and Edelman is used as a basis for informing the empirical study of the actions and utterances that comprise the unfolding of the

Harper administrations criminal justice program. These theories are treated as complementary rather than competitive. The empirical also serves as a test of the theoretical frameworks themselves. If Luhmann's theoretical approach is valid, evidence of the existence and interaction of different systems acting in accordance with systems logic will be found. Further, the final results of legislation and other policy initiatives will be the result of operations of the different systems and the interactions between them. These results will be indeterminate. A correlation between the stated objectives of legislation or political acts and substantive policy outcomes cannot be assumed. If Edelman's theoretical approach is valid, evidence of political acts undertaken at least in part for symbolic rather than substantive reasons must be found. Further, the symbolic aspects of these acts must be directed toward the mobilization of acquiescence to the political system in general and the members of the Harper administrations in particular.

¹ Talcott Parsons, *The System of Social Action* (New York: McGraw Hill, 1937), 40-42.

² Parsons, *System of Social Action*, 43.

³ *Oxford English Dictionary*, s.v. "Laws," accessed November 12, 2017, <http://www.oed.com/view/Entry/106405?rskey=6R7sG4&result=2&isAdvanced=false#eid>.

⁴ Parsons, *System of Social Action*, 229-230.

⁵ Parsons, *System of Social Action*, 737.

⁶ Robert K. Merton, "Social Structure and Anomie," *American Sociological Review* 3, no. 5 (1938): 672-682.

⁷ Lewis Coser, *The Functions of Social Conflict* (New York: Free Press, 1956), 21-23.

⁸ Niklas Luhmann, *Social Systems*, trans. John Bednarz Jr. with Dirk Baecker (Stanford, CA: Stanford University Press, 1995).

⁹ Niklas Luhmann, *Law as a Social System*, trans. Klaus S. Ziegert (Oxford, UK: Oxford University Press: 2004), 364-365.

¹⁰ Luhmann, *Law as a Social System*, 378.

¹¹ Luhmann, *Law as a Social System*, 369.

¹² Niklas Luhmann, "The Limits of Steering," *Theory, Culture and Society* 14, no. 1 (1997): 41-57.

¹³ Luhmann, *Law as a Social System*, 93.

¹⁴ Luhmann, *Law as a Social System*, 220-222.

¹⁵ Luhmann, *Law as a Social System*, 367.

¹⁶ Luhmann, *Law as a Social System*, 369.

¹⁷ Luhmann, *Law as a Social System*, 372.

¹⁸ Luhmann, *Law as a Social System*, 371.

¹⁹ Luhmann, *Law as a Social System*, 131.

²⁰ Luhmann, *Law as a Social System*, 369.

²¹ Luhmann, *Law as a Social System*, 368-380.

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- ²² Luhmann, *Law as a Social System*, 372.
- ²³ Luhmann, *Law as a Social System*, 377.
- ²⁴ Luhmann, *Law as a Social System*, 369.
- ²⁵ Murray Edelman, *The Symbolic Uses of Politics* (Urbana Ill: University of Illinois Press, 1964), 3.
- ²⁶ Edelman, *Symbolic Uses*, 20.
- ²⁷ Murray Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988), 7.
- ²⁸ Edelman, *Constructing*, 4-5.
- ²⁹ Edelman, *Constructing*, 120-130.
- ³⁰ Murray Edelman, *Politics as Symbolic Action* (Chicago: Markham, 1971), 12-30.
- ³¹ Edelman, *Politics as Symbolic Action*, 14.
- ³² Edelman, *Politics as Symbolic Action*, 12-30.
- ³³ Edelman, *Constructing*, 12-36.
- ³⁴ Edelman, *Politics as Symbolic Action*, 15.
- ³⁵ Edelman, *Symbolic Uses*, 44-72.
- ³⁶ Edelman, *Symbolic Uses*, 42-43.
- ³⁷ Edelman, *Symbolic Uses*, 39.
- ³⁸ Murray Edelman, *Political Language: Words That Succeed and Policies That Fail* (New York: Academic Press, 1977).
- ³⁹ Edelman, *Political Language*, 149.

4. Methodology: Description and Issues

The purpose of this chapter is to describe the data used as evidence in support of the arguments made as answers to the research question, how these data were collected, and the methods utilized to analyse data.

4.1. Methodological Implications of the Nature of the Argument

In this dissertation, I am attempting to open a black box.¹ In chapter 1, evidence is presented to argue that the Harper administrations had the stated intention of increasing incarceration levels in Canada and undertook legislative action that they described as fulfillment of this intention. In chapters 5 and 6, I examine actual achieved effects for both individual legislative initiatives and the Harper administrations' program as a whole to establish that the substantive effect of this legislative activity was, at best, muted. In short, there is a limited correlation between stated intentions and results. Victory could be declared by claiming that no causal relationship had been found. This would be unsatisfying. The primary task of the dissertation, therefore, is to present a plausible explanation as to why this result happened. This makes for an eclectic approach to methodology. To clearly establish what the stated intentions of legislative acts were, a close reading of the words spoken is required. To establish substantive results, a quantitative analysis of justice system outcomes is required. To follow the chain of unit actions leading to a single legislative act, a following of the legislative process is required. Finally, I assess the relationship between the symbolic and substantive nature of legislative initiatives and how legislation is processed by different systems. Each of these components of the evidentiary basis to the argument requires different data sets and different methodologies.

This dissertation is based on a discrepancy between stated intentions and results. I argue that one reason for this is a discrepancy between words and acts. This raises the question of the motivation for the acts. In undertaking the analysis of words, I have attempted to focus on what was said rather than assigning motive as to why the words were said. In some cases, motive is straightforward at one level. For example, the motivation for the choice of words in an election platform is to attract enough votes to win election. However, even in this motivation can be nuanced. Election commitments and language can attempt to win votes by attracting swing or traditionally oppositional voters or by creating and magnifying cleavages between groups of voters. The straightforward, singular motivation of winning elections can result very different motivations for specific commitments and language. In the end, ascribing motivation is based on an assessment of what is reasonable for an actor to do in a particular circumstance. This is dangerous because “what looks reasonable to us will not be what looked reasonable to them.”² The problem of motivation becomes even more difficult because of the nature of the core argument that many of the actions undertaken by the members of the Harper administrations in the realm of criminal justice appear to be symbolic rather than substantive in effect - and possibly in motive. If a symbolic act is undertaken to build acquiescence to the exercise of political power, the act can never be described in these terms. This inevitably posits a certain disconnect between stated and actual intent, which is drifting into the very dangerous realm of ascribing motive. Methodologically, I have attempted to resolve this by comparing the words and the acts to see if there was consistency. My task was to determine whether there was enough patterned inconsistency between the two to support the hypothesis that some of the actions were symbolic in nature.

4.2. Textual Analysis

In order to examine the structure and meaning of decision-making, this dissertation relies primarily on the textual analysis of existing documents, judicial decisions, and transcriptions of legislative debate. The exercise “consists of breaking down or fragmenting the pertinent units of information for their subsequent coding and categorization.”³ In addition to the meanings of the words, the context of the discourse is accorded attention.⁴ The utterance or writing of meaningful words is also considered as an act that has both meaning and consequence.⁵ The major

documentary sources relied on are the *Hansard* record of parliamentary debate with special emphasis on the second reading debate of tough-on-crime bills; the platforms of the major political parties contesting the 2006, 2008, 2011, and 2015 Canadian federal elections; the record of key events in parliament; written judgments from Canadian courts at both the trial and appellate levels; policy directives guiding the decisions of public servants, with particular emphasis on provincial prosecutorial policies; and media articles. The particular nature of and approach to each of these sources is discussed in turn.

4.2.1. *Hansard* Recording of Parliamentary Debates

The words uttered by recognized speakers in Canadian parliamentary forums (House of Commons, Senate, and committee meetings) are recorded and transcribed. Access is available in both print and internet-accessible electronic formats. For the most part, the record captures only the words uttered by a speaker formally recognized by the Speaker or committee chair, although from time to time unrecognized interjections (“heckling”) is uttered with sufficient volume and vigour to be recorded by the microphone and transcribed. Advance copies of the transcripts are provided to Members of Parliament, who are permitted to suggest minor alterations to improve clarity and accuracy. “Material changes to meaning” are not permitted.⁶

Utterances are bound by many stylistic conventions that are usually observed. Violation of these conventions can result in a speaker being interrupted to reaffirm a commitment to these conventions.⁷ Failure to do so can result in sanction, including temporary expulsion from the chamber.⁸ Those speaking in parliamentary forums are rigidly governed by both legal qualification to speak and the time available for speaking to specifically defined issues.⁹ Those speaking in the chamber of the House of Commons receive their qualification to speak from winning a plurality of electoral votes from a precisely defined geographical area while those speaking in the Senate have been legitimized by appointment by the Governor General acting on the advice of the prime minister at the time of appointment.

In both House of Commons and Senate Committees, people who are not members of the parliamentary bodies are granted the right to speak, subject to invitation or acceptance by the members of the committee.¹⁰ Those speaking during committee meetings include a subset of the

members of the House of Commons or Senate, government officials, representatives of interest groups, and people appearing as individuals. The latter group is usually either people who have been intensely and personally affected by issues arising from the legislation being discussed (i.e., family members of homicide victims) or academics who have either been asked or volunteered to share their expertise.

Permission to speak is restricted by the clock, with all speakers being subject to strict and inflexible limits on the time available.¹¹ The number of speakers and hence the time devoted to each individual piece of legislation is negotiated by the House leaders of each political party. In the event of major disagreement or delaying tactics by opposition members, the government can limit total time spent on a particular bill through the passage of a “time allocation” motion. The use of this expedient is an indication both of government commitment and opposition intransigence on a measure. As a result of the centrality of time in the operations of Parliament, evaluation of government commitment and opposition resistance must include an assessment of the time spent on a bill as well as the actual words spoken.

Another contextual issue that must be considered in examining parliamentary debate is the intended audience of the speaker. If the general purpose of argumentative discourse is to change the minds of others toward your own interests,¹² the reality is that members of parliamentary bodies rarely attempt to persuade each other during debate. Partisan positions are established in caucus meetings before debate opens. The “debate” is thus directed at convincing those outside of the parliamentary chamber about the wisdom of the speaker’s party position and the perfidious nature of other parties. For opposition party speakers, close attention is paid to positioning between opposition parties as well as between opposition and government. All utterances are capable of being amplified to audiences outside of the chamber by the media, academics, and other readers of *Hansard*, or by the active efforts of both political friend and foe.¹³ If the self is broadly defined to include individuals wrapped in a partisan banner, speakers in the parliamentary debate are often engaged in a form of systematically distorted communication¹⁴ in which debate ostensibly engaged to reach mutual understanding contains an element of self-deception in which the mobilizing and consolidation of general political support

can supersede real attempts to convince other legislators about the merits or limitations of particular measures in the legislation.

The second reading of debate is deemed to ascertain “agreement in principle.” Votes are conducted by voice unless either the Speaker deems the bill to have been defeated at the voice vote or if any member calls for a recorded vote. The conducting of a recorded vote consumes time, so calling for a recorded vote is an indication of more vigorous dissent than is expressing opposition during a voice vote. The recorded vote also places the support or opposition of each member as an individual onto an easily accessible public record.

During second reading debate, the lead government spokesperson explains the purpose and contents of the legislation. A specified period is allocated for questions and replies. A designated spokesperson from each recognized political party makes a response in reply, with the order being determined by the size of each party’s House of Commons delegation. Time is allocated for questions and answers. The opposition speakers generally describe the legislation, indicate their party’s position, and criticize either specific provisions in the legislation or mount a generalized critique of the government’s record. Avoidance of any discussion of the specific terms of the legislation is usually the good indicator of support, acquiescence, or tepid opposition to the legislation before the House. For most bills, second reading debate is confined to one round of speeches. However, for important or controversial bills, additional rounds of debate are conducted until the government effectively abandons the attempt to pass the bill by not bringing it forward on the Order Paper, the House leaders agree that enough time has been spent on the bill, or the government imposes time allocation.¹⁵

The transcript of all second reading debates for all tough-on-crime bills during the Thirty-ninth, Fortieth, and Forty-first Parliaments were analyzed using NVivo 11. All second reading debate was sorted according to the partisan affiliation of each speaker and coded according to the arguments presented in support or opposition to the legislation. Development of coding categories began with the principles of sentencing outlined in Section 718 of the *Criminal Code of Canada*. A preliminary reading of key speeches resulted in the addition of the argument categories of ease of conviction, confidence in the legal system, cost, proportionality and deserts.

A concern for public safety can form the basis of the Section 718 principles of rehabilitation, incapacitation or deterrence. In cases where a public safety appeal was embedded in an argument based on one of these three principles, the specific argument was counted. There remained a residual category of general appeals on the basis public safety arguments that did not specify the mechanism by which public safety was deemed to be enhanced. The first use of a coded argument by a speaker was recorded. If the speaker raised the argument repeatedly in different forms, the categorization was scored once for every fifth argumentative utterance to provide a measure of the centrality of different arguments advanced. It should be noted that in some opposition speeches, no arguments about the bill in question were advanced. These instances usually occurred when the opposition voted in favour of the bill but did not want to highlight their support. In these cases, voting support for the bill was accompanied by a generalized critique of the government's record. As a check on coding accuracy, word frequency was analyzed for each party's utterances on the legislative package in each parliamentary session. The results were consistent with the findings of the coding exercise.

The transcripts of both Commons and Senate committee hearings were also reviewed with the primary goal of identifying the level of conformity between the arguments presented by parliamentarians and witnesses. These transcripts were not coded according to arguments, but examined to review the general tenor and tone of the debate and identify specific utterances deemed to be succinctly expressive of the arguments made in this debate.

4.2.2. Judicial Decisions

According to Luhmann, a primary mechanism for the system of law to maintain itself is the process of written argumentation in the form of case decisions. These decisions also serve as a key coupling mechanism with other systems, especially the political.¹⁶ Analyzing cases is a cornerstone activity of lawyers and judges, with the record of cases serving as the data for any analysis of the function of the system of law.¹⁷

In this dissertation, cases were initially located using a keyword search on the case repository maintained by the Canadian Legal Information Institute (Canlii).¹⁸ Searches were initially conducted using the titles of eighteen bills which generated 486 trial court and 135

appellate court rulings. These were reviewed for relevance. The topical descriptive words of “firearm”, “conditional sentences”, “mandatory minimum”, “sexual interference”, “sexual offences”, “drug (importation/trafficking/production)” and “street racing” that were the focus of specific pieces of legislation generated another 5,603 cases for review of relevance. Because of the volume, only cases that generated appellate court rulings were reviewed. A snowball sampling technique was also used by reviewing cases cited in previously identified rulings. Decisions from both trial and appellate courts were examined including all Supreme Court of Canada decisions ruling specifically on the interpretation or constitutionality of any tough-on-crime bill passed during the Thirty-ninth, Fortieth or Forty-first Parliaments. In total, 318 judicial decisions were deemed relevant enough to be subjected to coding and analysis. All cases reviewed were evaluated to assess any discernable effect rising from the legislative change being considered.

All cases were reviewed to assess judicial application to legislation, application of sentencing principles, and relationship between sentences and any mandatory minimums legislatively imposed during the administrations being examined. Word frequency analysis was conducted on decisions using NVivo 11 to assess the emphasis placed on different sentencing principles by the courts.

4.2.3. Policy Directives

Policy directives to prosecutors dealing with the issues of sentencing recommendations, charge election, and position on bail applications were examined on a comparative basis. All directives issued to prosecutors by provincial governments from January 1, 2000, to the present were examined. The directives were obtained via searches of Justice Department websites and archived material and written requests to officials. Access to Manitoba policy documents was initially denied but was ultimately granted as a result of Freedom of Information requests 2017-74, 2017-75, and 2017-76.

4.2.4. Media Articles

For information about events cited as precipitating legislative changes and for utterances of elected officials made outside of Parliament, media articles were used. Appropriate articles were identified with keyword searches on Google, ProQuest Media, CBC, Global TV, CTV, and Globe and Mail search engines.

4.2.5. Party Platforms

One basis of a political party's appeal for electoral support is a collection of policy commitments popularly known as a platform.¹⁹ These documents serve to organize a political party's appeal to voters and provide an indication of the perception of issue salience by those making strategic political decisions during an election campaign. If a party wins sufficient electoral support to form or participate in government, the commitments in the platform become a justification for legislative initiatives. Fulfillment of platform commitments also becomes a standard against which the government is measured.²⁰

The platforms of all registered political parties winning enough seats to be accorded official party recognition following the 2006, 2008, and 2011 elections were examined both for specific commitments and for the overall prominence of criminal justice proposals in each party's appeal for popular support. The platforms were treated as the primary documentary source for each party's appeal to voters. The English language versions of all election platforms were used. The platforms were treated as the primary documentary source for each party's appeal to voters.

4.3. Records of Acts

In addition to examining discourse, I focused on actual acts following Parsons' definition outlined in chapter 3. In the process of passing legislation, specific unit acts include drafting a bill, introducing it into Parliament, presenting it for consideration at each stage of the legislative process, voting and so on. In enforcing the law, police officers decide whether to convert a complaint into a recorded crime by recording it. They take the act of laying charges or arresting. Prosecutors must take the specific act of presenting charges in court. In addition to being a forum

for discourse, judicial decisions constitute the act of declaring the accused guilty or innocent and imposing specific sanctions. Those working in the corrections system lock people behind bars or release them. Taken together, these acts constitute the substantive results of the criminal justice system. The aggregation of these acts determines such social facts as incarceration rates. In this dissertation, I examine a range of acts, most notably the acts involved in passing legislation, the acts of judicial decisions, the recording of crimes and the depriving of individuals of their liberty.

The primary source of data on acts examined in this dissertation is administrative data derived from information collected for administrative purposes.²¹ This form of data generally consists of criteria-driven counts of individuals, cases, or transactions. In using this form of data, it is essential to understand the reasons the information was collected, the decisions made in counting, and any systematic biasing of results.²²

The primary source of quantitative evidence on the prevalence of cases and punitive outcomes was derived from administrative data collected by Statistics Canada's Canadian Centre for Justice Statistics and published online in the sortable CANSIM series. In cases where data was unavailable from the Canadian Centre for Justice Statistics, data tables were constructed from departmental topical publications, annual reports, and departmental performance monitoring documents. The majority of these publications were accessible online on government websites. In the remaining cases, access to the reports was provided upon request to the appropriate governmental officials. In no instance was such a request denied or ignored.

One complicating factor for some analysis is the inconsistency in reporting periods. Some of the CANSIM series report on the basis of a calendar year, while others report on the basis of a governmental fiscal year (April 1 to March 31). Where rates are reported using data collected for different time periods, aggregate numbers are assigned on a pro rata basis to allow for the calculation of a single rate. This procedure is identified when utilized.

Temporality problems also exist as a result of the workings of the justice system. The reporting of a crime, laying of charges, and adjudication of the charges do not necessarily occur in the same reporting period. This issue is most acute for charges deemed most serious. One implication is that the impact of legislative changes lags since charges laid under the new

provisions often do not begin to appear as adjudication results by the courts until subsequent reporting periods. In the case of incarceration census numbers, counts of prisoners are often the result of legislation and policies implemented years earlier. As Zimring puts it, change in the criminal justice system is “a process, not an event.”²³ In order to explore the effects of this process of change, change was recorded over time. Identification of key events such as a change in government administration or passage of a particular piece of legislation are identified as being key events in the process of change, but the impacts of these changes will develop over time.

In order to present the results of change in the carceral outcomes of Canada’s political and criminal justice systems, the methodology modelled by Zimring²⁴ on a number of occasions is utilized in chapter 5 to explore the question of whether Canada’s treatment of those convicted of criminal offences became tougher. The trend over time for bottom line results are presented using descriptive statistics. The possible effect of factors such as changing crime rate or a change in the mix of offences is then explored and presented individually. The most important confounding variable on the measure of toughness is ongoing change in Canada’s crime rate. The general conclusions reached via the method of sequential measure was tested using time series regression analysis utilizing *SPSS*®. The dependent variable was Canadian incarceration rates, with the dependent variables being Statistics Canada’s Crime Severity Index (CSI) and the government administrations identified by the Prime Minister. To check the effect of delayed results, the regressions were run on a time-lagged basis for date of transition, one year delay and two year delay.

4.3.1. Legislative Acts

The consideration and passage of legislation in Canada’s Parliament contains a number of acts from introduction (first reading), voting, referral to committee, royal assent and proclamation. These acts are recorded on a Parliament of Canada website called *LEGISinfo*. This site was used to track the progress of legislation, the iterations it took, and the temporal markers. The calendar for Canada’s Parliament measures time in terms of Parliaments and Sessions rather

than years and months. The numbering of bills begins anew with each new Session of Parliament. Table 4.1 outlines the parliamentary calendar used in this dissertation.

Table 4.1

Parliamentary Calendar for Harper Administrations

Parliament	Session	Begin Date	End Date	Number of Commons Sitting Days	Reason for End of Session
39 th	1 st	April 3, 2006	September 14, 2007	113	Prorogation
39 th	2 nd	October 16, 2007	September 7, 2008	73	Election
40 th	1 st	November 8, 2008	December 4, 2008	8	Prorogation
40 th	2 nd	January 26, 2009	December 30, 2009	83	Prorogation
40 th	3 rd	March 3, 2010	March 26, 2011	99	Election
41 st	1 st	June 2, 2011	September 13, 2013	272	Prorogation
41 st	2 nd	October 16, 2013	August 2, 2015	235	Election

4.3.2. Judicial Acts

Data on court decisions was obtained from two sources. The first was record of decisions and sentences in the cases selected and analyzed as discussed in section 4.2.2. In addition, aggregate data on charge disposition and length of proceedings is derived from the Integrated Criminal Court Survey (ICCS). Data is extracted electronically from court administrative data. Coverage for the ICCS varies over time and between jurisdiction, with participation from all provinces and territories not beginning until the 2005–06 fiscal year. Coverage remains incomplete as superior courts in Prince Edward Island, Ontario, Manitoba, and Saskatchewan and Municipal Courts in Quebec do not report results. The absence of data from the four superior court jurisdictions results in an unquantifiable underreporting of sentences for serious crimes in these jurisdictions. Manitoba does not report on sentence lengths from any level of court. The ICCS data contains a number of missing variables and variable values.²⁵The limitations of the ICCS data presents two major problems. The limitations in coverage make comparability for any

temporal period prior to 2005-2006, or roughly the beginning of the Harper administrations tenure in office, impossible. This makes it impossible for any determination as to whether changes during the Harper era represents a change or extension of pre-existing trends. Further, the because of the partial coverage of superior courts, the data loses reliability concurrent with increases in the seriousness of the charge. The coverage limitations will have very little effect for charges such as Level 1 Assault, but court data on Murder is essentially worthless. In the presentation of ICCS data, this problem was imperfectly resolved by concentrating on charges most likely to be heard at the lower court level. However, it should be noted that there is some imprecision in this. For example, the choices made by prosecutors on election for hybrid offences can affect the level of court in which the charge is dealt with, and therefore upon data reliability,.

4.3.3. Corrections Systems Acts

In this dissertation, the key act of the corrections systems is the admission and continued incarceration of prisoners. Census and admissions data for incarceration and other corrections data are derived from the *Corrections Key Indicator Report*. Data is collected from federal, provincial, and territorial corrections services. Coverage is complete and no concerns about reliability are identified by Statistics Canada. Comparable data exists from 1981 to present.²⁶

4.3.4. Acts of Police Recording

There is no data source from which an accurate recording of the number of acts that violate the Criminal Code (crimes) in Canada. The proxy measure is the number of criminal acts recorded by police in the *Uniform Crime Report Survey* (UCR). Statistics Canada notes, “In actuality, the UCR crime statistics represent a subset of all crimes occurring in Canada, but are an accurate measure of the number of incidents of crime being reported to the police.”²⁷ Individuals who have been victimized by criminal activity exercise discretion whether to file a report to police, while other criminal activities such as impaired driving, drug possession, and drug trafficking do not usually generate victims with a motivation to report the offence to police. For these crimes, incidence reports are affected by police staffing levels and enforcement priorities. In addition to variability and inconsistency in victim willingness to report criminal

offences, police processing of complaints into documented incidents is also variable.²⁸ Data on the volume of criminal acts recorded by police and persons charged is derived from the UCR Survey completed by police forces and detachments across Canada. Participation is mandatory, and coverage is deemed to be almost complete. Comparable data coverage exists from 1988 to the present.²⁹ During the period under review in this dissertation, there was a general downward trend in Canada's reported crime rate from the UCR. This trend is consistent with estimates based on other methodologies³⁰ but the impact of the limitations in the UCR data means that the resulting analysis should be treated as an estimate.

4.3.5. Acts of Bureaucratic Decision-Making

The commitment of fiscal resources involves acts of authorizing expenditures and the subsequent transfer of money for the purchase of goods and services or transferring this money to individuals or other corporate entities. Data on these expenditures was compiled from budget documents, departmental annual reports and performance reporting documents. These reports are subjected to official audit scrutiny and verification. However, changes in categorization criteria or program location within government has the potential to make comparisons over time misleading. Data on police staffing levels was compiled by Statistics Canada³¹ and is derived from the Police Administration Survey.³²

4.4. Treating Toughness as a Variable

As discussed in Chapter 1, the metric utilized to operationalize "toughness" was incarceration. This is approached both in terms of the changes in the aggregate number of Canadians admitted and maintained in correctional facilities and in terms of the conversion of guilty case to days incarcerated. In my analysis of the criminal justice policies of the Harper administrations, I make the argument that the impact of the legislative tough-on-crime program was not unequivocally tough. In the language of popular analogy, its bark was worse than its bite. However, this is not meant to imply that there was no substantive effect. This presents a conceptual problem. If substantive toughness is viewed as measurable, at what point does a "somewhat tough" substantive outcome become "truly tough"? There is inevitably some degree

of subjective opinion in reaching this decision. To move beyond this, I use three different comparators: rhetoric, the United States, and an ideal type.

4.4.1. Comparison with Rhetoric

In political discourse, the members of the CPC consistently drew a bifurcated distinction between their own claimed toughness on crime compared to the alleged softness on crime of their political opponents. This was accompanied by claims about the scope and impact of legislative initiatives. As a result, the first comparator is the substantive results of legislation compared to the claims advanced.

4.4.2. Comparison with the United States

Case studies consist of the detailed analysis of a single example of a phenomenon.³³ They have particular utility in developing typological theories for complex phenomena.³⁴ Such comparisons involve a small number of historically or culturally important case studies that focus on the distinctive features of causally complex outcomes.³⁵

The backdrop to the political debate on criminal justice issues is the justice system in the United States. Until the mid-1970s, incarceration rates between the two countries were similar in magnitude. In 1974, the American incarceration rate began a sustained increase. Canadian rates remained relatively stable. By the time Stephen Harper became prime minister, incarceration rates between the two countries were different by an order of magnitude of roughly six to one. Increases in the level of incarceration experienced in the United States are thus treated as “tough” while lower levels are treated as “less tough”. Since substantive toughness was operationalized in terms of the extent of incarceration, the two countries provide the opportunity for comparative case study analysis. The use of the United States as a comparator has been used both in political debate³⁶ and academic discourse.³⁷

4.4.3. Comparison with an Ideal Type

In chapter 8, the Weberian concept of an ideal type is used as the basis of comparison. This introduces an imaginary construct as the basis of comparison. As such, it consists of the

abstracted essential features of a phenomenon.³⁸ The approach consists of identifying the essential elements of a phenomenon against which the real historical instance can be examined.³⁹

4.5. Ethical Approval

No human subjects, animals, or biohazardous material were used in the conduct of this dissertation. As a result, approval by the University of Saskatchewan's Ethical Review Committee was not required.⁴⁰

4.6. Conclusion: Methodology

The starting point for this dissertation is an examination of the results of the Harper administrations legislative program. From there, I turn to an analysis of both an analysis of legislative acts and the discourse accompanying these acts. As a result, the methodological approaches are, by necessity, eclectic.

¹ Howard S. Becker, *What About Mozart? What About Murder? Reasoning from Cases* (Chicago: University of Chicago Press, 2014), 61-93.

² Howard S. Becker, *Tricks of the Trade: How to Think About Your Research While You Are Doing It* (Chicago: University of Chicago Press, 1998), 14.

³ Jorge Ruiz, "Sociological Discourse Analysis: Methods and Logic," *Forum: Qualitative Social Research* 10, no. 2 (2009): 9; See also Peter Burnham, Karin Gilland Lutz, Wyn Grant, and Zig Layton-Henry, *Research Methods in Politics*, 2nd ed. (New York: Palgrave MacMillan, 2008), 187-212; Michael Lynch, "Discourse Analysis," in *The SAGE Handbook of Social Science Research*, ed. William Outhwaite and Stephen P. Turner (London: Sage, 2007), 499-515.

⁴ Ruiz, "Sociological Discourse."

⁵ Teun J. van Dijk, "Text and Context of Political Debates," in *Cross-cultural Perspectives on Parliamentary Discourse*, ed. Paul Bayley (Philadelphia: John Benjamin, 2004), 359.

⁶ Parliament of Canada, House of Commons, *Compendium of Procedure: Hansard*, https://www.ourcommons.ca/About/Compendium/ParliamentaryPublications/c_d_debateshansard-e.htm.

⁷ Parliament of Canada, House of Commons, *Compendium of Procedure: Rules of Debate*, https://www.ourcommons.ca/About/Compendium/DebateandVoting/c_d_rulesdebate-e.htm.

⁸ Paul Bayley, "The Whys and Wherefores of Analysing Parliamentary Discourse," in *Cross-cultural Perspectives on Parliamentary Discourse*, ed. Paul Bayley (Philadelphia: John Benjamin, 2004), 1-44.

⁹ Van Dijk, "Text and Context," 355-358.

¹⁰ Parliament of Canada, House of Commons, *Compendium of Procedure: Witnesses Appearing Before a Committee*, https://www.ourcommons.ca/About/Compendium/Committees/c_d_witnessesappearingbeforecommittee-e.htm.

¹¹ Parliament of Canada, House of Commons, *Compendium of Procedure: Time Limits on Speeches*, https://www.ourcommons.ca/About/Compendium/DebateandVoting/c_d_timelimitsdebate-e.htm.

¹² Teun J. van Dijk, "Principles of Critical Discourse Analysis," *Discourse and Society* 4, no. 2 (1993): 254.

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- ¹³ Sven-Oliver Proksch and Jonathan B. Slapin, *The Politics of Parliamentary Debate: Parties, Rebels and Representation*. (Cambridge, UK: Cambridge University Press, 2015), 15-42.
- ¹⁴ Jürgen Habermas, "A Reply to My Critics" in *Habermas: The Critical Debates*, ed. John B. Thompson and David Held (Cambridge, MA: MIT Press, 1982), 264.
- ¹⁵ Parliament of Canada, House of Commons, *Compendium of Procedure: Time Allocation and Closure*, https://www.ourcommons.ca/About/Compendium/DebateandVoting/c_d_closure_time_allocation-e.htm; Erin Melrose, "Limiting Parliamentary Debate: The Inception of Closure and Time Allocation," *Manitoba Law Review* 30, no. 1 (2003): 5-29.
- ¹⁶ Luhmann, *Law as a Social System*, 305-356.
- ¹⁷ Kenneth J. Vandavelde, *Thinking Like a Lawyer* (Boulder, CO: Westview Press, 2011), 40-52; 242-243.
- ¹⁸ Canadian Legal Information Institute (Canlii), <https://www.canlii.org/en/>.
- ¹⁹ Amanda Bittner, *Platform or Personality: The Role of Party Leaders in Elections* (Oxford, UK: Oxford University Press, 2011), 2-3; Tracy Sulkin, "Campaign Appeals and Legislative Action," *Journal of Politics* 71, no. 3 (2009): 1093-1108.
- ²⁰ Greg Flynn, "Rethinking Policy Capacity in Canada: The Role of Parties and Election Platforms in Government Policy-Making," *Canadian Public Administration* 54, no. 2 (2011): 235-253; Emmett MacFarlane, "You Can't Always Get What You Want: Regime Politics, the Supreme Court of Canada and the Harper Government," *Canadian Journal of Political Science* 51, no. 1 (September 11, 2017): 1-21; Robert Thomson et al., "The Fulfilment of Parties' Election Pledges: A Comparative Study on the Impact of Power Sharing," *American Journal of Political Science* 61, no. 3 (2017): 527-542.
- ²¹ Roxanne Connelly, Christopher J. Playford, Vernon Gayle, and Chris Dibben, "The Role of Administrative Data in the Big Data Revolution in Social Science Research," *Social Science Research* 59, no. 1 (2016): 1-12.
- ²² Roger Groom, *Social Research Methodology: A Critical Introduction*, 2nd ed. (New York: Palgrave MacMillan, 2008), 196-207.
- ²³ Franklin E. Zimring, *The Great American Crime Decline*, 20.
- ²⁴ Franklin E. Zimring, *The Great American Crime Decline*; Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment*.
- ²⁵ Statistics Canada, *Integrated Criminal Court Survey*, modified September 22, 2017, <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&lang=en&db=imdb&adm=8&dis=2&SDDS=3312>.
- ²⁶ Statistics Canada, *Corrections Key Indicator Report for Adults and Youth*, modified February 28, 2017, <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&lang=en&db=imdb&adm=8&dis=2&SDDS=3313>.
- ²⁷ Statistics Canada, *Uniform Crime Reporting Survey (UCR)*, modified July 21, 2017, <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&lang=en&db=imdb&adm=8&dis=2&SDDS=3302>.
- ²⁸ Donald J. Black, "Production of Crime Rates," *American Sociological Review* 35, no. 4 (1970): 733-748; Ingrid Connidis, "Problems in the Use of Official Statistics for Criminal Justice System Research," *Canadian Journal of Criminology* 21, no. 4 (1979): 397-415; William J. Chambliss, "Policing the Ghetto: The Politics of Law and Law Enforcement," *Social Problems* 41, no. 2 (1994): 177-194; David Seidman and Michael Couzens, "Getting the Crime Rate Down: Political Pressure and Crime Reporting," *Law and Society Review* 8, no. 3 (1974): 457-493; Jim Hackler and Kim Don, "Estimating Systems Biases: Crime Indices That Permit Comparison Across Provinces," *Canadian Journal of Criminology* 32, no. 2 (1990): 243-264.
- ²⁹ Statistics Canada, *Uniform Crime Reporting Survey*.
- ³⁰ Perrault, Samuel. *Criminal Victimization in Canada, 2014*. (Ottawa: Canadian Centre for Justice Statistics, 2015).
- ³¹ Statistics Canada, *Police Personnel and Selected Crime Statistics*, CANSIM 254-0002.
- ³² Statistics Canada, *Police Administration Survey*, modified March 27, 2018, <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&lang=en&db=imdb&adm=8&dis=2&SDDS=3301>.
- ³³ Bent Flyvbjerg, "Five Misunderstandings About Case Study Research," *Qualitative Inquiry* 12, no. 2 (2006): 219-245.
- ³⁴ Alexander R. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2004), 9-10.

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- ³⁵ Charles C. Ragin, "Comparative Methods," in *The SAGE Handbook of Social Science Methodology*, ed. William Outhwaite and Stephen P. Turner (London, UK: Sage Publications, 2007), 67-81.
- ³⁶ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 017. September 21, 2011.
- ³⁷ Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990), 90-116; John Hagan, "Comparing Crime and Criminalization in Canada and the U.S.A." *Canadian Journal of Sociology* 14, no. 3 (1989): 361-371; Irvin Waller and Janet Chan, "Prison Use: A Canadian and International Comparison," *Criminal Law Quarterly* 17, no. 1 (1974): 47-71.
- ³⁸ Max Weber, *The Methodology of Social Sciences*, trans. and ed. Edward A. Shils and Henry A. Finch (1949; repr. New York: Routledge, 2017), 90-93.
- ³⁹ J. W. N. Watson, "Ideal Types and Historical Explanation," *British Journal for the Philosophy of Science* 3, no. 9 (1952): 22-43.
- ⁴⁰ University of Saskatchewan, *Ethics*, accessed November 11, 2017, <https://vpresearch.usask.ca/researchers/ethics/faq.php>.

5. Trends in Punishment in Canada: System Results During the Harper Administrations

As outlined in chapter 1, commitments to get tough on crime formed a core component of the Conservatives' election platform in 2006. The stated goal of the administrations led by Stephen Harper, as highlighted in election platforms, was to protect Canadians from the harmful effects of crime by increasing the sanctions against people defined as criminals. The Harper administrations' commitment to their campaign promises was measured by legislative activity. During the Harper era slightly more than one-fifth of government bills and almost half of all Conservative sponsored private members bills introduced in Parliament contained tough-on-crime measures.

Conceptually, the goal of increased safety could be achieved from the mechanism of deterrence, incapacitation, or even a tough-love form of rehabilitation. However, by the logic of any of these mechanisms, for the end goal of increasing safety to be achieved, measurable punishments would have to be increased. This could mean increased use of capital punishment, increased severity of corporal punishment, increased incarceration, an increase in the amount of money being assessed as fines, or increased non-custodial forms of supervision. The Harper administrations continued the long-standing Canadian prohibition on capital and corporal punishment,¹ thereby leaving incarceration as the most severe punishment available for imposition. Incarceration rates have been widely used as a measure of how punitive a criminal justice system is.²

The purpose of this chapter is to examine the actual achieved effects rather than the stated intentions of this legislative program. The recent history of incarceration rates in Canada is

explored. This is followed by an examination of the court decisions that result in incarceration rates. The primary focus of analysis is on the adult criminal justice system. However, patterns in the youth justice system are briefly explored to determine whether there was consistency in the direction of the two systems.

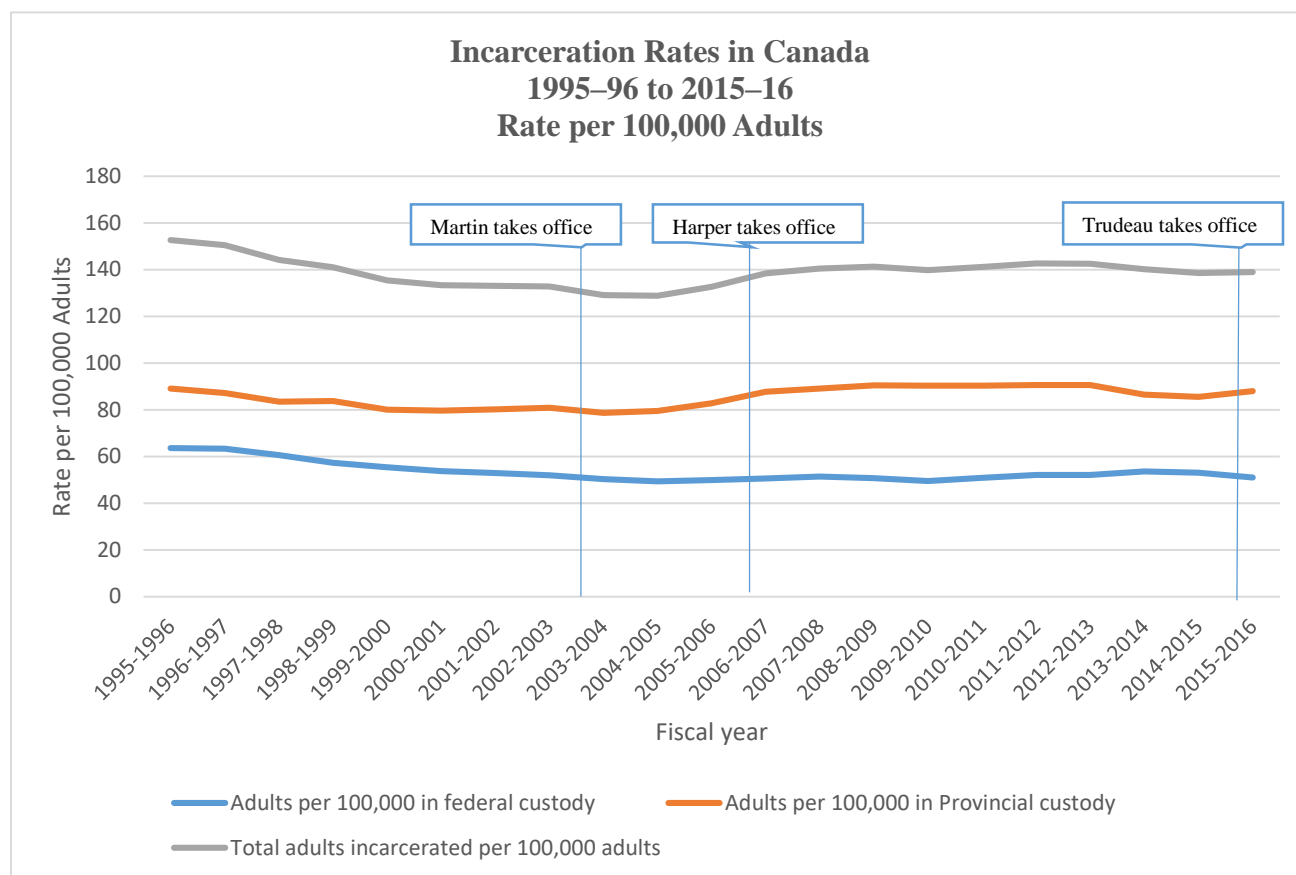
5.1. Trends in Incarceration

This section examines trends in adult incarceration in Canada. This is approached in three ways. First, incarceration and admission rates are outlined. This measures changes in the proportion of the population that is incarcerated. In order to take into account changes in the volume of reported crime, I then examine the number of people incarcerated per reported crime. Finally, I examine trends in the ratio of those incarcerated and those in community-based correctional programs.

5.1.1. Incarceration Rates by Population

The incarceration rate is the average daily census by government fiscal year of jails and prisons per one hundred thousand adults. Figure 5.1 traces the Canadian incarceration rates for both federal and provincial institutions. The period between the two vertical lines represents the Harper administrations' terms in office. The chart shows a slow decline in incarceration rates roughly coinciding with the Chrétien administrations, followed by an increase during the Martin administration. The rates then stabilized for the period coinciding with the Harper administrations.

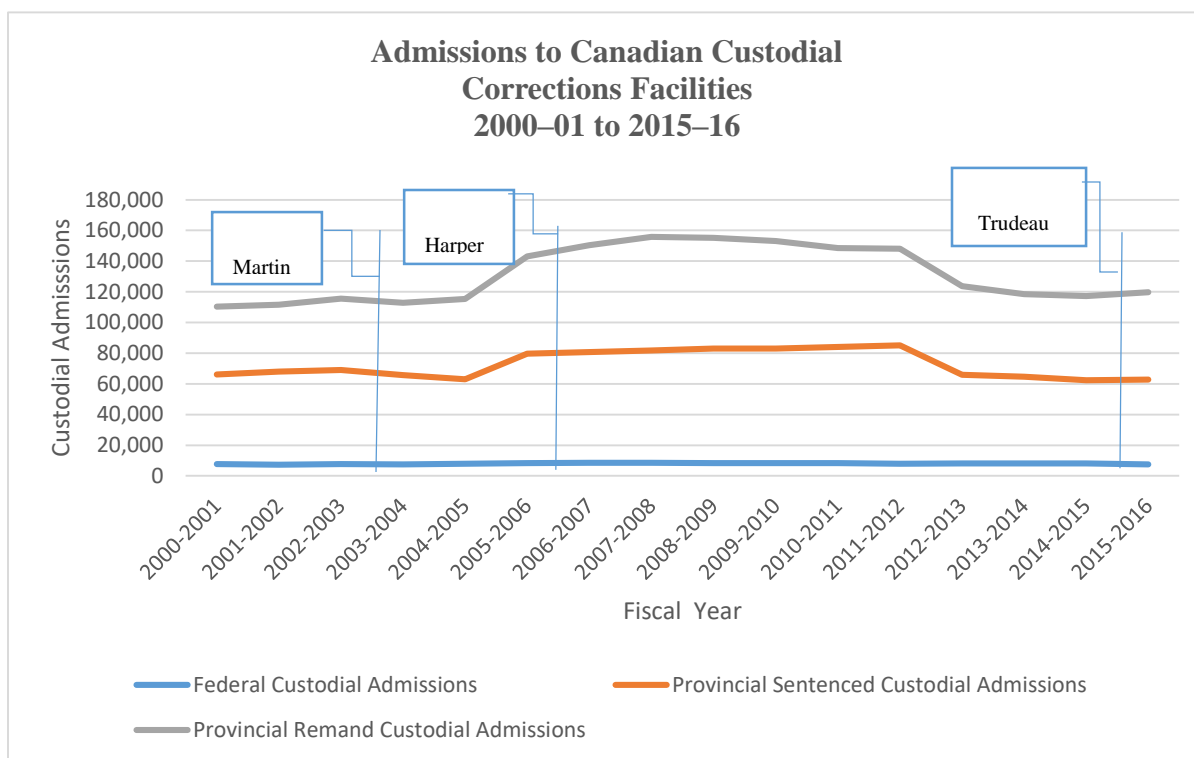
Figure 5.1



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs*, CANSIM 251-0005; Statistics Canada, *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 251-0006.

Trends in admissions to jails and prisons show a somewhat similar pattern. Figure 5.2 outlines the trends in admissions to custodial institutions, both remand and post-conviction. The available data does not permit quite as extensive a historical comparison. The general pattern, however, shows an increase in admissions roughly coinciding with the Martin administrations followed by a plateauing and subsequent decline during the Harper administrations. While admissions peaked during the term of the Harper administration, the decline in admissions towards the end of this period is inconsistent with toughening of the response to crime. During the period of increase in custodial admissions, change was primarily driven by changes in remand admissions. As will be argued in chapter 7, this appears to me more a function of changes in provincial prosecutorial policies rather than federal legislative changes.

Figure 5.2



Source: Statistics Canada, *Adult Correctional Services, Custodial and Community Admissions to Provincial and Territorial Programs*, CANSIM 251-0020; Statistics Canada, *Adult Correctional Services, Custodial and Community Admissions to Federal Programs*, CANSIM 251-0028.

During the first decade of increase in the use of incarceration in the United States, incarceration rates more than doubled. There is no evidence that the tough-on-crime legislative program of the Harper administrations had any similar effect. Incarceration rates were stable. Admissions, which had been increasing when the Harper administrations assumed office, stabilized, and then declined.

5.1.2. Incarceration Rates by Reported Crimes

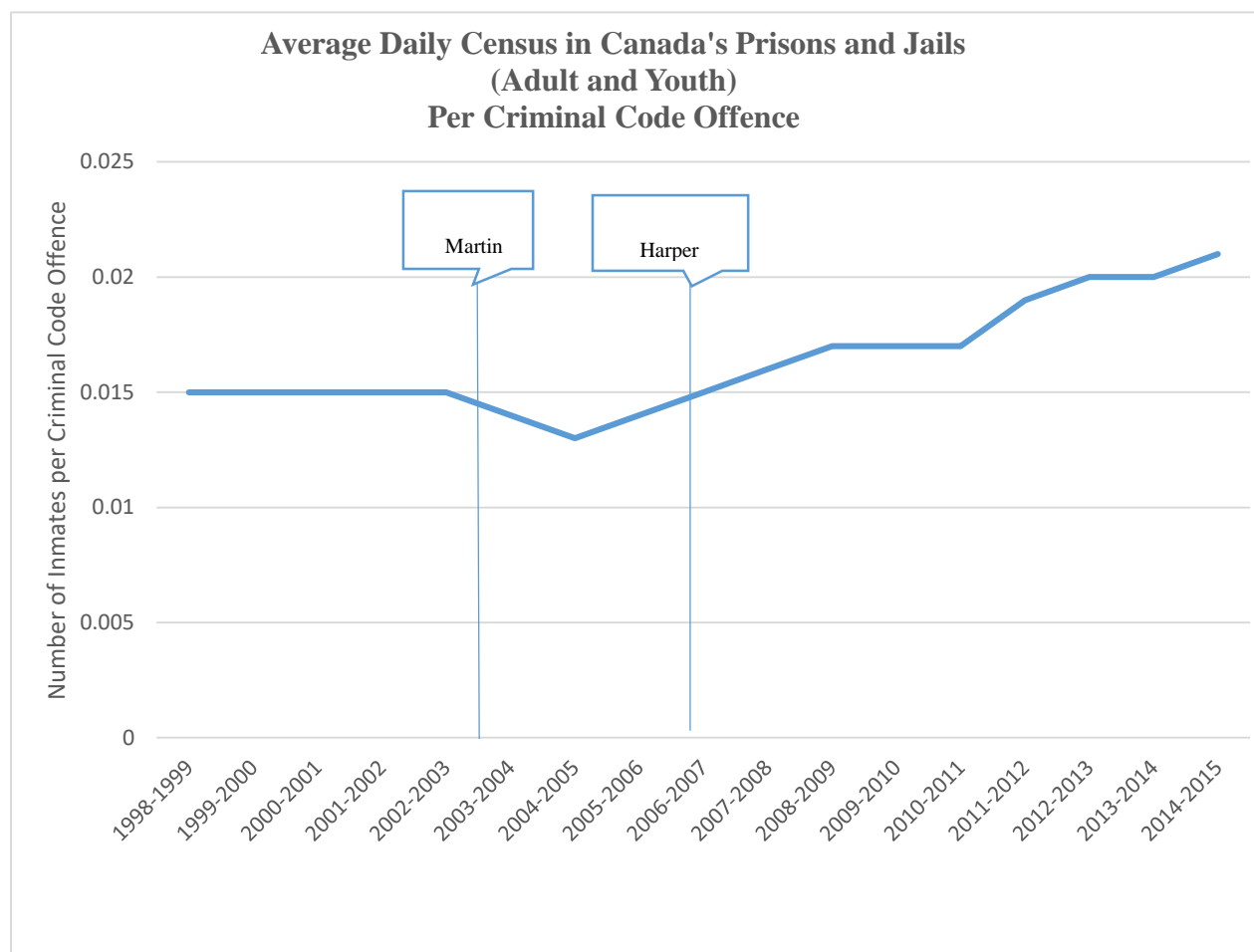
Reliance on incarceration rates as a measure of “tough on crime” has the potential to be misleading because of fluctuations in the occurrence of crime. If the number of crimes committed and reported increases, incarceration rates will rise even if apprehension, conviction, and sentencing practices remain the constant. Conversely, a declining crime rate should naturally produce reduced admissions and declining incarceration rates. In the United States, the post-1974

increase in incarceration rates began during a period of increases in officially reported crime rates.³ During the first term of the Harper administration, the number of reported crimes continued a general downward trend dating back to the 1990s.⁴

Statistics Canada reports crime incidence statistics on the basis of a calendar year. Incarceration statistics are based on the governmental fiscal year of April 1 to March 31. To construct a best estimate, total reported offences in a calendar year were proportionately assigned to the appropriate fiscal year. The result is an estimation for any particular year, but the trends should be reasonably accurate. Further, because until arrest and conviction it is impossible to determine whether a reported criminal offence has been committed by a youth or adult, the numbers incarcerated include both categories.

Figure 5.3 outlines the number of people incarcerated per reported criminal code offence. When the incarceration rates are calculated per crime rather than on the basis of population, there is more support for a tough-on-crime conclusion. The number of people incarcerated per crime increased steadily throughout the Harper administrations' terms in office rising from 0.015 prisoners per reported crime to 0.021. Prisoners incarcerated in a particular point in time are being held as a result of sentencing decisions made in prior periods and do not necessarily reflect the degree of toughness at the moment of the inmate count. However, the sustained nature of the increases in the number of people incarcerated per crime committed suggests that there was some degree of toughening in responses to criminal acts during the Harper administrations'

Figure 5.3

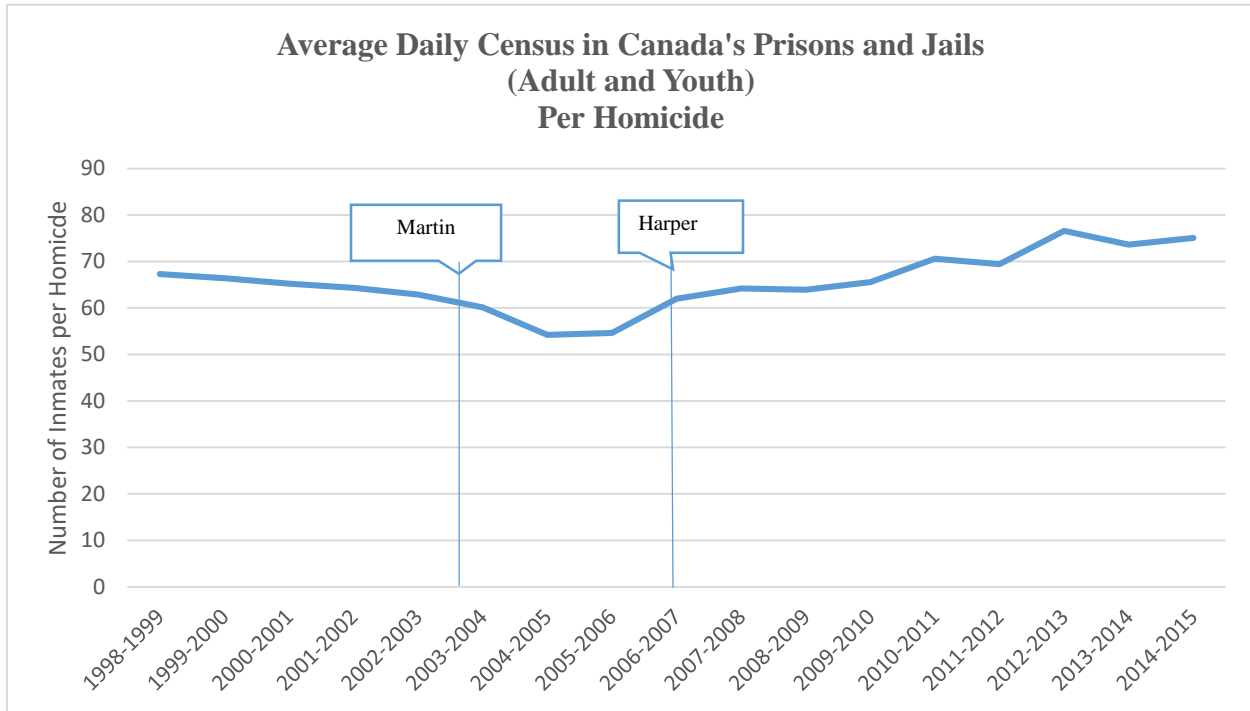


Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs*, CANSIM 251-0005; Statistics Canada, *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 251-0006; Statistics Canada, *Youth Correctional Services, Average Counts of Youth in Provincial and Territorial Correctional Services*, CANSIM 251-0008; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations*, CANSIM 252-0051.

Official counts of the numbers of people incarcerated can be treated as being reasonably reliable. Subject to administrative errors, it is possible to count the number of prisoners committed to a custodial institution. Statistics on reported crimes should be treated more cautiously since they are reliant on both an individual's willingness to report victimization to police and the police decision to record the report as an actual crime.⁵ Some crimes, such as drug and prostitution offences involve willing participants. For these offences, the number of reported crimes are affected by police enforcement decisions.⁶ Homicides are considered to be the crime

most reliably reported to and by police.⁷ To confirm the findings outlined in Figure 5.3, the number of people incarcerated per reported homicide is reported in Figure 5.4

Figure 5.4

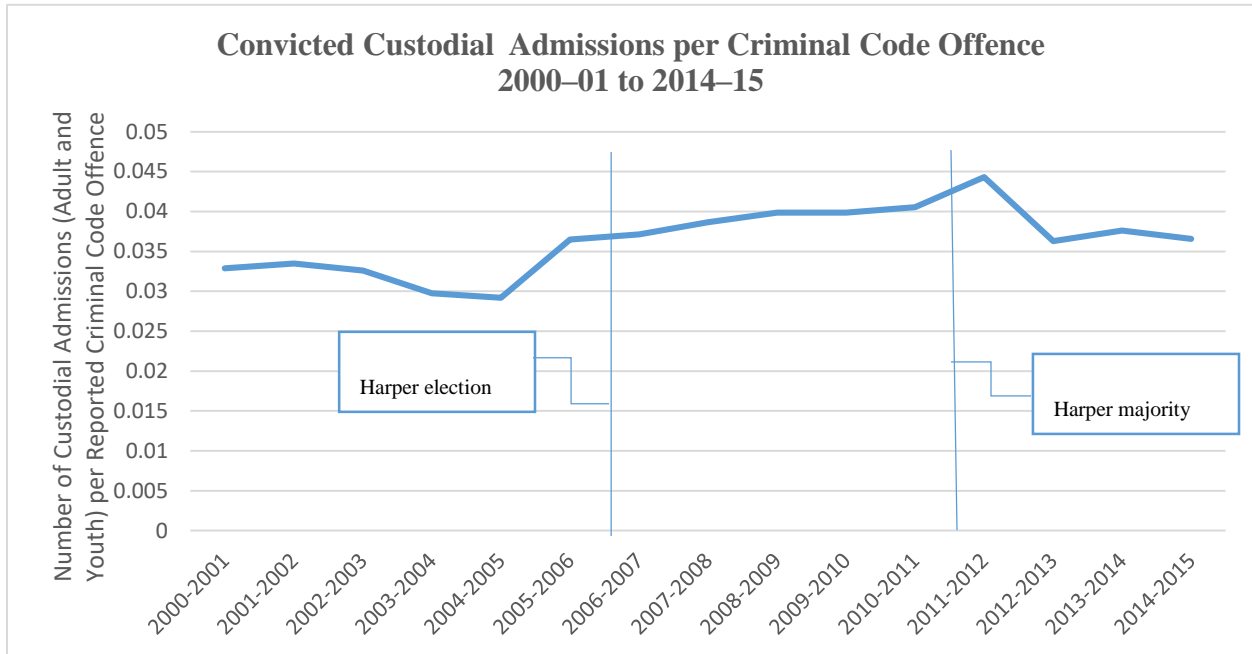


Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs*, CANSIM 251-0005; Statistics Canada, *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 251-0006; Statistics Canada, *Youth Correctional Services, Average Counts of Youth in Provincial and Territorial Correctional Services*, CANSIM 251-0008; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations*, CANSIM 252-0051.

While the data on incarceration rates per crime presents trends, the approach suffers the weakness of failing to take into account the cumulative effect of sentences, particularly for federal institutions. Today’s incarceration numbers reflect the impact of crimes, policies, and sentencing decisions that occurred years or decades in the past. This lag factor is particularly relevant to incarceration in federal prisons. To eliminate the legacy effects of past cases, Figure 5.5 illustrates trends in admission rates per reported criminal code offences. While this measure has the advantage of reducing legacy effects, tracking admissions is imperfect because it does not capture the length of time that people will be staying, once admitted. The combined results for adult and youth facilities are again reported for the reasons indicated above. The data

suggests there was an increase in custodial admissions per criminal code offence for the first two terms of the Harper administration, followed by a drop in the third term.

Figure 5.5



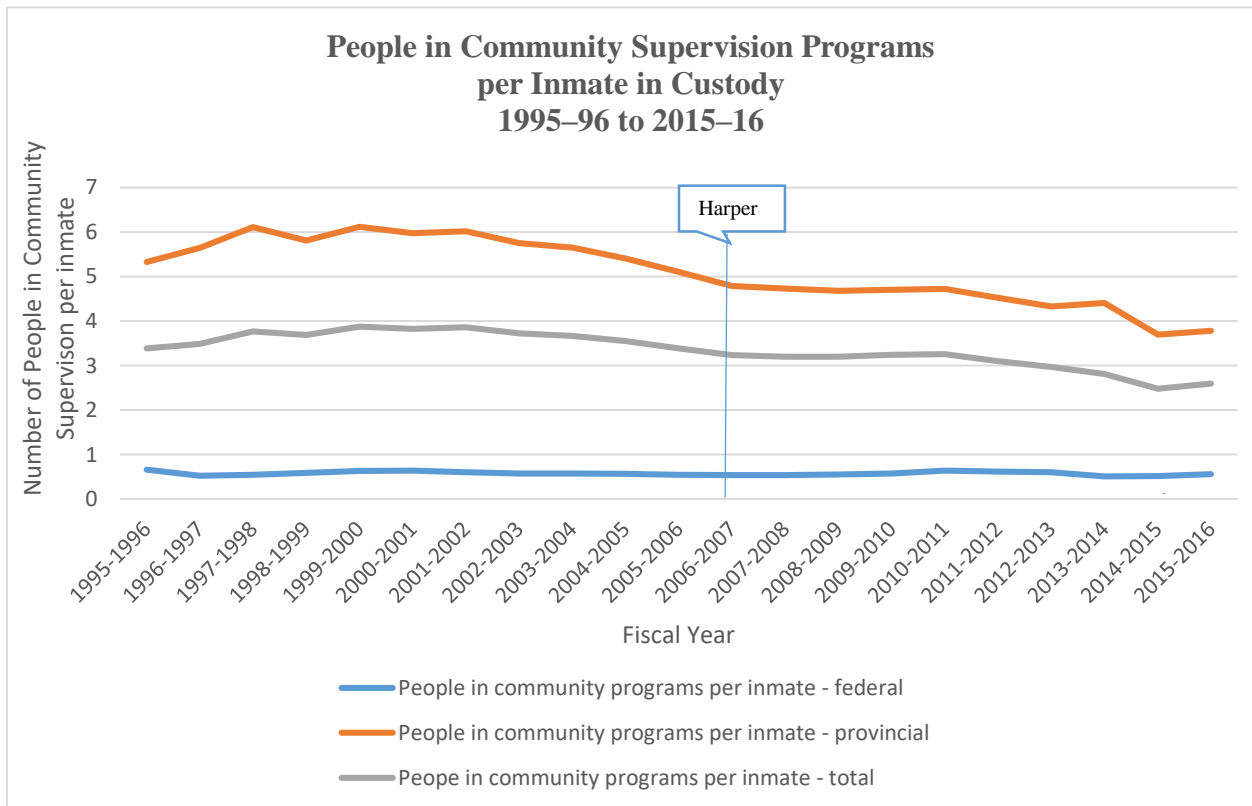
Source: Statistics Canada, *Adult Correctional Services, Custodial and Community Admissions to Provincial and Territorial Programs*, CANSIM 251-0020; Statistics Canada, *Adult Correctional Services, Custodial and Community Admissions to Federal Programs*, CANSIM 251-0028; Statistics Canada, *Youth Custody and Community Services (YCCS), Admissions and Releases to Correctional Services*, CANSIM 251-0010; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations*, CANSIM 252-0051.

Analysis of incarceration and admission numbers by reported crime presents a different picture than the more standard portrayal of population-based rates. The crime-rate-based analysis conforms to the population-based numbers by suggesting that a gradual decline in incarceration during the tenure of the Chrétien administrations was reversed during a period roughly coinciding with the Martin administrations. However, the increased use of incarceration continued during the first half of the Harper administrations before levelling off (incarceration rates) or declining (admission rates).

5.1.3. Comparison of Incarceration and Non-custodial Punishments

My final approach to examining trends in incarceration is to compare trends in the ratio of the number incarcerated compared to those being supervised in community-based correctional programs. Figure 5.6 outlines the number of adults being supervised in the community compared to the number incarcerated. A decline in this ratio indicates an increase in the relative use of incarceration, while an increase indicates greater reliance on community-based supervision. This data suggests that a trend toward a greater reliance on incarceration began around the turn of the millennium and continued throughout the period coinciding with the Harper administrations. This change was confined to those in provincial correctional programs with the federally administered regime fluctuating within a very narrow range. This suggests that any trend toward increased use in incarceration was confined to those found guilty of less serious offences.

Figure 5.6



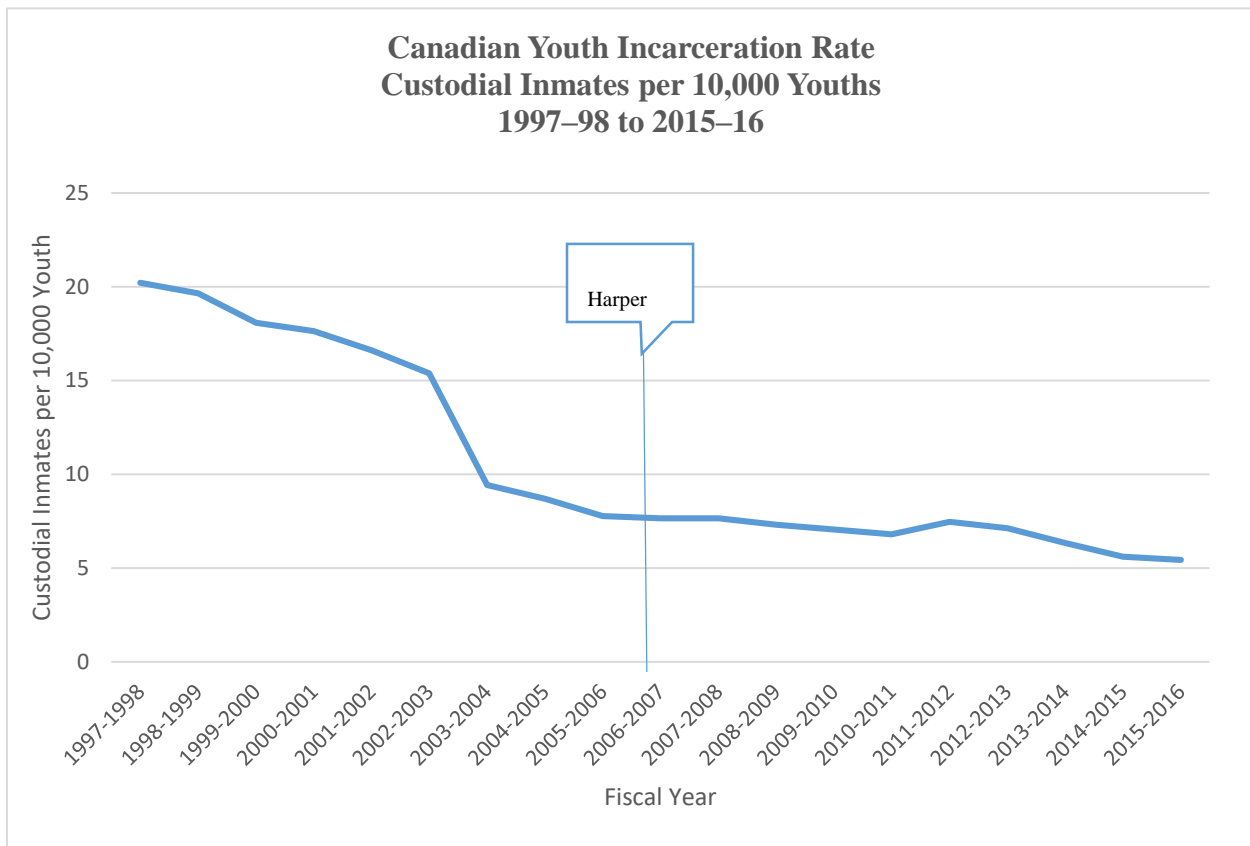
Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs*, CANSIM 251-0005; Statistics Canada, *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 251-0006.

5.1.4. Youth Incarceration Rates

The primary focus of this dissertation is the adult criminal justice system. However, the trends in youth incarceration provide another test of the salience of punitive measures.

The implementation of the *Young Offenders Act* in 1984 created a legal regime that resulted in Canadian youths having a higher incarceration rate than did adults. By the end of the 1990s, most provincial governments implemented policies designed to reduce the use of incarceration for youth. In 2003, the legal regime across Canada changed with the proclamation of the *Youth Criminal Justice Act*. The decline in youth incarceration rates accelerated before beginning to stabilize during the Martin administrations. The gradual drop continued during the first half decade of the Harper administrations. There was a minor increase concurrent with toughening the *Youth Criminal Justice Act* in 2012, but the slow downward trend resumed. In 2005–06, 7.77 per ten thousand youth were incarcerated; by 2015–16, this had dropped to 5.44. Figure 5.7 outlines the downward trend in youth incarceration.

Figure 5.7



Source: Statistics Canada, *Youth Correctional Services, Average Counts of Youth in Provincial and Territorial Correctional Services*, CANSIM 252-0008.

5.1.5. Regression Analysis of Incarceration Rates

The data presented above suggests that, by population, the use of incarceration as a response to criminal acts remained stable during the terms of the Harper administrations. However, during this period, reported crime rates in Canada were declining. Carceral response per criminal act increased. Taking these trends together, the results suggest some increase in the toughness of Canadian response to crime, but not of a magnitude to generate increases in the Canadian incarceration rate of anything approaching the American experience in the last quarter of the 20th Century. To test these findings, a time series regression model for the years 1997-98 to 2015-2016 was utilized to control for the effects of changes in the volume and mix of criminal offences in Canada. The years coinciding with governments headed by someone other than Harper serves as the input parameter for the variable of government administration. Because of

the lag involved between the commission of an offence and possible incarceration, the analysis was run also run with a lag of one and two years. The Durbin-Watson test was used to evaluate the fit of each model. A lag of one year had the best fit (Durban-Watson score = 1.589). The results with a one year lag are presented in Table 5.1.

Table 5.1

Estimated standardized coefficients for incarceration rates from a time-series regression (one year lag), by Harper as Prime Minister and Crime Severity Index (1997-98 to 2015-16).

	Unstandardized B	p value
(Constant)	171.759	.009
Year	1.223	.010
Crime Severity Index	.453	.010
Harper Government	3.150	.055

Sources: Statistics Canada. *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs*, CANSIM 252-0005; Statistics Canada. *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 252-0006; Statistics Canada, *Crime Severity Index and Weighted Clearance Rates*, CANSIM 252-0052.

When controlled for changes in reported crime frequency and severity, the response to criminal acts was tougher during the Harper administrations than during the tenure of other Prime Ministers. However, these differences were not statistically significant to a level of .05. This is consistent with the analysis based on descriptive statistics presented above.

5.1.6. Summary of Data on Incarceration Rates

Trends for population incarceration rates do not support the contention that the Harper administrations increased the use of incarceration in Canada. Both incarceration and admissions data suggests that the use of incarceration declined during the period coinciding with the last half

Chrétien administrations. This trend reversed during the period coinciding with the Martin administrations. During the Harper administrations' tenure in office, the use of incarceration eventually stabilized

The story is different when changes in the reported crime rate are introduced. Incarceration and admissions rates per reported crime show the same pattern of a Chrétien-era decline turning into a Martin-era increase. However, instead of stabilizing concurrent with Harper's assumption of office, these rates continued to increase for another half decade before stabilizing (total incarceration) or dropping (admissions).

Regression analysis suggests that that the response to criminal acts was moderately tougher during the tenure of the Harper administration, but that this increase did not reach a level of statistical significance of $p=.05$.

The data suggests that a modest toughening of the criminal justice system coincided with the tenure of the Harper administrations. The concentration of increases in incarceration in provincial facilities suggests that the toughening was largely confined to the treatment of crimes deemed by the law and the courts to be more minor in nature. The result of these changes was stability in overall incarceration rates. Normative assessment of the significance of the extent of any toughening is, like beauty, in the eye of the beholder. It is clear, however, that the toughening of the justice system that did occur was different than what occurred in the United States during either the decade following the beginning of the increase in incarceration rates in 1974 or the decade following the beginning of the drop in reported crime rates in the 1990s. During both these periods, incarceration rates in the United States more than doubled.⁸ By any reasonable standard, doubling of the incarceration rate is different than a relatively stable rate. The data supports Zinger's contention that "a decade of tough on crime government in Canada just did not result in the anticipated American-style-mass incarceration."⁹

5.2. Court Treatment of Criminal Acts

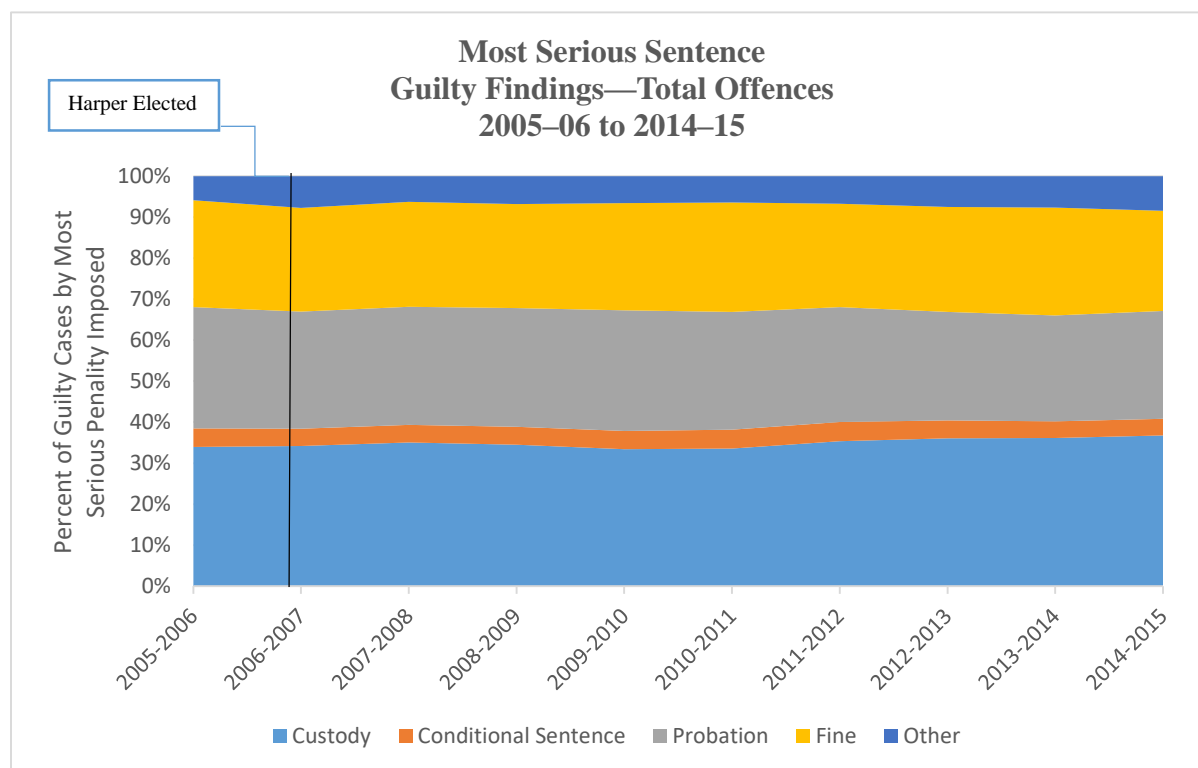
End results such as incarceration rates can be described in a Durkheimian sense as a social fact.¹⁰ They are the product of a myriad of decisions by legislators who make the laws,

individuals who decide to obey or disobey them, and the members of the judiciary who impose sanction. I now attempt to unpack this complex set of interconnections by examining the decisions of judges that are the proximate cause of individuals being incarcerated. This analysis is designed to achieve two goals. First, it indicates whether legislative changes had substantive effect on the judicial treatment of cases. Second, it allows disaggregation of the overall statistics to locate trends in the treatment of particular types of crime.

5.2.1. Most Serious Sentence

In 21st century Canada, the range of sanctions available to the courts includes incarceration, various forms of community-based restrictions on liberty, fines, restitution, and community service orders. Of these, incarceration is the most severe or toughest penalty available, “to be used only where no other sanction, or combination of sanctions, is appropriate for the offence or the offender.”¹¹ Figure 5.8 illustrates trends in the most serious sentence imposed for all guilty findings by Canadian courts. National statistics are not reported prior to the government fiscal year of April 1, 2005, to March 31, 2006, so it is impossible to establish trends prior to Harper’s assumption of office.

Figure 5.8



Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057.

Custody as the most serious sentence increased from 33.92 percent of guilty cases in 2005-2006 to 36.79 percent in 2014-15.

The imposition of fines as the most serious sentence remained relatively stable during the tenure of the Harper administrations. Fines were the most serious sentence imposed in 25.29 percent of guilty cases in 2006–07. This declined to 24.42 percent of cases in 2014–15.¹² The major change in the regime governing fines came early. In the First Session of the Thirty-ninth Parliament, Bill C-23 *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing, and other amendments)* was introduced. It was described in non-ideological terms as housekeeping legislation by the Minister of Justice, with an increase in the maximum fine for summary convictions without a specific penalty from two thousand to ten thousand dollars being justified simply by referencing that the last adjustment had taken place 20 years earlier.¹³ The government accepted without objection an amendment lowering the revised maximum fine to five thousand dollars¹⁴ as the legislation cleared the House of Commons

without a recorded vote.¹⁵ After dying on the Senate Order Paper with prorogation, the legislation was reintroduced as Bill C-13 and obtained royal assent on May 29, 2008.¹⁶

The passage of Bill C-13 had little demonstrable effect on the level of fines imposed by the courts. The mean fine for all criminal code offences increased from \$594 in 2006–07 to \$848 in 2014–15. Mean fines for crimes against property increased from \$478 to \$788 over the period, with the rate of increase being marginally statistically significant at .047. The largest increase in fines was for impaired driving, which was not affected by Bill C-13. The mean fine for impaired driving increased from \$798 in 2005-06 to \$1,286 in 2014-15.¹⁷ Table 5.2 presents regression results on the change in mean fines for categories of criminal offences. The table also presents results for the specific offense of impaired driving since the fines for this offence were subjected to the greatest increase during the era of the Harper administration. With the exception of criminal code traffic offences (primarily impaired driving), the percentage of fines issued that were over one thousand dollars remained stable at less than three percent.¹⁸ Analysis of changes in fine levels was conducted in current dollars. As a result, the substantive impact of increases in fine levels reported are overstated.

Table 5.2

Regression models for coefficients of changes in average amounts of fines (current dollars) for each additional year the Harper administrations was in power.

	Unstandardized B	p value
Total Criminal Code		
(constant)	560.333	
Additional year of Harper administration	42.521	.004
Crimes Against the Person		
(constant)	440.533	
Additional year of Harper administration	-.133	.984
Crimes Against Property		
(constant)	348.133	
Additional year of Harper administration	40.830	.047
Crimes Against the Administration of Justice		
(constant)	278.533	
Additional year of Harper administration	1.139	.704
Impaired Driving		
(constant)	716.667	
Additional year of Harper administration	65.242	<.001

Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Amount of Fine*, CANSIM 252-0062.

The members of the Harper administrations argued that community-based punishments were inappropriate for a broad range of crimes deemed to be serious.¹⁹ As is demonstrated in a subsequent chapter, reducing the use of community-based sanctions was a focal point of several legislative initiatives. Empirically, the use of non-custodial constraints declined during these terms of office. In 2005–06, the last year prior to the Conservative Party of Canada’s assumption

of power, 4.59 percent of guilty cases received conditional sentences and 29.59 percent received probation. By 2014–15, these had dropped to 4.01 and 26.35 percent respectively.²⁰ There were declines in the use of both these sentences. Likely reflecting restrictions on the use of probation for more serious cases, the average length of probationary sentences declined by 16.67 percent during the same period.²¹

The category of “other” penalties includes restitution, absolute and conditional discharge, suspended sentence, community service orders, and prohibition orders.²² Many of these penalties are generally considered to be elements of restorative—rather than punitive—justice.²³ The use of these penalties as the most serious sentence increased during the term of the Harper administrations.

The decline in the use of conditional and probationary sentences is consistent with the articulated tough-on-crime program, although the declines were modest. This was offset by the modest increase in the generally softer measures that constitute the “other” category. The use of fines and the amounts being imposed, with the exception of fines for impaired driving, remained stable.

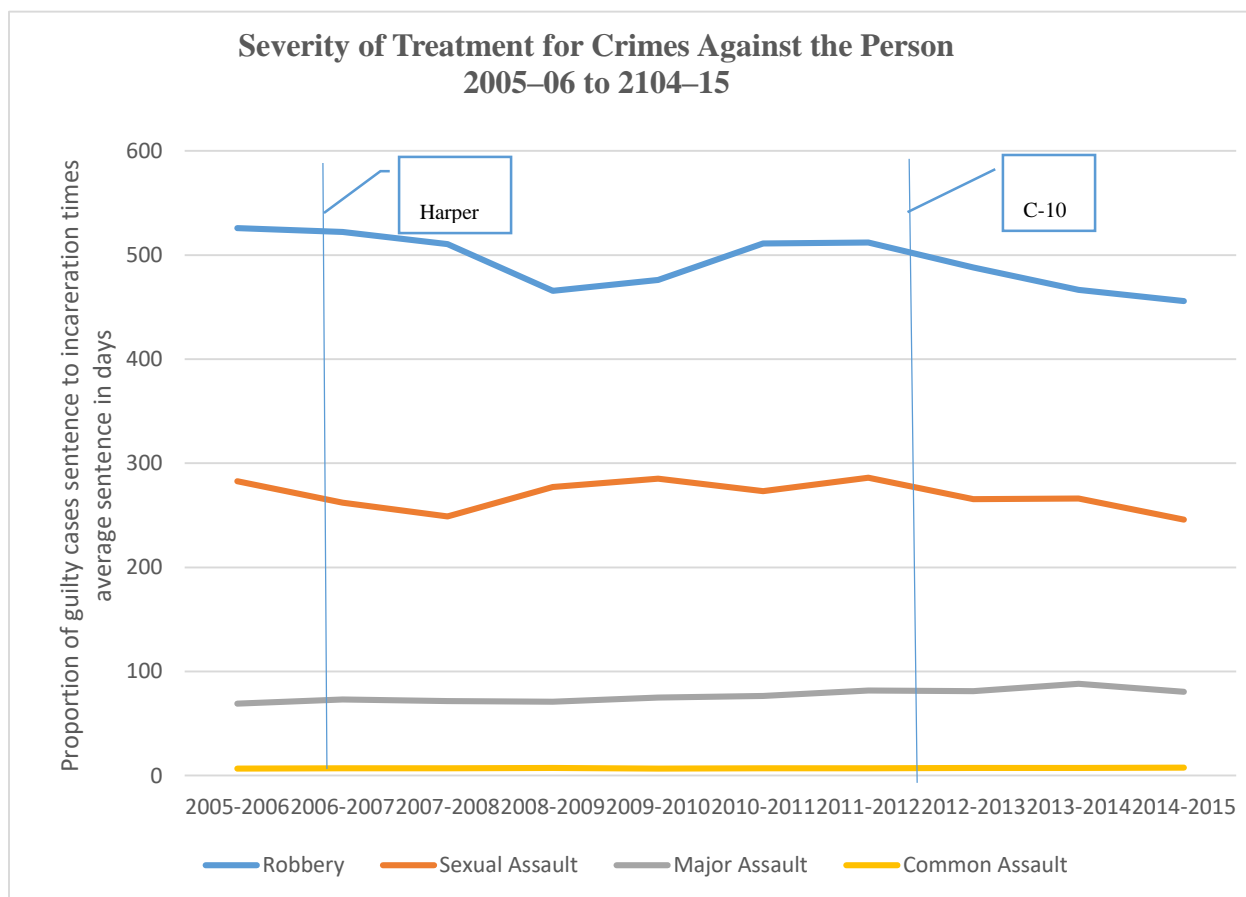
5.2.2. Severity of Incarceration

As Figure 5.8 illustrates, the percentage of guilty cases receiving incarceration as the most serious sentence increased from 33.92 percent in 2005–06 (the last year prior to Harper’s assumption of office) to 36.79 percent in 2014–15.²⁴ This supports the contention that the justice system became tougher. During the same period, however, the average length of incarceration sentence declined from 126 days to 105 days.²⁵ Adults convicted of an offence were thus slightly more likely to be incarcerated by the end of the Harper administrations, but were on aggregate sentenced to shorter terms. In order to reconcile this, the analysis presented below adopts Statistics Canada’s methodology in creating a single Crime Severity Index (CSI). This is a single number index created by multiplying the proportion of guilty cases sentenced to incarceration by the average sentence length in days.²⁶ Using this measure, the average severity index rating of sentence for all adult offences dropped from 42.74 in 2005–06 to 38.62 in 2014–15. Over the

period, the p value for standardized coefficient of annual changes in the severity index rating was a non-statistically significant .388.

The modest decline in the overall CSI for total adult offences is suggestive of a decline in the severity of punishment—that is, a softening rather than a toughening, albeit a very modest softening. It could also simply be a statistical artifact rising from a change in the composition of cases being brought before the courts. In order to address this issue and to see if changes followed particular legislative initiatives, the results will be disaggregated into specific crimes. Several benchmark crimes have been chosen for presentation. For ease of interpretation, separate charts are presented for crimes against the person, crimes against property, and crimes that are usually identified as a result of police initiative rather than from victim complaint. Because information from superior courts in Prince Edward Island, Ontario, Manitoba, and Saskatchewan is not collected,²⁷ the analysis excludes the serious offences most likely to be heard in these courts. However, offences such as murder are the subject of long-standing mandatory minimum sentences that reduce judicial discretion. These remained unchanged during the Harper administrations. Because of data limitations, presentation of trends prior to 2005–06 is impossible. The results will first be presented in graph form. Regression analysis was then utilized to confirm these results and assess statistical significance.

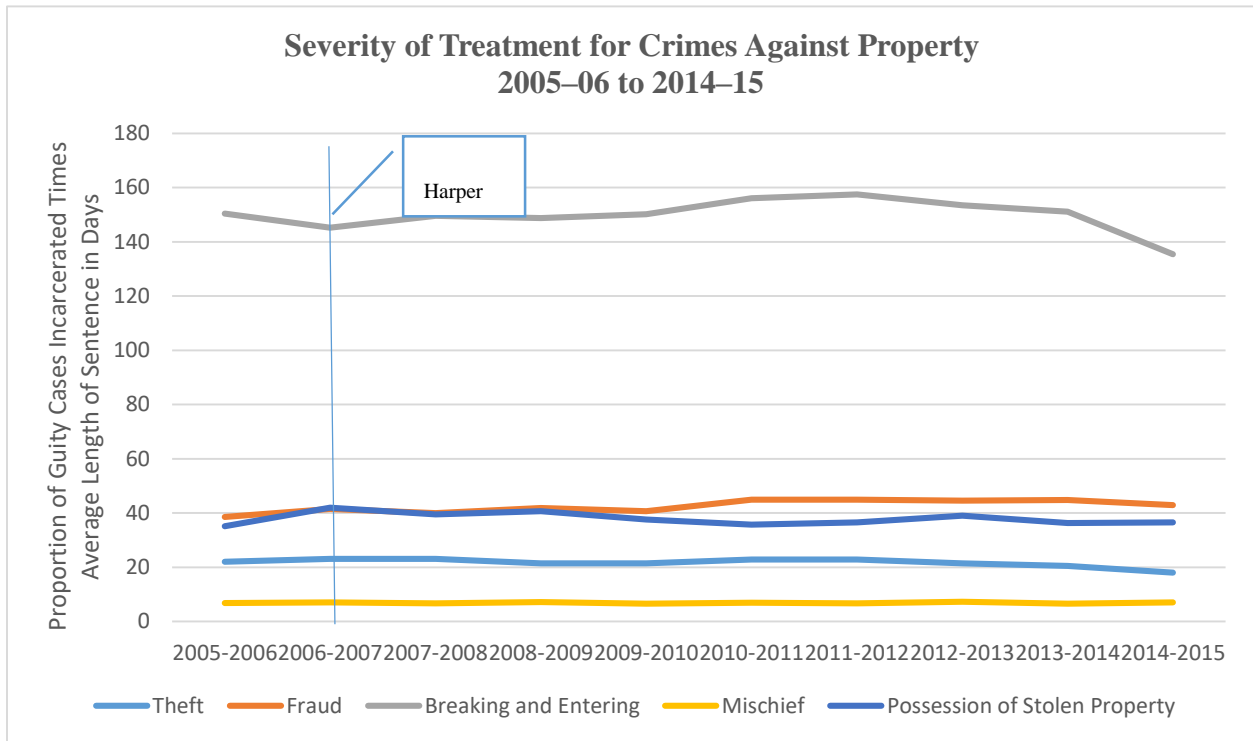
Figure 5.9



Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

Figure 5.9 presents data for selected crimes against the person. There is no overall trend in the direction of toughness or softness with respect to offences against the person. The treatment of robberies and sexual assault fluctuated, but the CSI was lower at the end of the Harper years than at the beginning. The treatment of assault, both major and common, was more stable but became slightly tougher during the period. It is noteworthy that the treatment of sexual assault cases became softer following the passage and proclamation of Bill C-10 (*Safe Streets and Communities Act*) in 2012. As will be outlined in detail in chapter 6, this legislation contained several measures to toughen sanctions for various sex offences.

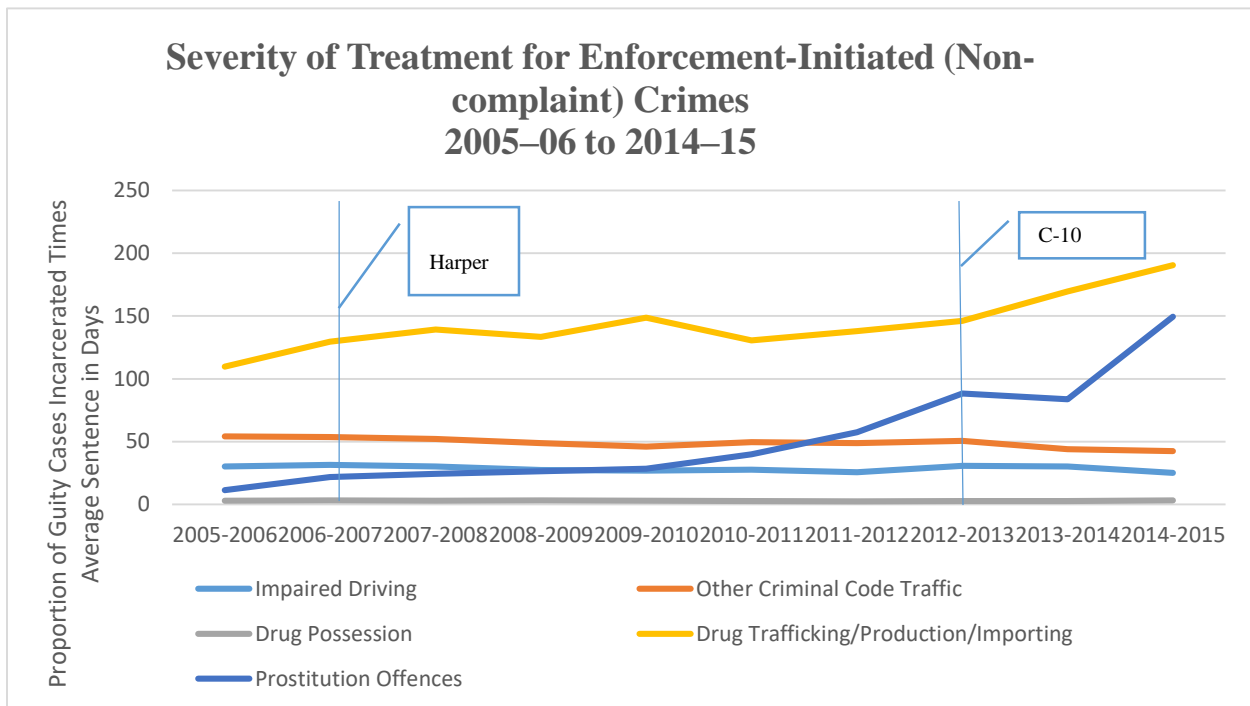
Figure 5.10



Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

The severity of treatment for theft declined by 18.2 percent from 2005-06 to 2014-15. The severity of treatment for those convicted of breaking and entering declined by 9.9 percent during the same period, while those convicted of fraud, mischief and possession of stolen property experienced an increase in the severity of their sentence of 11.2, 3.5 and 3.8 percent respectively.

Figure 5.11



Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

Figure 5.11 outlines the severity of treatment for drug offences. There is an increase in the severity of treatment of adults found guilty of drug trafficking, production, or importation from 109.6 in 2005-06 to 190.6 in 2014-2015. Further, the timing of the major portion of this increase is consistent with the implementation of tougher sanctions prescribed for these offences in Bill C-10. The increase in the toughness of prostitution-related offences was not preceded by any legislative change. However, the increase in the severity of penalty for this group of offences was accompanied by a large decline in the number of offences recorded by police. The number of such recorded offences dropped from 5,679 in 2006 to 171 in 2015.²⁸ Given that prostitution offences are generally charged and recorded as a result of police initiative rather than victim complaint, it is likely that the increase in severity of punishment was a result of increased police discretion in laying charges.

5.2.3. Regression Analysis of the Severity of Punishment of Crimes

The annualized changes in the severity of punishment as expressed by the severity index utilized above were subjected to regression analysis to evaluate the correlation of sentences for each additional year of the Harper administration. The results are presented in Table 5.3.

Table 5.3

Regression models for coefficient of changes in punishment severity for each additional year the Harper administration was in power.

	Unstandardized B	p value
<i>Crimes Against the Person</i>		
Robbery		
(constant)	528.318	
Additional year of Harper administration	-5.089	.032
Sexual Assault		
(constant)	276.245	
Additional year of Harper administration	-1.260	.456
Common Assault		
(constant)	6.765	
Additional year of Harper administration	.069	.020
Major Assault		
(constant)	67.127	
Additional year of Harper administration	1.745	.001

Crimes Against Property

Theft

(constant)	23.550	
Additional year of Harper administration	-.343	.036

Fraud

(constant)	39.178	
Additional year of Harper administration	.597	.008

Breaking and Entering

(constant)	154.163	
Additional year of Harper administration	-.636	.373

Mischief

(constant)	6.857	
Additional year of Harper administration	.004	.901

Possession of Stolen Property

(constant)	39.385	
Additional year of Harper administration	-.268	.315

Other Selected Offences

Impaired Driving

(constant)	30.460	
Additional year of Harper administration	-.336	.164

Other Criminal Code Driving

(constant)	54.836	
Additional year of Harper administration	-1.065	.003

Drug Possession		
(constant)	2.993	
Additional year of Harper administration	-.031	.269
Drug Trafficking, Importation and Production		
(constant)	109.927	
Additional year of Harper administration	6.294	.002
Prostitution Offences		
(constant)	-17.003	
Additional year of Harper Administration	12.738	<.001

Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

There is no consistent pattern of in changes to the toughness of crimes against the person during the terms of the Harper administrations. The treatment of those convicted of robbery softened by a statistically significant amount. The treatment of those convicted of sexual assault also softened, but not by a magnitude sufficient to be statistically significant to a level of $p=.05$. The treatment of those convicted of common and major assault was toughened in a statistically significant manner.

The treatment of those convicted of crimes against property also shows no consistent pattern of toughening. Those convicted of theft experienced a softening of treatment that was statistically significant. Those convicted of breaking and entering and of possession of stolen property both experienced a small softening of treatment that was not statistically significant. There was a toughening of sentences for those convicted of mischief and fraud by an amount that was statistically significant.

The severity of carceral punishment of criminal code driving offences softened slightly during the Harper era. This softening was not statistically significant for those convicted of impaired driving but was statistically significant for those convicted of other criminal code driving offences. As was shown in Table 5.2, the fines for those convicted of impaired driving

increased significantly, which suggests that higher fines had some replacement effect for incarceration. Those convicted of drug possession experienced a non-statistically significant softening of punishment severity. Those convicted of prostitution offences experienced very large and statistically significant toughening of sentencing severity. However, as discussed above, the large drop in the number of charges likely means that this toughening is an artifact of changes in police enforcement decisions. If “minor” offences are ignored, the residual charges will be for the serious cases.

The clearest example of a toughening of the severity of punishment came in the response to drug trafficking, importation and production.

5.3. Summary

Despite the outpouring of tough-on-crime legislation from the Harper administrations, actual change in punitive outcomes for those convicted of criminal acts was muted. In aggregate, people found guilty of offences were slightly more likely to be incarcerated, but the average length of sentence declined. The arithmetical result was overall stability in incarceration. Within this aggregate stability, different offences were treated differently. Those convicted of drug trafficking, importation, or production were very likely more harshly treated. For those found guilty of other offences, the justice system appears to have delivered very similar results at the end of Prime Minister Harper’s terms in government as it did at the beginning. This is not to claim that no individual was adversely affected, but rather to simply observe that there was no momentous increase in the proportion of Canadians deprived of their liberty by way of punishment. Very certainly, Canada did not experience a movement toward the ill-defined destination of “mass incarceration.”

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² Michael Tonry, “Explanations of American Punishment Policies: A National History,” *Punishment and Society* 11, no. 3 (2009): 377-394; Anthony M. Doob and Cheryl Marie Webster, “Creating the Will to Change: Decarceration in the United States,”

Criminology and Public Policy 13, no. 4 (2014): 548-559; Webster and Doob, "Punitive Trends," 297-369; Franklin Zimring, "Penal Policy and Penal Legislation in Recent American Experience," *Stanford Law Review* 58, no. 1 (2005): 323-338; Gottschalk, *Prison and Gallows*, 1-6; Alexander, *New Jim Crow*, 40-56; Zimring, Hawkins, and Kamin, *Punishment and Democracy*; Pfaff, *Locked In*, 1-18.

³ James Q. Wilson, *Thinking about Crime*, rev. ed. (New York: Basic Books, 1983), 13-25; Pfaff, *Locked In*, 1-18.

⁴ Mary Allen, *Police Reported Crime Statistics in Canada, 2015* (Ottawa: Centre for the Study of Crime Statistics, 2016), *Juristat* Catalogue Number 85-002-X, 4.

⁵ Black, "Production of Crime Rates," 733-748; Ziggy MacDonald, "Official Crime Statistics: Their Use and Interpretation." *The Economic Journal* 112, no. 447 (2002): F85-F106; Rémi Boivin and Gilbert Cordeau, "Measuring the Impact of Police Discretion on Official Crime Statistics," *Police Quarterly* 14, no. 2 (2011): 186-203; Donald R. Cressey, "The State of Criminal Statistics," *Crime and Delinquency* 3, no. 3 (1957): 230-241; Michael D. Maltz, "Crime Statistics: A Historical Perspective." *Crime and Delinquency* 23, no. 1 (1977): 32-40; Andrew A. Reid and Neil Boyd, "Hidden in the Shadows: The Impact of Temporary Worker Population on Crime Rate Calculations," *Canadian Journal of Criminology and Criminal Justice* 57, no. 4 (2015): 555-565; Jim Hackler and Wasanti Paranjape, "Juvenile Justice Statistics: Mythmaking or Measures of Systems Response," *Canadian Journal of Criminology and Criminal Justice* 25, no.2 (1983): 209-226; Connidis, "Problems," 397-145; Zavin Nazaretian and David M. Merolla, "Questioning Canadian Criminal Incident Rates: A Re-analysis of the 2004 Canadian Victimization Survey," *Canadian Journal of Criminology and Criminal Justice* 55, no. 2 (2013): 239-261.

⁶ Cristine Rotenberg, *Prostitution Offences in Canada: Statistical Trends* (Ottawa: Canadian Centre for Justice Statistics, May 10, 2016); Ryan Macdonald and Michelle Rotermann, *Experimental Estimates of Cannabis Consumption in Canada* (Ottawa: Statistics Canada, December 18, 2017); Eric P. Baumer and Janet L. Lauritsen, "Reporting Crime to the Police, 1973-2005: A Multivariate Analysis of Long-Term Trends in the National Crime Survey (NCS) and National Crime Victimization Survey (NCVS)." *Criminology* 48, no. 1 (2010): 131-185

⁷ Colin Loftin et al., "The Accuracy of Supplementary Homicide Report Rates for Large U.S. Cities," *Homicide Studies* 19, no. 1 (2015): 6-27; Marc Reidel and Wendy C. Regoeczi, "A Case-by-Case Comparison of the Classification of Law Enforcement and Vital Statistics Data on Homicide," *Criminal Justice Police Review* 17, no. 1 (2006): 61-82.

⁸ Pfaff, *Locked In*, 2.

⁹ Zinger, "Human Rights and Federal Corrections," 612.

¹⁰ Emile Durkheim, *The Rules of Sociological Method and Selected Texts on Sociology and its Method*, ed. Stephen Lukes, trans. W. D. Halls (New York: Free Press, 2013), 20-28.

¹¹ Clayton C. Ruby, Gerald J. Chan, and Nader R. Hasan, *Sentencing*, 8th ed. (Markham ON: LexisNexis Canada, 2012), 507.

¹² Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520057&tabMode=dataTable&p1=-1&p2=9&srchLan=-1#customizeTab>.

¹³ Parliament of Canada, *Edited Hansard*, 39th Parliament, 1st Session, Number 059. October 4, 2006.

¹⁴ House of Commons, Standing Committee on Justice and Human Rights, *Evidence*. 1st Session, 39th Parliament, Number 65, May 2, 2007.

¹⁵ Parliament of Canada, *LEGISinfo*, <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=2304866>.

¹⁶ Parliament of Canada, *LEGISinfo*, <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=3085474>.

¹⁷ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Amount of Fine, Annual (Number), 1994/1995 to 2014/2015*, CANSIM 252-0063, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520063&tabMode=dataTable&p1=-1&p2=9&srchLan=-1>.

¹⁸ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Amount of Fine...*, CANSIM 252-0062, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520062&tabMode=dataTable&p1=-1&p2=9&srchLan=-1>

¹⁹ Parliament of Canada, *Edited Hansard*, 40th Parliament, 2nd Session, Number 038. May 3, 2010.

²⁰ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence...*

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- ²¹ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody, Annual (Number), 1994/1995 to 2014/2015*, CANSIM 252-0059
<http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520059&tabMode=dataTable&p1=-1&p2=9&srchLan=-1>.
- ²² Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence...* Note 45.
- ²³ John Braithwaite, "Restorative Justice," in *The Handbook of Crime and Punishment*, ed. Michael Tonry (New York: Oxford University Press, 1998), 323-344.
- ²⁴ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence...*
- ²⁵ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.
- ²⁶ Anthony Matarazzo et al., *Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey* (Ottawa: Statistics Canada, April 21, 2009), <http://www.statcan.gc.ca/pub/85-004-x/85-004-x2009001-eng.pdf>.
- ²⁷ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody...*, Note 5.
- ²⁸ Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Annual*, CANSIM 252-0051.

6. Legislative Case Study: Bill C-10 or the *Safe Streets and Communities Act*

This chapter examines the passage, judicial treatment, and results of Bill C-10 or the *Safe Streets and Communities Act* passed in the First Session of the Forty-first Parliament—that is, after the CPC received a majority mandate. It thus represents the first major legislative expression of the Harper administrations’ tough-on-crime program after it was freed from the constraints of a minority Parliament. Since Bill C-10 was omnibus legislation consisting of a wide range of initiatives that were introduced but not passed during earlier Parliaments, focus on this bill also provides a panoramic overview of the Harper administrations’ legislative program. Each component of Bill C-10 is examined with a history of antecedent legislation, the main themes advanced by the government and opposition during debate, the treatment of the legislation by the courts, and, to the extent possible, an analysis of the substantive impact of the legislative provisions on the justice systems’ outcomes of those convicted of offences affected by the legislation.

Bill C-10 was introduced on September 20, 2011, on the 16th sitting day of the Forty-first Parliament.¹ In introducing the legislation, the Minister of Justice said, “We have bundled together crime bills that died on the Order Paper in the last Parliament into a comprehensive piece of legislation and it is our plan to pass it within the first 100 sitting days of Parliament.” The introduction and passage of Bill C-10 “fulfills the commitment in the June 2011 Speech from the Throne to quickly reintroduce law and order legislation to combat crime and terrorism. This commitment, in turn, reflects the strong mandate that Canadians have given us to protect society and to hold criminals accountable.”²

The *Safe Streets and Communities Act* was vigorously opposed by the parliamentary opposition. The Justice Critic for the NDP described the bill's introduction as a "historic day" that was the culmination of an attempt "to reverse the approach to the criminal justice system that we have taken in our country for the better part of 40 years." He described the legislation as "radical right wing ideology adopted mostly from the United States."³ The Liberals agreed with this critique, with their spokesperson suggesting alternative names for the legislation:

An act to divide Canadians and keep the Conservative base happy; an act to provide prisoners for empty prisons; an act to fill prisons in order to build new ones; an act to take more aboriginals off reserves and put them into prisons; an act to provide a Conservative comprehensive affordable housing strategy; an act to make prisons the largest mental health institutions in Canada; and, one I particularly like, an act to stimulate the penal sector.⁴

The government needed its new majority to pass the *Safe Streets and Communities Act*. Time allocation was imposed, 19 recorded votes were taken⁵ and 13 days of hearings were held to hear from 87 witnesses.⁶ The witnesses were emphatic in their support for, or denunciation of, the legislation. The daughter of a murdered retired farmer told the committee, "As a victim, I am relieved to see that the government is taking statutory measures to ensure the protection of citizens."⁷ Former NHL hockey player and co-founder of the victim advocacy group Respect Group Sheldon Kennedy said,

To me, the fundamental reason for change to these laws is simple: we can't let these perpetrators walk freely among our youth organizations, our schools, our neighbourhoods, and our workplaces. Children need to feel safe, and parents have to trust that the government is playing a role in protecting them. Criminals need to be held accountable and be dealt with consistently with clearly defined consequences. In my mind, child protection is paramount.

In closing, I want to thank this government for standing up for victims and finally taking action. It's about time someone gets tough on criminals.⁸

In opposing Bill C-10, University of Toronto Professor Anthony Doob described sections as "a cruel and dishonest joke on the part of the government."⁹ Kim Pate, the Executive Director of the Canadian Association of Elizabeth Fry Societies, said,

The direction of this bill is to encourage more use of imprisonment—in fact, unprecedented use of imprisonment in Canada—and that the cost of that will detract from other services and resources. It will make prisons more overcrowded, and it will ensure

that we have more women, people with mental health issues and, particularly, indigenous people in prison.¹⁰

Elected officials from other levels of government joined in the debate. The New Brunswick Justice Minister told the Commons Justice Committee, “Without hesitation, we support the efforts to strengthen these laws aimed at protecting the victims of crime, protecting our children and giving a voice to victims.”¹¹ Her Quebec counterpart took the opposite view, saying, “It is difficult to see how this is a tough-on-crime proposal” arguing the focus on incarceration “actually encourages repeat offences and increases the number of victims ... [since]... prison may actually serve as crime school, thus encouraging prisoners to reoffend.”¹²

Winnipeg Mayor Sam Katz told the Commons Justice Committee,

I am encouraged by the bold steps in Bill C-10 to change the status quo and start taking real responsibility for our citizens’ safety. The revolving doors of justice need to close, and we need to change the *Youth Criminal Justice Act* so repeat offenders stay behind bars instead of escalating the nature of their crimes out in society.

The rights of our citizens need to trump the rights of the criminals in our country. There is so much in this legislation that is vital to preserving the safety of our citizens.¹³

Bill C-10 received third reading in the House of Commons on January 3, 2012. The Senate proposed minor editorial amendments to the section dealing with terrorism,¹⁴ which were accepted by the House of Commons. Bill C-10 received royal assent on March 13, 2012.¹⁵ This was the 95th sitting day of the First Session of the Forty-first Parliament. The government had met its throne speech commitment for timely passage.

While the supporters and opponents of Bill C-10 differed on many things, there were points of consensus. All agreed that the *Safe Streets and Communities Act* represented a rupture in Canada’s criminal justice system and in the treatment of those accused of crimes. There was consensus that the legislation would lead to a major increase in Canada’s jail and prison populations. Finally, there was consensus that the legislation made incarceration the primary response to criminal offences.

6.1. Precursors to the *Safe Streets and Communities Act*

There were no surprises in the *Safe Streets and Communities Act*. The omnibus legislation consisted of tough-on-crime legislation introduced in the previous minority Parliament before dying on the Order Paper when the election was called in the spring of 2011. As such, Bill C-10 consisted of nine pieces of independently introduced legislation that had, conceptually, simply been stapled together and provided with a new title. Table 6.1 provides a topic outline of this precursor legislation, the position taken by opposition parties on the original legislation, and where the legislation was in the legislative process when the election wiped the legislative calendar clean.

Table 6.1

Precursor Legislation to the *Safe Streets and Communities Act*

Legislative Topic	Bill	Liberal	NDP	Bloc	Last Stage
Violent Young Offenders*	C-4	Ambiguous	Support	Support	2 nd reading
Repatriation of Canadian Inmates	C-5	Support	Oppose	Oppose	Committee
Conditional Sentences/House Arrest*	C-16	Oppose	Oppose	Oppose	2 nd reading
Victims of Terrorism	S-7 ¹⁶	Support	Support	Support	Senate
Drug Offences (non-possession)	S-10 ¹⁷	Support	Oppose	Oppose	Senate
Pardons*	C-23B	Oppose	Oppose	Oppose	Committee
Vulnerable Immigrants (sex industry)	C-56 ¹⁸	Support	Oppose	Support	1 st reading
Early Release of Inmates	C-39	Support	Support	Support	2 nd reading
Sexual Offences Against Children*	C-54	Ambiguous	Support	Support	Senate

Source: Compiled from Parliament of Canada, *LEGISinfo*, www.parl.ca/LegisInfo/Home.aspx?Language=E&ParliamentSession=42-1. Indication of party support is based on the votes of the members of each party at the most advanced stage of legislative debate. In cases where no recorded vote was held, the position of each party was determined from comments from each party's lead spokesperson during second reading (debate in principle) debate. Precursor bills marked with an "*" proceeded without any recorded vote.

The position of the opposition parties when dealing with the precursor legislation to the *Safe Streets and Communities Act* was much more ambiguous than the statements made during the debate on the omnibus legislation. Bill C-54, which provided for increased mandatory minimum sentences for sexual offences against children first imposed during the tenure of the

Liberal Martin administration,¹⁹ had passed through the House of Commons without a recorded vote and with unequivocal statements of support from the NDP and Bloc Québécois. Bill S-10, which provided for new mandatory sentences for drug trafficking, importation, or production in some circumstances, had passed through the House of Commons as Bill C-15 with the support of Liberal members. Bill C-16, which restricted the range of offences eligible for conditional sentences, had passed an unrecorded second reading vote despite all opposition parties declaring their dissent. A major theme of the opposition response to the legislation making up Bill C-10 had been to refute government claims that they were responsible for the slow pace of passage of tough-on-crime legislation.

6.2. Provisions of the *Safe Streets and Communities Act*

Bill C-10 amended eight previously existing acts and created one new act. It is therefore not possible to speak of the overall impact of the *Safe Streets and Communities Act*. Instead, the bill must be disaggregated into its various component parts.

6.2.1. *Justice for Victims of Terrorism Act*

Part 1 section of Bill C-10 completed the legislative approval for the *Justice for Victims of Terrorism Act* and amended the *State Immunity Act*. Although included in omnibus crime legislation, these provisions were not intended to deal with crime in Canada. Instead, this legislation permitted Canadian citizens harmed by acts of terrorism to sue supporters of terrorism, including foreign governments deemed to be supportive of the terroristic activity.²⁰ As such, these provisions cannot affect Canadian incarceration rates. According to the Minister of Justice, the primary purpose of these provisions was to deter terrorism.²¹ The direct connection of the *Justice for Victims of Terrorism Act* with the rest of the *Safe Streets and Communities Act* is somewhat tenuous, but the point of underlying commonality is that they promise a response to perceived dangers facing Canadians. The provisions of Part 1 were not subjected to any meaningful opposition, although the report of the Special Senate Committee on Anti-Terrorism noted that some opposition had been expressed to leaving the right to designate “foreign governments deemed to be supportive of terrorism” in the hands of the Governor General in Council.²²

At the time Bill C-10 was passed, the only country with equivalent legislation was the United States. In that country, seven countries had been designated at some time as supporting terrorism and were subject to civil suit. However, “a common problem ... has been the refusal of defendants to recognize the jurisdiction of the American courts. Defendants do not appear and default judgments are rendered, which the debtor countries then ignore and refuse to pay.”²³

The Islamic Republic of Iran and the Syrian Arab Republic have been the two countries deemed to be supporters of terrorism and subject to civil action under the terms of the *Justice for Victims of Terrorism Act*.²⁴ Presentation of cases before the courts arises from civil actions launched by individuals rather than criminal proceedings launched by the state. There do not appear to be court decisions based on this legislation.

6.2.2. Sentencing

Sections 10 to 36 of Bill C-10 toughened sentences for sexual offences against children and Sections 39 to 46 did the same for those convicted of trafficking, importing, or producing illegal drugs under specified conditions.²⁵

6.2.2.1. Sentencing: Sexual Offences Against Children

Bill C-10's provisions increased existing penalties for sexual offences against children and created the new offences of making sexually explicit material available to a child and agreeing or arranging to commit a sexual offence against a child. The bill's provisions were almost identical to Bill C-54, which had received third reading in the House of Commons but died on the Order Paper in the Senate when Parliament was dissolved for the 2011 election.

For the most part, the legislation left the maximum penalties unchanged. Instead, the focus was on increasing the mandatory minimum sentences that had been imposed in 2005 during the Martin administration and imposing new mandatory minimum sentences for other offences. The mandatory minimum for an indictable conviction for sexual interference with someone under the age of sixteen was increased from 45 days to one year. The same charge on a summary conviction had the mandatory minimum increase from 14 days to 90 days.²⁶ Previously, a conviction for bestiality in the presence of a child had no mandatory minimum. Bill C-54

provided for a mandatory minimum of one year for an indictable conviction and 30 days for a summary conviction.²⁷

When launching Bill C-54's second reading debate, the Parliamentary Secretary for the Minister of Justice told the House of Commons:

There are many issues on which parliamentarians may disagree but the protection of children against sexual exploitation should never be one of them.

The proposals in Bill C-54 have two objectives: one, to ensure that all forms of child sexual abuse irrespective of how they are charged are always treated as serious offences for sentencing purposes; and two, to prevent the commission of sexual offences against a child.²⁸

The Liberal spokesperson suggested that the mandatory minimums provided for in Bill C-54 were "appropriate," but cautioned against a "bidding war" on the imposition of mandatory minimums.²⁹ The Bloc Québécois critic noted, "The Bloc Québécois has always maintained here in the House that minimum sentences are ineffective and unfair by nature," but said they "will support this bill at second reading to ensure that it can be studied in committee and that it meets everyone's expectations."³⁰ The NDP said, "This is a very good bill."³¹ Bill C-54 passed through the House of Commons promptly and received third reading on March 11, 2011, or only 50 sitting days after introduction for first reading and 34 sitting days after the government brought the legislation forward for second reading. No recorded vote was called for by any party at any stage of the House of Commons process.³² Despite the dispatch with which the opposition parties helped move Bill C-54 through the House of Commons, its introduction late in the parliamentary session precluded its passage in the Senate prior to the 2011 election.

When the provisions of Bill C-54 were reintroduced as part of the omnibus Bill C-10, the government members highlighted the mandatory minimums for sexual offences against children.³³ In their critique of mandatory minimum sentences, the opposition members largely ignored these by focusing instead on the mandatory provisions for illicit drugs, particularly cannabis.³⁴ An NDP member attacked the mandatory minimum sentences for drug offences with a proportionality argument:

We believe people should be punished for crimes that are committed, but the punishment must fit the crime. We must look at it in a little bit bigger context. We cannot just

narrowly focus on setting minimums. It is very troubling when a minimum sentence for marijuana use is longer than for the rape of a child. That is very troubling to me.³⁵

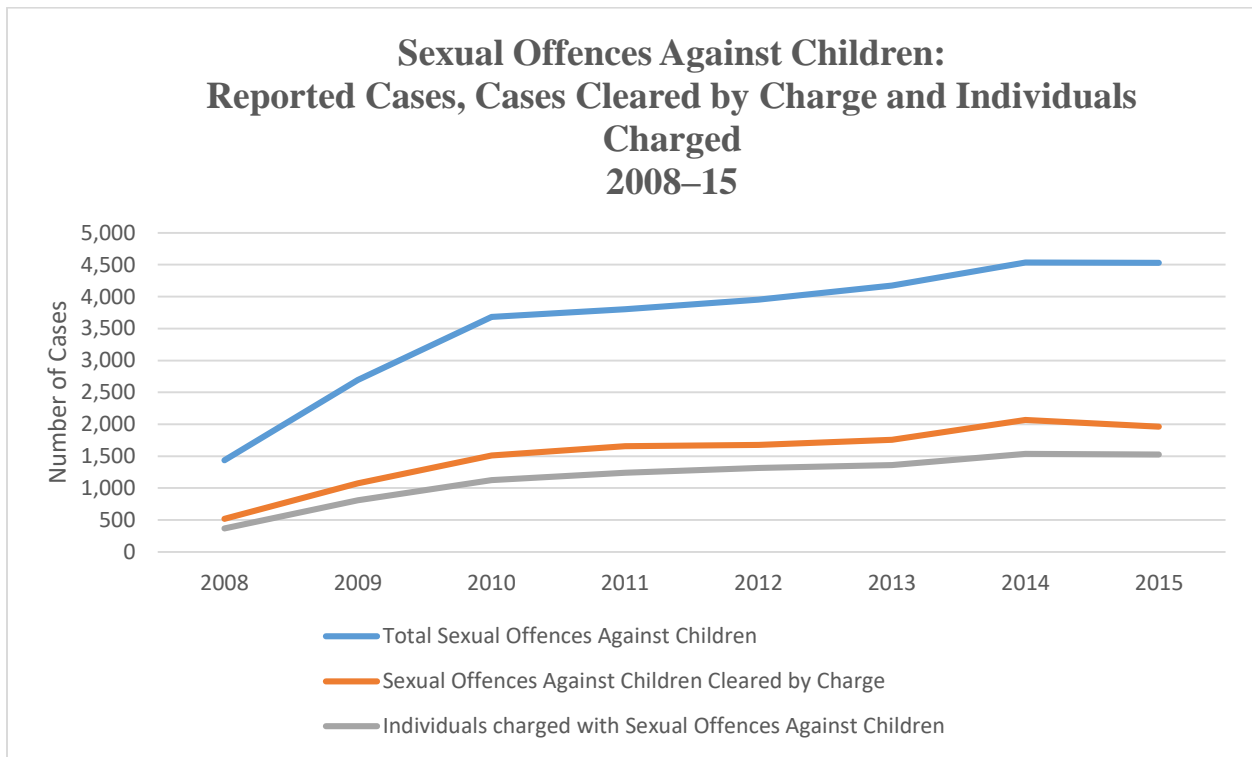
The statement was misleading in that Bill C-10 provided for mandatory minimum sentences for drug trafficking, production, and importation rather than for “use” and because rape does not exist as an offence in the *Criminal Code*. Given that mandatory minimums were being increased for both drug and sexual offences against children, this proportionality argument could be viewed as an argument for increased sentences for the sexual offences rather than for a call for decreases for the drug offences.

Seven reported cases where the new or increased mandatory minimum sentences were challenged on constitutional grounds have been located. In two cases, the court found that the mandatory minimum was within the range of proportionate and comparable sentences.³⁶ In three cases, the court indicated that the mandatory minimum was longer than the sentence that had been imposed without the legislation, but that the disproportionality did not reach the threshold of gross disproportionality required to sustain the constitutional challenge.³⁷ In one case, the judge indicated that in the absence of a mandatory minimum the sentence would have been nine months incarceration. The one-year mandatory minimum had raised the floor such that a 13-month sentence was now appropriate. This increase was not deemed to create any gross disproportionality.³⁸ The mandatory minimum did create a result deemed to be grossly disproportionate when it would have resulted in a proportionate four-month sentence becoming a one-year sentence. In this case, the judge’s criticism was directed toward the prosecution more than the legislation saying, “The Crown could have elected to proceed by summary conviction in which case the minimum sentence would have been 90 days and the issue of proportionality would not arise. The Crown elected to proceed by indictment and that changes the landscape.”³⁹ A case involving the retrospective implications of some provisions on historical sexual offences against children reached the Supreme Court, which ruled that the provisions were protective rather than punitive in intent. As a result, retrospective effect was deemed justifiable.⁴⁰

The introduction of Bill C-54 and the passage of its provisions in Bill C-10 coincided with a period of growth in the reporting and charging of sexual offences against children. Statistics Canada provided consistent data for offences such as sexual interference, invitation to

sexual touching, and sexual exploitation beginning in 2008.⁴¹ Figure 6.1 outlines the trends in reported cases and charges for these sexual offences against children. Sexual assault and pornography cases are not included in this data. From 2012 to 2015, the number of individuals potentially affected by the increased mandatory minimum sentences in Bill C-10 includes 3,881 individuals charged with sexual interference, 833 for invitation to sexual touching, 189 for sexual exploitation, and 789 for luring via the internet. Data for cases of committing bestiality in the presence of a child is not reported, but appears to be rare since only 33 individuals were charged with bestiality over this four-year period. A total of 45 individuals were charged with the newly created offence of providing sexually explicit material to children during the period 2012 to 2015.⁴²

Figure 6.1

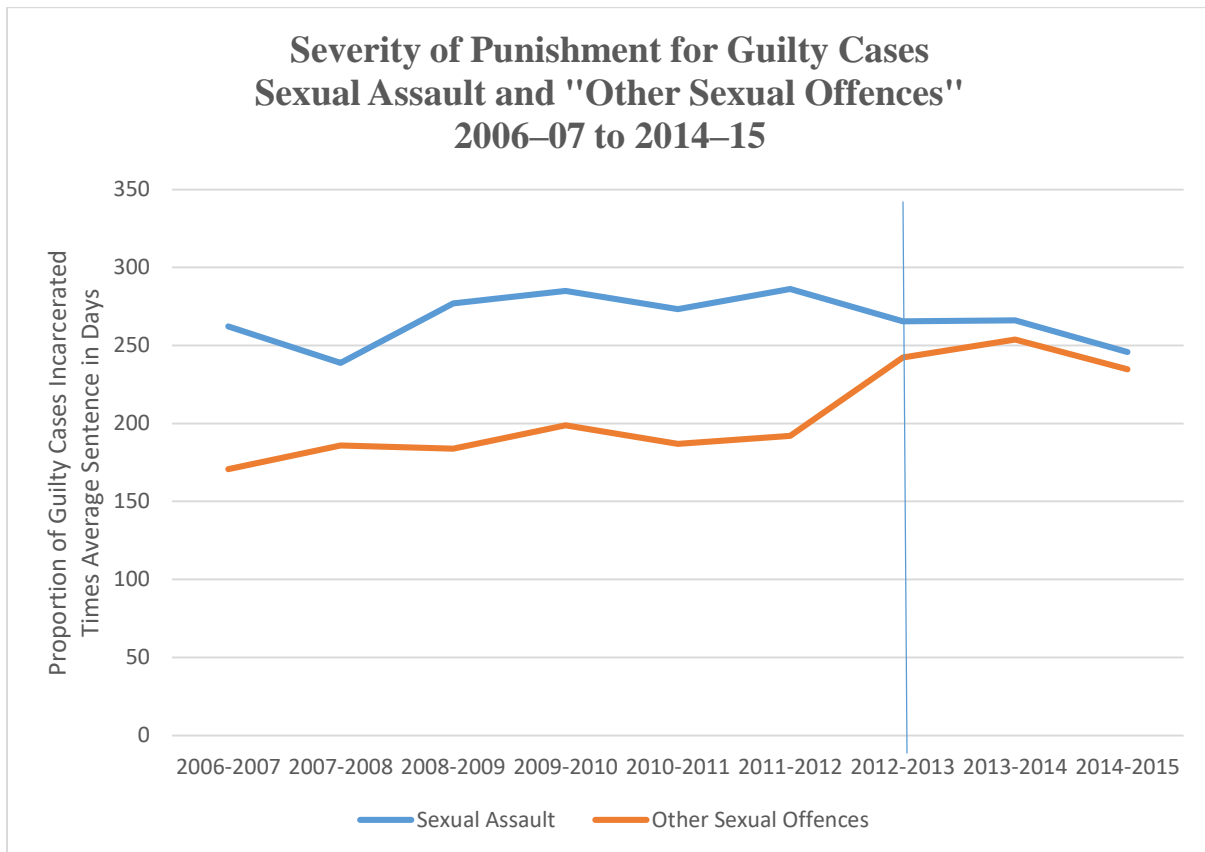


Source: Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Annual*, CANSIM 252-0051.

Figure 6.2 outlines the severity of sentences received by those found guilty of sexual assault or Other Sexual Offences. Most of the offences affected by Bill C-10 reside in the Other Sexual Offences category, which contains sexual offences against children except those filed as

sexual assault or child pornography offences.⁴³ Statistics Canada does not disaggregate the data by the age of the victim, but the overall severity of punishment for Sexual Assault decreases after Bill C-10 received royal assent on March 12, 2012. In the case of Other Sexual Offences, a trend toward an increase in the severity of punishment ended following the passage of the *Safe Streets and Communities Act*.

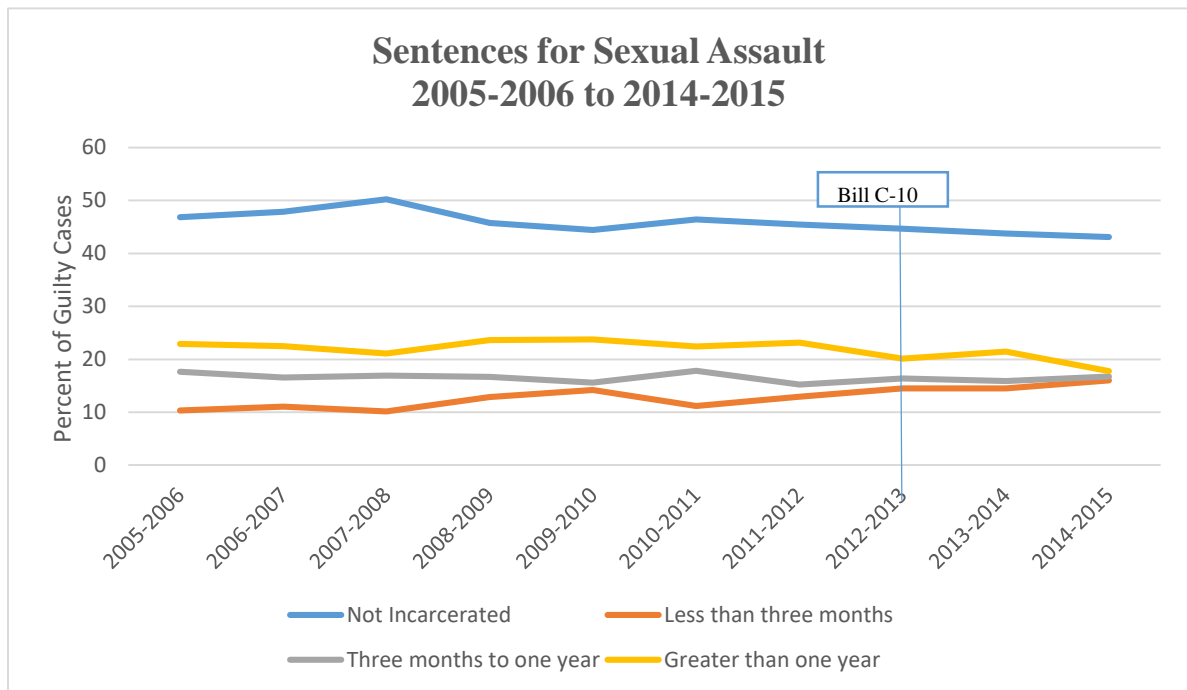
Figure 6.2



Source: Compiled from Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

Figure 6.3 outlines the sentencing patterns for those convicted of Sexual Assault as their most serious offence. The benchmarks of three months and one year are highlighted because these were the primary mandatory minimum sentences imposed in the *Safe Streets and Communities Act*.

Figure 6.3

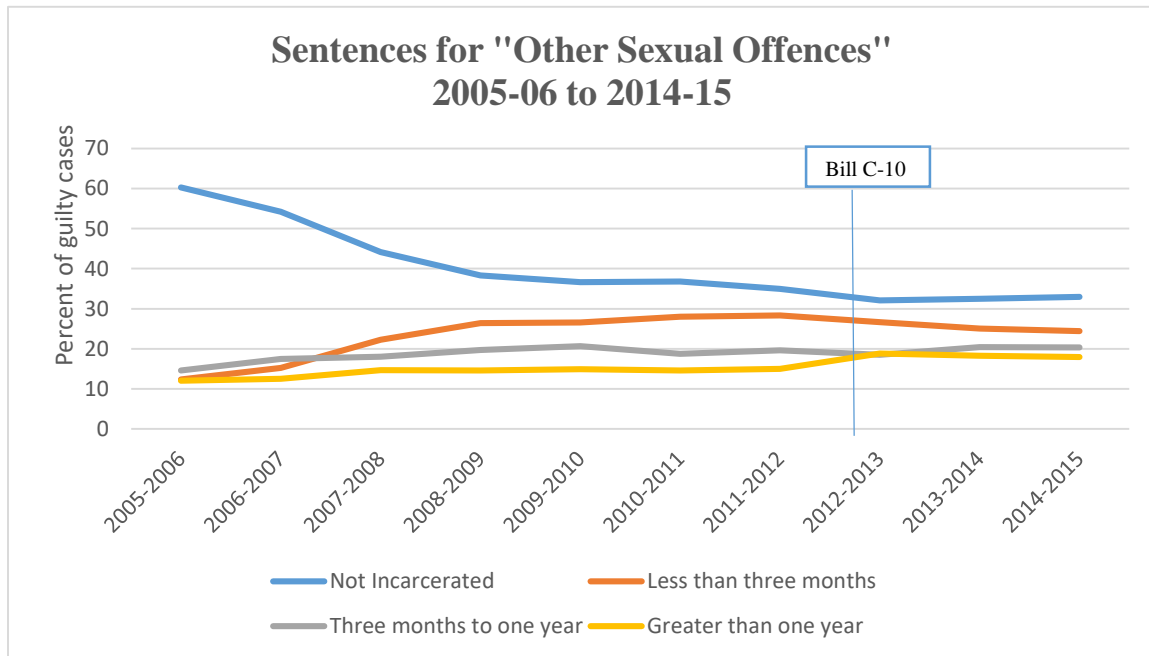


Source: Compiled from Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Length of Custody, Annual*, CANSIM 252-0058

There was a trend towards the increased utilization of incarceration that predated the passage of the increased mandatory minimum sentences for offences against children contained in the *Safe Streets and Communities Act*. In 2007-2008, 49.8 percent of those convicted of Sexual Assault received custodial sentences. By 2011-2012, the year preceding the proclamation of the Bill C-10, this had risen to 54.5 percent. This trend continued following passage of the legislation. By 2014-2015, 56.9 percent of those convicted received custodial sentences. The greatest growth both before and after the passage of Bill C-10 occurred in sentences of less than three months, which is below the mandatory minimum threshold for offences against children as revised in Bill C-10. In 2005-2006, 10.3 percent of those convicted received a sentence in this range. In the year before the proclamation of Bill C-10, this had increased to 12.9 percent and reached 16.0 percent by 2014-2015. Sentences longer than two years was relatively stable prior to the passage of Bill C-10, but dropped from 23.1 percent in 2005-2006 (just prior to the proclamation of Bill C-10) to 17.7 percent in 2014-2015.

Figure 6.4 presents the sentencing data for “Other Sexual Offences”, the category of offences most impacted by the sentencing changes in the *Safe Streets and Communities Act*.

Figure 6.4



Source: Compiled from Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Length of Custody, Annual*, CANSIM 252-0058.

There was a dramatic increase in the utilization of custodial sentences during the period under examination. National data is not available prior to 2005-2006, but in that year, 39.7 percent of those convicted of this category of offences received a custodial sentence. By 2011-2012, the last year prior to the proclamation of the *Safe Streets and Communities Act*, this had increased to 65 percent. The greatest growth was in short sentences of less than three months, which increased from 12.4 to 28.3 percent of guilty cases. In 2012-2013, the first year following the proclamation of Bill C-10, this trend towards increased use of custodial sentences continued, reaching 67.9 percent of cases. However, a number of the cases disposed of in 2012-2013 will have been for offences pre-dating the legislative changes and would not be subject to the new mandatory sentencing regime. The use of incarceration for this category of offences then stabilized, accounting for 67.0 percent of cases in 2014-2015.

The aggregate data above is problematic in that it does not allow for analysis of sentences received by age of victim. In a *Juristat* publication, Allen uses access to the ICCS micro-data to examine sentencing patterns for the sexual offences specifically against children.⁴⁴ She finds that the largest change in sentencing patterns subsequent to the passage of Bill C-10 for offences such as invitation to sexual touching and possession of child pornography occurred where summary charges were preferred. In these cases, “the greatest shift was from non-custodial sentences such as probation (pre-2005), to custody sentences at or just above the level of the MMP [mandatory minimum penalties] (post-2005).”⁴⁵ The greatest shift to more cases resulting in incarceration occurred when the mandatory minimum sentences were imposed in 2005 during the tenure of the Martin Liberal administration. Allen’s conclusion is consistent with the data presented above, particularly in Table 6.4.

Allen’s study documents the impact of the 2005 and 2012 legislative changes for both summary and indictable offences. It does not report on the proportionate mix of these charges, so it is impossible to determine changes in the total of these charges. It is possible that the increased mandatory minimum sentences for summary charges could be sufficient for a prosecutor to decide that a summary charge would result in an “appropriate” sentence of incarceration with the resulting decision to forego the more punitive indictable charge. In short, it remains unclear what effect the legislative changes had on the average penalty for all those convicted of these offences.

The substantive effect of the provisions dealing with sexual offences against children contained in the *Safe Streets and Communities Act* remains murky. The most likely effect is that those facing summary charges were more likely to experience a relatively short period of incarceration rather than receiving probation or a conditional sentence. There is less support for a contention that those who would have been incarcerated in the absence of the legislative changes received a longer sentence. Further, the shift in sentencing patterns for sexual offences against children appears to have followed the imposition of mandatory minimum sentences during the Martin administrations’ tenure rather than the increase in the mandatory minimums imposed in the *Safe Streets and Communities Act*. Between the proclamation of the legislation in 2012 and 2015, approximately 1500 people per year were charged with the sexual offences against children.

6.2.2.2. Sentencing: Drug Trafficking, Importation, and Production

Clauses 32 and 33, 39 to 48, and 50 and 51 amended the sentencing provisions of the *Controlled Drugs and Substances Act*. The provisions were almost identical to those in Bill S-10, which died on the Order Paper when the Third Session of the Fortieth Parliament was dissolved for the 2011 election. Bill S-10, in turn, was based on Bill C-15, which had passed in both the House of Commons and the Senate but died on the Order Paper without royal assent when the Second Session of the Fortieth Parliament was prorogued on December 30, 2009. Bill C-15, in turn, had been based on Bill C-26 of the Second Session of the Thirty-ninth Parliament. This legislation passed at second reading but died on the Order Paper when this Parliament was dissolved on September 7, 2008.⁴⁶ The provisions thus took 1,179 calendar days or 481 parliamentary sitting days. Two general elections had intervened. This lengthy process occurred despite the legislation being passed in the House of Commons at third reading once and at second reading twice during the two minority Parliaments. As Bill C-15, these provisions were supported by the Liberals.⁴⁷ As Bill C-26, they had been supported by both the Liberals and Bloc Québécois, with only the NDP voting in opposition during second reading.⁴⁸

With a few exceptions, the drug sentencing provisions in the *Safe Streets and Communities Act* did not add to maximum sentences. Instead, the legislation imposed mandatory minimum sentences for the trafficking, importation, or production of drugs prohibited by the *Controlled Drugs and Substances Act*. The new mandatory minimum sentences were conditional upon specified circumstances. Trafficking of Schedule I drugs (primarily opiates or coca derivatives) and specified quantities of Schedule II drugs (primarily cannabis) were subject to a mandatory minimum sentence if the person convicted was acting as a member of a criminal gang, used or threatened the use of violence, carried a weapon, or had specified previous convictions.⁴⁹ A mandatory minimum of two years held if the offence occurred in or near a school ground or playground or “near any other public place usually frequented by persons under the age of 18 years.” A two-year mandatory minimum was also imposed for drug sales in a prison or if the offender used the services of someone under the age of 18 to sell drugs.⁵⁰

The minimum sentencing matrix was finely divided for some offences. For the production of cannabis for the purpose of trafficking, the mandatory minimum sentence was set at six months incarceration for six to 200 plants, one year for 201 to 500, and two years for more than 500 plants.⁵¹ These minimums were statutorily increased if the offender used the real property of another person, posed a health or safety risk to someone under 18 or a residential neighbourhood, or who set traps to protect the grow operation.⁵² These factors had previously been listed as aggravating factors for sentencing.⁵³

In a rehabilitative exception to the general punitive approach, the mandatory minimum could be waived upon successful completion of an addictions treatment program.⁵⁴

Bill C-10 also specified that Parliament was to establish a committee to review the cost and effectiveness of the mandatory minimum sentences within five years of the implementation of the section.⁵⁵

The NDP opposed the drug sentencing provisions primarily on the basis of proportionality and cost. The NDP critic told the House of Commons, “We are going to have a mandatory minimum penalty for an offence of trafficking a drug that is double what the mandatory minimum is for the rape of a child.” He explained, “I am emphasizing the drug part of the bill because it is where the costs primarily are... the reality that the cost is totally unjustifiable in terms of this bill doing anything to combat drug trafficking.”⁵⁶ Perhaps because of their previous support for the provisions contained in the drug sentencing sections of Bill C-10, the Liberals questioned costs of the legislation and the effectiveness of mandatory sentences in general without criticizing the specific provisions.

The constitutionality of the mandatory minimum sentences for drug offences contained in Bill C-10 generated debate in Canadian courts. The mandatory minimum sentences of Bill C-10 challenged as being grossly disproportionate have been identified in 24 decisions. These decisions compared the mandated minimums to what the people would have otherwise received. The constitutional question was posed strictly within an argument of proportionality—that is, whether the legislation produced results that were grossly disproportionate to past judicially imposed sentences. In 11 cases, the court ruled that the mandatory sentence was within the

previously established sentencing range.⁵⁷ In two cases, the mandatory minimum was deemed to be higher than the normal sentence, but not of a sufficient magnitude to be declared grossly disproportionate.⁵⁸ In 10 cases, the mandatory minimum was deemed to have exceeded the normal sentencing range such that an unconstitutional gross disproportionality had occurred.⁵⁹ In one case, an appeal court ruled that the trial judge had erred in imposing the mandatory minimum when the facts justified a higher sentence.⁶⁰

The mandatory minimum also introduced new debates around evidence, such as what constituted safety risks⁶¹ and how the number of marijuana plants was counted.⁶²

In dealing with the question of proportionality, the courts confined their comparison to like offences. That is, drug trafficking charges and individuals convicted were compared to others convicted of drug trafficking charges. This differed from the parliamentary debate in which the severity of penalties for drug offences was compared with other, conceptually unrelated types of crimes.

The courts also tended to take into consideration the personal characteristics of the perpetrator and its impact on the principles of rehabilitation and specific deterrence. In one case having “two children” and having “worked her whole life at a lawful occupation”⁶³ resulted in the mandatory minimum being found to a grossly disproportionate result on the grounds of both rehabilitation and specific deterrence. In another case, the disproportionate consequences of the mandatory minimum resulted from the triggering of a deportation order arising from a sentence of the prescribed length.⁶⁴ In yet another case, the mandatory minimum was deemed to be within the appropriate sentencing range, but its application was deemed to preclude any recognition of a guilty plea.⁶⁵

The Supreme Court of Canada (SCC) ruled on Bill C-10’s mandatory minimums in *R v Lloyd*. In this case, the sentence imposed by proportionate comparison was found to be consistent with the legislatively mandated minimum. However, the SCC declared the legislated mandatory minimums to be in violation of Section 13 of the *Charter of Rights and Freedoms* because grossly disproportionate sentences could be produced by “reasonably foreseeable applications of the law.”⁶⁶

The new and increased mandatory minimum sentences stipulated for drug offences in the *Safe Streets and Communities Act* had the potential to affect many more individuals than were affected by changes to the treatment of sexual offences against children. From 2012, when the penalties came into effect, to 2015, a total of 29,233 adults were charged with offences related to the trafficking, importation, or production of cannabis. Another 33,788 were charged with these offences related to cocaine, and 21,849 were charged with offences related to other proscribed drugs.⁶⁷ With this volume of individuals charged, a toughening in the disposition of cases likely had an impact on incarceration rates in Canada.

As was outlined in chapter 5, the total severity of punishment increased following the proclamation of Bill C-10. The overall severity index for these offences increased from 137.95 in 2011–12 (the year before the passage of Bill C-10) to 190.58 in 2014–15.⁶⁸ During this period, the mean length of an incarceration sentence rose from 343 to 362 days⁶⁹ while the percentage of guilty cases resulting in incarceration rose from 40.22 percent to 52.65 percent.⁷⁰ The percentage of those incarcerated sentenced to a term of less than six months (the lowest of the new mandatory minimum sentences) dropped from 52.45 percent to 47.04 percent.⁷¹

The percentage of cases resulting in a finding of guilt dropped from 52.73 percent to 49.87 percent during the same period.⁷² This could be indicative of less incentive to plead guilty with the existence of the enhanced mandatory minimum sentences.

In summary, the drug offence sentencing provisions of the *Safe Streets and Communities Act* took the Harper administrations a long time to pass despite the support of the Liberal party in minority Parliaments. Once enacted, the legislatively prescribed mandatory minimum sentences were the object of resistance from the courts, which continued to stress the principles of proportionality, rehabilitation, and specific deterrence instead of an exclusive focus on denunciation and general deterrence.

Despite resistance by the courts, the proclamation of the new and increased mandatory minimum sentences coincided—and likely directly or indirectly caused—some increase in incarceration for these drug offences. That being said, the evidence indicates that the mandatory sentences were established at a level within the general range of sentences already being imposed

by the court.. Cases in which the mandatory minimums produced results sufficient to trigger the provisions of Section 12 of the *Charter of Rights and Freedoms* usually were the result of the preclusion of mitigating factors.

6.2.2.3. Sentencing: Conditional Sentences

Clauses 34 and 51 of the *Safe Streets and Communities Act* expanded the number of offences in which conditional sentences, generally served in the community, were prohibited.⁷³ These provisions were almost identical to Bill C-16, the *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*, that was introduced in the Third Session of the Fortieth Parliament.⁷⁴ This legislation had passed second reading without a recorded vote but died in committee without any attempts by the government to move it forward. In second reading debate, the Liberals, NDP, and Bloc Québécois all expressed opposition to the provisions of the legislation.⁷⁵ This rare united front from the opposition against a minority Parliament likely caused the Harper administration to abandon the legislation until it achieved a majority while the opposition's failure to call for a recorded vote at second reading allowed them to avoid placing their rejection of the bill on an easily verifiable public record.

Under the terms of the precedent established by the Supreme Court in *R v Proulx*,⁷⁶ new mandatory minimum sentences for some drug offences and sexual offences against children were also made ineligible for conditional sentences.

The *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act* itself was a resurrection of provisions first introduced in Bill C-9 of the First Session of the Thirty-ninth Parliament,⁷⁷ albeit with a much more descriptive and evocative title. Bill C-9 reflected a CPC platform commitment in the 2006 election and was introduced May 4, 2006, or the 16th parliamentary sitting day of the new government's mandate.⁷⁸ Bill C-9 was amended as a result of a vote by a united opposition⁷⁹ to restrict the new prohibitions on conditional punishment to terrorism offences, serious crimes committed as part of organized crime activity, and assaults resulting in serious personal injury.⁸⁰ As amended, Bill C-9 was very similar to Bill C-70 which had been introduced by the Martin Liberal administration but which had died on the Order Paper after first reading.⁸¹

Restrictions on the use of conditional sentences were advanced on a reasonably persistent basis by the CPC. The opposition parties supported some narrow restrictions, but consistently and effectively opposed the broader restriction contained in Bill C-10. The CPC focused their arguments that conditions imposed by the courts were often ignored by those convicted of crimes and “confidence in the justice system erodes when serious criminals get to serve their time at home in front of their big screen TVs, their computers, and all the luxuries they would normally enjoy at home.”⁸² The opposition parties argued that conditional sentences were tougher than the CPC portrayed and conditional sentences were often a better rehabilitative tool than incarceration. The NDP and Bloc Québécois based their objections on rehabilitative and crime prevention arguments. The Liberals stressed the fiscal argument that incarceration cost more than community-based sentences. The financial critique was based on a report by the Parliament Budget Officer that estimated the financial cost of the resulting increased incarceration to be \$156 million per year, with the bulk of this cost being incurred by provincial and territorial governments.⁸³ All opposition parties attacked the scope of restrictions on the use of conditional sentences.⁸⁴

The SCC has not ruled on a case challenging the restrictions on the use of conditional sentences contained either in Bill C-10 or the passage of Bill C-9 (as amended) five years earlier. There have been relatively few cases where these provisions were challenged in lower courts.⁸⁵ The courts have usually been deferential to Parliament’s right to restrict the use of conditional sentences. In *R v Veljanovski*, the court observed:

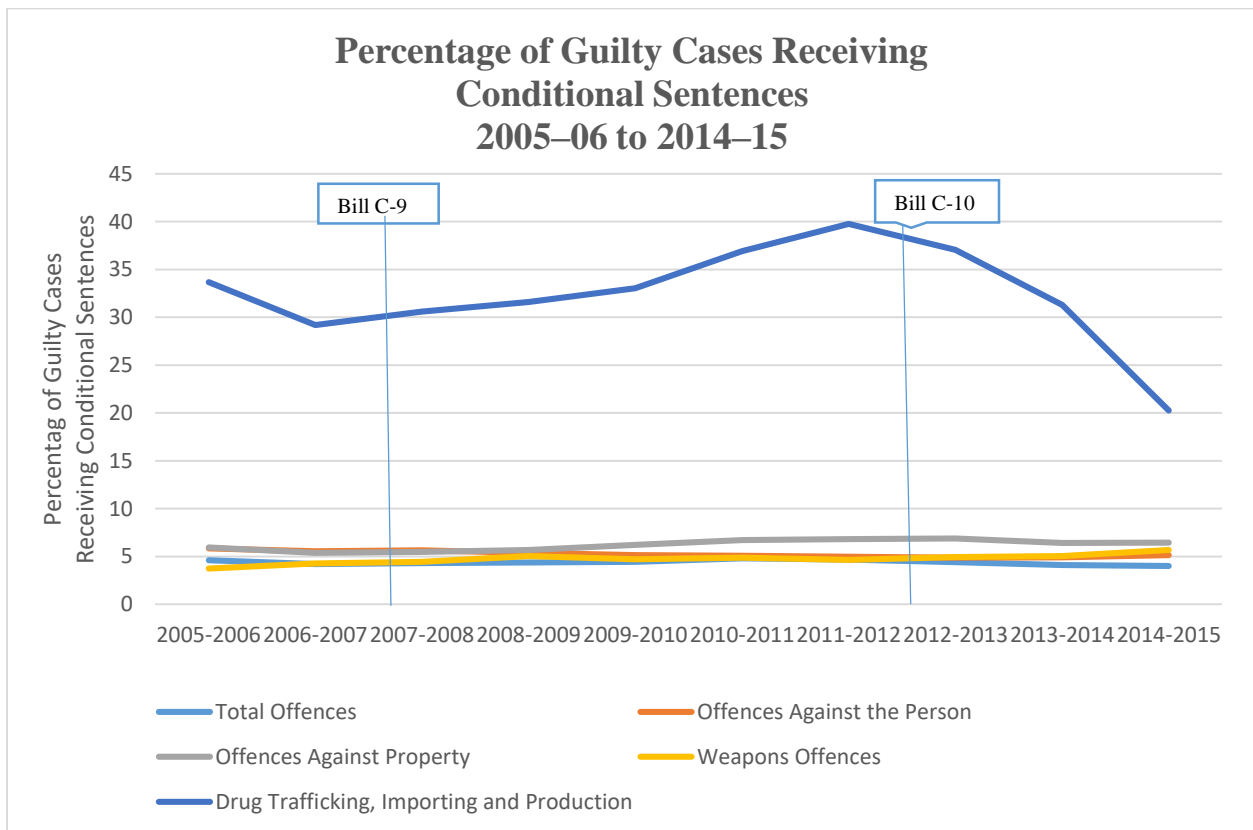
It is clear that Parliament’s intent was to emphasize the objectives of denunciation and deterrence for serious crimes...the fact that a custodial sentence may be entirely appropriate does not become grossly disproportionate because I am precluded from allowing it to be served in the community.⁸⁶

One temporary exception to this deference came in *R v Neary*. The Saskatchewan Court of Queen’s Bench rejected a Section 12 constitutional challenge to the prohibition on a conditional sentence arising from the *Safe Streets and Communities Act*, but then went on to state that “no larger good is served by sentencing Seamus John Neary to jail.” Citing promised changes to the legal regime governing cannabis, the judge sentenced Neary to a community-based conditional sentence.⁸⁷ The Saskatchewan Court of Appeal upheld the rejection of the

Section 12 constitutional argument but said, “Judges are bound to apply the law as it exists not as it might be in the future especially when, as here, it is unknown when the law will be changed, what the terms of it will be, and how it will affect the offences of trafficking drugs or possession for the purpose.”⁸⁸ In accordance with the terms of the *Safe Streets and Communities Act*, Neary was ordered to serve his sentence in jail rather than in the community.

Figure 6.5 outlines trends in the use of conditional sentences for total offences, offences against property, and offences against the person. Results for weapons offences and drug trafficking, importation, and production are also reported on this chart. The implementation of restrictions on the use of conditional sentences for both C-9 (2007) and C-10 (2012) are represented by the vertical lines on this chart.

Figure 6.5



Source: Calculated from Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057.

Because of the length of time the criminal justice system takes to process cases, a lag between the proclamation of the restrictions on the use of conditional sentences and actual sentencing decisions can be expected. The data presented in Figure 6.5 suggests there has been very little effect arising from Bill C-9 passed in 2007. The use of conditional sentences for drug trafficking, production and importation offences actually increased. Bill C-10, on the other hand, appears to have had a very uneven result. The rate at which conditional sentences were utilized dropped slightly for total offences and offences against property but increased slightly for offences against the person and weapons offences. The big change occurred for the offences of drug trafficking, importation, and production. The trend towards increased utilization of conditional sentences for these offences was reversed. For these offences, conditional sentences were imposed in 39.76 percent of guilty cases in 2011–12, the full year prior to the proclamation of Bill C-10. Three years later, this had fallen to 20.25 percent of guilty cases. In the year prior to the proclamation of the *Safe Streets and Communities Act*, those charged with drug distribution offences accounted for 22.71 percent of all conditional sentences imposed by the courts. Three years later, this had fallen to 10.70 percent.⁸⁹

The restrictions on the use of conditional sentencing was consistently and persistently promoted by the Harper Conservative governments and opposed by the opposition. Parliament's right to impose these restrictions has generally been upheld by the courts. The provisions in this legislation appear to have had little effect on actual judicial sentencing practices with the exception of cases dealing with drug trafficking, importation, and production.

6.2.3. Pardons and Record Suspensions

Clauses 108 to 134, 137 to 146, and 148 to 165 of the *Safe Streets and Communities Act* mandated a change in terminology from the word “pardon” to the term “record suspension” in Canada's criminal records administration. Waiting time before an application could be made were increased from three years to five for a summary offence and from five years to ten for indictable offence. Applications were prohibited from individuals with any convictions for sexual offences against children and for those with three or more convictions for indictable offences. The provisions also required that the Parole Board of Canada provide Parliament with

an annual accountability report on the issuing of record suspensions and that Parliament establish a committee to examine the legislation's effect within five years of passage.⁹⁰ These provisions in Bill C-10 had been previously contained in Bill C-23B. C-23B had been part of a more straightforwardly named Bill C-23.

Pardons had the effect of removing an individual's criminal record from criminal record searches. Routine granting of pardons upon application following a waiting period from the time of the last offence had been in place since 1970, with over 400,000 being issued since that time.⁹¹ Obtaining a pardon allowed an individual to work in occupations in which licensing bodies prohibited people with criminal records, allowed people to become bondable, and allowed them to meet American border entry requirements.

Tightening the issuing of pardons had not been on the Conservatives' priority list for justice reform in the first years of the Harper administrations. The issue was not mentioned in either the Conservative 2006 or 2008 election platforms.⁹² In 2006–07, Public Safety Minister Stockwell Day conducted a review of the pardon system. No legislative or policy changes resulted. Instead, the government made the administrative change of having applications reviewed by two members of the Parole Board instead of one.⁹³ This acceptance of the status quo changed abruptly in 2010 following a public and media outcry arising from news reports that convicted sex offender Graham James had applied for, and received, a pardon. Among the Canadians outraged by the James pardon was the Prime Minister, who phoned the Public Safety Minister at home the day the story broke in the media to demand an explanation as to how this had occurred.⁹⁴ Bill C-23 followed with dispatch. In introducing Bill C-23 for second reading, the government explained:

We have heard from many ordinary Canadians who wonder how a serial sex offender such as Graham James could have his record sealed just five years after finishing his sentence.

We have heard from other Canadians who asked the same question about other offenders who may be eligible to receive a pardon for their offences with almost no regard for what kind of crimes they have committed or the lasting impact on victims.⁹⁵

Spokespeople from all three opposition parties supported aspects of Bill C-23 but argued it failed to differentiate between people who had committed serious offences or posed an ongoing threat to the community from those who were unlikely to reoffend. The Liberals said,

Someone who was in a desperate financial situation and made a really dumb choice to engage in cheque fraud could be in a situation where she or he would not get a pardon for 10 years.

This is a major difference, because someone who is 18 years old and has to wait three years for a pardon and are then able to continue their life at 21, is materially different than someone who has to wait 10 years for a pardon and would be then 28 years of age before he or she could begin his or her life.⁹⁶

The debate appeared to be heading down a path that was common during the Harper administration, with the Conservative members insisting that anything short of expeditious passage constituted opposition to the legislation and with the opposition members indicating support in principle but demanding the right to careful study and deliberation. In this case the NDP member from Welland had a powerful symbolic weapon to counter the symbolism of Graham James. His constituents included the parents of the victims of convicted sex-murderers Paul Bernardo and Karla Homolka. He pointed out that Homolka was approaching the end of her waiting period before being able to apply for a pardon and that, under the current legislation, her application would be successful. The NDP member said,

Clearly, for us, the granting of a pardon to Karla Homolka is unconscionable. Unfortunately, the bill before us cannot be passed in time to prevent Ms. Homolka from applying for a pardon.

New Democrats offered the government a way out by suggesting that we split this bill with a motion that would allow us to deal now with people like Karla Homolka. We would look for unanimity in the House, which I believe the government could get, to fast track it so that Ms. Homolka would not be granted a pardon.⁹⁷

Intransigence would mean the Conservatives would be vulnerable to accusations that they granted Karla Homolka a pardon. They surrendered almost immediately by agreeing to split Bill C-23. As a result, Bill C-23B died on the Order Paper until resuscitated in the Conservative-majority Forty-first Parliament as part of Bill C-10. The remainder of the legislation, now known as Bill C-23A, sped through the House of Commons and Senate to receive royal assent twelve days after the first introduction of Bill C-23.⁹⁸ The revised legislation confined the extended

waiting period needed before an application for a pardon to those convicted of violent offences or sexual offences against children. It also stipulated that the Parole Board conduct an investigation to ensure that the applicant was in “good standing” in the community and that the applicant provide a statement of the “measurable benefit” a pardon would create for rehabilitation. The Parole Board was granted the authority to deny pardons that would “bring the administration of justice into disrepute.”⁹⁹ The opposition parties supported a toughening of the laws governing the issuing pardons but its scope was restricted when the symbolism of sex-killer Karla Homolka trumped the symbolism of pedophile Graham James.

These provisions in both C-23A and C-10 transformed the issuing of pardons from an automatic administrative act into one involving the discretionary judgment of worthiness. The symbolism of specific language was noteworthy. While the legislation made pardons more difficult, and in some cases impossible, it did not affect their substantive impact. The naming of the action was changed from “pardon” to “record suspension.” The Minister of Public Safety said that the term pardon implied forgiveness and

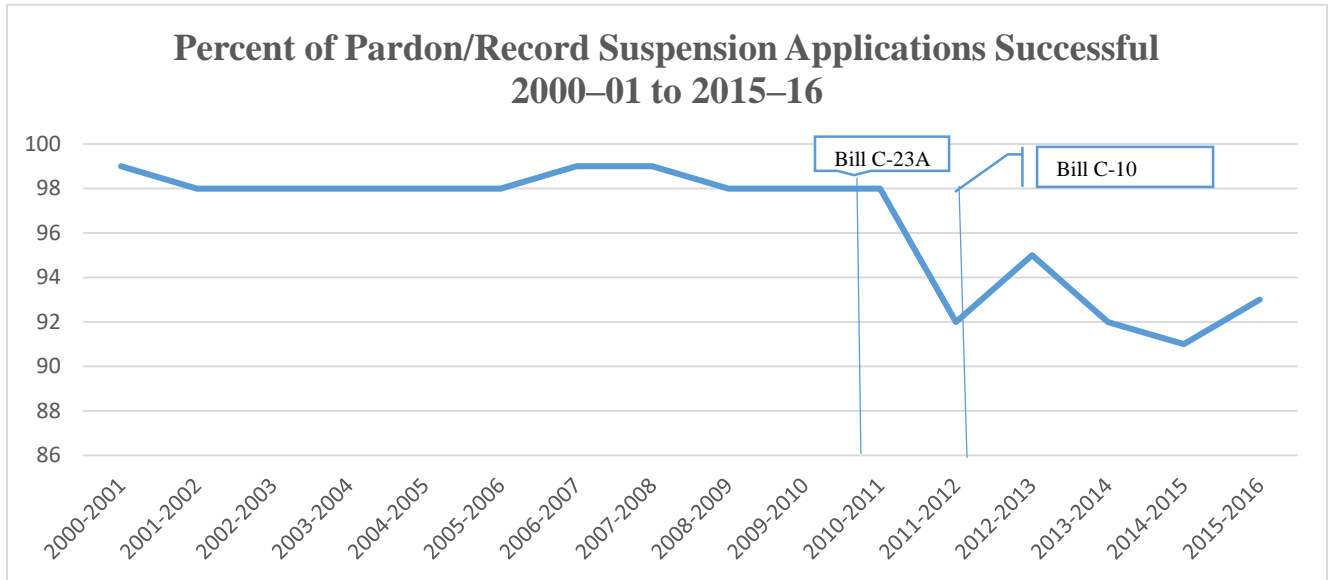
Implicit in the concept of a pardon is that once the pardon is granted, society is removing responsibility for the crime from the applicant... the issue of personal forgiveness is not something for the state to do on behalf of victims... that is something victims do. The state has certain roles in assisting the rehabilitation of convicted individuals, and I believe the term “record suspension” more appropriately reflects the role of the state in that process.¹⁰⁰

One result of making the granting of a record suspension discretionary was an increase in the information requirements and processing costs. The Parole Board reported that processing costs climbed from \$231 to \$725 per application and that “due to the additional requirements imposed by Bill C-23A, the costs for the processing of pardon applications have increased substantially, making the pardon program unsustainable.” In accordance with legislatively prescribed cost-recovery principles, application fees were increased from \$150 to \$631.¹⁰¹

Increased discretion coincided with a drop in the success rate in applications. Figure 6.6 outlines the trends in the percentage of decisions that resulted in the granting of a pardon or record suspension. In the five years prior to the proclamation of Bill C-23A, two percent of completed applications were denied. This increased to an average of 5.76 percent. Since the

proclamation of Bill C-23A through until March 31, 2016, a total of 2,241 applications were rejected.¹⁰²

Figure 6.6



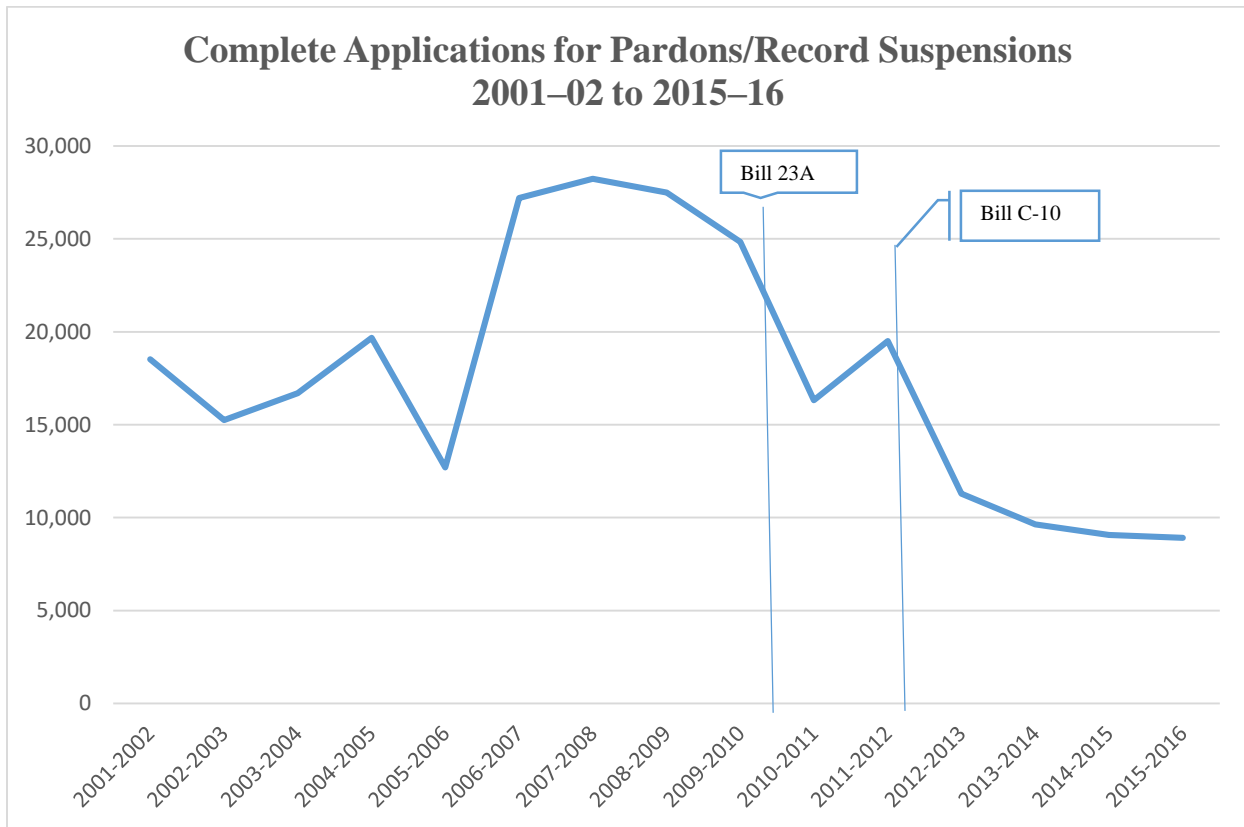
Source: Compiled from Parole Board of Canada, *Performance Monitoring Report* (annual).

The combination of restrictions on the offences qualifying for pardons/record suspensions, increased waiting periods before eligibility, increased application complexity, and fee increases appears to have resulted in a decline in the number of applications for pardons/record suspensions. Increased complexity also generated a backlog in application processing, which reached 22,500 applications by 2012–13.¹⁰³ In 2010–11, before the legislative changes, the average processing time for a pardon application took 3.7 months.¹⁰⁴ Average processing time for residual pardon applications climbed to 36 months by 2013–14, while processing times for record suspensions peaked at 13 months in the same year¹⁰⁵ before being reduced to 151 days for summary files and 242 days for indictable files in 2015–16.¹⁰⁶

The granting of pardons/record suspensions fluctuated on an annual basis depending, in large part, on the priorities of the Parole Board. As a result, it is impossible to disaggregate the impact of the legislative and resulting fee changes on the granting of pardons and record suspensions. The number of applications is likely more directly affected. Figure 6.7 outlines the

trends of the volume of complete applications. The vertical lines correspond with the passage of Bills C23A and C-10.

Figure 6.7



Source: Parole Board of Canada, *Performance Monitoring Reports* (Annual).

Court cases arising from the changes to pardon/record suspensions are relatively rare. They result from challenges to the review and decision-making processes of the Parole Board as it exercises its discretionary powers. These are heard in the Federal Court which has simply deemed application rejections as “reasonable”¹⁰⁷ unless the Parole Board decision “lacks transparency and intelligibility and is unreasonable”¹⁰⁸ or simply “entirely unreasonable.”¹⁰⁹ The Federal Court has confined itself procedural review rather challenging of the legislation on constitutional grounds. In *Chu v Canada (Attorney General)*, the constitutionality of the retrospective nature of the legislation was denied by the British Columbia Supreme Court. The right of Parliament to set or change the conditions for granting pardons/record suspensions was recognized, but the application of the new conditions to offences that occurred before the

legislation's passage was deemed to constitute an unconstitutional retrospective increase in punishment.¹¹⁰ This decision has not been tested by appellate courts.

Both Bill C-23A and the provisions of Bill C-10 dealing with the granting of pardons or record suspensions were generated in response to specific controversial cases which cast a spotlight on what had hitherto been a relatively uncontroversial rehabilitative aspect of the justice system. The changes had both symbolic and substantive importance. The granting of pardons or record suspensions has dropped by more than 50 percent annually. Most of the decline is likely as a result of the increased cost and complexity of application.

6.2.4. Corrections and Conditional Release

Clauses 52 to 107 and 147 of the *Safe Streets and Communities Act* tightened the rules governing conditional release from federal correctional institutions. The provisions also allowed police to arrest without warrant a parolee suspected of being in breach of conditions and allowed Corrections Canada to mandate the use of monitoring devices as a condition of release. Finally, the provisions increased the level of disclosure about the inmate to people deemed to be victims and enshrined the right of victims to make statements at parole hearings.¹¹¹

The corrections and conditional release sections of Bill C-10 supplemented the elimination of early parole eligibility for designated offences passed as Bill C-59, the *Abolition of Early Parole Act*,¹¹² during the Third Session of the Fortieth Parliament to receive royal assent on March 23, 2011. Bill C-59 had received unanimous support at second reading.¹¹³ The Liberals and NDP opposed Bill C-59 at third reading, but it passed with the support of the Bloc Québécois.¹¹⁴ While two opposition parties ultimately voted against this legislation, their opposition did not slow passage. The government waited until February 9, 2011, or sitting day 127 before introducing this legislation at first reading. It cleared all stages of the House of Commons a week later, on February 16, or sitting day 132.¹¹⁵ The *Abolition of Early Parole Act* received royal assent on March 23, 2011, just three days before Parliament was dissolved for a general election.

The provisions contained in the *Safe Streets and Communities Act* replicated almost exactly the provisions of Bill C-39, the *Ending Early Release for Criminals and Increasing Offender Accountability Act*, from the Third Session of the Fortieth Parliament.¹¹⁶ Bill C-39 had received unanimous support at second reading¹¹⁷ but died on the Order Paper in committee without being brought forward for consideration.¹¹⁸ Bill C-39, in turn, replicated Bill C-43, the *Strengthening Canada's Corrections System Act*,¹¹⁹ which had also died on the Order Paper without being called forward at committee despite passing second reading without a recorded vote being called for.¹²⁰ In short, these provisions took 902 calendar days or 261 parliamentary sitting days to clear the House of Commons. They died on the Order Paper once because of prorogation and once because of an election call. This slow passage occurred despite the fact that the opposition parties voted to support the provisions and did nothing to impede or delay their passage. The provisions were based¹²¹ on the recommendations of a review of by Correctional Service Canada that reported to the Minister of Public Safety on October 31, 2007.¹²² In addition to the time expended in the legislative process, it had taken the Harper administration 595 calendar days to convert the report recommendations into draft legislation.

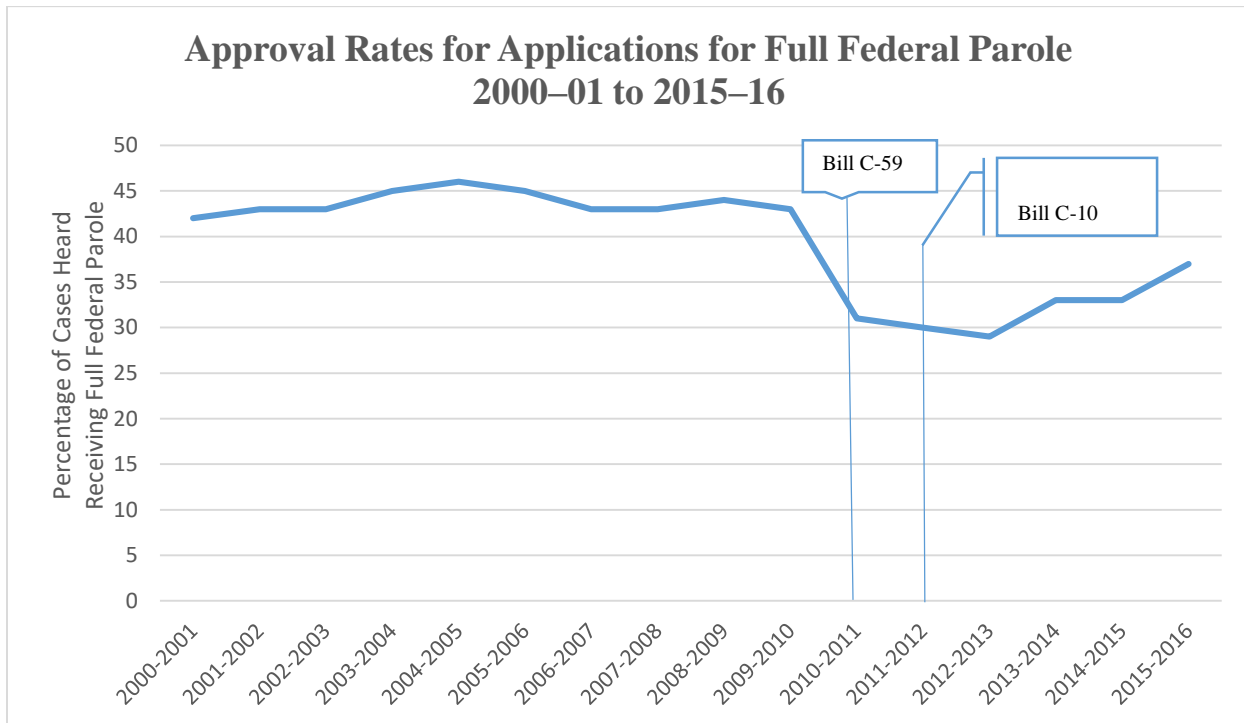
In the limited debate on Bill C-43 and C-39, the Conservatives stressed the need to “protect the safety and security of Canadians” by “requir[ing] offenders to conduct themselves in a way that demonstrates respect for other people and property.”¹²³ The Liberals described the legislation as “placebo policy” but “supportable.”¹²⁴ The Bloc Québécois focused their remarks on attacking the slow pace at which the government was moving saying, “Peoples' safety should come before political games.”¹²⁵ The NDP said that most of the provisions were “housekeeping-type amendments,” while insisting on the importance of both rehabilitation and victims’ rights.¹²⁶ When the provisions were reintroduced as part of Bill C-10, the opposition parties ignored them in their general critique of the legislation.¹²⁷

The changes to the granting of parole and statutory release contained in Bill C-10 do not appear to have been tested in the courts.

Parole Board data on decisions is consistent with a toughening of conditional release adjudication following the passage of the *Abolition of Early Parole Act* in 2011 and the *Safe*

Streets and Communities Act in 2012. Figure 6.8 outlines the success rate of applications for full federal parole. A drop in the success rate for full parole applications predates legislative changes, which suggests that policy changes did not necessarily need to be implemented by legislative means.

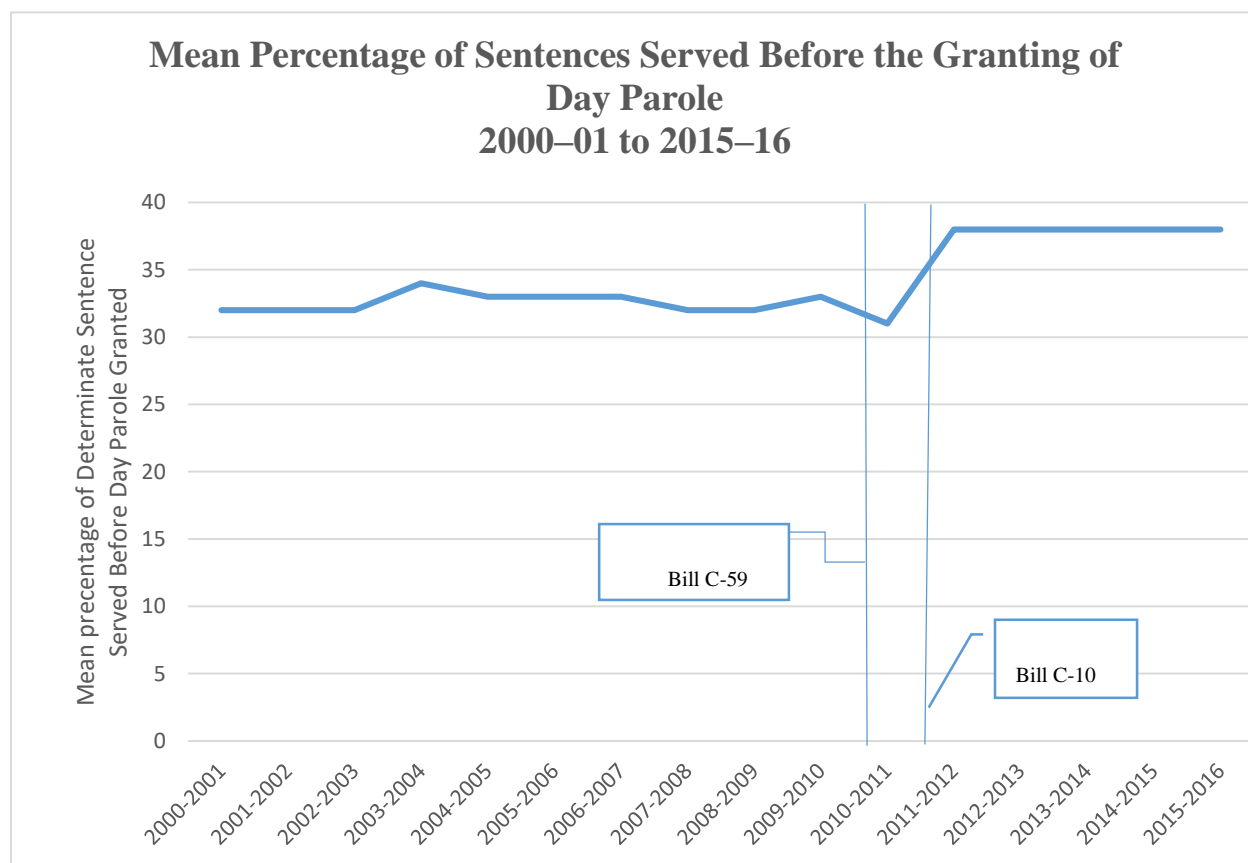
Figure 6.8



Source: Parole Board of Canada, *Performance Monitoring Reports* (annual).

Another indicator of a toughening of conditional release is the average percentage of a sentence served before an inmate receives day parole, which is usually the first step toward full release. Figure 6.9 outlines the trend for this indicator. Prior to the legislative changes, the mean period of incarceration prior to the granting of day parole was just under one-third determinate-length sentences. This abruptly rose to 38 percent of sentence length concurrent with the legislative changes. The case adjudication data is thus consistent with a toughening of conditional release concurrent with the passage of the legislative changes in 2011 and 2012.

Figure 6.9

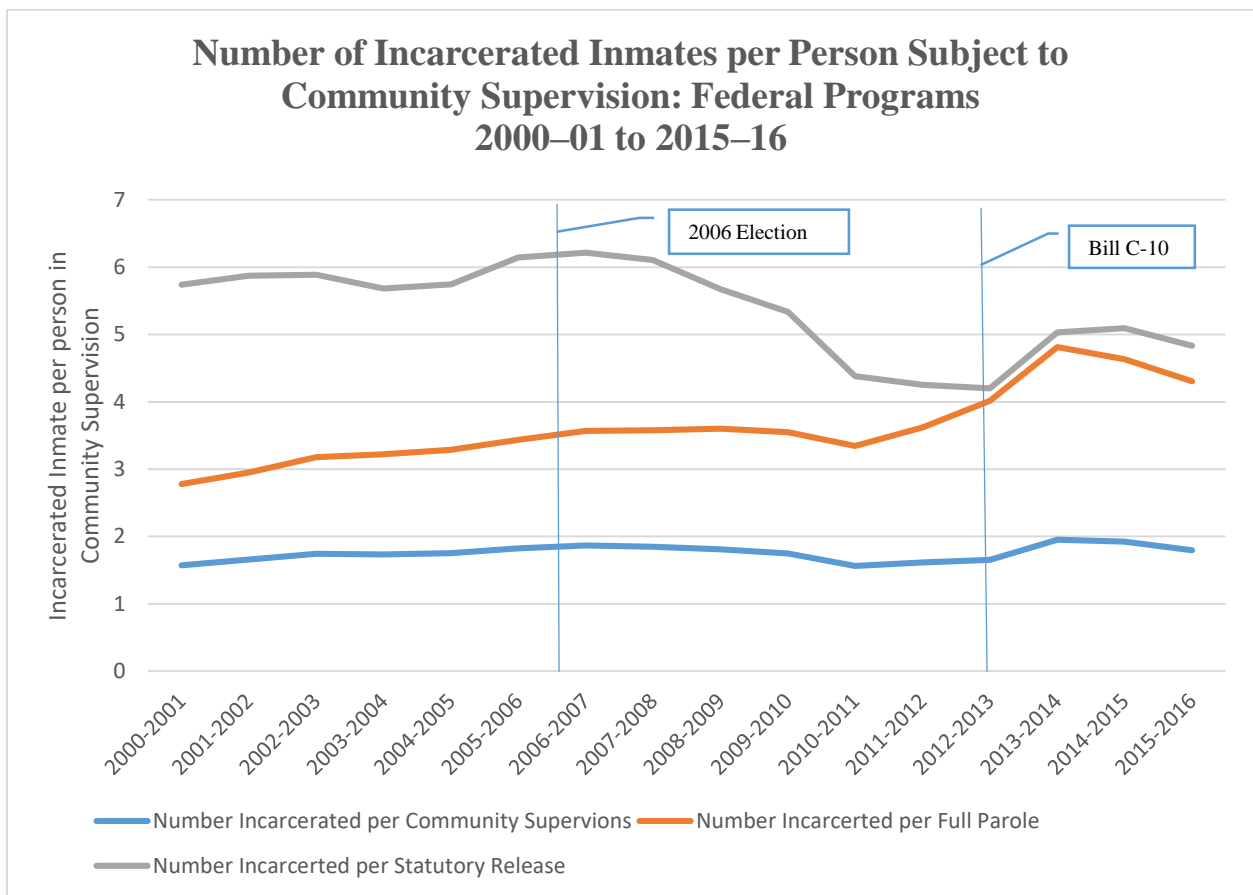


Source: Parole Board of Canada, *Performance Monitoring Reports* (Annual).

Another indicator of toughness is the distribution of people in incarceration and community supervision programs. Figure 6.10 outlines the trends in the relationship between the number of incarcerated prisoners in federal programs and the number of people being supervised in community programs. Since the granting of full parole and statutory release were most affected by the *Abolition of Early Parole Act* and the *Safe Streets and Communities Act*, equivalent data is presented for these two forms of community supervision. The assumption of office of the Harper Conservative administrations is represented by the first vertical line, and the proclamation of the legislation tightening parole and statutory release by the second. Given that these pieces of legislation affect people serving sentences ranging from two years to life, the impact of legislative changes will be gradual and cumulative. The line illustrating trends in parole shows a long-term increase in the number of incarcerated prisoners compared to the

number being supervised on parole. This is consistent with a toughening in the adjudication of parole applications. This trend accelerates concurrent with the legislative changes, but reverses direction soon after. The trend in the numbers on statutory release shows a long-term decline prior to the legislative changes. This is also suggestive of a toughening in the granting of parole since being released on statutory release implies that efforts to obtain parole were either not taken or were unsuccessful. This trend also reverses direction concurrent with the implementation of the legislative changes.

Figure 6.10



Source: Calculated from Statistics Canada, *Adult Correctional Services, Average Counts of Offenders in Federal Programs*, CANSIM 252-0006.

The daily census data is inconsistent with a toughening in treatment in the granting of parole and other forms of community. While the legislative changes almost certainly resulted in some individuals remaining incarcerated longer than they would have without the changes, the overall impact on the system appears muted.

6.2.5. International Transfer of Prisoners

Clauses 135 and 136 of Bill C-10 amended the *International Transfer of Offenders Act*. This provides for the international transfer of prisoners so that people convicted of crimes in foreign countries can serve their incarceration in their own country. The Bill C-10 amendments introduced an explicit public safety criteria for such transfers and increased the discretionary powers of the Minister. The provisions copied the provisions of Bill C-5, the *Keeping Canadians Safe [International Transfer of Offenders] Act* of the Third Session of the Fortieth Parliament and Bill C-59 of the Second Session of the Fortieth Parliament. Bill C-59 died on the Order Paper after first reading. Bill C-5 received Liberal support at second reading,¹²⁸ but was allowed by the government to die on the Order Paper in committee after the legislation was amended to place restrictions on ministerial discretion.¹²⁹

Government speakers said the legislation was needed to ensure “the safety of any member of the offender's family, the safety of children and the safety of victims.”¹³⁰ Opposition speakers used Bill C-5 as the basis for a generalized attack on the government’s record in dealing with crime.¹³¹

In the period subsequent to the passage of the amendments to the *International Transfer of Offenders Act*, there was a small flurry of court challenges to the Minister’s use of discretion to deny the transfer of Canadian citizens to serve sentences in Canadian institutions. The results were mixed, with the Minister’s use of discretion sometimes being upheld¹³² but sometimes rejected on the grounds of unreasonableness in others.¹³³ The amendments to the legislation contained in Bill C-10 were not central to any of the decisions. During the term of the Harper administrations for which data is available, the number of transfers approved fluctuated between a low of 24 and a high of 121 with approval rates ranging from 27 percent to a high of 97 percent with no pattern to the fluctuations.¹³⁴

6.2.6. Human Trafficking

Clauses 205 to 208 of Bill C-10 authorize immigration officers to refuse work permits to individuals believed to have been trafficked or to work in sexual industries. Earlier versions of

the legislation appeared as Bill C-56 (Fortieth Parliament, Second Session), C-45 (Fortieth Parliament, First Session), C-17 (Thirty-ninth Parliament, Second Session) and C-57 (Thirty-ninth Parliament, First Session).¹³⁵ The provisions took from May 16, 2007, to December 8, 2011—1,664 days—to proceed from introduction at first reading to passage at third reading in the House of Commons. The legislation died on the Order Paper four times despite being supported by both the Liberals and Bloc Québécois. NDP opposition was muted, with the party never demanding a recorded vote.

The legislation was designed to prevent women from being the victims of human trafficking to work as exotic dancers.¹³⁶ For some time, applications for temporary workers had been “fast tracked” for temporary work permits in order to meet an identified labour shortage.¹³⁷ Controversy had erupted in 2004 when the Liberal Minister for Citizenship and Immigration resigned amidst conflict of interest allegations that she had approved the work permit for a Romanian-national exotic dancer who worked in the Minister’s re-election campaign.¹³⁸ Following the controversy the fast tracking of these work permits ended. This, buttressed by changes in administrative procedure, reduced the number of applications for temporary work permits for exotic dancers from 423 in 2004 to 17 by 2006.¹³⁹

Despite the curtailment of human trafficking associated with sexually oriented industries with administrative measures, the Conservatives introduced the legislative changes in 2007. The introduction of Bill C-57 was accompanied by a major press event with endorsement from groups including the Stop the Trafficking Coalition, the Future Group, and the Salvation Army.¹⁴⁰ In Bill C-57’s second reading debate, government said they were “taking real action to help prevent the exploitation of women and children” and “no longer shall our government be complicit in facilitating human trafficking by permitting foreign strippers into the country when they could be potential victims of abuse or exploitation.”¹⁴¹

The lack of sedulousness with which the legislation was subsequently guided through the House of Commons invites a cynical interpretation of the government’s intentions.

6.2.7. Youth Criminal Justice

Clauses 167 to 204 of the *Safe Streets and Communities Act* replicated the provisions of Bill C-4 or Sébastien's Law (Protecting the Public from Violent Young Offenders) from the Third Session of the Fortieth Parliament.¹⁴² The provisions introduced protection of the public as one of the explicit purposes of the *Youth Criminal Justice Act*¹⁴³ and added denunciation and deterrence as factors for judges to consider when sentencing.¹⁴⁴ The legislation imposed a number of specific measures, such as making pre-conviction custody for young people easier,¹⁴⁵ lowering the age at which youths convicted of major violent crimes could be sentenced as adults,¹⁴⁶ and allowing the publication of the names of youth sentenced as adults.¹⁴⁷ The legislation required police to keep records of cases in which they had used extrajudicial measures for alleged offences.¹⁴⁸

When introducing Bill C-4 in 2010, the government said that Sébastien's Law (Protecting the Public from Violent Young Offenders) was a response to a Nova Scotia Commission of Inquiry headed by Mr. Justice Nunn.¹⁴⁹ The commission followed the death of Theresa McEvoy who was struck by a stolen car driven at high speeds by a 16-year-old youth with a long record of offending. Ms. McEvoy's death was portrayed by the media and politicians in Nova Scotia as an example of systemic failures of the youth criminal justice system.¹⁵⁰ Bill C-4 was named in honour of Sébastien Lacasse¹⁵¹ who was murdered in 2004 by a gang that included a 17-year-old youth. Speaking at the committee hearings on Bill C-4, Lacasse's parents said, "Sébastien's Law, in memory of our son and in honour of our determination, makes our hearts sing a little. It is gratifying and reassuring to see that a government body is looking into this problem."¹⁵²

In introducing Bill C-4, the government described its approach as a balance between "prevention, enforcement and rehabilitation." When dealing with youth, "the law must be adequate to hold them appropriately accountable for the offences committed, consistent with their degree of responsibility in a manner that protects the public."¹⁵³ The Liberals criticized the two and a half year delay between the issuing of the Nunn Report and the introduction of legislation and demanded full implementation of Nunn Report.¹⁵⁴ The Bloc Québécois contrasted what they described as a rehabilitative provincial approach with a punitive federal one, but said

that notwithstanding “quite a few irritants...the Bill is not as excessive as we had been led to believe it would be.”¹⁵⁵ The NDP promised support at second reading but said the wording was “quite clumsy in some areas.”¹⁵⁶ Concern was expressed about a “hidden agenda.” Bill C-4 passed second reading on a voice vote.

The legislation became very controversial in committee. Over the 16 committee sitting days, 91 witnesses appeared.¹⁵⁷ Support for the legislation was led by family members of people murdered by young people. A typical comment came from the parent of a murdered girl who said, “We need to do a better job of controlling young offenders.... It is imperative to protect the public from repeat young offenders with a history of violent behaviour.”¹⁵⁸ Despite the calls for tougher measures, all supporters of the legislation acknowledged the need for a separate justice system to deal with the reduced culpability of youth and called for additional rehabilitation and prevention services. Opposition to the legislation was summarized by the Executive Director of the Moncton Youth Residences Inc. who said, “What concerns me is that although the proposed changes may give the appearance of creating safer communities, the actual consequences of such changes that have an increased reliance on incarceration may indeed have the reverse effect.”¹⁵⁹ The tone of the debate was polite and respectful with a common acknowledgement of both the imperatives of public safety and the differential culpability of youth. The intense interest in the legislation at committee and the resulting number of witnesses contributed to Bill C-4 dying on the Order Paper. When the provisions were reintroduced as part of the omnibus *Safe Streets and Communities Act*, they were uncontroversial.

The youth justice provisions contained in the *Safe Streets and Communities Act* do not appear to have been subjected to any constitutional challenge in the courts. There is little evidence that the changes have contributed to any substantive increased reliance on incarceration. As noted in chapter 5, the overall level of youth incarceration has continued its downward trend. The number of youth remand admissions has dropped every year since the proclamation of Bill C-10, declining from 7,281 in 2011–12 (the last full year prior to the legislative changes) to 1,581 in 2015–16.¹⁶⁰ Custody as the most serious sentence declined marginally from 15.19 percent of youth cases in 2011–12 to 14.89 percent in 2014–15.¹⁶¹ The

percentage of cleared cases involving youth resulting in charges has increased marginally from 43.77 percent in 2012 to 44.70 percent in 2015.¹⁶²

6.3. Summary: The *Safe Streets and Communities Act*

Bill C-10 received detailed attention because it has been portrayed as the crystallization of the Conservative administrations' tough-on-crime policies. The common narrative is that with a majority in Parliament, the government was now able to act swiftly to implement a set of comprehensive tough reforms that had been previously thwarted by the opposition.

The reality is more nuanced. The opposition parties supported many of the provisions contained in Bill C-10. Opposition was carefully structured to avoid defeating legislation. The opposition parties took turns voting in favour of legislation, allowed reading votes to succeed on a voice vote despite having expressed opposition, or voting in favour at second reading (agreement in principle) claiming this was to allow detailed examination. Most of the delay that caused legislation to die on the Order Paper was caused by tardy introduction or lethargic advancement by the government. The political shell game undertaken by all parties is summarized by the amendment put forward by the Liberals during the second reading debate for Bill C-10. This amendment called for Bill C-10 to be defeated, because its provisions ignore the best evidence with respect to public safety, crime prevention and rehabilitation of offenders; because its cost to the federal treasury and the cost to be downloaded onto the provinces for corrections have not been clearly articulated to this House; and because the bundling of these many pieces of legislation into a single bill will compromise Parliament's ability to review and scrutinize its contents and implications on behalf of Canadians.¹⁶³

Even when opposing the legislation during debate-on-principle, the reasons advanced for defeating Bill C-10 were lack of attention to social science evidence, cost, and procedure. Perhaps reflecting the awkward fact that most of the provisions had been supported as stand-alone pieces of legislation in the previous Parliament, the mover of the motion did not list a single objection to the actual provisions of the legislation.

The provisions of Bill C-10 did not have the dramatic effects, for good or for ill, that were predicted. That is not to say there were no effects. The provisions restricting the granting of pardons seems to have contributed to a drop in applications, likely in large part because the new vetting processes resulted in a major fee increase to cover the cost of the program. The sentencing provisions for drug trafficking, importation, and production offences appear to have made sentencing harsher. Even here, the new or increased mandatory minimum sentences were established at a level that appears to be within the established sentencing range. In striking down the legislation as a cruel and unusual punishment in violation of Section 12 of the *Charter of Rights and Freedoms*, the SCC relied on hypothetical cases.

6.4. Conclusions

The detailed examination of Bill C-10 reveals patterns that are explored in the next two chapters:

- The Harper administration was extremely inconsistent in its sense of urgency. Legislation to fulfill some 2006 election commitments were introduced promptly and pursued with focus. In other cases, there appeared to be no haste in passage. Introduction of the legislation rather than its passage sometimes appeared to be the primary concern of the administration. During the two minority Parliaments, the government frequently blamed the opposition parties for delay and obstruction. The opposition vigorously denied these allegations.
- The opposition parties supported most of the legislative initiatives. In some cases, opposition to legislation was token, as opportunities to defeat or seriously obstruct passage were foregone.
- With the exception of some drug trafficking, production, and importation offences, the legislative changes in sentencing regimes were generally within the range of penalty already being imposed by the courts or affected a very small number of actual cases. As a result, with the exception of some drug offences, the legislative changes increased the severity of penalty for some individuals but had little discernable effect on the overall pattern of punishment.

- The implementation of some legislative initiatives had operational implications that appear to have been unanticipated. The expansion of Parole Board discretion in the granting of pardons or record suspensions increased the complexity of the adjudication process increased processing time. One result was a fee increase for applicants. The number of applications declined. This had much more impact on the number of pardons or record suspensions being granted than did changes in the pattern of adjudication decisions.

In the next two chapters, I return to analysis of the processes and impact of the entire legislative program. Chapter 7 deals with the systemic factors that limited the substantive impact of the Harper administrations' legislative program. Chapter 8 deals with the symbolism inherent in the government's program and opposition to it.

¹ Parliament of Canada, *LEGISinfo*, <http://www.parl.ca/LegisInfo/BillDetails.aspx?billId=5120829&Language=E&Mode=1>.

² Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.

³ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.

⁴ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.

⁵ Parliament of Canada, *LEGISinfo*, Recorded Votes, <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829&View=5>.

⁶ Parliament of Canada, Standing Committee on Justice and Human Rights, *Report and Government Response: Bill C-10*. November 24, 2011. <http://www.ourcommons.ca/Committees/en/JUST/StudyActivity?studyActivityId=4305047#DT20111122JUSTMEE14ID4305047>.

⁷ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 008. October 27, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-8/evidence#Int-4466466>.

⁸ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 006. October 20, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-6/evidence#Int-4384048>.

⁹ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 005. October 18, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-5/evidence#Int-4375728>.

¹⁰ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 008. October 27, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-8/evidence#Int-4466466>.

¹¹ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 010. November 3, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-10/evidence#Int-4575855>.

¹² Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 009. November 1, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-9/evidence#Int-4538708>.

¹³ Parliament of Canada, Standing Committee on Justice and Human Rights, *Evidence*. 41st Parliament, 1st Session, Number 010. November 3, 2011. <http://www.ourcommons.ca/DocumentViewer/en/41-1/JUST/meeting-10/evidence#Int-4575855>.

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- ¹⁴ Senate of Canada, The Senate Standing Committee on Legal and Constitutional Affairs, *Ninth Report*, 41st Parliament, 1st Session, February 28, 2012. <https://sencanada.ca/Content/SEN/Committee/411/lcj/rep/rep09feb12-e.htm>.
- ¹⁵ Parliament of Canada, *LEGISinfo*, <http://www.parl.ca/LegisInfo/BillDetails.aspx?billId=5120829&Language=E&Mode=1>.
- ¹⁶ Bill S-7 had received first reading in the House of Commons as Bill C-35 in the 2nd Session of the 40th Parliament. It was reintroduced in the 3rd Session of the 40th Parliament in the Senate as S-7. Following Senate passage, it received first reading in the House of Commons before dying on the Order Paper.
- ¹⁷ Bill S-10 had previously received third reading as Bill C-15 in the 2nd Session of the 40th Parliament. It was first introduced as Bill C-26 in the 2nd Session of the 39th Parliament.
- ¹⁸ Bill C-56 had previously received third reading as Bill C-45 in the 2nd Session of the 40th Parliament, C-17 in the 2nd Session of the 39th Parliament, and originally as Bill C-57 in the 1st Session of the 39th Parliament.
- ¹⁹ Bill C-2. 38th Parliament, 1st Session.
- ²⁰ Bill C-10, Sections 3-9. 41st Parliament, 1st Session.
- ²¹ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 017. September 21, 2011.
- ²² Senate of Canada, The Special Committee on Anti-Terrorism, *Second Report: Bill S-7, An Act to Deter Terrorism and to Amend the State Immunity Act, Without Amendment*. 40th Parliament, 2nd Session. October 5, 2010. <https://sencanada.ca/Content/SEN/Committee/403/anti/rep/rep02oct10-e.htm>.
- ²³ Laura Barnett et al., *Legislative Summary: Bill C-10*, rev. ed. (Ottawa: Parliamentary Research and Information Service, 2012), 8. Publication Number 41-1-C10-E. https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c10-02&Parl=41&Ses=1&source=library_prb&Language=E#a10.
- ²⁴ “Order Establishing a List of Foreign State Supporters of Terrorism.” SOR/2012-170 September 7, 2012, <http://www.gazette.gc.ca/rp-pr/p2/2012/2012-09-26/html/sor-dors170-eng.html>.
- ²⁵ Bill C-10, Sections 10-46. 41st Parliament, 1st Session.
- ²⁶ Bill C-54, Section 3. 40th Parliament, 3rd Session.
- ²⁷ Bill C-54, Section 7(3). 40th Parliament, 3rd Session. In Bill C-10, the mandatory minimum for a summary conviction was increased to six months.
- ²⁸ Parliament of Canada, *Edited Hansard*, 40th Parliament, 3rd Session, Number 110. December 3, 2010.
- ²⁹ Parliament of Canada, *Edited Hansard*, 40th Parliament, 3rd Session, Number 110. December 3, 2010.
- ³⁰ Parliament of Canada, *Edited Hansard*, 40th Parliament, 3rd Session, Number 110. December 3, 2010.
- ³¹ Parliament of Canada, *Edited Hansard*, 40th Parliament, 3rd Session, Number 110. December 3, 2010.
- ³² Parliament of Canada, *LEGISinfo*. <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=4751699&View=0>.
- ³³ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.
- ³⁴ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.
- ³⁵ Parliament of Canada, *Edited Hansard*, 41st Parliament, 1st Session, Number 016. September 21, 2011.
- ³⁶ *R v E.R.D.R.*, 2016 BCSC 684; *R v Deyoung*, 2016 NSPC 67.
- ³⁷ *R v M.L.*, 2016 ONSC 7082; *R v S.S.*, 2014 ONCJ 184; *R v C.F.*, 2016 ONCJ 302.
- ³⁸ *R v E.M.Q.*, 2015 BCSC 201.
- ³⁹ *R v Morrison*, 2015 ONCJ 599.
- ⁴⁰ *R v K.R.J.*, 2016 SCC 31.
- ⁴¹ Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violation*, CANSIM 252-0051. Note 26.
- ⁴² Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violation*, CANSIM 252-0051.

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- ⁴³ Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0058. Note 33. Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violation*, CANSIM 252-0051. Notes 64 and 73.
- ⁴⁴ Mary Allen, *Mandatory Minimum Penalties: An Analysis of Criminal Justice System Outcomes for Specific Offences*. (Ottawa: Canadian Centre for Justice Statistics, 2017).
- ⁴⁵ Allen, *Mandatory Minimum Penalties*, 13.
- ⁴⁶ Parliament of Canada, *LEGISinfo*, <http://www.parl.ca/LegisInfo/Home.aspx?Language=E&Mode=1&ParliamentSession=41-1&Page=2>.
- ⁴⁷ Parliament of Canada, *Vote Details*, 40th Parliament, 2nd Session, Vote 82, June 8, 2009.
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- ⁴⁹ Bill C-10, Section 39(a)(i). 41st Parliament, 1st Session.
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7. Systemic Limitations on the Harper Administrations' Tough-on-Crime Program

If the Harper administrations' tough-on-crime legislative program had effects that were more muted than acknowledged by either the government or its opponents, the obvious question is "Why not?"

In this chapter, I present a partial explanation. This can be summed up with the simple observation, "Because it couldn't." That is, there are systemic constraints on the powers of a federal government to directly influence justice system outcomes. The Harper administration did not throw a lot more people into jail for longer periods of time, because it could not do so. There were other players in the game. Specifically, the court system is a system distinct from the legislative and executive arms of government. The legal system operates according to a different logic and dynamic than does the political system.

Further, within the political system, the constitutional division of powers in Canada's federal system give provincial governments a bearing on the outcomes of the justice system. This will be examined with specific reference to the governance of prosecutorial discretion. Between them, the courts and the provincial governments impose restraints on the ability of a federal administration to turn punitive intent into prisoners.

In an overstated sense, the federal government is in the position of a castaway on a desert island who attempts to get rescued by putting a message in a bottle. After the message is tossed into the sea, she is hostage to the vagaries of currents and tides that determine in whose hands, if any, the message is read. The federal government is not as helpless as the castaway in this analogy, but the point is that the result of legislative initiative is indeterminate and unpredictable.

Sometimes the other systems served to reinforce and magnify the Harper government's punitive intent. Sometimes they served to undermine or mitigate. Taken as a whole, the effect seems to have been to restrain the punitive attempts of the Harper administration.

7.1. Impact of the Legal System

According to liberal theories of government and the state, the cornerstone of limitation on state power over individuals is a division of power and responsibility. The classic liberal formulation is that the legislative bodies are responsible for making laws, the executive for implementing law and the judiciary for interpreting laws.¹ Unlike a presidential system such as exists in the United States, in the Westminster system adopted by Canada, the executive gains its authority from the legislature and is accountable, or responsible, to it. On the one hand, an executive administration only has a mandate to administer while it enjoys the confidence of the legislature. On the other, the executive operating as the government-of-the-day possesses the ability to exercise a substantive degree of control over the legislature, most importantly by controlling the content and timing of proposed legislation presented for consideration. This blurring of the boundary between the legislative and executive gives a government administration in the Westminster system a greater ability to impose a coherent and consistent policy direction than does a presidential system.² In this context, the role of the judiciary and court system becomes a key potential barrier to government policy initiatives³ such as a tough-on-crime program. The ability of the courts to moderate, subvert, or obstruct government policy direction has been vigorously attacked⁴ and celebrated⁵ usually depending on the alignment of the court with the political and normative position of the observer.

There are two aspects to the potential restraint the courts can place on the legislative and executive functions of the political system. The first is the system of common law derived from England. The second is constitutionalism derived from the United States.

The normal business of the courts is the judging of cases. In a common law system, judges are guided by past precedent, that is, jurisprudence or judge-made law. There is an organizational and temporal hierarchy to the evolution of law, with the rulings from higher levels of courts and the past serving as operative precedent for court rulings in the present.⁶ Judges thus

have one eye on the statute book created by the legislature and the other on compilations of cases created by other judges, living and dead. I argue below that this normal operation of the courts is inherently conservative in the sense of mitigating against ruptures and policy departures created by the political system.

The second aspect of the operation of the courts is adjudicating the validity of laws passed by the legislature against an enduring standard. Writers such as Ronald Dworkin argue that the courts should evaluate the validity of law against universal moral principles.⁷ More prosaically, the common basis of judging the validity of laws in the United States and Canada is measurement against the constitution.⁸ For the first 115 years of Canada's existence as a nation, the primary basis of challenging the validity of legislation was the delineation of powers between the federal and provincial governments. With the adoption of the Charter as part of the constitution in 1982, it became possible to challenge the validity of laws on substantive as well as jurisdictional grounds.⁹ As retired Supreme Court Justice Bertha Wilson noted, this substantive increase in judicial power was as a result of a political decision:

That by a widely accepted constitutional process Canadians decided to charge the courts with the onerous responsibility of reviewing legislative and executive action for compliance with the constitution, and they did so with full knowledge of the American experience and the criticism of the role of the courts in that society by some of its most eminent judges.¹⁰

Particularly since the implementation of the Charter, much of the debate in Canada has centred on the actual or appropriate level of “activism” or “deference” shown by the court (particularly the Supreme Court of Canada) in relation to Parliament. When the courts declare a legislative initiative invalid, “one side argues that the courts have a key responsibility to protect the rights of Canadians within a system of constitutional supremacy. The other side argues that the courts have inappropriately come to act as legislators.”¹¹ The normative position on the ability of the courts to challenge majority opinion as expressed through elected legislators varies over time and the nature of decisions. In the 1930s, as the courts were obstructing the implementation of social welfare programs, the left tended to support legislative supremacy while opposing judicial review. More recently, as court rulings have resulted in substantive challenges to legislation restricting such things as recognition of human rights protection on the

basis of sexual orientation¹² or legislative restrictions on access to abortion,¹³ the location of support for the powers of the court changed.¹⁴ The approach of the Supreme Court has been described in terms such as “submissive deference,”¹⁵ “dialogue” with Parliament,¹⁶ or a judicial “monologue” in which the court talks and Parliament listens.¹⁷

The twin pre-occupations of keeping an ideological scorecard of court rulings and conducting a quasi-psychological assessment about the inclination of the Supreme Court on a scale of submission–dominance toward Parliament leaves much unexplained. As Supreme Court Justice Rosalie Abella notes, courts and legislative bodies “respond to different imperatives.”¹⁸ This points the way to an analysis of how the two systems operate and the coupling between them. With this approach, I move past the classical differentiation based on function (legislature = passing laws, courts = interpretation) toward exploring how the different systems imperatives, modes of operation, and method of processing information lead to different outcomes. In chapter 4, I reviewed Luhmann’s argument that the political system has a limited capacity to give purposeful direction to other societal systems. Political initiatives are introduced to other systems through coupling points. The political decisions are treated as input by other systems, but each will process decisions according to their own systems’ logic and criteria. In this section, I examine a coupling point between the systems of politics and law, namely the ability of the political system to appoint personnel to the courts. This is followed by an examination of the operation of the courts as a test of systemic constraints on the ability of the Harper administrations to implement tough-on-crime policies.

7.1.1. Appointment of Judges

Following the British conception that “the courts were the King’s courts and the judges were the King’s judges,”¹⁹ Canada follows a model of executive appointment of judges. There have been various consultation, vetting, and recommendation processes implemented, but the decision on judicial appointment still ultimately resides in the hands of the Crown acting on advice from the leader of the government-of-the-day. In the end, the prime minister has the right to appoint superior and appellate court judges, subject to the criteria that they be lawyers with a specified length of practice experience²⁰ and, for at least three members of the Supreme Court,

practice and residency requirements from the Province of Quebec.²¹ The power of judicial appointment by the prime minister is also limited by the provincial appointment of lower court judges. The lower courts are responsible for adjudicating the vast majority of criminal cases. If the power to make judicial appointments contains the ability to influence the toughness of the justice system, this power resides in the hands of provincial premiers as well as the prime minister. As I argued in the preceding section of this chapter, the orientation of provincial governments can either reinforce or mitigate against federal tough-on-crime measures. Further, judges in Canada are appointed for terms that extend past the terms of the appointing government. Change in judicial composition is a gradual process although a long term in office can yield a cumulative effect. By the time the last Harper administration left office, approximately 600 of the 840 federally appointed judges in Canada had been appointed by his administrations.²²

These qualifications notwithstanding, the ability to appoint judges is commonly deemed to convey the ability to influence the content of subsequent judicial decisions. Attributions of ideological effect of appointment are long-standing—the Mulroney Conservative government had been accused of using appointments to create a more conservative court using mechanisms such as appointing a disproportionate number of prosecutors to superior courts.²³ Prime Minister Harper initially optimistically subscribed to the belief that power to appoint judges could determine the direction of decisions, telling the House of Commons, “We want to make sure that we are bringing forward laws to make sure we crack down on crime and make our streets and communities safer. We want to make sure that our selection of judges is in correspondence with those objectives.”²⁴ To assist with this objective, in 2006 a judicial representative on the appointments advisory committee was replaced with a representative from law enforcement.²⁵

To examine the ability of appointment to shape direction, I focus on the rulings of the Supreme Court of Canada on the validity of tough-on-crime legislation passed by the Harper administrations. The SCC issued rulings declaring the mandatory minimum sentences for drug²⁶ and firearms offences²⁷ invalid. Decisions affecting the administration and application of tough-on-crime legislation included restrictions on the retrospective effect of restrictions on early parole,²⁸ effectively loosening the impact of the *Truth in Sentencing Act*.²⁹ The Supreme Court

also issued rulings affecting tough provisions dealing with prostitution,³⁰ the relationship between lawyers and clients,³¹ and the licensing system for the production of medicinal cannabis.³² A substantive executive decision on extending the licence of a drug injection site was also overturned.³³ While this later basket of rulings placed restrictions on a general tough-on-crime approach and were viewed as defeats for the Harper government,³⁴ they involved legislation passed by Parliament during other administrations and are not included in the analysis of the position taken by judges appointed on the advice of Prime Minister Harper.

Six Supreme Court Justices were appointed during Harper's tenure in office. These were Michael Moldaver (October 2011); Andromache Karakatsanis (October 2011); Richard Wagner (2012); Clément Gascon (June 2014); Suzanne Côté (December 2014); and Russell Brown (August 2015). By the end of 2014, judges appointed by the Harper administrations comprised a majority on the Supreme Court. Despite this, decisions declaring mandatory minimum sentences imposed or increased for drug and firearms offences were declared invalid by the Supreme Court in 2015 and 2016. In both these cases, judges appointed by the Harper administrations split evenly. In total, Supreme Court judges appointed by the Harper administrations wrote or concurred with judgments dealing with the Harper administrations' tough-on-crime legislation as 25 individual acts of judicial decision-making—20 opposed the government position, with only five supporting. Two of the six judges have never supported the administrations' positions in their decisions.

As a mechanism for imposing the government's political and ideological objectives, the Harper administrations learned that control over Supreme Court appointments was singularly ineffective. This suggests that these judges make decisions on grounds other than strict conformance to the political program of the administration that appointed them. But what of judges at trial and appellate levels? It is beyond the scope of this study to conduct a large-scale comparative analysis of the sentencing decisions of judges appointed by different political administrations, but it should be noted that while judges in Canada are appointed by politicians, their work is supervised by other judges. Sentences that depart from the normal, proportionate driven range are subject to appeal. This serves to create consistency in sentencing³⁵ and thereby mute the effects of legislative change.

Control over judicial appointment thus appears to have a less dramatic effect on sentencing than the Prime Minister and his critics believed. I now turn to the different processes and criteria for decision-making in the systems of law and politics.

7.1.2. Differential Operations of the Legal and Political Systems

The fundamental implications of Luhmann's argument in favour of conceptualizing society as an aggregation of intercoupled, autopoietic systems operating according to their own coding and logical systems is indeterminacy of result.³⁶ The final impact of decisions in the political system are mediated, influenced, reinforced, or mitigated through the operations of other systems. Human society is too complex for a simple positivistic statement of causality.

If society is too complex to predict results of political decisions, *ex post facto* measuring of the effects is correspondingly difficult. In other sections of this paper, data is presented on changes in incarceration rates and sentencing patterns during the terms of the Harper administrations both in aggregate and for specified offences that were the object of particular legislative attention. There is a natural tendency to treat these as the result of the Harper administrations' policy decisions. In the words of Alana Cook and Ronald Roesch, the legislative changes "have or will increase the number of people incarcerated as well as longer periods of incarceration."³⁷ This interpretation is incorrect on both empirical³⁸ and interpretive grounds. More accurately, the end results reflect the effect of the policy and legislative changes made by the political system as processed by the legal and enforcement systems. A legislative change does not "cause" a change in the treatment of those accused of crimes. Instead, it changes the parameters of actions and decisions by those operating and maintaining the intercoupled systems. One methodological problem that arises is the difficulty inherent in teasing out the effects of different systems' operations and inputs.

7.1.2.1. Differing Structure of Justifications

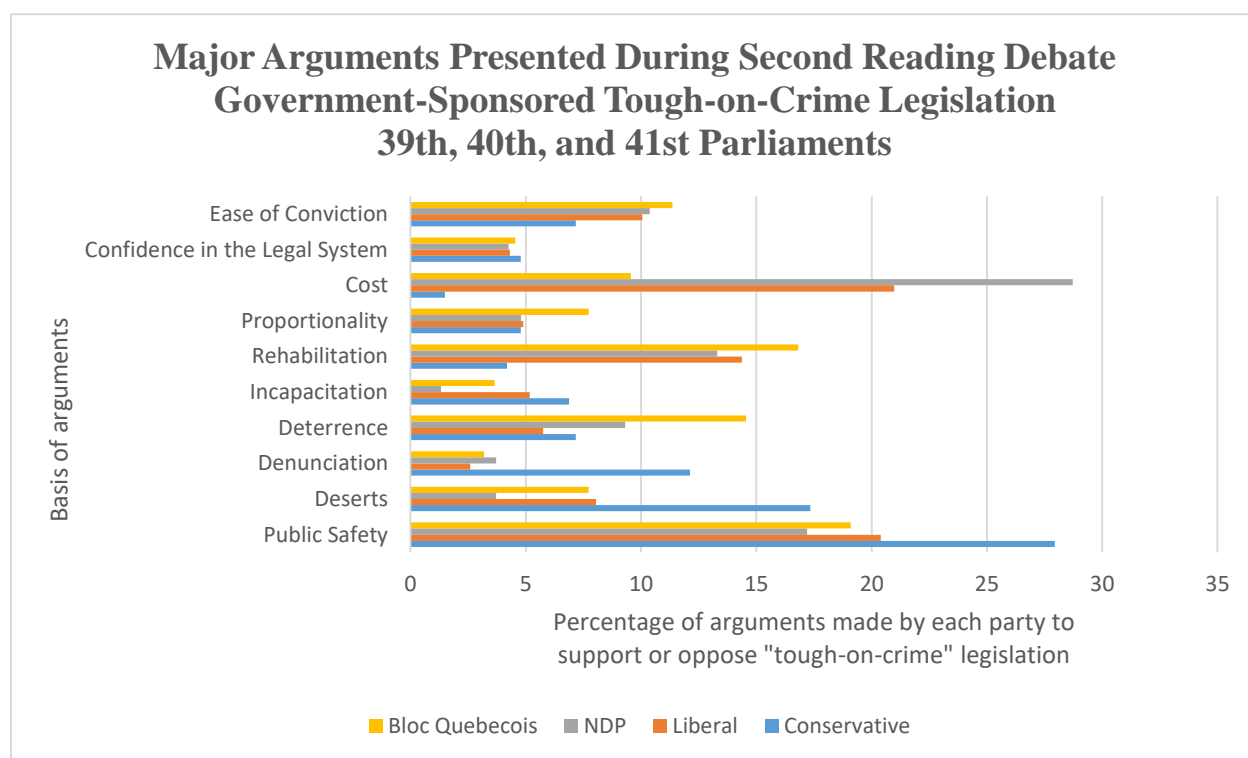
One way of addressing this methodological difficulty is to turn our attention from outcomes to processes—that is, the institutional contexts of how the different systems make and justify decisions.³⁹ A common feature of both the political and legislative systems is that reasons

and justifications are advanced decisions. Figure 7.1 outlines the justifications offered by parliamentarians during second reading (debate in principle) debate on the package of government sponsored tough-on-crime bills during the Harper administrations. These justifications can be made to support or oppose a provision. For example, the government members almost invariably invoked the mantra of the need to improve public safety when speaking to their legislative initiatives. It was generally left unspecified as to how the measure would address safety, but it seemed implicit that, for them, increasing public safety was based on a combination of deterrence and incapacitation.

When supporting legislation, members from opposition parties would join the Conservatives in claiming improvements to public safety. When opposing particular legislative initiatives, the opposition parties would assert concurrence with the goal, but emphasize that safety could be better improved by measures directed toward rehabilitative instead of punitive measures. For the NDP and Liberals, the primary justification for opposing legislation was the fiscal cost of increased incarceration. This was usually accompanied by the accusation that the federal Conservatives were offloading these fiscal costs onto the provinces. Even when the opposition parties were voting in favour of legislation, the government was often criticized for failing to produce costing estimates.

There are differences between the parties in the nature of arguments made during a tough-on-crime legislative debate, but there are also grounds of commonality. The most important was a consensus that the primary purpose of criminal legislation was to reduce the risk of victimization and improve public safety. The second is the support for a basket of explicitly punitive measures of deterrence, incapacitation, deserts, and denunciation. Every party based its arguments much more often on this package of tough justifications than it did for the softer argument in support of rehabilitation.

Figure 7.1



Source: Compiled from *Hansard*, 39th, 40th, and 41st Parliaments.

The justification structure of judicial sentencing decisions was very different. The fiscal cost to the state of incarceration was not mentioned in any of the judicial decisions reviewed. Concern for the balancing of the government's books belongs squarely in the system of politics, not the courts. The structure of judicial sentence justification begins with a recitation of the objectives of sentencing outlined in Section 718 of the *Criminal Code*. The judge will then often note that Parliament has identified the particular offence for deterrence or denunciation. The substance of the arguments, however, is based on the justification of proportionality. The judges will evaluate the facts of the case at hand with cases cited as similar by the prosecution and defence. The judge will outline how the case under adjudication has facts that should accentuate or mitigate punishment in relation to the comparison cases under review. In cases such as *R v Nur* and *R v Lloyd*, where the validity of a mandatory minimum sentence was being challenged—even when the mandatory minimum did not produce a disproportionate sentence—the comparators were hypothetical cases whose imaginary facts would result in a disproportionate sentence if the case were real.

The judicial process of justification is intrinsically conservative in that it is backward looking to similar case precedent. Changes in what sentence is deemed to be proportionate is an incremental process, as facts justifying sentences departing from the norm result in these sentencing outcomes becoming the basis for future comparison. This process of precedent-based comparatives mitigates any legislatively specified change in the sentencing range. During the tenure of the Harper administrations, this operating procedure of the court system likely served to mitigate politically driven directives toward harsher penalties. However, if a future political administration moves to legislatively lower sentencing ranges, it is likely that this same procedure would dampen any move toward leniency.

7.1.2.2. Different Meanings of Proportionality

As trial judges impose sentences and appellate courts evaluate their appropriateness, the key consideration is proportionality. By this, the courts invariably mean comparisons with similar offences.

Thus, in *R v Nur*, the court found that Hussein Nur was attending school, had no past involvement with law, came from a “supportive law abiding family,” and had “not been found to have been involved with the threatening behaviour”. These facts were cited in favour of leniency. On the other hand, the offence had occurred in a neighbourhood with “very high levels of crime. Gun violence was a serious problem” and his semi-automatic pistol had an “oversized ammunition clip” making it possible to fire “all 24 rounds in 3.5 seconds.”⁴⁰ Balancing these mitigating and aggravating factors, the trial, appellate, and Supreme Courts all ruled that the mandatory minimum did not create a disproportionate result.

In another case involving the same charge and election, Leroy Smickle was deemed to have an irreproachable background similar to Nur’s. However, he was “alone in [a] private dwelling” rather than the “aggravating circumstance” of being in public with the restricted weapon. Thus, notwithstanding the “aggravating circumstance” of the gun being loaded and cocked,⁴¹ the combination of a hitherto blameless past and the lack of a threat to public safety resulted in the court declaring the mandatory minimum sentence to be invalid as a disproportionate outcome. At about the same time and in the same city, Sidney Charles was

discovered by police to have a loaded restricted weapon in a private residence. His past was not blameless, however. With several previous convictions,⁴² he was sentenced to seven years—that is, two years longer than the specified mandatory minimum. The weighing of circumstance and the record of the offender resulted in different punitive sanctions being deemed to be proportionate and determinative of the sentence.

While proportionality is the key and central justification for sentencing, it is a relatively minor consideration for legislators. The concept figured in less than five percent of all justifications made by Conservative, Liberal, and NDP members. Block Québécois members stressed proportionality more often. Accounting for slightly less than eight percent of their arguments, proportionality for these members still ranked well below arguments such as public safety, deterrence, cost, rehabilitation, and the ease of gaining convictions.

When the Members of Parliament made arguments based on proportionality, they used the concept very differently than did members of the judiciary. Judges examine proportionate outcomes for offences within the same category of offence. Politicians use it to compare outcomes for different types of crime. Almost all of their arguments using the concept of proportionality came in debate on two pieces of legislation: the *Standing up for Victims of White Collar Crime Act*⁴³ and the *Safe Streets and Communities Act*.⁴⁴ In chapter 6, I discussed the NDP proportionate comparison between those convicted of drug trafficking offences and sexual offences against children. In the case of the legislation dealing with fraud, the government compared the damage done by large-scale financial fraud with other criminal offences such as robbery.⁴⁵ The opposition parties joined in the proportional comparison to criticize the government for setting a one million dollar threshold before a two-year mandatory minimum sentence would be triggered.⁴⁶ Despite these criticisms that the Harper government was being too “soft” in its treatment of this form of crime, the legislation passed with unanimous support.

7.1.2.3. Case Study: Judicial Processing of Mandatory Minimum Sentences

There can be two related political purposes to mandatory minimum sentences. One is to increase the severity of sentences. The other is to increase the consistency of sentences by restricting the range of judicial discretion. The political discourse on mandatory minimums has

been to conflate these two objectives. Responding to the passage of the *Safe Streets and Communities Act*, one trial judge wrote, “With the new legislation, we will see a change in the sentences imposed on criminal offenders. We will see more jail for longer periods of time.”⁴⁷ However, as Zimring, Hawkins, and Kamin put it so graphically, there is a vast difference between a haircut and a beheading, even though the two exercises can share a common categorical descriptor.⁴⁸ I argued in chapter 5 that, with the partial exception of the mandatory minimum sentences for drug trafficking, importation, and production offences, the mandatory minimum sentence levels established by Parliament during the Harper administrations tended to be within the previously existing, judicially driven sentencing range. Indeed, while Justice Pomerance predicts that the legislative changes initiated by the Harper administration will lead to more incarceration, she acknowledges a substantive difference with the mandatory minimum sentences prescribed in California’s “three strikes” law by saying, “We have, to date, been spared the draconian legislation at issue in that case.”⁴⁹

The effect of the restriction on judicial discretion is to remove the possibility of disproportionately “soft” sentences rather than to have an immediate impact on the overall level of toughness. The clear and immediate effect of the legislative mandatory minimum sentences is to toughen the sentence of those individuals who have mitigating factors of personal characteristics or circumstances of the offence that would have caused a judge to substantially reduce a sentence below the normal range. The mandatory minimum sentences prevent sentencing decisions such as delivered by the trial judge to a varsity football player, honour-roll university student convicted of drug trafficking who said, “No larger good is served sentencing Seamus John Neary to jail. He has conducted himself well as a citizen but for this single unfortunate foray into the mire of the drug world.”⁵⁰ A legislatively imposed mandatory minimum gives primacy to the offence and the charging decision of the prosecutor over any judge’s assessment of the culpability and moral worth of a convicted individual. As such, the immediate and direct impact of legislative mandatory minimum sentences on overall incarceration levels would be relatively minor if that was the only effect of the legislation.

Luhman’s conception of the autopoietic systems dealing with inputs provided by another system introduces more complexity to the outcomes of the judicial processing of cases to create

sentences. Just as an increase in the minimum wage can create upwards pressure on wages set slightly above minimum wage by increasing the point of comparison,⁵¹ the imposition of a legislative mandatory minimum can have an escalating effect on punishment by creating a floor. The existence of aggravating conditions or circumstances can cause proportionate punishments to build from this floor. The inflationary impact of mandatory minimum sentences was highlighted in Canada's leading text on sentencing.⁵² Long before the new and enhanced mandatory minimum sentences imposed by Parliament during the Harper administrations, the Supreme Court observed that "the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions."⁵³ As such, the procedure of judicial reasoning can mean that the imposition of mandatory minimum sentences can toughen sentences even in cases that are normal rather than exceptional.

The imposition of mandatory minimum sentences can also have the opposite effect on judicial reasoning, particularly when the legislatively prescribed minimums are attached to general offences subdivided according to characteristics or circumstances that trigger the mandatory minimum. Thus, a higher statutory minimum for those convicted of sexual offences against people under the age of 16 can become grounds to argue for more lenient treatment if the victim was, or believed to be, over 16.⁵⁴ Using a stick rather than a gun as a weapon in a home invasion can become the basis for a sentence less severe than the minimum prescribed when a gun is used.⁵⁵ Mandatory minimums based on the number of cannabis plants being cultivated can become grounds for lower sentences for the defendant who can argue imprecision in police counting⁵⁶ or even whether cloned plants constitute a single or many organic entities.⁵⁷

A similar effect can be obtained with the creation of a specially defined offence carrying a higher maximum, but no mandatory minimum. The creation of the specially defined offence of dangerous or negligent driving while street racing generated justifications for more lenient treatment of those engaged in dangerous or negligent driving without being engaged in street racing.⁵⁸ In both cases, the process of judicial reasoning can respond to the singling out of an offence in some circumstances for especially severe treatment, and can have the effect of reducing the severity of sentencing in cases where these circumstances are absent. If the presence

of the aggravating circumstance is less common than its absence, a tough-on-crime legislative provision can have the perverse effect of lowering the overall level of sentencing severity. For example, the imposition of tougher sanctions for criminal traffic offences committed while engaged in street racing was followed by a 20.9 percent decline in the sentencing severity for criminal traffic offences nine years after the passage of the imposition of harsher penalties for street racing.⁵⁹ In dealing with other cases, of dangerous driving, judges pointed to the special denunciation of street racing by Parliament to impose lower sentences.⁶⁰

The processing of cases by the court system thus generates indeterminate results from legislative changes. Sometimes this can magnify toughness. Other times it can create “softness.” The method of operation of the court system does ensure that whatever results emerge will be gradual. Evaluation of the actual impact of legislative change cannot be based on either stated intentions of legislators or the short-term impact on a few cases. In a very classical Luhmann fashion, the system of law receives inputs from the system of politics and processes them with indeterminate and unpredictable results.

7.1.2.4. Case Study: Judicial Processing of Interim Release

The major legislative initiative affecting pre-trial custody during the Harper administrations was the 2009 passage of Bill C-25 or the *Truth in Sentencing Act*. This legislation limited the granting of credit for pre-conviction custody to one day for every day served in remand.⁶¹ Judges were authorized to grant credit at a rate of one and a half days per day served “if the circumstances justify it” except in cases where interim release had been denied because of a prior criminal record or had been revoked for the violation of release terms. On these occasions, judges were required to provide a written justification for the more generous recognition of time served.⁶² Prior Bill C-25, the only legislative initiative by the Harper administration dealing with pre-conviction custody was the implementation of a reverse onus provision for those charged with offences involving the use of firearms, which was passed as part of the *Tackling Violent Crime Act*.

Bill C-25 was uncontroversial among MPs. The bill received third reading 35 sitting days after introduction. No recorded vote was called for.⁶³ In the second reading debate the Liberals

said, “Our objective will be to pass this legislation expeditiously, to ensure that it passes all stages of the House in a way that is responsible but that proceeds quickly to adoption of the legislation.”⁶⁴ The Bloc Québécois said, “The Bloc Québécois supports this bill.... The measures were part of our election platform.”⁶⁵ The NDP said, “Bill C-25 is an appropriate bill to deal with a problem and a perception of a problem in our sentencing process.”⁶⁶ Bill C-25 was more controversial amongst Senators. The Senate Standing Committee on Legal and Constitutional Affairs recommended amending Bill C-25 to increase the recognition of time served in remand,⁶⁷ which prompted the NDP Premier of Manitoba to call for the abolition of the Senate.⁶⁸ The committee recommendations were defeated by the Senate as a whole and Bill C-25 received royal assent on November 22, 2009.⁶⁹

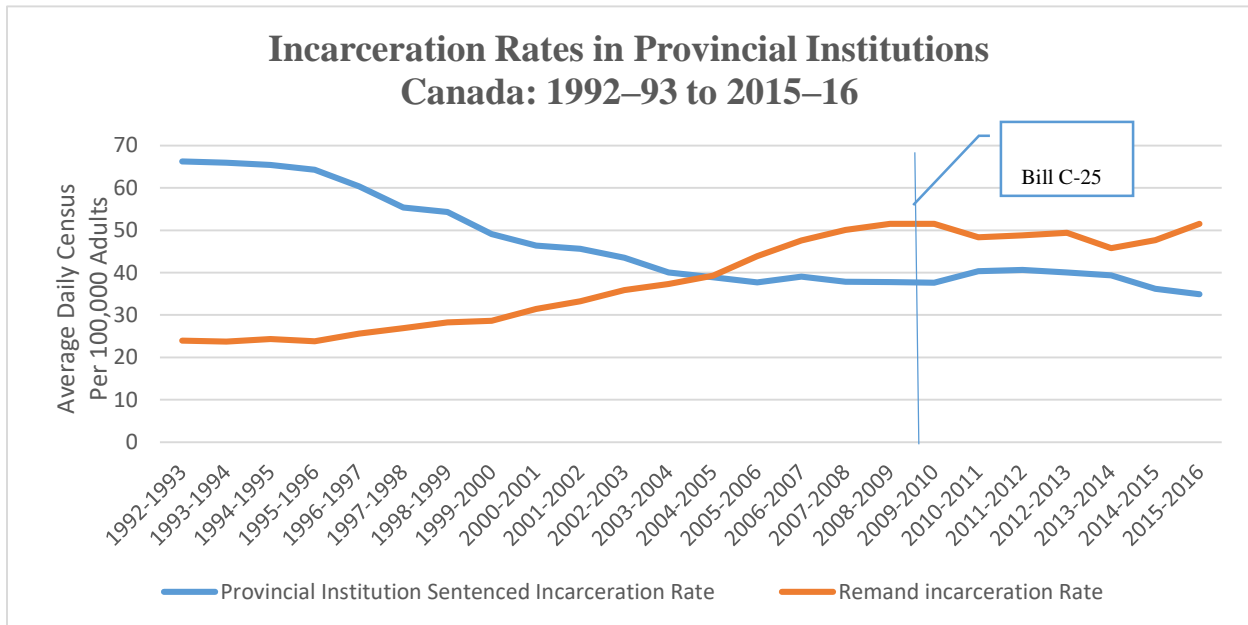
Legislative restrictions on the recognition of pre-conviction custody does not appear to have initially been a high priority for the Harper administrations. In the 2006 election campaign, the Conservatives promised to “prevent courts from giving extra “credit” for pre-trial custody (remand) for persons denied bail because of their past criminal record or for violating bail.”⁷⁰ During the Harper administration’s first term, no action was taken on this commitment. The commitment was not repeated in the Conservative’s 2008 election platform. Demand for legislation emerged from provincial justice ministers who “unanimously encouraged the federal ministers to proceed with these criminal code amendments as a priority”.⁷¹ This provincial request was cited by the federal Justice Minister during his second reading speech for Bill C-25.⁷² Justice ministers from Manitoba and Alberta appeared before the Senate committee to urge quick passage on behalf of all their provincial and territorial colleagues. The Manitoba Justice Minister told the Senators that “we represented virtually every political party in Western Canada: the Liberal Party, the Conservative Party, the Saskatchewan Party, and I, from the New Democratic Party. We were at one in our consensus on the importance of this amendment.”⁷³ The provincial request for legislative change came in the context of a growth in use of remand. Figure 7.2 outlines the incarceration rates in provincial institutions for remand and sentenced prisoners. The vertical line signifies the proclamation of the *Truth in Sentencing Act*. During second reading debate, the federal Justice Minister said:

There is a concern that the current practice of awarding generous credit for pre-sentence custody may be encouraging some of those accused to abuse the court process by

deliberately choosing to stay in remand in the hope of getting a shorter term of imprisonment once they have been awarded credit for time served.⁷⁴

The government also argued that the reasons for granting extra credit for time served in remand lacked transparency and undermined confidence in the justice system.⁷⁵

Figure 7.2



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 252-0005.

With a virtual political consensus on the merits of Bill C-25, opposition within the parliamentary process was left to a small group of academics and criminal defence lawyers who appeared before the House and Senate Committees. They mounted a qualitative argument for enhanced credit because conditions of confinement were worse in remand than in post-conviction facilities and a quantitative argument that the interaction between Bill C-25 and post-conviction conditional release programs would mean people who waited for trial in remand would face a total longer period of incarceration than a person receiving the same sentence but who had been granted bail or released on a recognizance.⁷⁶ The Minister of Justice anticipated the quantitative argument in his second reading speech by promising other legislative changes to toughen conditional release to eliminate the disparity.⁷⁷

Following the passage of the *Truth in Sentencing Act*, much of the debate centred around the question of cost. Federal and provincial ministers argued that the legislation reduced costs. The federal Justice Minister said:

We have had overwhelming support from attorneys general and solicitors general because they believe that Bill C-25 will help them cope with the growing number of accused who are awaiting sentencing while housed in their jails. They believe it will help them stem the tide of increased costs due to a growing demand.⁷⁸

People accused of crimes being held in remand await a finding of guilt or innocence prior to any possible sentencing. The Justice Minister, however, seemed to assume guilt by stating remand prisoners were simply awaiting sentencing. The legislation was portrayed as a cost-saving measure because of its perceived effect in reducing remand numbers. However, Bill C-25 had the explicit purpose of causing people convicted of crimes to serve a longer proportion of their sentence—that is, more days in jail. For those ultimately sentenced to more than two years of incarceration, Bill C-25 would increase the proportion of time served in federal penitentiaries rather than provincial jails. In 2008–09, the average cost of a federal inmate was \$322.51 compared to \$161.14 for the average inmate in a provincial jail.⁷⁹ The potential of Bill C-25 to increase total costs in the justice system by increasing the volume of incarceration and changing its location was raised by witnesses during committee hearings on Bill C-25, but no interest in the issue was displayed by parliamentarians.⁸⁰ In response to a request from a Liberal MP, the Parliamentary Budget Office released a report that estimated the total financial cost of Bill C-25 would be in excess of a billion dollars per year.⁸¹ This belatedly changed the tone of the discussion around the *Truth in Sentencing Act*. For example, a columnist in the *Globe and Mail* opined, “There's a difference between being "tough on crime," as the federal Conservatives profess to be, and being stupid about crime, which is what they are.”⁸²

The *Truth in Sentencing Act* immediately generated challenges in the courts. The arguments centred on judicial discretion in the granting of recognition for time served at a rate between the “one day per one day” specified as standard in Bill C-25 up to the legislative maximum of a day and a half stipulated as the maximum in the legislation. In a series of related rulings, the Supreme Court ruled against the argument that the wording of “if the circumstances justify it” implied exceptional circumstances.⁸³ The Supreme Court said that it is “inconceivable

that Parliament intended to overturn a principled and long-standing sentencing practice, without using explicit language, by instead relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*.”⁸⁴ As a result, “normal” circumstances could be sufficient to justify enhanced recognition of time served in remand up to the statutory limit of one and a half days credit per day in remand. The Supreme Court rulings were widely interpreted as a “loss to the government”.⁸⁵ Ignoring his party’s support for Bill C-25 while it was before the House of Commons, the NDP’s Parliament Reform Critic said, “It’s a slap in the face for the government.”⁸⁶ The interpretation of the Supreme Court’s decisions as striking down the *Truth in Sentencing Act* occurred despite the rulings’ affirmation the legislation as written. Despite a clear statement by the Supreme Court that it was within the authority of Parliament to impose a harder cap, no such legislation was introduced.

A further challenge to the constitutionality of the provisions of Bill C-25 was made in *R v Shayne Arthur Beck*. A Territorial Court judge in the Northwest Territories ruled that the limitation of credit for time served in remand to one day per day served, where remand was the result of a previous criminal record violated Charter rights. Credit was granted at the rate of one and a half days per day served in remand in accordance with the general cap imposed by the *Truth in Sentencing Act*.⁸⁷ The decision does not appear to have been appealed.

As interpreted by the courts, the general effect of the *Truth in Sentencing Act* appears to have been to lower the “normal” credit to one and a half days per day served in remand from two days. This represents a modification of the stated purpose of the legislation to establish a one to one recognition as the norm.

7.2. Federalism and Systems Constraints on Central Government Action

Luhmann portrayed the system of politics functioning as an autopoietic system in which “the centre of the system here is occupied by the state organization.”⁸⁸ However, as a federal state with each provincial government being deemed as sovereign within their sphere of constitutional jurisdiction, Canada possesses multiple systems within the system of politics. Canada’s long and gaudy history of jurisdictional conflict between the federal and provincial states⁸⁹ suggests that each is self-referential and attempts to maintain its boundaries in

autopoietic fashion. Indeed, Canada has been described as having a “dual constitutional structure.”⁹⁰ I argue in this section that interprovincial variation in incarceration and sentencing points to Canada having a fragmentary crime punishment policy rather than a single policy that can be imposed by directives from the national Parliament.

The differential results of provincial justice systems has many causal components, including the differential commitment of resources for the programs to deal with convicted people or the utilization of alternative resolution measures by police forces,⁹¹ provincial control over the appointment of lower court judges combined with the “progressive expansion” of their jurisdiction⁹² and provincial passage of “quasi-criminal” laws.⁹³ Provincial governments determine whether trial court decisions mitigating tough-on-crime legislation are appealed and can intervene to support or challenge federal legislation as interveners in cases.⁹⁴ I will examine one of these, namely the differential use of prosecutorial discretion between provinces.

7.2.1. Extent of Interprovincial Variation in the Treatment of Crime

In this section, the extent of interprovincial variation in the treatment of crime is documented by examining provincial incarceration rates and sentencing patterns.

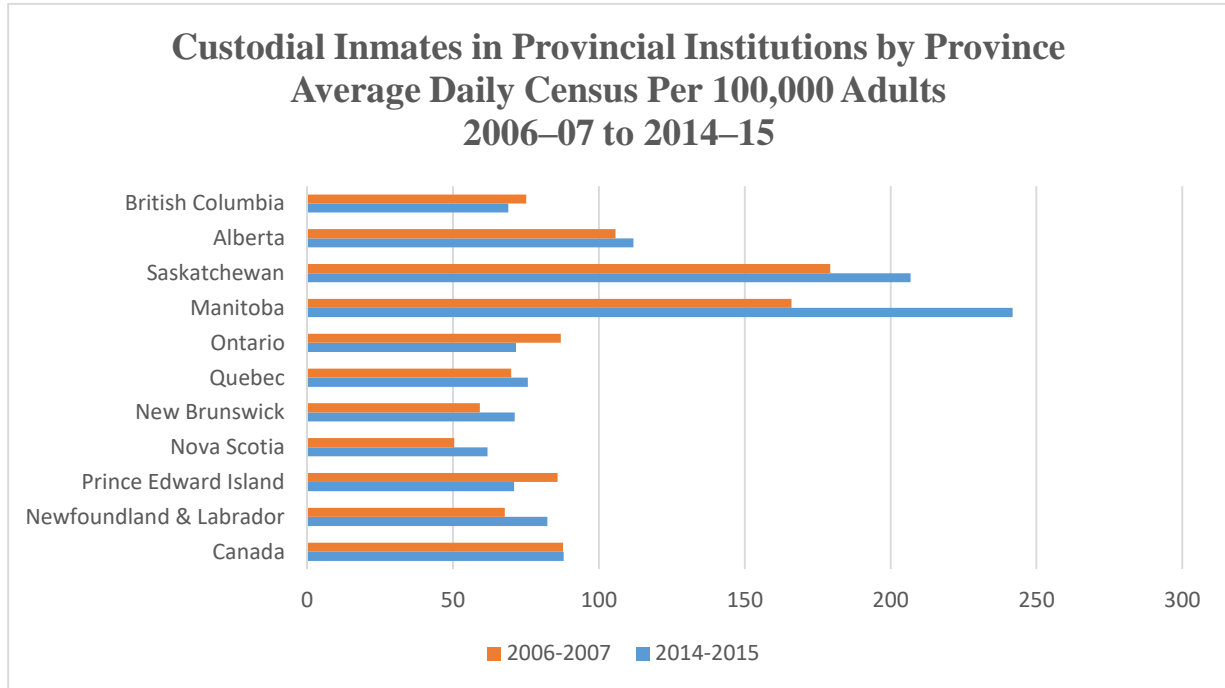
7.2.1.1. Interprovincial Incarceration Rates

As was outlined in chapter 4, the adult incarceration rate for those in provincial institutions remained essentially flat during the Harper administrations’ tenure in office. In 2006–07, the first year of Harper’s terms in office, there were an average of 87.73 prisoners per hundred thousand adults in provincial institutions.¹ In 2014–15, the last year for which data is available at the time of writing and the last full year of the Harper administrations, this had risen marginally to 87.9.⁹⁵ Figure 7.3 outlines the interprovincial variation in this data. By this

¹ For those sentenced to a term of over two years, there is no necessary correlation between the province in which an offender is convicted and the location of the federal institution in which all or a portion of the sentence is served. As a result, inmate counts for federal institutions cannot be used as a measure of the differential interprovincial degrees of punitiveness.

measure, the justice system became more punitive in Manitoba and, to a lesser degree, in Saskatchewan even though crime rates in these two provinces declined. The incarceration rate dropped in Ontario and British Columbia, with small increases in the six remaining provinces.

Figure 7.3



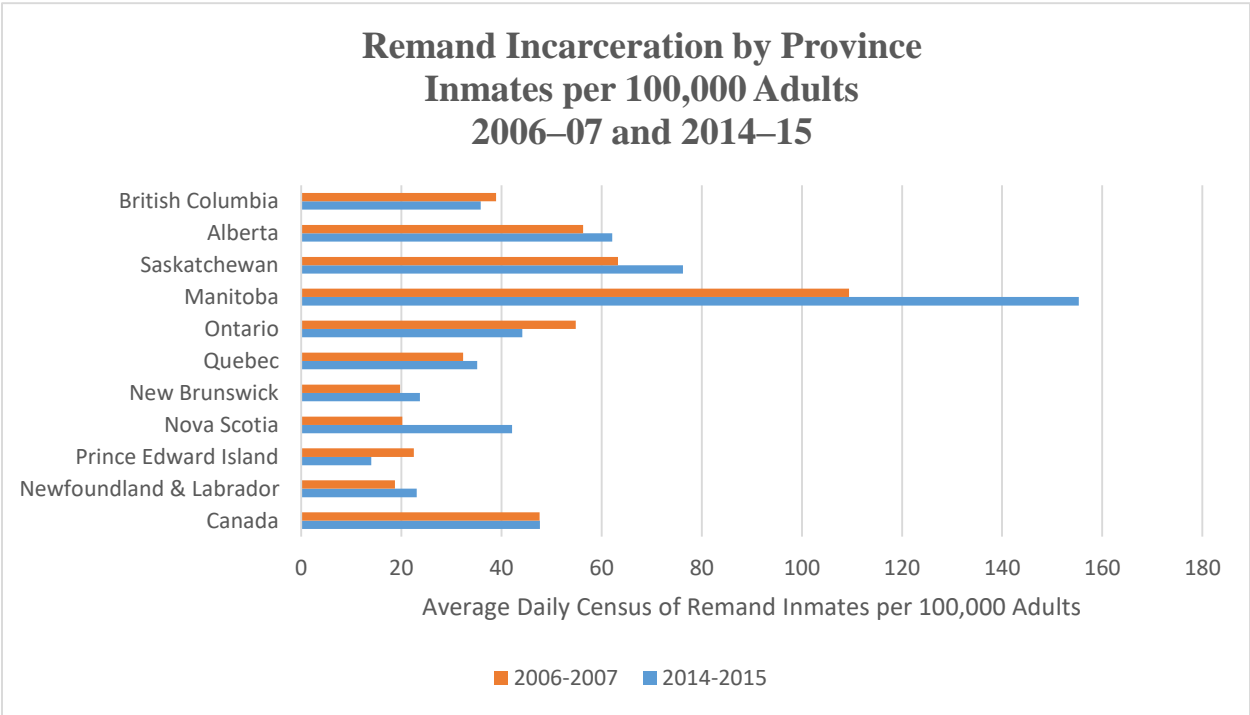
Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 251-0005.

By 2014–15, Manitoba had an incarceration rate of 241.85 prisoners per 100,000 adults, almost four times the rate of Nova Scotia despite having a crime rate less than twice as high⁹⁶.

In addition to overall incarceration rates, prosecutorial decisions can have a effect on pre-conviction (remand) custody. If an accused is arrested and held by police when charged, the courts can either grant interim judicial release or order that the accused by held in remand custody.⁹⁷ The decision of the prosecutor to oppose or accede to an application for judicial interim release has an influence on the outcome.⁹⁸ Figure 7.4 outlines changes in the remand custody rate from the first full year of the Harper administrations to the last. There is interprovincial variation in the extent of remand custody. This custody rate remained stable nationally while increasing in seven provinces and decreasing in three. In 2014–15, the average

daily census of remand inmates per 100,000 adults ranged from 14.00 in Prince Edward Island to 155.32 in Manitoba. The increase in the remand custody rate in Manitoba during the terms of the Harper administrations nationally exceeded the 2014–15 rate in every other province except Saskatchewan and Alberta.⁹⁹

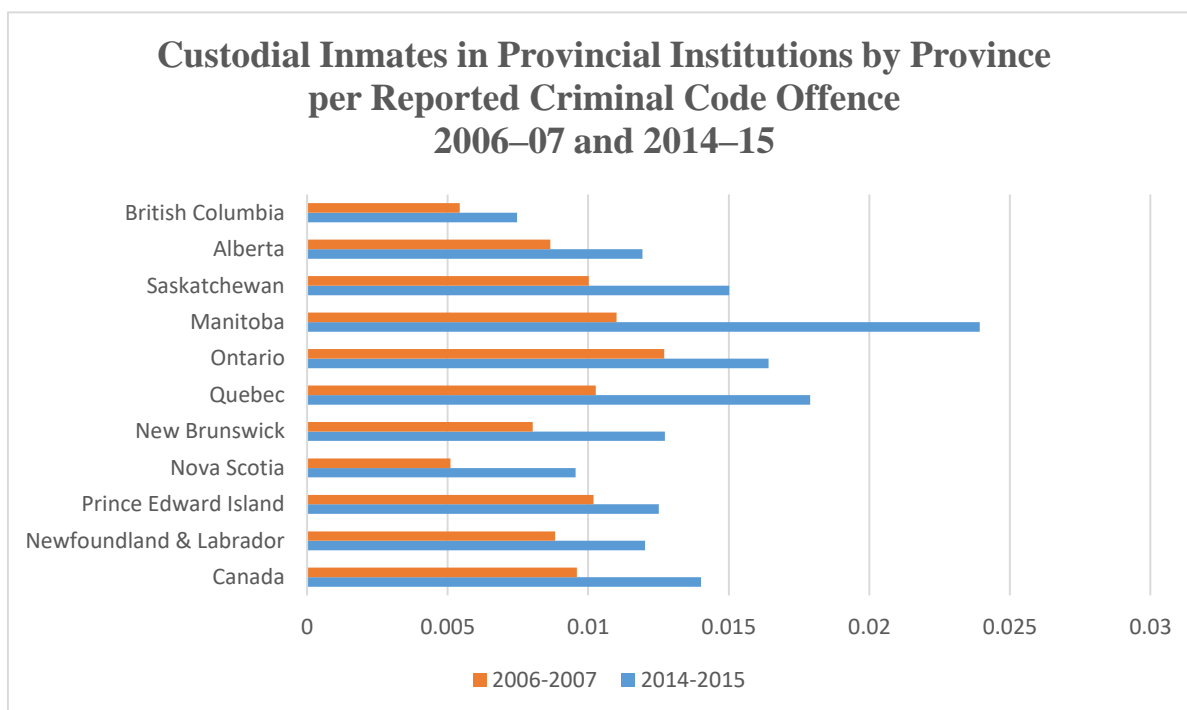
Figure 7.4



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 252-0005.

The changes in incarceration rates by population obscure the effect of ongoing declines in the volume of reported crimes. As outlined in chapter 4, this measure indicates a general increase in the level of punitive response during the Harper administrations’ tenure in office. Figure 7.5 provides the interprovincial breakdown of the number of provincial prisoners per reported criminal code offence. There is interprovincial variation with Manitoba having a 2014–15 rate three times that of the province that is least punitive by this measure (British Columbia).

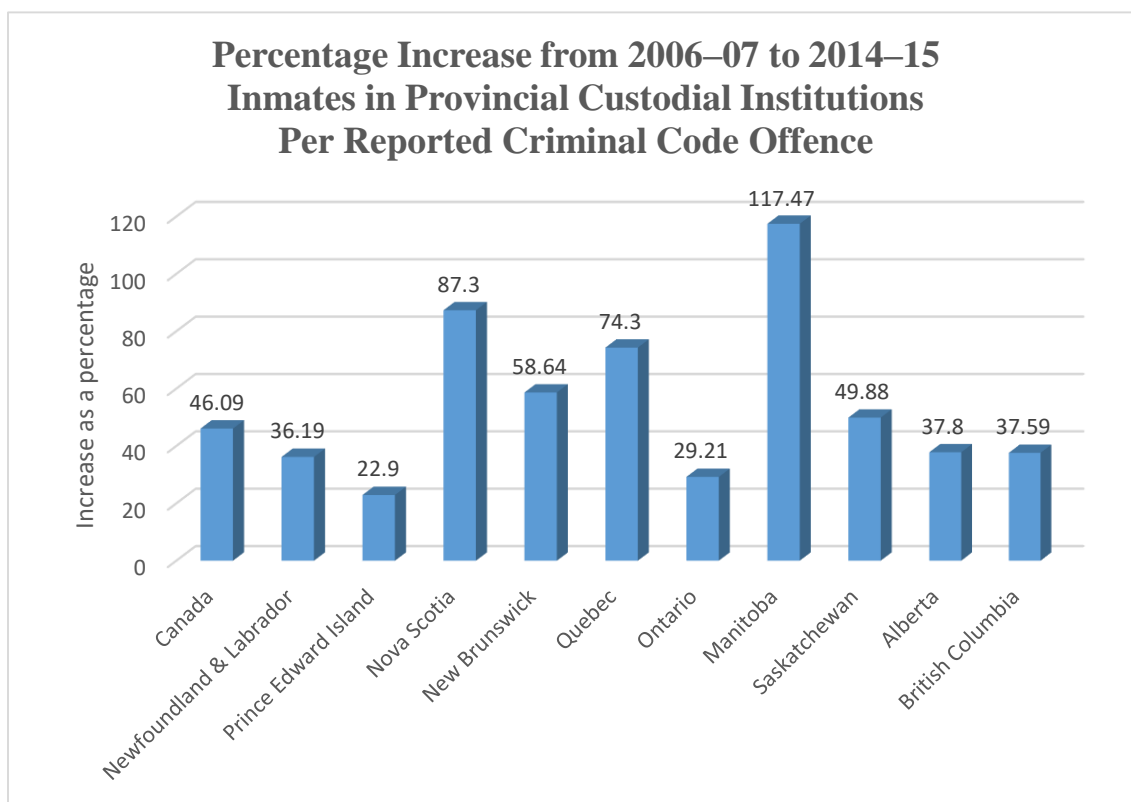
Figure 7.5



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 251-0005; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Annual*, CANSIM 252-0051.

The incarceration data is suggestive of a justice system that generates different interprovincial results. For our purposes, however, the question is how the justice systems in different provinces responded to the national legislative changes imposed by the federal government. Figure 7.6 outlines the total change in incarceration rates per criminal code offence during this period. The number of prisoners per reported crime increased across Canada, but at different interprovincial rates. This measure of punitiveness increased 22.9 percent in Prince Edward Island and 117.47 percent in Manitoba.

Figure 7.6



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 251-0005; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Annual*, CANSIM 252-0051.

The incarceration data suggests that Canada’s justice system became somewhat more punitive during the Harper administrations’ terms in office. There was interprovincial variation in the incarceration outcomes when Harper assumed office. The justice systems in each province processed the legislative changes passed during this decade in different ways, with different interprovincial results. It should be noted that Manitoba had the greatest increase in incarceration, regardless of the measure selected. During the entire period under examination, this province was governed by an NDP administration.

Attention is now turned to interprovincial variation in the adjudication of particular criminal offences.

7.2.1.2. Interprovincial Variation in Court Sentencing Patterns

As discussed in chapter 5, the overall severity of sentencing for criminal code offences dropped during the Harper terms in office. There was an increase in the proportion of guilty cases that resulted in incarceration, but the mean length of sentence decreased. This national finding obscures interprovincial variation. For total criminal code offences, the severity of sentencing index for all criminal code offences rose in Prince Edward Island, Nova Scotia, Ontario, and Saskatchewan, but dropped in Newfoundland and Labrador, New Brunswick, Quebec, Alberta, and British Columbia. Because Manitoba does not report data on sentence length, it is not possible to calculate a severity index rating for this province. However, Manitoba had both the largest increase in the percentage of criminal cases resulting in incarceration (from 36.30 percent in 2006–07 to 50.99 percent in 2014–15)¹⁰⁰ and incarceration rate during this period, it is likely that the overall sentencing severity rose in this province as well.

Table 7.1 presents the change in severity of all criminal code offences along with the standard deviation of provincial severity rates. This increased from 8.91 in 2006–07 to 13.93 in 2014–15, indicating an increase in interprovincial variability during this period. The percentage of guilty cases resulting in incarceration increased in all provinces except Newfoundland and Labrador, but the extent of the increase in other provinces varied. As noted above, the percent of guilty cases resulting in incarceration increased by 40.47 percent in Manitoba compared to Ontario's increase of 6.25 percent and a drop of 5.80 percent in Newfoundland and Labrador.

While nine of ten provinces experienced an increase in the proportion of guilty cases resulting in incarceration, seven of the nine reporting provinces experienced a drop in the mean sentence length. Variation ranged from a 50.41 percent decrease in mean sentence length in British Columbia to a 20.83 percent increase in Prince Edward Island.

The variation in interprovincial results for total criminal code offences could simply be the result of differential variation in the composition of the aggregate of criminal offences. If a province saw a relatively small increase in an offence such as murder, but a drop in prosecutions for Level 3 Assault, the aggregate sentencing severity index would show an increase in the severity of sentencing even if prosecution and sentencing behaviour remained identical. As a

result, Table 7.1 also presents results for four benchmark offences. Robbery and breaking and entering were chosen because they are offences that generate public consternation, but (except in cases where firearms were an aggravating factor) there were no legislative changes directly affecting the sentencing severity of these offences. However, when these charges were elected by the prosecutor as indictable offences, severity would be affected by restrictions on conditional sentences. A uniform application of the Harper administrations' legislative package would be expected to produce a modest increase in the sentencing severity index and a modest decrease in the spread of sentencings and a resulting reduction in the standard deviation. Other Sexual Offences primarily comprise sexual offences against children and Other Drug Offences comprise drug trafficking, importation, exportation, and production offences. These two categories were the primary object of new and increased minimum mandatory sentences imposed during the Thirty-ninth, Fortieth, and Forty-first Parliaments. The toughening of sentencing laws can be predicted to increase the sentencing severity for these cases while the imposition of mandatory minimums can also be predicted to decrease the standard deviation by eliminating sentences below the legally specified threshold.

Table 7.1

Severity of Sentencing: Interprovincial Comparisons: Selected Offences, 2006–07 and 2014–15

Offence	2006–07 Severity*	2014–15 Severity*	2006–07 Severity Standard Deviation*	2014–15 Severity Standard Deviation*
Total <i>Criminal Code</i>	41.889	36.357	8.908	13.927
Robbery [×]	522.253	455.658	249.47	220.930
Breaking & Entering	145.275	135.467	35.025	76.390
Other Sexual Offences	170.789	234.624	91.190	64.740
Other Drug Offences [°]	129.683	190.583	82.977	137.453

Source: Statistics Canada, *Adult Criminal Courts, Guilty Cases by Most Serious Sentence*, CANSIM 252-0057; Statistics Canada, *Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody*, CANSIM 252-0059.

*All Severity Data excludes Manitoba, which does not report on length of sentence.

[×]2006–07 robbery standard deviation data does not include Prince Edward Island because small sample size would result in a breach of Statistics Canada’s privacy policies.¹⁰¹

[°]Other Drug Offences does not include Quebec because data is not available.¹⁰²

Other Sexual Offences includes offences such as sexual interference, invitation to sexual touching, luring a child via a computer, and sexual exploitation.¹⁰³ It includes most of the offences affected by the changes in the age of consent in the *Tackling Violent Crime Act* and the sexual offences against children affected by the mandatory minimum sentences in the *Safe Streets and Communities Act*.

Other Drug Offences consists of drug trafficking, production, importing, and exporting.¹⁰⁴

Of these benchmark crimes, only those in the category of Other Sexual Offences behaved as predicted had there been a uniform application of the legislative changes. The severity of sentencing for these offences increased and the range of sentences decreased. That is, sentences became both tougher and more consistent. The only province that departed from this trend was Quebec, where those found guilty became slightly less likely to be incarcerated, while the mean sentence length declined by 20.17 percent. Even with this decline, sentences in Quebec were still higher than the national average.

The prosecution of offences in the category of Other Drug Offences differs from the other offences gathered in that prosecutions are conducted by federal prosecutors in all provinces

except Quebec and Nova Scotia. As such, the interprovincial variation in the selection, supervision, and policy direction is lessened for these offences. The federal government has much more direct influence over the prosecution of drug trafficking and related offences. Sentencing data for these offences is not available for Quebec. Nationally, both the proportion of guilty cases receiving a sentence of incarceration and the mean length of incarceration increased. Sentencing severity increased in all provinces except Newfoundland and Labrador, Nova Scotia, and Alberta. In Newfoundland and Labrador, the proportion of guilty cases sentenced to incarceration increased, but the mean sentence length decreased. In Alberta, both the proportion sentenced to incarceration decreased while the mean sentence length increased. The Alberta sentencing severity index rating remained higher than the national average, with incarcerated people in that province receiving the longest mean sentences of any reporting province (80.66 percent above the national average).

Because the court data presents results based on the cases that reach the courts, the effect of both differential crime rates and police clearance rates are removed. The interprovincial variation in sentencing severity, both in overall scores and in trends, suggests provincial systems impact upon the toughness of the justice system. For offences for which the Harper administrations devoted specific attention to imposing minimum mandatory sentences—primarily those associated with drug trafficking and the sexual abuse of children, there was a toughening effect in most provinces. This toughening was most uniform in dealing with sexual offences against children, where the only province to register a “softening” of treatment was Quebec, which moved toward the national norm (but remained tougher than Canada as a whole). For offences such as robbery or breaking and entering that did not receive specific legislative attention, sentencing severity declined despite general toughening measures, such as restrictions on the use of conditional sentences.

7.2.2. Importance of Prosecutorial Discretion

Prosecutors working in adversarial justice systems such as Canada and the United States exercise discretion that has a impact on the outcomes of the criminal process.¹⁰⁵ Prosecutors decide whether and what charges will be pursued, the election of charges for hybrid offences,

position on applications for interim judicial release, and, in the event of conviction, the nature of the sentence to recommend.¹⁰⁶ An overwhelming majority of guilty findings are obtained through a negotiated agreement with the accused, with sentencing heavily influenced by negotiated joint submissions from the prosecutor and accused.¹⁰⁷ The multiplicity of charges available and the differential sentences specified in legislation give the prosecutor power and flexibility in such negotiations.¹⁰⁸ In short, prosecutorial powers and the exercise of discretion can have a effect on how tough on crime the administration of justice is. Indeed, some argue that the exercise of prosecutorial discretion is the single most important factor in determining incarceration rates.¹⁰⁹ The acceptance of a public interest criteria for making prosecutorial decisions serves to introduce policy considerations into the exercise of discretion.¹¹⁰

The strength of prosecutorial discretion is aptly demonstrated by the case of *R v Morrison*.¹¹¹ Douglas Morrison was an elderly man who used the internet to seek sexual contact with a young girl. Instead, he managed to engage in correspondence with a police officer posing as a youth. He was charged with using a computer to lure a minor. Under the provisions of the *Safe Streets and Communities Act*, this offence provided a mandatory minimum of 90 days incarceration for a summary conviction and one year for an indictable conviction. The prosecutors elected to proceed by indictment. The resulting one year mandatory sentence was challenged as being grossly disproportionate, and thus constituting a cruel and unusual punishment under Section 12 of the Charter. The trial judge upheld the challenge, declared the mandatory sentencing provisions invalid, and sentenced Morrison to a four-month period of incarceration deemed to be proportionate to the circumstances. In making this ruling, the judge noted that if the Crown had elected to proceed on a summary basis, “the issue of proportionality would not arise. The Crown elected to proceed by indictment and that changed the landscape.”¹¹² In his desire to impose a sentence that was justly proportionate, the judge was willing to declare an act of Parliament invalid but not to challenge or override the charging decision of a Crown prosecutor.

The discretion of prosecutors was also demonstrated in *R v Smickle*. Leroy Smickle was visiting his cousin’s apartment. He was posing with a loaded handgun to post “cool” pictures of himself on Facebook when the police burst into the apartment seeking to arrest Smickle’s cousin.

The prosecutor elected to proceed with the resulting firearm charges on an indictable basis, thereby activating the three-year mandatory minimum sentence as outlined in the *Tackling Violent Crime Act*. Both the trial¹¹³ and appellate courts¹¹⁴ ruled that this produced a grossly disproportionate result and declared the mandatory minimum sentences invalid. The election decision that activated the mandatory minimums was not questioned.

R v Morrison and *R v Smickle* are not anomalies. In 2000, the Director of Prosecutions for Newfoundland suggested that the passage of the Charter had created a vehicle for challenging prosecutorial discretion, but that such challenges had been “spectacularly unsuccessful.”¹¹⁵ This discretion, however, is not simply a function of individual whim, personality or values, but is bounded, shaped, and guided by systemic and organizational constraints.¹¹⁶ Tonry argues that the diversity of systems of prosecutions provides the basis for comparative research on determinates of justice outcomes.¹¹⁷ His analysis is confined to the national level, but is suggestive of national differences between Canada and the United States that contribute to tougher outcomes south of the 49th parallel. These national differences are useful to review before turning to interprovincial differences within Canada.

In the United States, control over prosecutions and prosecutorial discretion is highly fragmented with prosecutors being appointed by and reporting to municipal, county, state, and federal governments depending on the issue offence.¹¹⁸ Each jurisdiction can, and does, have a different set of prosecutorial policies, priorities, and practices.

The organization of prosecution services in Canada is more centralized. Prosecutions for criminal code offences are conducted by branches of provincial governments, while the Criminal Law Branch of the federal Department of Justice conducts criminal code prosecutions in the three territories. Federal prosecutors also conduct prosecutions for all federal offences contained in legislation other than the *Criminal Code*. Of most significance for this dissertation are prosecutions for violations of drug offences outlined in the *Controlled Drugs and Substances Act* in all provinces except Quebec and New Brunswick. In these two provinces, provincial prosecutors conduct the prosecutions of alleged offences arising from investigations conducted

by municipal and provincial police forces, while federal prosecutors conduct the prosecutions arising from investigations by the RCMP.¹¹⁹

The increased centralization of the Canadian system also applies to integration with other components of the justice system, most importantly corrections. In the United States, the local control of prosecutions is accompanied by state control and funding of corrections. As a result, the fiscal costs of being tough are externalized.¹²⁰ In Canada, both prosecutions and a majority of correctional services are administered by provincial governments. While there is a departmental separation of budgets, the overall financial constraints faced by the province can fiscally restrain an enthusiasm for tough prosecutorial practices.¹²¹

In addition to the different organizational framework for prosecutors, the relationship between partisan and electoral politics is very different in Canada and the United States. In both cases, the basis of prosecutorial discretion is seen as flowing from the people rather than the authority of the courts. As a result, the exercise of this discretion is almost impervious to judicial review or restraint.¹²² However, the mechanism of this democratic accountability varies greatly between the two countries.

In most American jurisdictions except federal, the senior prosecutorial official is directly elected to the executive office. Federal district prosecutors are appointed, but the appointment is at the pleasure of the current administration with wholesale changes being common in the event of partisan changes in administration.¹²³ Serving as a prosecutor is a common pathway to higher elected office, with 51 members of the House of Representatives and eight Senators in the 114th Congress listing “prosecutor” as their pre-election occupation—more than any other occupational identification.¹²⁴ It is likely that considerations of political careers influence the handling of individual cases. Prosecutors as a group are also active politically in lobbying for tougher laws and harsher sentences, with the cynical or realistic suggesting that such a legislative sentencing regime assists with workflow by increasing prosecutor ability to successfully negotiate guilty pleas.¹²⁵

In Canada, democratic accountability is exercised indirectly. Prosecutors serve as agents of the Minister of Justice. The incumbent in this position is elected as a member of a legislative

body with a broad policy mandate rather than to a specific executive position. In Canada, Ministers of Justice report directly to legislatures rather than directly to the people.¹²⁶ In Canada, a career in prosecutions is not seen as a pathway to elected office. There were no MPs serving in the Thirty-ninth, Fortieth, or Forty-first Parliaments listing “prosecutor” as their pre-election occupation.¹²⁷ Prosecutors are generally career civil servants subject to the restrictions and protections inherent in public sector employment law. The lack of a prosecutorial service as a pathway to elected office is exemplified by the case of Emilie Tamon, a federal prosecutor who was denied leave to run for elected office on the grounds that this engagement in the political process “could be perceived as interfering with Ms. Tamon’s ability to independently perform her prosecutorial functions.”¹²⁸ The management decision to deny Ms. Tamon’s leave was upheld upon judicial review¹²⁹ but overturned on appeal.¹³⁰ There is also no generalized practice of prosecutors lobbying for specific legislative changes in criminal law. During the Harper terms in office, prosecutors as a group made only one intervention into legislative debate, with the representatives of the Canadian Association of Crown Counsel (CACC) testifying before the Senate committee examining the *Truth in Sentencing Act*.¹³¹ In contrast to the normal position of American prosecutors, this tough legislation was opposed by the association representing prosecutors in opposition to the unanimous position of provincial ministers of justice.

In the United States, prosecutions explicitly motivated by partisan politics and political considerations are far from rare.¹³² By contrast, in Canada the “independence of the prosecution decision-making function from inappropriate political control, direction, and influence” has been described as a “quasi-constitutional principle.”¹³³ In the first substantive piece of legislation introduced by the Harper administration, the independence of prosecutorial decisions was enhanced and formalized with the passage of the *Director of Public Prosecutions Act* as part of omnibus legislation¹³⁴ fulfilling platform commitments made to improve the accountability and transparency of governance. The commitment was made as part of an implicit accusation that partisan considerations guided prosecution decisions connected to the “Sponsorship Scandal,” which arose from the distribution of federal event and promotion grants in Quebec.¹³⁵ The legislation created the position of Director of Public Prosecution with security of tenure and appointment by a committee that included representatives from all recognized political parties in the House of Commons. The government retained the right to issue policy directives, but

directives on the handling of individual cases could only be undertaken with procedures designed to ensure transparency and invite scrutiny.¹³⁶ The opposition parties joined to force the passage of some procedural amendments to the legislation, but Bill C-2 itself passed through the House of Commons and the Senate without a recorded vote being called for. There is a certain irony to this. In order to advance its political critique of the previous Liberal government, the first substantive legislative act of the Harper administration was a measure that placed restrictions on its ability to be directive in implementing a tough-on-crime program.

The Harper administrations' strengthening of the independence of federal prosecutors from political influence directly affected a small proportion of prosecutions in Canada. During the period from 2006 to 2015, a total of 23,245,201 offences were reported to police resulting in 6,264,739 individuals being charged. Of these, 1,326,960 (5.71 percent) offences and 731,637 (11.68 percent) individuals were charged within the jurisdiction of federal prosecutors.¹³⁷ The remainder of prosecutions were conducted by provincial government prosecutors.

The organization of prosecution in Canada contains systemic limitations on the ability of a federal government to directly influence the executive government function of prosecuting federal offences. One aspect of this is the tradition of the independence in the exercise of prosecutorial discretion. The simple fact is that all prosecutors are lawyers. As such, they have been trained and socialized to "think like lawyers,"¹³⁸ which includes evaluating facts against established principles and laws while reasoning by analogy and deduction. In preparing and presenting sentencing recommendations to the court, prosecutors base their argument on the sentences imposed for similar offences in circumstances deemed to be similar. As I will discuss more fully in the section dealing with the judicial restrictions on the imposition of political will, this backward looking process has an inherently conservative tendency that discourages abrupt transformative change. Decision driven sentencing standards can change, but this comes from an incremental process of creating self-referential distinctions.¹³⁹ Commentators generally acknowledge that individual prosecutorial discretion is an inevitable part of an adversarial system of justice, but in constant danger of foundering on the Scylla of generating coercive plea bargains even from the innocent¹⁴⁰ and the Charybdis of using discretion to use leniency as a tool for expediency and efficiency.¹⁴¹

However, prosecutorial discretion is not simply a power attributed to an individual. The prosecutor who decides what charges to lay, whether to oppose interim judicial release, negotiate plea agreements, and make sentencing recommendations does so within the context of a system of policy and supervision.¹⁴² In Canada, the basis of the individual prosecutor's authority is as an agent of the Minister of Justice who is politically motivated and accountable to the legislative body to which she or he is a member. The discretion of the individual prosecutor is bound both by explicit policy directives emanating, ultimately, from the Minister of Justice and by requirements for consultation with more senior colleagues and/or supervisors before exercising discretion in serious or potentially controversial cases. The corporate nature of prosecutorial discretion was demonstrated in *R v Nixon*. In this case, an individual prosecutor handling the case of an individual facing various charges arising from impaired driving causing death was dubious about the quality of some evidence and, accordingly, negotiated a plea agreement that was generally extremely lenient to the accused. This agreement proved controversial and resulted in the province's Assistant Deputy Minister of Justice issuing an order that the plea agreement be reneged. The trial judge refused to accept the reneging of the plea agreement.¹⁴³ This ruling was overturned on appeal.¹⁴⁴ The Supreme Court upheld the right of the Crown to renege on the plea agreement.¹⁴⁵ The ruling has been interpreted as an affirmation of prosecutorial discretion,¹⁴⁶ but this analysis is valid only when looking at the relationship of the prosecutor to the courts. Representatives of organizations for defence lawyers argued before the Supreme Court that "a plea bargain is an undertaking 'like any other given by a lawyer'."¹⁴⁷ The case attracted interventions from the Attorneys General of three provinces to argue that discretion included the right to renege on plea agreements, with Manitoba basing its argument on "the importance of the Attorney General's supervisory role over the exercise of prosecutorial discretion."¹⁴⁸ In upholding the exercise of prosecutorial discretion by the corporate entity of a prosecutor's office, the Supreme Court also upheld the ability of an elected official, the Attorney General, to have ultimate authority over discretionary decisions.

The detailed impact of the exercise of discretion by individual prosecutors is beyond the scope of this study. I examine, however, the effect of prosecutorial discretion as exercised by the corporate entity of prosecutor's offices serving as agents of the Minister of Justice in individual provinces.

7.2.2.1. Interprovincial Variation of Prosecutorial Policies

The extent of punitiveness created by prosecutorial discretion arises from the patterns of discretionary decision-making on issues such as which charges to pursue for criminal events, election of charges, position on applications for interim judicial release, nature of plea bargaining, and sentencing recommendations. Formal direction to individual prosecutors takes the form of policy statement. A variety of names are used for these, including policy directives, guidelines, and practice notes. The majority are accessible to the public online with the remainder being provided after an informal request or freedom of information application. As such, these policy directives are universally treated by governments in Canada as public documents. In most provinces, the policies comprise a collection of statements on specific topics that are joined by website architecture. Presumably, within each prosecutor's office they are available within a single binder. Individual statements are usually fairly terse and oriented toward articulating principles and directing action in specified circumstances. The federal government's guidebook along with those of Newfoundland and Labrador and Prince Edward Island are more substantive works that are organized into book format, attractively designed, and contain discussions of legal principles and operations appropriate for a lay audience. These are clearly intended for educational purposes as well as to direct the work of prosecutors in their capacity as employees. The guidebook for Prince Edward Island was based on Newfoundland and Labrador's, with the appropriate modifications to reflect differences between the provinces and policies.¹⁴⁹

Changes to the policies are infrequent and appear to arise either from a periodic general review or in response to issues or controversial cases. Unless otherwise specified, the policies being referred to for each province were in effect during the entire period of the Harper administrations' terms in office. Alberta completed a general review of prosecutorial policies in 2008, so all references to that province refer to this compilation of policy directives.

In every province, the formally stated policies contain silences. For example, only five provinces provide any explicit policy direction on the election of charges for hybrid offences. Among the other five, some provide direction for election in the case of particular offences or for

particular objectives. In cases where there are no explicit policies, the exercise of individual discretion may be influenced by the collegial consultation process and the judgment of individual prosecutors.

A universal theme in the policy directives is the centrality of collegial consultation in maintaining some uniformity in the exercise of discretion. Individual prosecutors are repeatedly instructed to consult with more senior colleagues or supervisors before making decisions in cases that involve very serious offences, present unusual interpretations of law, or have the potential to generate public comment.

7.2.2.1.1. Interim Judicial Release

With the exception of the imposition of a reverse onus provision for those charged with criminal offences involving firearms, the Harper administrations left the legislative provisions governing access to interim judicial release (bail) untouched. That notwithstanding, there were dramatic differences in the remand admission and custody rates. These differences grew wider during this period.

The prosecutorial policies of five provinces are silent on the general position to be taken on bail applications. New Brunswick instructs prosecutors to base their position on their anticipation of the court's ruling and prohibits the use of pre-conviction custody as an investigative tool.¹⁵⁰ Alberta and Nova Scotia articulate policies that are procedural without providing any direction as to positions that should be argued by the prosecutor.¹⁵¹ British Columbia, Alberta, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island have special instructions for bail applications for those charged with spousal or domestic violence.¹⁵² British Columbia and Ontario have supplementary instructions to deal with those charged with sexual crimes.¹⁵³ These special instructions direct prosecutors to prioritize victim and societal safety. Nova Scotia instructs prosecutors to actively oppose bail for all violent offences¹⁵⁴ and New Brunswick does the same for all accused of offences involving the use of firearms.¹⁵⁵ Ontario and Manitoba provide the most detailed policy guidance to prosecutors for the general conduct of bail applications.

Ontario's policy dates from 2005 and remained unchanged during the Harper administrations' tenure. It was issued in specific response to three homicides committed by individuals who were on bail at the time they committed their homicide. Prosecutors are instructed to consider:

- protection of the community including victims and other individuals
- the reputation of the administration of justice and public perception of the criminal justice process
- society's interest in ensuring that accused persons attend court
- the liberty interests of the accused.

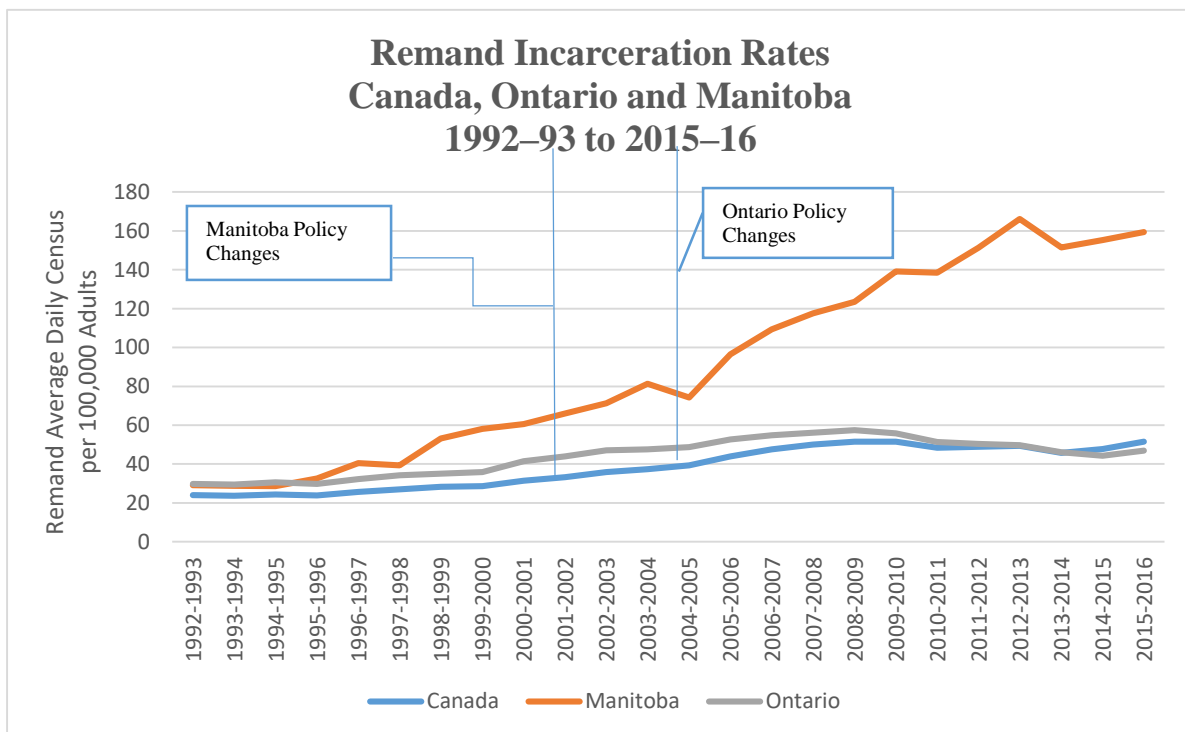
Despite the tragic events leading to the issuing of Ontario's policy directive, the document is even-handed. It is the only policy document from any province that specifically acknowledges the liberty interests of the accused and states that "efficiency should not be achieved at the expense of public safety or fairness to the accused."¹⁵⁶ This statement contrasts, for example, with the directive to Nova Scotia prosecutors instructing them to oppose bail applications for all those accused of offences involving violence. In 2007, the Nova Scotia Minister of Justice instructed prosecutors to use "every appropriate means" to prevent the pre-trial release of alleged violent offenders stating, "We need to send a strong message to those who ignore the laws and inflict harm upon our citizens. Everything possible must be done to provide safety to the public so that there is a sense of security in our communities throughout the Province."¹⁵⁷ In this combination of denunciation and safety-driven policy, the distinction between accused and convicted is obscured.

Manitoba's policies toward interim judicial release predate the Harper administration but represent the most general punitive approach of any province. In 1990, Manitoba issued a policy directive stressing "the need to promote confidence in the administration of justice." It was exclusively procedural and without guidance as to the position to be adopted by prosecutors.¹⁵⁸ This changed in 2002, when the NDP administration led by Gary Doer issued a comprehensive policy directive. Prosecutors were instructed to oppose bail for any individual charged with murder, aggravated sexual assault, any offence causing serious personal injury, or any offence

believed to be gang-related. In cases alleging domestic violence, safety was specified as the primary consideration. Prosecutors were instructed to consult with victims before taking a position on any bail application and to appeal any judicial granting of bail that had been opposed by the prosecution.¹⁵⁹ In 2005, offences involving the intimidation of witnesses and any offences involving the use of firearms were added to the list in which bail was to be opposed in every case.¹⁶⁰ In approaching all bail applications, prosecutors were reminded that “the safety of the public should be the paramount consideration in all cases.”¹⁶¹ Unlike in Ontario, there was no acknowledgement of a presumption of innocence for the accused or their liberty interest. The issuing of the bail policy directives to Manitoba prosecutors coincided with a sustained increase in remand custody in that province.

Figure 7.7 compares the national trend with those in Manitoba and Ontario. The first vertical line represents the issuing of unreservedly tough guidelines to prosecutors in Manitoba while the second signifies the issuing of more balanced guidelines to prosecutors in Ontario.

Figure 7.7



Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 252-0005.

In the early 1990s, the remand incarceration rates in Manitoba and Ontario closely tracked the national average. Ontario's rate was slightly higher than Manitoba's despite a lower crime rate. In the late 1990s, the rates began a general increase, with the rate of increase higher in Manitoba. The higher rate of increase in Manitoba intensified following the 1999 election of the NDP Doer administration. Following the 2002 issuing of a formal tough-on-crime policy directive to prosecutors, Manitoba's remand incarceration rate continued to increase exponentially. The rate of increase in Canada and Ontario was more modest. Ontario's 2005 balanced policy directive appears to have had little impact on the general trend. By the end of the decade, remand incarceration rates stabilized nationally and began to trend downward in Ontario.

In summary, most provinces did not issue substantive policy direction to prosecutors to direct their position on bail application except for dealing with those charged with domestic violence offences and, less commonly, other sexual, firearms, or violent offences. Ontario and Manitoba provided the clearest direction to prosecutors for all criminal offences, with Manitoba's directive being explicitly punitive while Ontario stressed balance between objectives. The differential policy directives coincided with a different trend in the use of remand custody.

7.2.2.1.2. Election of Charges

Most provinces rely on the exercise of individual prosecutorial discretion for the election of charges. Newfoundland and Labrador, Prince Edward Island, and Alberta provide direction that stresses balanced consideration of several objectives including expediency, seriousness of the offence, and the ultimate sentencing range desired in the event of conviction.¹⁶² British Columbia does not provide guidance, except for sexual offences and offences involving the use of firearms. For these offences, indictment is to be elected except where specific permission has been obtained.¹⁶³ Ontario and Saskatchewan have a general direction to summary election on the grounds of expediency and efficiency. Exceptions are permitted when the penalties arising from a summary conviction are deemed to be clearly inappropriate for the seriousness of the offence.¹⁶⁴

7.2.2.1.3. *Plea Bargains*

All provinces have a policy statement specifically authorizing plea bargains. These mandate prosecutors to enter into discussions with the defence to reach a negotiated plea and settlement. The practice is justified on the grounds of expediency and efficiency, with general warnings having both the process result in sentences that are too lenient and the use of charging practices to generate coercive plea bargains.

An identified danger with plea bargaining is the ability to coerce guilty pleas from the innocent.¹⁶⁵ Saskatchewan and Ontario specifically instruct prosecutors not to accept plea bargains knowing the accused is innocent.¹⁶⁶ Alberta, New Brunswick, Quebec, and British Columbia instruct prosecutors to disclose a low probability of conviction to the defence and to agree to negotiated pleas only when the accused admits guilt.¹⁶⁷ Nova Scotia requires a disclosure of a weak case¹⁶⁸ while Newfoundland and Labrador and Prince Edward Island require an “unequivocal acknowledgement of guilt.”¹⁶⁹ Only in Manitoba is the policy directive on plea bargaining silent on the issue of innocence.¹⁷⁰

7.2.2.1.4. *Sentencing Recommendations*

Saskatchewan policy is silent on the issue of sentencing recommendations. British Columbia, Alberta, Quebec, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island are generally silent about sentencing recommendations but have specific instructions for dealing with cases involving domestic violence. For these offences, prosecutors are told to prioritize denunciation, deterrence, and safety. Mandating consultation with victims prior to reaching sentencing recommendations and encouraging the use of victim impact statements are also a common feature of the directives dealing with domestic violence offences.¹⁷¹ British Columbia also specifies that prosecutors should seek victim impact statements for sexual offences.¹⁷² New Brunswick provides a general affirmation of prosecution discretion and restatement of the aggravating factors listed in the *Criminal Code*.¹⁷³ In the case of offences involving firearms, New Brunswick prosecutors are directed to charge in a way that activates mandatory minimums and seek penalties in excess of the mandatory minimums.¹⁷⁴

Manitoba and Nova Scotia issued policy directives explicitly in response to the passage of the *Safe Streets and Communities Act*. Manitoba informed its prosecutors that:

In establishing mandatory minimum jail sentences, Parliament clearly intended that offenders who commit those offences were to be incarcerated for at least the minimum amount of time provided in the *Criminal Code*.... it would be inappropriate to take steps to avoid the imposition of a mandatory sentence of imprisonment.¹⁷⁵

Prosecutors in Nova Scotia received direction in the form of “practice notes” that were appended to existing policy directives. In dealing with the new and enhanced minimum mandatory sentences, Nova Scotia prosecutors were told:

It may be appropriate in exceptional cases to pursue a charge which is not the most serious which could be supported by the evidence when it is apparent from the outset that the expected length of trial or the usual penalty for a particular type of charge is out of proportion to the gravity of the alleged criminal conduct. In order to maintain public confidence in the administration of justice, prosecutors who withdraw or otherwise discontinue prosecution of a charge with a mandatory minimum penalty when the circumstances apparently support such a charge should be able to provide to the court and to the public a reasonable explanation for their course of action.¹⁷⁶

Similar direction was provided for restrictions on the use of conditional sentences.¹⁷⁷ Manitoba thus responded to the tough-on-crime federal legislation by insisting that its prosecutors act to implement the intent of the legislation. Nova Scotia, on the other hand, provided a “wink and nod” reminder of the means to circumvent the legislation along with a cautionary note to use appropriate discretionary caution in so doing.

As in the case of interim judicial release, the two provinces that provided the most general direction to prosecutors were Ontario and Manitoba.

In 2005, Ontario issued a policy directive on sentencing recommendations that stressed the importance of balance between the competing objectives of sentencing.¹⁷⁸ Separate policy statements stressed the importance for cases involving domestic violence¹⁷⁹ and sexual offences. In the case of sexual offences, protection of the public and society was named as the primary objective.¹⁸⁰ In dealing with offences involving firearms, prosecutors were told to stress denunciation and deterrence, and that their recommendations should be “premised on providing

the greatest protection to the community, not on considerations of expediency.”¹⁸¹ Ontario thus stressed a balancing of sentencing objectives except for specific offences.

Manitoba’s policy directives, on the other hand, reinforced a tough approach. The policy statement on minimum mandatory sentences has been discussed above. In 2002, the province replaced a two-sentence policy statement recognizing the possibility of victim impact statements¹⁸² with a three-page statement mandating prosecutors to encourage their use and document their effort to enable or persuade victims to add their voice to the sentencing process.¹⁸³ In 2005, prosecutors were instructed to oppose conditional sentences cases in all cases involving death, serious bodily harm, sexual offences against children, and “sexual offences where the victim has suffered psychological or physical harm” since “the granting of conditional sentences frequently does not reflect the denunciation and deterrence that is warranted where serious offences result in serious consequences for victims.”¹⁸⁴ A year later, prosecutors were instructed to seek adult sentences in all youth cases involving firearms.”¹⁸⁵ In domestic violence cases, prosecutors were instructed to make recommendations that “reflect public denunciation of this kind of conduct” to oppose recommendations for conditional or absolute discharges and conditional sentences.¹⁸⁶

7.2.2.1.5. Non-enforcement Policies

In 2002, Nova Scotia issued a directive stating that “the Public Prosecution Service generally does not prosecute charges of simple assault” since “it is not necessary to bring the full weight of the criminal process to bear upon the situation.”¹⁸⁷ In 2003, Nova Scotia also ordered prosecutors not to proceed with registration offences under the *Firearms Act* (long gun registry).¹⁸⁸

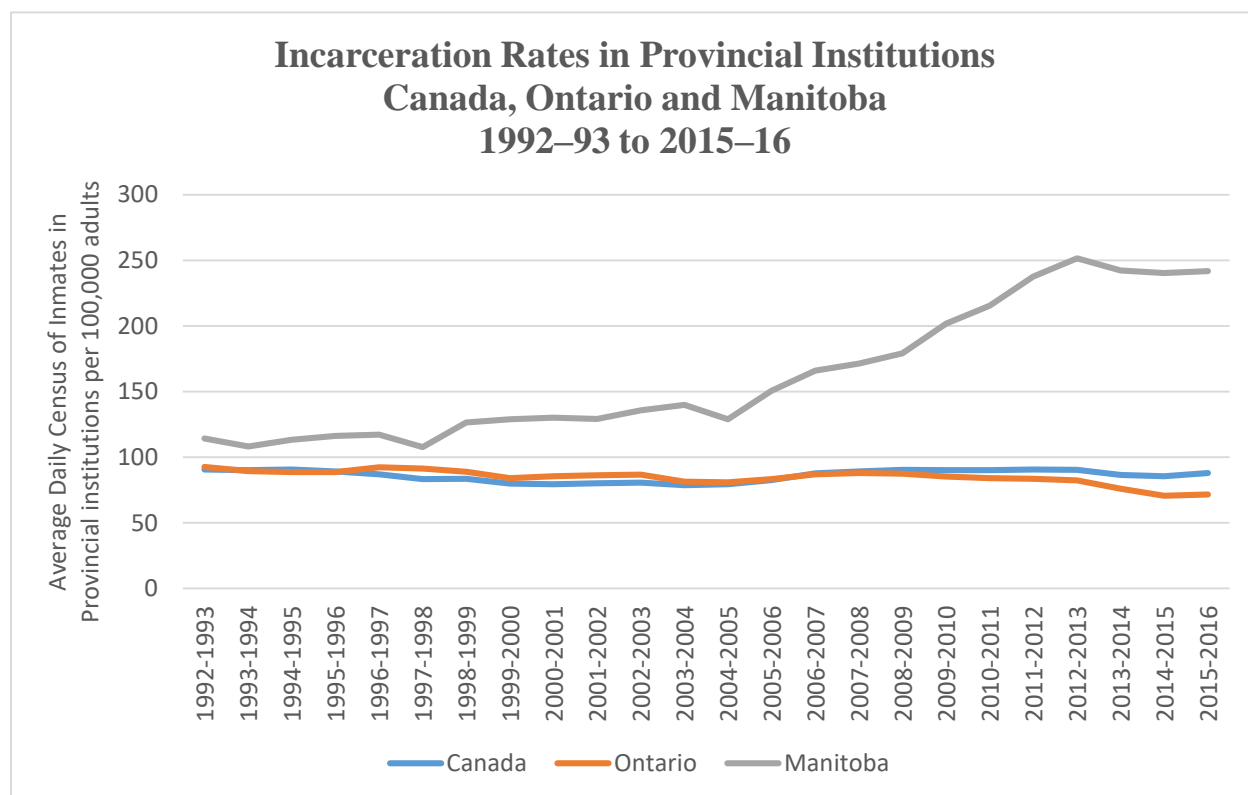
7.2.2.2. Comparative Case Study: Manitoba and Ontario

The formal policy directives provided to prosecutors demonstrate a range of provincial government direction toward justice system outcomes. In many areas, provincial governments appear to be content to let the normal exercise of prosecutorial discretion determine policy direction. Given the number of references to the need for prosecutors to consult with senior

colleagues, the informal imposition of standards for the exercise of discretion clearly deserves further study but is beyond the scope of this project. However, the tendency of provincial governments to allow prosecutors to be prosecutors is overridden by concerns about particular offences. In general, policy attention results in the imposition of tougher standards as exemplified by the treatment of domestic violence, sexual, and firearms offences. Nova Scotia's suggestion that simple assault cases not be prosecuted show that official policy attention can work toward leniency as well.

The two provinces that have developed the most consistent and comprehensive formal policy direction to guide the work of prosecutors are Ontario and Manitoba. Ontario's policies stress expediency (except for specified offences and in cases when this would lead to punishments incommensurate with the offence), efficiency, and balancing between competing objectives, while Manitoba's have been singularly and uniformly in the direction of being tough on crime. It is impossible to conduct comparative analysis of the historical impact these different policies have on court decisions since Manitoba did not begin to report data on the type of sentence imposed until the fiscal year 2005–06¹⁸⁹ and the province still does not report data on sentence length.¹⁹⁰ This leaves assessment of results by measurement of incarceration rates. Figure 7.8 outlines the trends in the incarceration rates of provincial institutions for Canada, Ontario, and Manitoba.

Figure 7.8



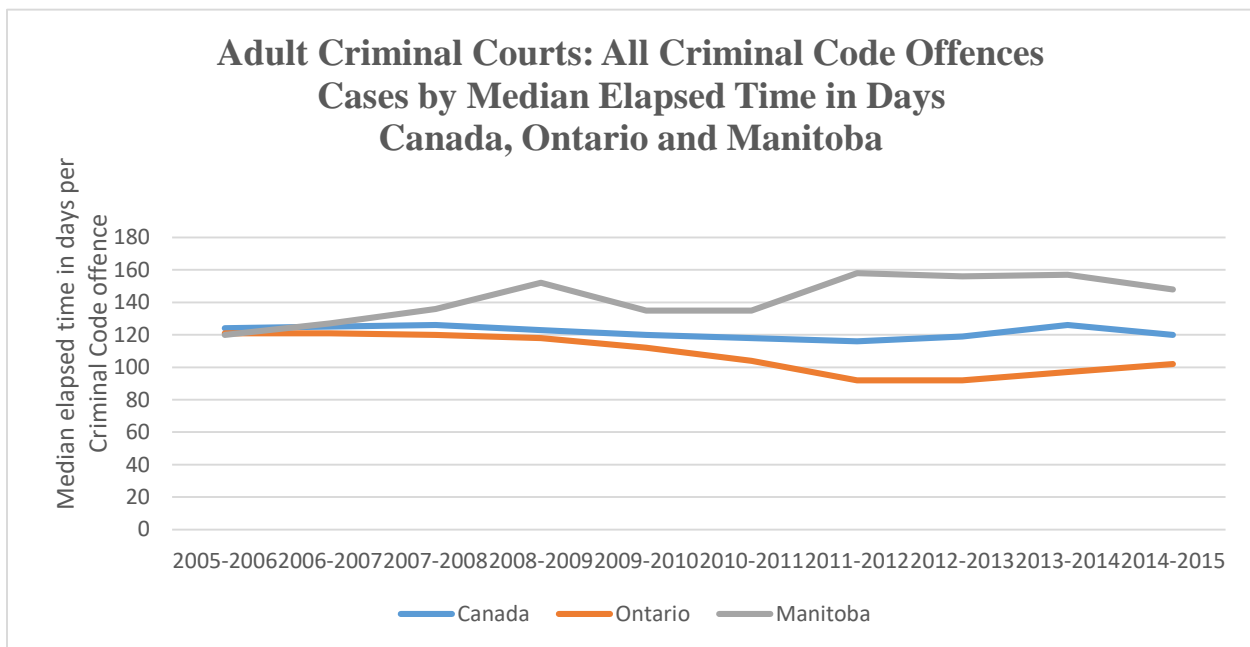
Source: Statistics Canada, *Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, Annual*, CANSIM 251-0005.

During the 1990s, the incarceration rates tended to follow a similar pattern, with Manitoba’s modestly higher rate reflective of a higher crime rate. In Manitoba, the implementation of tougher policy directives to prosecutors began occurring in 2002. This was followed by a sustained and substantial increase in the province’s incarceration rate. In Ontario, the formal enunciation of “balanced” policies occurred in 2005. A sustained but modest drop in the incarceration rate followed. During this period, both Ontario and Manitoba experienced a drop in the crime rate, and the incarceration rate per reported crime rose in both provinces. As illustrated on Figure 7.6, in Ontario this increase was 29.21 percent between 2006-07 and 2014-15. In Manitoba, it was 117.47 percent.

Another approach to measuring toughness of prosecution policies is the length of time taken to deal with cases. Being tough takes time. Opposing bail applications consumes court time in show cause hearings. Electing indictment on hybrid offences introduced more complexity.

Seeking harsher penalties increases defendants’ incentives to fight charges aggressively and makes successful resolution of plea negotiations problematic. All things being equal, tougher prosecution policies should result in a slower court system.¹⁹¹ Figure 7.9 provides comparative data for Canada, Ontario and Manitoba. Neither Ontario nor Manitoba report data from superior courts, so the data from these provinces is consistent for the range of offences covered.¹⁹² Manitoba did not begin reporting data until April 1, 2005, so comparative data is not available prior to this date.¹⁹³

Figure 7.9



Source: Statistics Canada, *Adult Criminal Courts, Cases by Median Elapsed Time in Days, Annual*, CANSIM 252-0055.

It is important not to read too much into these results. Differences in median court processing time can result from a different mix of criminal charges, the nature of case management systems, the vacancy rate for judicial positions, the availability and nature of legal aid services, and the informational handling systems used by the various components of the justice system.¹⁹⁴ Courts can also develop a “culture of adjournment,” as getting through the day’s docket is accorded more importance than reaching substantive outcomes.¹⁹⁵ However, the trends in court times are consistent with what would be predicted from the differential prosecutorial mandates in Manitoba and Ontario. In 2005–06, the two provinces had an almost

identical median elapsed time for the processing of criminal code offences. As the differential policy directions were implemented, Ontario, with an emphasis on expediency and balance, experienced a decline in the processing time. Manitoba, with its emphasis on maximizing punitive consequences, experienced an increase. By 2011–12, Manitoba’s median elapsed time was 71.74 percent higher than Ontario’s. The gap has closed slightly since then.

These differential outcomes in both incarceration and court processing time occurred despite both provinces operating under an identical federal legislative regime.

7.2.2.3. Federal Prosecution Policies

As noted earlier, most prosecutions in Canada are conducted by prosecutors selected, employed, and supervised by provincial governments. However, federally employed prosecutors conduct the prosecutions of various federal statutes. For the purposes of this dissertation, the most important of these are conducted to enforce the terms of the *Controlled Drugs and Substances Act* in all provinces except Quebec and New Brunswick.

Policy direction of prosecutors employed by the federal government is provided by the *Public Prosecution Service Deskbook*.¹⁹⁶ This 536-page document is considerably more detailed and offers more explanatory narrative than any of its provincial government equivalents. The current version was published in 2014 and replaced an existing policy compilation published in 2005.¹⁹⁷ Both the 2005 and 2014 versions of the federal prosecutors’ policy guidelines emphasize balancing of objectives and fairness. As such, both are much closer to the Ontario policy approach than that of Manitoba. The most substantive change is the 2014 inclusion of guidelines prohibiting using charging or plea negotiation discretionary power with the intent of avoiding mandatory minimum sentences or prohibitions on access to conditional sentences.

7.3. Conclusion

The Harper administrations’ legislative initiatives were processed by other systems. In this chapter, I considered two—the prosecution offices of provincial governments and the courts themselves. These systems produced different results. For example, the operation of prosecution offices in Ontario seems to have mitigated against the Harper administrations’ tough initiatives,

while in Manitoba these policies were accentuated. On balance, however, the court and provincial political systems appear to have muted the effects of punitive legislative initiatives.

In chapter 8, I deal with another partial explanation for the limited impact of the Harper administrations' legislative program. In that chapter, I argue that, to a degree, those leading the government did not really care if their initiatives had a substantive punitive effect. Their goal, according to this argument, was to mobilize political support for their overall program. Actual punitive toughness was desirable, but not strictly necessary for a legislative initiative to be deemed worth pursuing.

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8. Symbolic Action and the Harper Administrations' Tough-on-Crime Legislative Program

In chapter 7, I provide a partial answer to the muted effect of the Harper administrations' tough-on-crime legislative agenda. That is, I argue that the constraints of Canada's federal political system and the operations of the courts makes it impossible for any federal government to impose a change in the outcomes in dealing with violations of criminal law. Like every other federal government in Canada's history, the Harper governments introduced legislative changes and propelled them through Parliament. The law of the land was changed. However, these legislative changes were operationalized, mediated, transformed, and interpreted by the legal system and other political systems in ways that were unpredictable and contradictory. The last chapter argues that the Harper administrations did not have more of an impact because they could not do so.

In this chapter, a very different partial answer to the question of muted impact is claimed. Here, I argue that the legislative changes did not produce more incarceration because this might not have been its primary goal. I argue that the Harper administrations effectively modified the famous aphorism of British Chief Lord Justice Hewitt that "not only must justice be done, it must also be seen to be done."¹ In the 21st century Canadian-politicized version, the guiding aphorism could be "it is not essential that justice be done, so long as it is seen to be done." There was disconnection between the ends of the overall tough-on-crime program and the ends of individual acts that comprise the process of introducing and passing legislation. The analysis in this chapter is based on Edelman's concept of symbolic action.

The evidence presented in this chapter supports the argument that the tough-on-crime legislative program appears to have been directed at positioning the CPC as the only party responsive willing to address Canadians' fear of crime. On occasion, it appears to have been intended to foster this fear as well. The concrete result of increasing punitive responses was not always of primary concern. Instead, in the language of political manipulators of public opinion, "keeping the issue alive," "driving wedges," and "mobilizing the base" are of import. With this, actions in the form of holding press conferences, introducing legislation, and creating forums for "victims" to applaud the legislative initiatives are as important as the results of the legislation—or indeed, whether it is even passed.

It is difficult and dangerous to impute motivations to actions. People, and governments, usually have many motivations for actions. Any request for an explanation of a motivation will result in a justification—a constructed case in which the most reputable of these motivations are presented. Establishing intentions and motivations is thus difficult in normal situations. It becomes even more problematic when dealing with political decisions in which there is almost assuredly some degree of Machiavellian deceit. Rather than attempting to untangle motivations per se, I approach the question by analyzing actions as a comparative case study with actions in the United States and against an ideal type of a government truly alarmed by the level of criminal acts and truly believing that increased punitiveness is the appropriate public policy response. The actions of the Harper administrations are then compared to this ideal type² of a truly punitive government. If there are discrepancies between ideal and real, it is postulated that these gaps are at least partially intentional.

8.1. Characteristics of Being Tough on Crime as an Ideal Type

Both in running for office and while in government, the elected members of the Harper administrations portrayed crime as an immediate and urgent problem threatening the safety of Canadians. The level and dangerousness of this criminal activity was asserted to be in large part the result of "soft-on-crime" Liberal administrations that preceded it. To rectify this situation, an ideal tough-on-crime government would likely possess a number of characteristics:

1. *Temporal Urgency.* If crime is deemed to be a pressing and real problem by an incoming administration, the legislative response should be introduced early in the administration's mandate, be pursued through the legislative process with vigour, and be reasonably comprehensive in scope. An example of temporal urgency by an administration was U.S. President Bill Clinton's introduction of omnibus tough-on-crime legislation during the first year of his mandate followed by a concerted effort to successfully secure legislative passage the following year.³
2. *Commitment of Resources.* In addition to passing laws, a primary task of Parliament is to authorize the collection of revenue and allocate these resources for specified purposes. Allocation of resources is a signifier of substantive commitment to dealing with a problem.⁴
3. *Substantive and Real Increase in Sentencing Provisions.* The goal of protecting the public from criminal acts can form the basis of either a rehabilitative or tough approach to dealing with those convicted. With a rehabilitative approach, the base assumption is that those who commit criminal acts have an underlying pathological condition that can be prevented or cured.⁵ In contrast, the tough approach is premised on a greater belief in individual agency. Criminal acts arise from individual choices that can be altered by increasing negative sanctions (deterrence) or constraining the ability of the individual to engage in such acts (incapacitation).⁶

The ultimate expression of both deterrence and incapacitation is capital punishment. Corporeal punishments can also be used as deterrence, such as castration of those convicted of sexual offences⁷ or severing the hand of a pickpocket.⁸ In the absence of these potential punishments, incarceration becomes the primary instrument of both deterrence and incapacitation. Tough-on-crime political regimes thus seek to increase the use and duration of incarceration.⁹ Increased reliance on mandatory minimum sentences is often a feature of this approach in an attempt to ensure universal application of the principles of deterrence and incapacitation.¹⁰

4. *Streamlining of Legal Process While Maintaining Protections Against False Conviction.* Both deterrence and incapacitation are premised on the need to impose sanctions expeditiously. The discounting of future consequences means deterrence is more

effective if applied quickly, while incapacitation does not become effective until the individual is incarcerated. At the same time, the effectiveness of deterrence is undermined if the justice system produces a number of false convictions.

In this respect, Texas serves as a North American archetype for combining sanctions that are very harsh compared to other political jurisdictions with legal protections that are more favourable to the accused than in other jurisdictions.¹¹ A principled tough-on-crime approach would seek to both strengthen procedural protections for the accused and speed the adjudication process. An unprincipled one would simply seek to speed the process. In either case, a substantive tough-on-crime program would include changes to the legal process.

5. *Forging Political Consensus on Need for Action.* In a Parliament in which the executive possesses only a plurality of seats, support from Opposition parties is necessary to enact legislation.¹² Since a Parliament is sovereign within its field of jurisdiction temporally as well as geographically, if any legislative changes are to be assured of permanency, there must also be a level of support, or at least acquiescence, from other political parties that have a chance of forming government in the future.¹³

Tough-on-crime justifications are often coloured by the language of deserts. However, this has been excluded from the construction of the ideal type since the concept of aligning the punishment to the nature of the crime can moderate punitive impulses as well as increase them.¹⁴

8.2. Symbolic Aspects of the Harper Administrations' Tough-on-Crime Program

The substantive record of the Harper administrations can be compared to these ideal type components. In the previous chapter, the emphasis was on the systemic limitations faced by the Harper administrations. The political goal of toughness was implicitly assumed. In the analysis that follows, this assumption is removed. This analysis thus focuses on decisions and actions within the control of the government by comparing each of the elements of the Harper administration against the ideal type.

8.2.1. Temporal Sequencing and Symbolism

In their 2006 election platform, the Harper-led Conservatives claimed urgency for their tough-on-crime program, stating that “the federal government must act decisively to ensure that all Canadians—particularly the most vulnerable members of society—can live in safe, healthy communities.”¹⁵

The quickest way to pass and implement a broad range of legislative initiatives is with omnibus legislation that brings forward several acts in a single bill. Goertz argues that moderate legislators prefer single issue bills, while more radical legislators prefer omnibus legislation to impose comprehensive change with dispatch.¹⁶ The Harper administrations used omnibus bills to implement the democratic reform package promised in the 2006 election¹⁷ and later used omnibus legislation to change Canada’s environmental protection legislative regime.¹⁸ In contrast, in passing the tough-on-crime legislative package promised in the 2006 election platform, the Harper administration opted for a long series of individual pieces of legislation. Following the prorogation or dissolving of Parliament, omnibus legislation was sometimes used to pass the pieces of legislation that had previously died on the Order Paper.¹⁹ The reliance on individual discrete legislation to implement the tough-on-crime package was regularly attacked by both Liberal and NDP critics during the two minority Parliaments. The opposition members argued that eschewing omnibus legislation was an indication the government was more interested in symbolism than being substantively tough. A typical argument came from a Liberal member:

The government has been trying to convince Canadians that it is hard at work ending crime and violence, but the facts speak otherwise. It has a plethora of justice bills before committees. Instead of doing omnibus reform and criminal bills, several at a time, it has chosen to do probably 20 by the time it is finished, because that is 20 news cycles, 20 news stories.²⁰

In many cases, a tardy introduction of a tough legislative initiative was followed by a lack of prioritization in its passage. During the minority Parliaments, delay was commonly cited by government members as being the result of resistance from opposition members. These allegations were vigorously denied by opposition members who pointed to the government’s

control of the legislative calendar. Table 8.1 outlines the pace of passage of several key tough-on-crime proposals contained in the 2006 CPC election platform.

Table 8.1

Timeline for Passage of Selected Tough-on-Crime Measures Promised in 2006

Campaign Commitment	Legislative Implementation	First Introduced	Royal Assent	Supported by During First Incarnation
Restrictions on conditional sentences	C-9 (39-1)*	May 4, 2006	May 5, 2007	Liberal, NDP
Presumption of dangerous offender with three violent offences	C-2 (39-2) C-27 (39-1)	Oct 17, 2006	Feb 28, 2008	Liberal, Bloc Québécois
Repeal “faint hope clause”	S-6 (40-3)	June 5, 2009	Mar 23, 2011	Liberal
Restrictions on credit for time served in remand	C-25 (40-2)	Mar 27, 2009	Oct 22, 2009 ^o	Unanimous No recorded vote
Raise age of consent for sexual activity	C-2 (39-2) C-22 (39-1)	June 22, 2006	Feb 28, 2008	Unanimous No recorded vote
Legislation on “precursors” for manufactured drugs	C-475 (40-3) C-475 (40-2) C-428 (39-2) C-428 (39-1)	Apr 19, 2007	Mar 25, 2011	Unanimous Recorded vote
Reverse onus for bail for offences using firearms	C-2 (39-2) C-35 (39-1)	Nov 23, 2006	Feb 28, 2008	Liberal, NDP
Mandatory minimums drug trafficking	C-10 (41-1) C-15 (40-2) C-26 (39-2)	Nov 20, 2007	Mar 13, 2012	Liberal, Bloc Québécois ^a
Mandatory minimums for child sexual offences	C-10 (41-1) C-54 (40-3)	Nov 4, 2010	Mar 13, 2012	Unanimous No recorded vote
Mandatory minimums for using firearms to commit a crime	C-2 (39-2) C-10 (39-1)	May 4, 2006	Feb 28, 2008	NDP, partial Liberal

*Bill C-9 was substantively amended during the legislative process over the objections of Conservative members. These opposition-driven amendments limited the scope of the restrictions. The full implementation of the promised restrictions on conditional sentences was not passed until Bill C-10 of the (majority) 41st Parliament, 1st Session.

^oBill C-25 received third reading in the House of Commons on June 8, 2009. Passage by the Senate did not occur until November 21, 2009. The legislation was amended by the Standing Senate Committee on Legal and Constitutional Affairs, but these amendments were rejected by the Senate as a whole.

^aBill C-27 was opposed by all three opposition parties during second reading debate but was referred to a special committee for examination. After six meetings of the committee, Bill C-27 died on the Order Paper with the prorogation of the 1st Session of the 39th Parliament. The terms were reintroduced as part of the omnibus Bill C-2 in the 2nd Session of the 39th Parliament. An NDP-sponsored amendment to delete the reverse onus provisions was defeated by the Conservatives, Liberals, and Bloc Québécois members voting against. Bill C-2 as a whole was passed with only one dissenting vote from an NDP member.

^aThe Bloc Québécois supported the mandatory minimum provisions for drug trafficking offences when presented as Bill C-26 but opposed them as Bill C-15.

The urgency of implementation of Conservative tough-on-crime legislative changes varied greatly. In some cases, the administration was clearly determined to achieve quick passage. For example, in placing restrictions on the availability of conditional sentences, the Harper administration introduced legislation with dispatch and propelled it through the legislative process in the first session of its mandate. When the opposition parties objected to some aspects, the Conservatives jettisoned these provisions to secure expeditious passage of the remainder. The provisions that were removed from the original legislation were reintroduced and passed as soon as the Conservatives received a majority mandate.

By contrast, increased mandatory minimum sentences for sexual offences against children were not introduced until the fourth year of the Conservatives' mandate. The legislation was allowed to die on the Order Paper even though the opposition members did not even call for a recorded vote. When the provisions were reintroduced as part of the omnibus Bill C-10, government members argued passage had become possible.

Judging by actions alone, hypocrisy trumped commitment. An extreme example of a lack of commitment to an election promise was the criminalization of the possession and sale of the precursor substances used in the manufacture of crystal meth and ecstasy. This legislation was introduced as a private member's bill on several occasions and allowed to die on the Order Paper. Private member's bills are generally considered to be symbolic statements and rarely are passed into law.²¹ In one second reading debate, the Conservative member said, "I hope all members will join me in bringing to an end the possession, production, and trafficking of crystal meth and ecstasy in Canada. By directly targeting the ingredients of these devastating drugs, we can work to create a safer and stronger Canada."²² The Liberal critic responded by complimenting the Conservative backbencher "for taking the initiative and trying to fix the Conservative government's omission in not bringing this forward as part of its own legislation" and expressing "extreme disappointment" that the legislation had not been passed earlier.²³

The decision to disaggregate the CPC's tough-on-crime election platform commitments into discrete legislative initiatives contrasts with the Conservative commitments for democratic reform and accountability. There were 59 specific platform commitments related to this

programmatic area. Almost all commitments requiring legislative changes were included in the omnibus *Federal Accountability Act*.²⁴ This controversial, complicated, and comprehensive legislation was introduced on the seventh parliamentary sitting day of the Harper administration's first mandate. Despite opposition to many provisions by Liberal and NDP members, 28 days of committee hearings and eight recorded votes on amendment proposals, the legislation cleared the House of Commons on June 21, 2006, or sitting day 45. The Senate Standing Committee on Legal and Constitutional Affairs conducted another 30 days of hearings and proposed 156 amendments and observations. The Senate as a whole passed 158 amendments to the legislation, which caused another round of debate within the House of Commons along with three more recorded votes to deal with the proposed Senate amendments. Bill C-2 received royal assent on December 12, 2006, the 145th parliamentary sitting day of the Harper administration's first session.²⁵

The contrast between these two key Conservative election programmatic areas is stark.

8.2.2. Fiscal Commitments and Symbolism

In the words of Finance Minister Jim Flaherty, "Budgets say something about your motivation and goals. They say something about your priorities."²⁶

Punishing those who commit criminal acts requires resources. Police must be on the streets to apprehend and arrest those suspected of crimes. Prosecutors must present the case against the accused. Judges must pronounce guilt and impose sanctions. Jails and prisons must be available to house, feed, and confine prisoners. In the United States, the cornerstone of the *Violent Crime Control and Law Enforcement Act* of 1994 was federal funding for the hiring of 100,000 additional police officers²⁷ and \$9.7 billion in federal funding for prison construction.²⁸ From 1993 to 2012, real total justice spending in the United States increased by 74 percent.²⁹

The level of expenditure on criminal justice in Canada is difficult to establish with precision. Spending on corrections is almost exclusively devoted to the imposition of punitive sanctions, but even in this area, expenditures such as providing health care services to prisoners represent expenditures that would otherwise be in the health budget. Police expenditures are both

directed at items unequivocally dedicated toward imposing criminal sanctions and at items that are clearly unrelated to the task of punishing criminals, such as the RCMP's Musical Ride. Other police expenditures are partially related to enforcement of criminal law, such as traffic patrol and emergency response preparedness. Expenditures on the courts include family law and civil litigation in addition to the adjudication of criminal cases. Accounting systems in different jurisdictions deal with these categorical cost allocations differently, if at all.³⁰ Notwithstanding the methodological difficulties, the general tendency of expenditures on apprehending and punishing those committing criminal acts appears to have been on a general upward trend since 2002.³¹ The trend to increasing expenditures in criminal justice predates the Harper administrations, but continued into this period.

Expenditure levels in criminal justice involve decisions by three levels of government. The jurisdictional division of responsibility in Canada restricts the ability of the federal government to determine resource levels. The federal government determines the funding levels for the CSC, which operates prisons for those sentenced to terms longer than two years. It also appoints and pays superior and appellate court judges. Provincial governments are responsible for funding for prosecutors, the operation of the courts, most programs designed as alternative programs to incarceration, and jails for those sentenced to less than two years. Responsibility for funding policing is divided by municipal, provincial, and federal governments. A portion of policing is provided by the federal RCMP on a contractual and subsidized basis to provincial and municipal governments.

As a result of this divided jurisdictional authority, the federal government has limited direct control over justice spending. If the federal government wants to allocate more resources to implement a tough-on-crime program, a major component would be a subsidy or cost-sharing initiative directed at provincial and municipal governments. In the 2006 CPC election platform, commitments for resources for the criminal justice system focused on police. The Conservatives promised to hire an additional one thousand RCMP officers and provide funding to provincial and municipal governments to hire an additional 2,500 police officers.³²

We now examine the Harper administrations' record on committing resources toward a tough-on-crime program. This treatment deals with the three main components of the criminal justice system: policing, courts, and correctional facilities.

8.2.2.1. Fiscal Commitment for Policing

As noted above, the primary 2006 Conservative platform promised the hiring of one thousand additional RCMP officers and a cost-sharing program with provinces and municipalities in order to increase the number of police officers by 2,500. Given the role of the RCMP in some jurisdictions in providing provincial and municipal policing, these commitments represent could have resulted in a political double counting of officers. Nonetheless, there was a clear commitment to fund at least 2,500 additional officers, with the impression being conveyed that the increase would be 3,500 more officers. This would have represented a four percent increase in the number of police officers in Canada³³ or enough to sustain staffing levels to accommodate about two years of population growth. On a per capita basis, it amounted to about one-quarter of the 1994 American federal government's assistance for additional police officers.

In the Harper administration's first budget, the Finance Minister announced \$161 million to begin hiring the thousand promised RCMP officers and a \$37 million expansion of the RCMP's Regina training facility.³⁴ There was no mention of the platform commitment for a cost-sharing program for 2,500 more police officers. By the Harper administrations' second budget in 2007, the issue of resourcing for police disappeared completely³⁵ and was not mentioned again until the last budget in 2015 when the Finance Minister stated, "Our government has also focused on making our streets and communities safer from crime."³⁶ There was no articulation of resources directed at this focus nor any new spending commitment. Ironically, in the 2015 election, the NDP committed to "work with provinces, territories, municipalities, and indigenous communities to provide stable, ongoing funding to put 2,500 new officers on the streets and keep them there."³⁷ There was no acknowledgement that the commitment had been appropriated from the 2006 Conservative platform.

Provincial governments clearly believed that the Harper administrations had effectively reneged on its commitment for cost-sharing of additional police officers. The official

communiqué of the 2007 annual meeting of federal, provincial, and territorial justice ministers was positive in tone, stating that:

The federal Minister of Public Safety provided an update on the 2,500 additional police officers initiative. Provincial and territorial ministers asserted the importance of full and permanent federal funding. The federal minister reiterated the Government's position that the program be cost shared. The federal minister also noted that it is his intention to move forward with a proposal in a timely manner that fully respects provincial and territorial jurisdictions on policing.³⁸

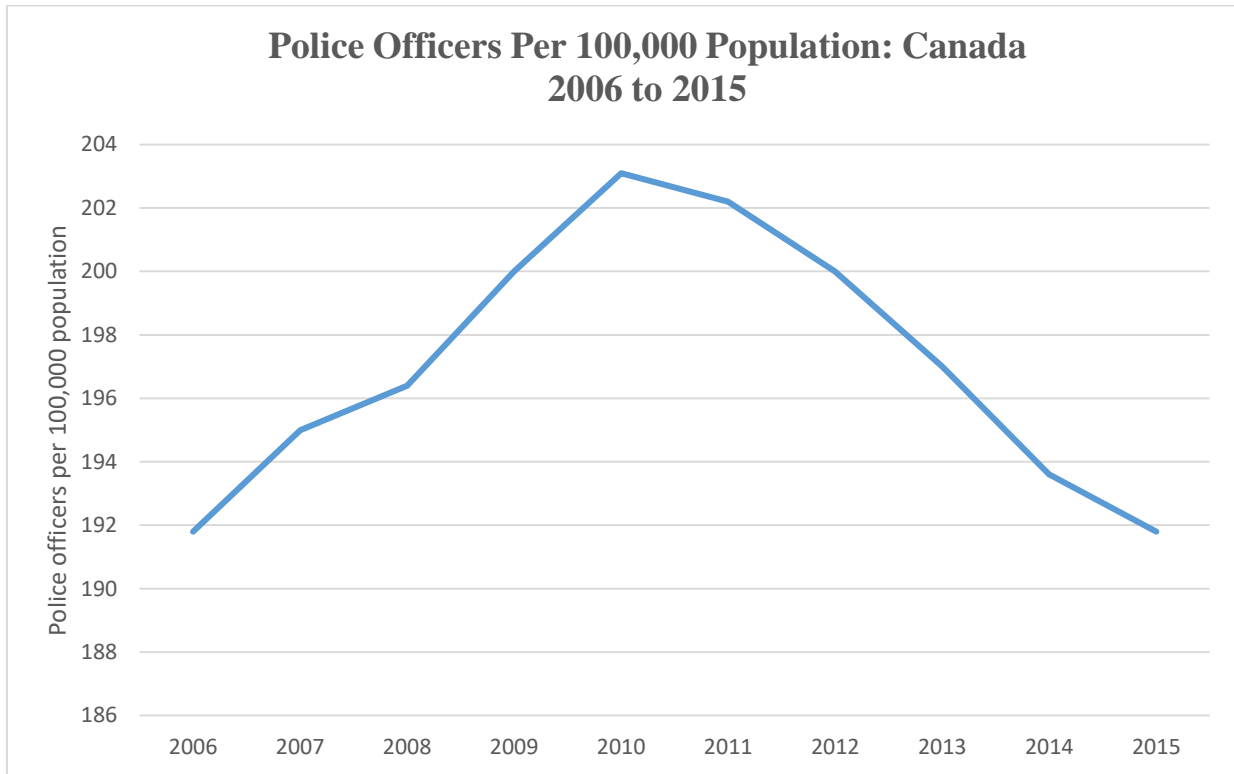
By the next meeting, the tone and content of the communiqué was less optimistic and congenial.

PT Ministers reiterated their position for permanent federal funding for the Police Officers Recruitment Fund. The federal Minister of Public Safety indicated that the federal government had delivered on its commitment to provide a one-time allocation to assist the provinces and territories in a manner that respects their responsibility for the administration of policing. It was agreed that this item will be on the agenda for the next Ministerial meeting.³⁹

Identical wording appeared in the justice ministers' communiqués for several years. In 2012, the communiqué stated that "the federal government reiterated that there are no plans to renew the one-time funding."⁴⁰ Following that definitive statement, future meetings highlighted discussions aimed at improving "the effectiveness and efficiency of policing" in order to "help transform and strengthen policing."⁴¹

In the absence of an ongoing cost-sharing program to increase the numbers of police officers, provincial and municipal governments did increase the number of police officers. The total number of officers increased from 62,461 in 2006 to 68,771 in 2015.⁴² However, this increase was sufficient only to compensate for population increases during this period. Figure 8.1 outlines the number of police officers per 100,000 population during this period. There was an increase from 191.8 officers per 100,000 population in 2006 to 203.1 in 2010. Increases in the number of officers then failed to keep up with population, resulting in population-adjusted police staffing levels returning to 191.8 in 2015. Police staffing levels by population were identical in the first and last years of the Harper administrations.

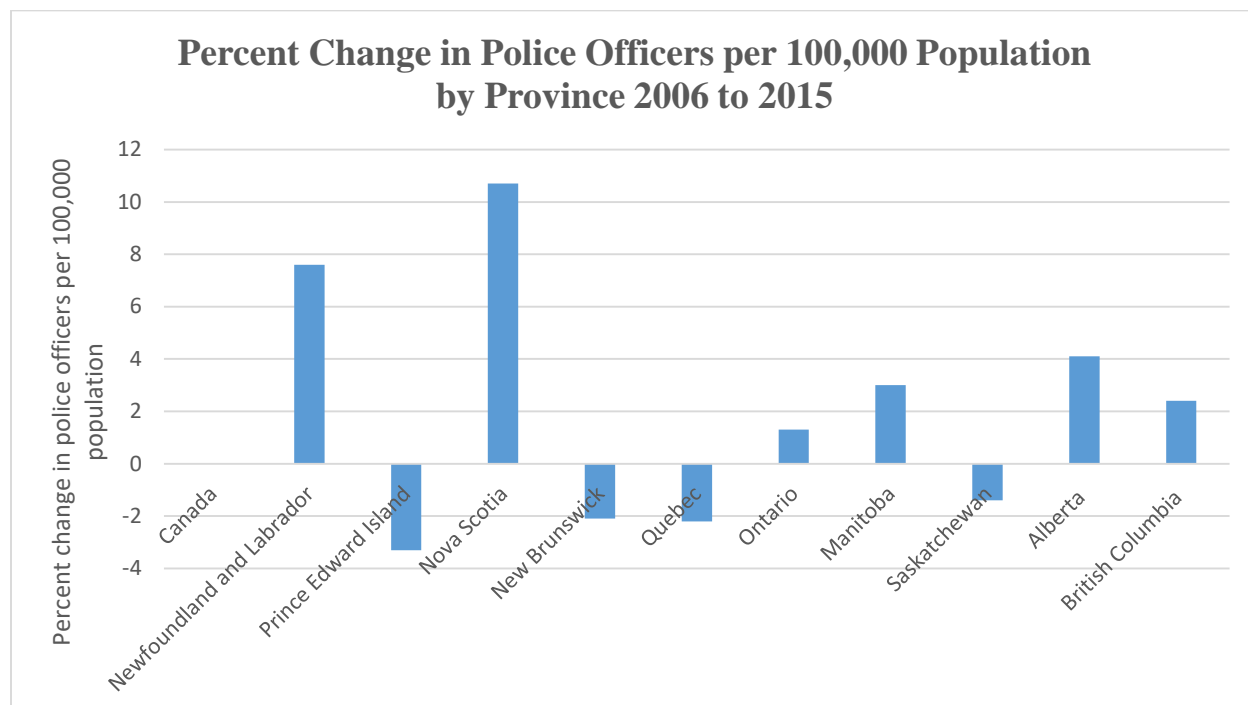
Figure 8.1



Source: Statistics Canada, *Police Personnel and Selected Crime Statistics, Canada, Provinces and Territories*, CANSIM 254-0002.

Changes in police staffing levels varied. Figure 8.2 outlines the change in the number of police officers per 100,000 population by province. This ranged from a 10.7 percent increase in population-adjusted police staffing levels in Nova Scotia to a 3.3 percent decrease in Prince Edward Island. Nationally, the police staffing levels on a per capita basis were identical at the beginning and end of this period. Increases in police staffing from 2006 to 2010 were offset by decreases from 2010 to 2015.

Figure 8.2



Source: Statistics Canada, *Police Personnel and Selected Crime Statistics, Canada, Provinces and Territories*, CANSIM 254-0002.

Provincial and municipal governments did express a fiscal commitment to policing in another way. Expressed in constant (2002) dollars, police salaries increased every year from 2000 to 2013. Average compensation for police officers employed by non-First Nations police services increased from \$67,865 (2002 dollars) in 2006 to \$75,499 in 2015.⁴³ In constant dollars, police salaries increased by 11.24 percent from the first year of the Harper administrations to the last. The increases in police salaries during the Harper era were part of a long-term trend in which police salaries increased in constant dollars by 40 percent from 2000 to 2013 compared with an 11 percent increase in the salaries of all employed Canadians during the same period.⁴⁴ The increase in police salaries was driven by collective bargaining outcomes and political decisions made by municipal and provincial governments. Federally controlled RCMP salaries lagged behind other forces during the terms of the Harper administrations.⁴⁵

8.2.2.2. Fiscal Commitment for the Courts

During the terms of the Harper administrations, the median length of time required to adjudicate criminal charges increased marginally from 124 days in 2005–06 to 126 days in

2015–16. This general modest increase in the length of time needed to adjudicate a case obscures variation between provinces and in the type of offence. Ontario (121 to 108 days), Saskatchewan (91 to 74 days), and British Columbia (105 to 104 days) experienced a drop in the median time to adjudicate a criminal code offence. All other provinces experienced an increase, with Nova Scotia going from 129 to 183 days and Quebec from 185 to 234 days. In general, the greatest increases in adjudication time were for crimes of violence.

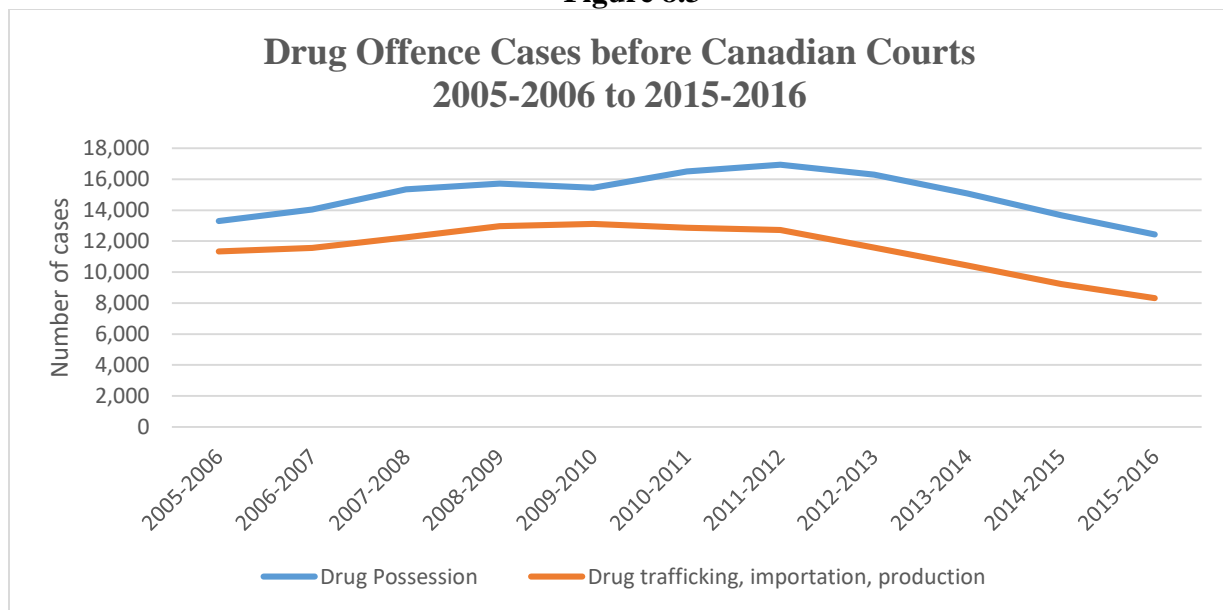
The median for crimes against the person increased from 154 to 176 days, while the median adjudication time for those accused of crimes against property rose from 111 to 113 days.⁴⁶ Delays in adjudicating criminal charges have been attributed to a complex package of factors including the increased complexity of technical evidence, the accessibility of legal representation for the accused, case management technology, a culture of adjournment,⁴⁷ and resource levels.⁴⁸ The administration and allocation of resources to the courts is within provincial jurisdiction. As a result, for the most part, resource allocation decisions about courts dealing with criminal offences are beyond the power of the federal government. The exceptions are the number of superior and appellate court judges available and the number of federal prosecutors available to prosecute alleged contraventions of the *Controlled Drugs and Substances Act*.

A long-term pattern of delays in filling vacant federally appointed judicial positions was identified by the Senate Standing Committee on Legal and Constitutional Affairs.⁴⁹ It has also been cited by the Chief Justice of the SCC as a major cause of delay in the adjudication of criminal cases.⁵⁰ In 2006, the incoming Harper administration inherited 23 federal judicial vacancies.⁵¹ By September 2006, the new administration had made only two appointments. The number of vacancies grew to 47.⁵² Media coverage of the issue was followed by ten appointments the following week⁵³ and another 43 by year end.⁵⁴ During the remainder of the Harper administrations' terms in office, the priority attached to filling vacant judicial positions appeared to ebb and flow, with another backlog created in 2010 when the government did not replace members of vetting advisory committees in a timely fashion.⁵⁵ The number of vacant positions tolerated by the government appeared to be related to media attention to court delays and controversy,⁵⁶ although the electoral cycle also appears important. An impending election produced a spate of judicial appointments.⁵⁷ In June of 2015, the Harper administration made 43

judicial appointments, reducing the number of vacancies to 14. The positions being filled with the pre-election appointments had been vacant for as long as 18 months.⁵⁸

The bulk of criminal prosecutions in Canada are conducted by provincial prosecution services. As a result, the federal government has little role in determining resource levels for this component of the justice system. Federal prosecutors conduct prosecutions for drug offences in all provinces except Quebec and New Brunswick, all offences related to terrorism, and national security and all criminal code offences in Canada’s three territories.⁵⁹ The format of reporting does not allow for comparative staffing levels dedicated to these functions prior to the Harper administrations’ assumption of office. Improvements to financial reporting allow for comparative reporting beginning in the 2007–08 fiscal year. At that time, 613 full-time equivalents (FTEs) were engaged in the prosecution of these offences.⁶⁰ By 2014–15 (the last full year governed by the Harper administrations), this had increased to 677 FTEs.⁶¹ This 10.44 percent increase in prosecutorial resources was slightly higher than the 8.95 percent increase in Canada’s population during this period.⁶² The activities of federal criminal prosecutors are directed at drug offences. Figure 8.3 outlines the number of drug cases dealt with during the Harper administrations’ terms in office.

Figure 8.3



Source: Statistics Canada, *Adult Criminal Courts, Cases by Median Elapsed Time in Days*, CANSIM 252-0055.

From 2006–07 to 2011–12, drug possession, trafficking, importing, and production cases increased from 25,608 to 29,675 or 15.88 percent,⁶³ outstripping the increase in the number of federal prosecutors and thereby decreasing the prosecutorial resources available for each case. During this period, the median length of time required to adjudicate drug possession cases increased slightly from 80 to 82 days, while the median time for other drug offences increased from 216 to 249 days. The median case time continued to rise after the volume of cases began to drop, reaching 99 days for drug possession cases in 2015–16 and 277 days for drug trafficking, importation, and production cases.⁶⁴

The other portion of the workload of federal prosecutors is the conduct of all criminal code cases in Canada’s three northern territories. Volume of these cases steadily increased until 2010–11 before beginning to decline. There were 3,429 criminal code cases in these territories in 2006–07 compared to 3,478 in 2015–16. In Yukon and Nunavut, the median time to deal with a case exhibited a pattern similar to the volume of cases, while in the Northwest Territories the median case time continued to rise as volume decreased.⁶⁵

In summary, the Harper administrations’ record on the two aspects of the court system for which it controlled resource allocation was mixed. The priority attached to appointing judges appears to have been influenced by the existence of controversy and the electoral cycle. Personnel numbers for federal prosecutors increased at a rate slightly above population increases. During the first half of the Harper administrations’ mandate, federal prosecutors faced increased workload resulting from increased case volume. Prosecutorial workload was subsequently lightened by a reduction in the number of cases. Throughout the period, the median time required to adjudicate a case continued to increase at a rate higher than that experienced by criminal code offences prosecuted by provincial prosecutors.

8.2.2.3. Fiscal Commitment for Jails and Prisons

The relationship between funding for jails and prisons and a federal administration’s toughness on crime is ambiguous. At the most basic level, incarcerating more people creates the need for more cells and prisons. At the same time, resource allocation decisions can have contradictory effects. Increasing the number of prisoners without increasing the number of cells

results in more crowded conditions, poorer food and fewer educational, vocational, recreational, and therapeutic programming. In some instances, increased inmate numbers in the absence of increased physical capacity has resulted in family visiting rooms, libraries, and vocational training areas being converted into dormitory accommodation.⁶⁶ Funding restraint can thus create a qualitative toughening of prison sentences.

However, increased spending cannot automatically be equated with less harsh conditions. More money can result in more intrusive monitoring. Segregation or solitary confinement units and long-term segregated “super-max” facilities provide for “single-bunking,” but carry with them both a financial cost to the system and a psychological cost to the inmate. Further, admissions to correctional facilities are not controlled by the administrators of this system, but are instead determined by the interaction between legislatively prescribed sanctions, resources allocated to police, and the adjudication decisions of the courts. Finally, in Canada, only about 40 percent of prisoners are held by the federal CSC and thus subject to resource allocation decisions by the federal government.⁶⁷

Any commitment for increased jail and prison resources to deal with the increased inmate numbers that could logically have been expected to arise from the myriad of “tough-on-crime” initiatives was absent in the 2006 Conservative election platform. The only indication directly related to the operation of jails and prisons was a commitment to “review the operations of the CSC with a view to enhancing public safety.”⁶⁸ In its first budget speech, the new Harper administration said it was “setting aside funds to expand Canada’s correctional facilities to house the expected increase in the number of prisoners as a result of changes in sentencing rules.”⁶⁹ This was the only time prison capacity or resourcing was mentioned during a budget speech of the Harper administrations.

The review of the operations of the CSC promised in the platform was completed in October 2007.⁷⁰ The report contained recommendations that have been interpreted as attacking the human rights of prisoners and stressing punitive sanction over rehabilitation,⁷¹ although there were exceptions to the general punitive orientation. For example, a policy adopted in 2001 was criticized for requiring all prisoners convicted of murder to serve the first two years of their

sentence in a maximum security facility for denunciation and deterrence purposes regardless of the inmate's actual security classification.⁷² The review panel report contained recommendations for increased capital expenditures to build new prison capacity, but the purpose was to replace existing capacity rather than to increase the overall supply of prison cells. The report did not contain any recommendation for, or mention of the need for, any actual increase in capacity.

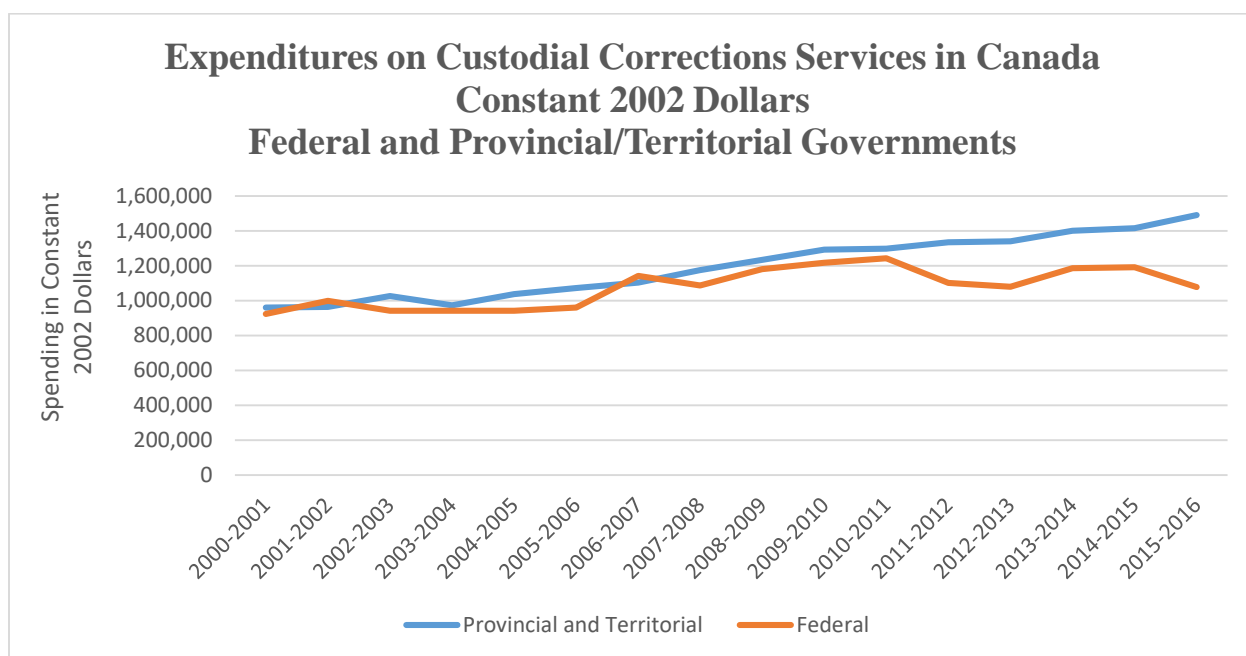
When the Harper administration assumed office, the CSC had a rated capacity for the incarceration of 14,261 prisoners. Of these cells, 737 (5.17 percent) were in facilities more than a century old and another 1,171 (8.21 percent) were in facilities more than 50 years old. The average age of in service facilities was 46 years. During the terms of the Chrétien and Martin administrations, most CSC construction had been directed at regional replacements for the 73-year-old Prison for Women in Kingston, the 140-year-old Laval Institute, and the construction of several relatively small "healing lodges" for indigenous prisoners in the Prairie Region. The only major addition of core incarceration capacity was the 1998 opening of the Fernbrook Institute in Ontario, with a rated capacity of 404 medium security prisoners.⁷³

The 2007 review panel report recommended construction of new facilities to replace obsolete capacity. It suggested that newer facilities would improve conditions, but the primary stated motivation was increased operational efficiency and economy. Attention was drawn to facilities that lacked toilets in cells, resulting in a situation where "staff must release prisoners individually to use common facilities."⁷⁴ In 2012, the CSC announced the culmination of the capital spending program resulting from the recommendations of the review panel. A total of 2,700 new incarceration spaces had been constructed.⁷⁵ The new capacity allowed for the closure of two facilities in Kingston, Ontario that had been built in 1835 and 1855, and another in Quebec that had been built in 1961. Institutions with a rated capacity of 1,045, or 7.33 percent of the capacity when the Harper government assumed power, were taken out of service. After accounting for the replacement of this capacity, the actual increase in incarceration capacity was 1,655 or 11.6 percent over the stock of prison cells in place when the Harper administration assumed office. During the same period, Canada's population increased by 8.95 percent, resulting in a marginal increase in prison capacity per capita.

During the Harper administrations' terms in office, some provinces engaged in construction of new jails. In his 2011 doctoral dissertation, Piché identified over three billion dollars in provincial prison construction ongoing or planned to create a capacity increase estimated between 6,312 and 7,348 new prison beds.⁷⁶ As in the case of the federal capital program, some new provincial institutions replaced obsolete facilities. The largest capital projects in Toronto⁷⁷ and Edmonton⁷⁸ combined replacement with expansion. In the case of Edmonton, a remand facility with a rated capacity of 388 but a population of 800 was replaced with an institution with a rated capacity of 1,952.⁷⁹ These two new facilities primarily house remand prisoners, the numbers of which are affected by decisions of police, prosecutors, and provincially appointed judges rather than any federal legislative change.

Figure 8.4 outlines the spending on jails and prisons in Canada in constant (2002) dollars. There was an increase in federal spending on prisons during the first half of the Harper administrations' tenure in government with an emphasis on capital expenditures. This was followed by a downward trend as the capital program instigated by the review panel report was completed. During the Harper administrations' last full fiscal year in office, real federal spending on prisons was 4.33 percent higher than when it assumed office. This increase was less than half of the increase in Canada's population. Real provincial spending on corrections increased by 28.31 percent during this same period.

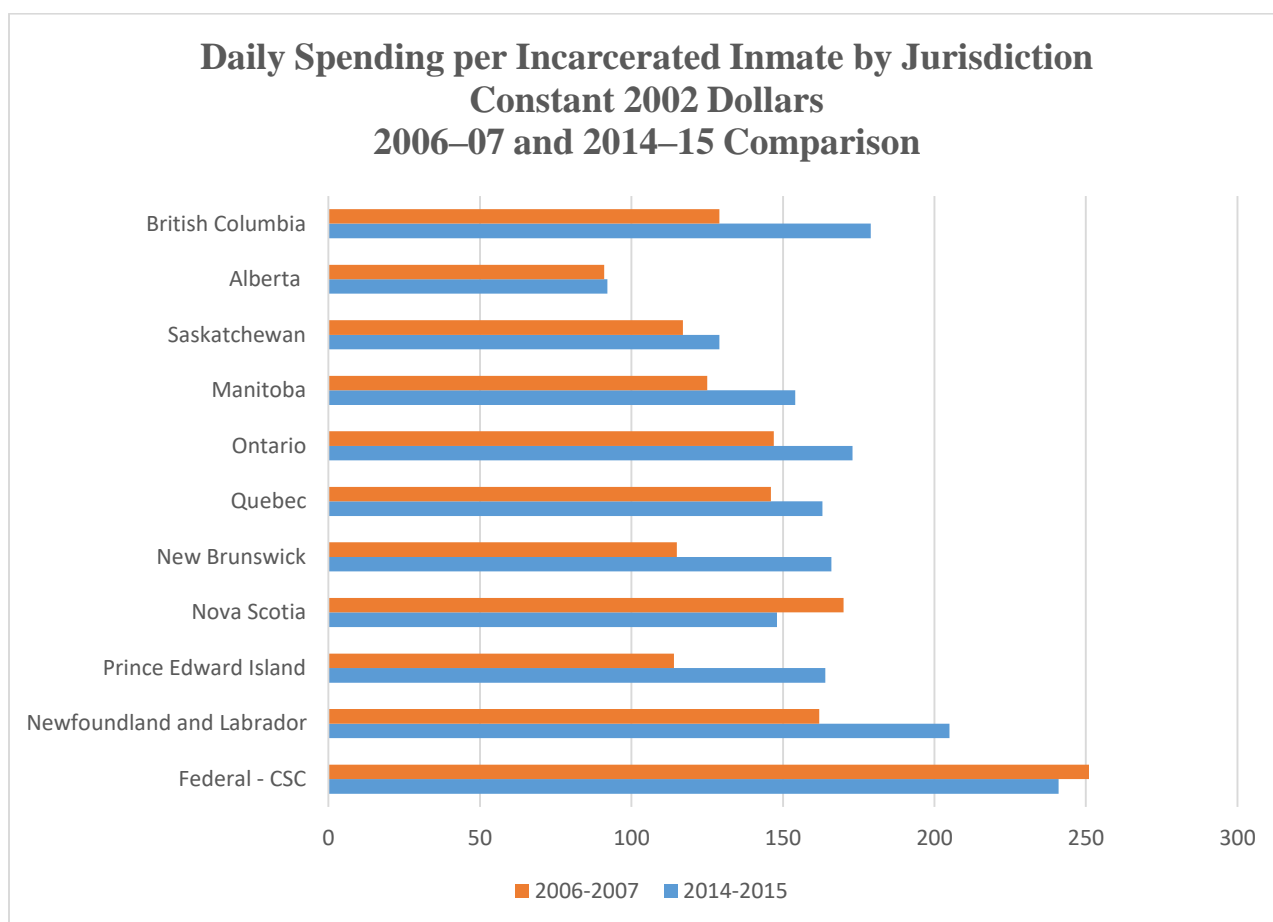
Figure 8.4



Source: Statistics Canada, *Adult Correctional Services, Operating Expenditures for Provincial, Territorial and Federal Programs*, CANSIM 252-0008.

Figure 8.5 outlines the cost per day of incarcerating an inmate by jurisdiction. As noted earlier, increased spending can be used to either increase or reduce punitive conditions. However, spending levels do indicate a willingness of political decision-makers to devote resources to delivering a public service. During the Harper administrations' tenure, real per inmate spending on incarceration increased in nine of the ten provinces, although only very marginally in low-cost Alberta. Spending per inmate dropped only in Nova Scotia and in federal penitentiaries.⁸⁰

Figure 8.5



Source: Statistics Canada, *Adult Correctional Services, Operating Expenditures for Provincial, Territorial and Federal Programs*, CANSIM 251-0018.

In addition to the relative stability of federal spending on prisons, the secrecy of the federal capital spending program is noteworthy.⁸¹ Emblematic of the Harper administrations' reluctance to engage in public debate about prison expansion is the announcement summarizing the results of the CSC capital program arising from the review panel report. Obsolete institutions that were being closed were identified, but there was no specific or disaggregated reporting of where capacity had been increased.⁸² This reticence to highlight, or even disclose, prison expansion contrasts with governmental behaviour in the United States. In the 1930s, the United States federal government chose the highly visible location of an island visible from downtown San Francisco for the site of its toughest prison as a symbolic statement of the expansion of its activities in fighting crime.⁸³ During the three decades of dramatic growth in American incarceration, construction of new prisons was highly visible as politicians used their

construction as an indicator of their toughness on crime and communities competed for prisons as an economic development strategy.⁸⁴ In some states, prison construction has been accompanied by interpretive museums at operating facilities to explicitly link prison construction with the promotion of community safety.⁸⁵ The Harper administration did not engage in the celebration of the construction of prisons as part of its symbolic commitment to get tough on crime. Where prison construction was celebrated, the government's focus was on the economic development and job creation benefits to communities rather than on the symbolic assertion of toughness.⁸⁶

8.2.2.4. Fiscal Commitment to Being Tough on Crime: Summary

The tough-on-crime legislative commitment of the Harper administrations was not accompanied by a fiscal commitment. The 2006 election commitment for a cost-sharing program to increase the number of police officers was much more modest than a similar commitment by the federal government in the United States during the Clinton administration. In any event, the commitment was quietly abandoned. Commitment to providing prosecutorial and judicial resources for the components of the legal system within the purview of federal constitutional authority was modest and sporadic.

There was some allocation of resources for new prison capacity. Almost half of this capital investment was directed to replacing capacity that was clearly obsolete. The remainder resulted in a capacity expansion that barely exceeded population increases. Unlike the aggressive and relentless promotion of legislative initiatives, resource allocation that did occur was done without being highlighted in communications vehicles such as budget speeches. In order to identify this construction, Piché needed to make extensive use of freedom of information requests.⁸⁷ While the opening of new capacity was done quietly, the closing of institutions deemed obsolete was accorded a higher profile by the government.⁸⁸

The issue of resourcing was the subject of parliamentary debate. In the second reading debate on the Harper administrations' legislation, the potential fiscal impact of the legislation and the lack of transparency on costing were the most common arguments raised by both Liberal (20.98 percent of arguments made) and NDP members (28.72 percent of arguments made). Bloc

Québécois members were much less focused on cost (9.55 percent of arguments made). Conservative members, on the other hand, almost never (1.49 percent of arguments made) focused on the fiscal impact of legislative initiatives. As a general practice, the government resisted providing estimates of the costs projected to result from the legislation.⁸⁹

In the absence of publicly accessible estimates of fiscal impact of legislative changes, the Parliamentary Budget Officer (PBO) (a position created by the *Federal Accountability Act* passed during the first year of the Harper administrations) produced fiscal impact assessments of two tough-on-crime legislative initiatives. The PBO estimated that the changes in eligibility for conditional sentences contained in the *Safe Streets and Communities Act* would have resulted in an additional cost of \$145 million if it had been in effect during the fiscal year 2008–09.⁹⁰ The changes in the treatment of time served while in remand custody embodied in the *Truth in Sentencing Act* used a similar methodology based on the contra-factual scenario of this legislation being in effect during the 2007–08 fiscal year. The PBO estimated that the *Truth in Sentencing Act* would result in an expenditure increase in the range of one billion dollars per year by the CSC and approximately three billion dollars per year for provincial and territorial governments.⁹¹ The legislative changes were not followed by increases in incarceration or spending approaching the PBO estimates. It should be noted that while constructing their costing estimates, “CSC officials failed to meet with PBO during the time that the project was being undertaken. Undertaking this type of costing exercise without rigorous bottom-up data from the department, absent any discussion with the department (CSC), poses significant risks.”⁹²

Despite inaccurate predictions of the magnitude of fiscal costs of the Harper administrations’ legislative program, the PBO reports appear to have accurately identified the distribution of costs by government. In both of the legislative costing studies conducted, the PBO argued that the bulk of additional fiscal costs would be borne by provincial and territorial governments. This was a theme consistently taken up by opposition members in Parliament. These predictions about the federal government externalization of fiscal costs appears accurate, as demonstrated by the different trend lines in corrections expenditures outlined in Figure 8.4. However, the expressions of concern about the fiscal impact on provincial justice systems arising from legislative changes do not appear to have been a major issue for the provincial governments

themselves. The annual meetings of the federal, provincial, and territorial justice ministers featured regular complaints about the Harper administrations' interpretation of its 2006 commitment for cost-sharing of additional police officers and requests for additional federal funding for legal aid services. Even so, the financial impact of legislative changes on corrections was never officially raised by provincial justice ministers during Harper administrations' tenure.⁹³ In chapter 7, the differential justice outcomes by province were noted. This contrasts with the American experience. Each state entered the 1970s with a different incarceration rate, and the rate of growth in incarceration varied over the next three and a half decades. However, growth in incarceration occurred in every state.⁹⁴

A key driver in the uniformity and continuity of policy direction was the use of American federal funding power to provide grants for police professionalization and growth, prison construction, and sentencing reform initiatives beginning with the *Law Enforcement Assistance Act* grants program launched in 1968.⁹⁵ Federal law enforcement granting programs even had a effect on academia with the creation of the Law Enforcement Education Program (LEEP) aimed at increasing the educational level and professional training of police and correctional officers. Immediately prior to the institution of the program in 1968, there were 184 American colleges and universities with criminal justice programs. This increased to 1,500 in 1980. To assist with the production of qualified instructors for the programs, seven universities received LEEP funding to establish PhD programs in criminal justice.⁹⁶ Quite simply, the Harper administrations' commitment to tough-on-crime policies did not follow the American model of using the financial powers of the federal government to encourage provincial and municipal governments to increase punitive infrastructure.

8.2.3. Sentencing Provisions and Symbolism

Increasing legislatively prescribed sentencing ranges and imposing or increasing mandatory minimum sentences was clearly the major legislative focus of the Harper administrations. In addition to changes in the prescribed penalties for specific offences, such as street racing, use of firearms in the commission of crimes, drug trafficking, major fraud, and sexual offences against children, legislative changes to restrict the use of conditional sentences

also had the goal and effect of imposing incarceration outcomes in more cases. While these legislative changes certainly had punitive outcomes for some individuals convicted of these crimes, there are three grounds for arguing that this extensive legislative effort was at least partly symbolic.

In some cases, the creation of new offences and new penalties simply represented a subdivision of existing offences. For example, creating the specific offence of criminal mischief toward war memorials is simply a situationally specific identification of the existing offence of mischief.

In other cases, increases in penalties or imposition of a mandatory minimum sentences were narrowly prescribed. For example, the imposition of a mandatory minimum sentences for fraud was restricted to cases involving the misappropriation of over one million dollars. For drug offences, mandatory minimums were imposed in a circumstantially conditional way for factors such as using the property of a third party without permission or using children as agents. In most cases, judges would have treated these as aggravating conditions warranting more severe penalty even in the absence of the legislatively prescribed minimum. Further, mandatory minimum sentences were often established within the normal pre-existing sentencing range imposed by the court. Some individuals were adversely affected but little change was created in the total amount of incarceration for these offences.

The third indicator of symbolic purpose to the program of legislatively increasing criminal sanction is the relatively small volume of criminal offences affected. In 2015, a total of 2,118,681 offences were reported to police. A total of 258,209 or 12.19 percent were offences that could be potentially affected by either specific legislative increases to sentences or by the general impact of changes in eligibility for conditional sentences. A total of 586,305 individuals were charged in that year, with 101,952 or 17.39 percent facing charges potentially affected by the legislative changes.⁹⁷ This estimate of the legislative changes potential coverage overstates the actual impact. For example, 94,425 incidents of fraud were reported by police. These resulted in 15,729 people being charged.⁹⁸ The primary impact of legislative change on sentences was the imposition of a mandatory minimum sentence in cases involving the misappropriation of over

one million dollars. While it is unlikely that most of fraud cases in 2015 met this criteria, the data does not allow for a disaggregation so all cases were included in the estimate. The legislative toughening of punishments thus affected only one in five people charged.

8.2.3.1. Case Study: Mischief to War Memorials

On February 11, 2011, Conservative MP David Tilson introduced a private member's bill, C-617. This bill created the crime of committing mischief on war memorials. It imposed a maximum sentence of 18 months incarceration for conviction on a summary charge and up to five years on an indictable charge. Regardless of how the Crown elected to proceed, Bill C-617 provided for a mandatory minimum of a thousand dollar fine for a first offence, 14 days incarceration for a second offence and 30 days for subsequent offences.⁹⁹ Like most private member's bills, C-617 died on the Order Paper after first reading. Mr. Tilson reintroduced it in the next Parliament as Bill C-217. This time, with Conservative and Liberal support,¹⁰⁰ it cleared third reading in the House of Commons before dying on the Order Paper in the Senate. The legislation was reintroduced a third time and received royal assent on June 19, 2014.¹⁰¹

Prior to the passage of Bill C-217, people who committed mischief (vandalism) on war memorials were subject to prosecution under the general mischief provisions contained in Section 430 of the *Criminal Code*. This provides for a penalty for conviction on an indictable charge of up to ten years if the property is valued over five thousand dollars and a summary conviction penalty if the Crown proceeded on a summary basis. Mischief on less valuable property carried a maximum two-year period of incarceration for an indictable offence.¹⁰² In 1995, the Chrétien Liberal administration introduced legislation adding the specific offence of mischief on a church or other place of worship that was motivated by hate. This carried the maximum penalty of ten years for a conviction on an indictable charge and 18 months for a conviction on a summary charge.¹⁰³ Special crimes relating to mischief in relation to computer data¹⁰⁴ and cultural property¹⁰⁵ had also been added to the *Criminal Code* prior to the Harper administration assuming office. The precedent of creating specifically designated offences for mischief based on the nature of the target was therefore well established prior to Bill C-217.¹⁰⁶

However, Bill C-217 differed from these other specially designated mischief offences because of the inclusion of mandatory minimum sentences.

During the debate on Bill C-217, Conservative members listed examples where war memorials had been vandalized or treated with disrespect. It was acknowledged that penalties had been imposed under the general mischief provisions of the *Criminal Code*, but discontent was strongly expressed about cases where inebriated people had urinated on war memorials and received conditional sentences. The sponsor of Bill C-217 told the House of Commons, “It is time to take a stand against this desecration of our sacred memorials and punish those responsible for this type of destruction.”¹⁰⁷ In opposing the bill, NDP members argued that the courts needed the capacity to distinguish between serious acts of destruction and inappropriate behaviour such as urination on the memorials. In the more minor cases, some mandated discussion with veterans had proven to be effective in changing both behaviour and attitudes. This was precluded by the mandatory minimum sentence.¹⁰⁸ A lawyer appearing before the House Standing Committee on Justice and Human Rights noted that the imposition of the mandatory minimum ensured a criminal record regardless of how minor the offence was or the success of any education arising from the charge.¹⁰⁹ This line of argument prompted a Conservative committee member to observe, “I’m not at all convinced that the main point of this bill is deterrence. I believe it is more about denunciation. As a Parliament, we wish to send a message to Canadians that this conduct is abhorrent.”¹¹⁰

The creation of the separate offence of mischief on war memorials has had a negligible impact on justice outcomes in Canada. In the five years since this offence was delineated from the general mischief provisions in the *Criminal Code*, a total of 1,379,624 cases of mischief have been reported to police. Of those, 12 involved war memorials. A total of 82,943 individuals have been charged with mischief offences—three of these charges for the special offence of mischief on war memorials.¹¹¹

8.2.3.2. Case Study: *Quanto’s Law*

On May 12, 2014, the Minister of Justice introduced Bill C-35, the *Justice for Animals in Service Act (Quanto’s Law)*.¹¹² This legislation proceeded in fits and starts. After receiving all-

party support and quick approval at second reading, Bill C-35 was not brought before the Standing Committee on Justice and Human Rights until April 27, 2015. Progress was then swift. The legislation received unanimous support in a recorded third reading vote on June 15¹¹³ and was introduced in the Senate on the same day. On June 23, 2015, *Quanto's Law* was proclaimed.¹¹⁴ The legislation had taken 407 days to become law despite being unanimously supported in both the House of Commons and the Senate.

Bill C-35 was named after an Edmonton police dog that was killed while assisting with the apprehension of a man who attempted to flee police after being stopped for driving a car with a stolen licence plate. Police Service Dog Quanto was released to catch the suspect and was fatally stabbed. The dog's killer received a sentence of 26 months incarceration for a basket of charges, with the presiding judge specifying that 18 months of the sentence was attributable to a cruelty to animals charge for killing the dog.¹¹⁵ Despite this demonstration of the applicability of existing provisions in the *Criminal Code* to the case, Quanto's handler lamented the lack of a specific law dealing with the killing of police dogs. Prime Minister Harper, accompanied by his wife and the Health Minister, travelled to Edmonton a short time later to announce the government would pass such a law. "This sends the message that violence against service animals is unacceptable and those who commit such callous acts will pay the consequences," Harper said.¹¹⁶

Quanto's Law stipulated that the sentence for the indictable offence of killing or injuring a "law enforcement animal" or a service animal would range from a six-month minimum to maximum of five years incarceration. Conviction on a summary charge would carry a maximum sentence of 18 months incarceration and or a fine up to ten thousand dollars. Sentences under this provision are consecutive to the sentences of any other charges arising from the incident, and judges are instructed to give "primary consideration to the objectives of denunciation and deterrence".¹¹⁷ Prior to the passage of Bill C-35, those convicted of killing or injuring any animal without lawful excuse were subject to a maximum penalty of five years by indictment and 18 months or a ten thousand dollar fine by summary charge.¹¹⁸ Bill C-35 left the maximum penalties unchanged but introduced a minimum for indictable charges, made any sentences automatically

consecutive, and specified the primary considerations in sentencing to be deterrence and denunciation.

The parliamentary debate on Bill C-35 centred on the perception of heroism on the part of police dogs. While the second reading speeches of most tough-on-crime bills were made by Parliamentary Secretaries, Bill C-35 warranted the attention of the Justice Minister who said, “The intent of the bill is to elevate the importance of what these animals do, the service they provide, and the potential vulnerability that is present in their life because of their service.”¹¹⁹ Passage of the legislation was presented as important as an act of societal denunciation. The Justice Minister said, “Sexually abusing a child or killing a police animal while it is conducting the task for which it is trained, in my view, requires serious denunciation.... This is one piece of legislation that transcends the lines of partisanship.”¹²⁰ While making very muted protests against mandatory minimum sentences, the opposition parties joined in the celebration of police service animals. The NDP Justice Critic chastised the government for not going further in toughening criminal code provisions for those convicted of injuring or killing any animal. Pointing to two NDP-sponsored private member’s bills, she said under NDP legislation “animals would be considered people and not property.”¹²¹

Committee hearings on Bill C-35 in both the House of Commons and the Senate consisted almost exclusively of a celebration of the virtues of police and service animals. The House of Commons Justice Committee summoned representatives of the Canadian National Institute for the Blind, the Canadian Federation of Humane Societies, and two police dog-handlers as the sole expert witnesses. The Senate committee replicated this witness list, but did add two representatives from criminal defence lawyer organizations. The lawyer witnesses stressed their love of dogs and supported the creation of a special offence for police and service dogs. They did, however, question the deterrent value and potential unfairness of the mandatory sentence while noting that the existing cruelty to animal provisions of the *Criminal Code* had been adequate to send the killer of Quanto to jail for 18 months and the killer of another police dog, Breezy, for two years.¹²²

For individuals, Bill C-35 has had more than symbolic effect. The first charge under the new legislation was laid in November 2015 after a police dog was injured in a raid on a home suspected of serving as an illegal gaming establishment. The accused faced the six-month mandatory sentence after the dog required five stitches.¹²³ In Kingston, an inebriated young woman faced the same mandatory sentence for slapping the rear of a police horse during a Queen's University Homecoming event. This charge was eventually downgraded to mischief.¹²⁴ As a symbolic statement celebrating service animals, Bill C-35 was successful for the government. A Google search of the term "*Quanto's Law*" generates over 5,200 results. Almost all are positive about the legislation. From Ontario, there was some discontent that the law was not named after Brigadier, a police horse killed by a hit-and-run driver in 2006. The horse's funeral had attracted over 1,200 mourners including Toronto's mayor and Ontario's Lieutenant Governor.¹²⁵ Brigadier's death had caused a Liberal MP to twice introduce private member's bills similar to Bill C-35, albeit without the mandatory minimum sentence and the inclusion of non-police service animals.¹²⁶

The symbolic celebration of police animals surrounding the introduction and passage of *Quanto's Law* does have implications. Police dogs can inflict considerable physical damage on humans.¹²⁷ Revulsion at the use of these dogs on civil rights demonstrators is viewed as a turning point in public opinion around desegregation in the United States.¹²⁸ In Canada, the use of police dogs using a "bite and hold" method is a not uncommon arrest tactic. Despite the injuries that this causes, courts have been "surprisingly tolerant of such violence".¹²⁹ Claims for redress have been rejected by the courts even when police dogs have injured innocent people sitting in their backyards¹³⁰ or walking down the street to buy cigarettes.¹³¹ Once a police dog has been used to effect an arrest, it is often unclear whether resistance and/or flight is an attempt to resist arrest or an attempt to avoid being bitten.¹³² If the dog is injured in such a struggle, the person struggling with the dog is subject to an extra-legal hazard even if they were attacked in error or without cause. In the celebration of the nobility of police dogs surrounding the passage of Bill C-35, the harsh and violent uses of these dogs was rendered invisible or irrelevant.

8.2.4. Legal Processes and Symbolism

The Harper administration did not undertake any comprehensive legislative reform of the rules or processes by which people are charged and judged for criminal offences. During this time, several specific measures were passed that affected the ease or speed with which people could be incarcerated.

8.2.4.1. Reverse Onus for Bail

In 2008, Bill C-2 or the *Tackling Violent Crime Act* added offences involving the use of firearms to the list of offences for which there was a reverse onus provision for bail applications.¹³³ This has the effect of making release from pre-conviction custody more difficult to obtain for those charged with these offences. The provision fulfilled a 2006 election platform commitment.¹³⁴

8.2.4.2. Dangerous Offenders

Bill C-2 also contained provisions to facilitate the process of declaring repeat violent or sexual offenders as long-term or dangerous offenders.¹³⁵ The legislation also provided for an indeterminate period of incarceration for those convicted of breaching a long-term supervision order.¹³⁶ The provisions fulfilled a 2006 election platform commitment.¹³⁷

8.2.4.3. DNA Testing

In 2011, Bill C-10 or the *Safe Streets and Communities Act* added two offences for which the provision of DNA samples for testing was compulsory.¹³⁸

8.2.4.4. Possession for the Purposes of Trafficking

The drug trafficking and production provisions in the *Safe Streets and Communities Act* facilitated convictions in addition to changing sentencing provisions by linking the “purposes of trafficking” to specific, measurable quantities of drugs.¹³⁹

8.2.4.5. Citizen's Arrest

In 2012, Bill C-26 or the *Citizen's Arrest and Self-Defence Act* expanded the legal ability of citizens to make arrests.¹⁴⁰ The legislation was introduced in response to the controversial case of a Toronto shop owner who was charged with a range of criminal offences after seizing, binding, and restraining a person who had been stealing from his store.¹⁴¹

8.2.4.6. Online Crime

In 2014, Bill C-13 or the *Protecting Canadians from Online Crime Act* contained provisions for police to obtain an order compelling people or internet service providers to preserve electronic data or a warrant to produce this information.¹⁴² The purpose was to facilitate police obtaining electronic evidence for the investigation and prosecution of crimes such as cyberbullying, spreading hate propaganda, and spreading computer viruses. The legislation also provided for the issuing of warrants to allow police to install tracking devices on things normally carried by people in order to track personal movements during investigations.¹⁴³

8.2.4.7. Not Criminally Responsible

In 2014, Bill C-14 or the *Not Criminally Responsible Reform Act* specified that public safety was to be the “paramount consideration” when deciding whether people who had been found not criminally responsible for a crime because of a mental disorder should be released.¹⁴⁴ The legislation also provided for a “high risk” designation for such people and for the involvement of victims in the adjudication process that determined whether such people would be released from secure-custody treatment facilities.¹⁴⁵ The legislation was first introduced as Bill C-54 in 2013. In introducing the legislation, the Justice Minister stressed a public safety rationale and stressed that the bill did “not seek to impose penal consequences on people who have been found by the courts to be not criminally responsible on account of mental disorder.”¹⁴⁶ However, the legislation was explicitly intended to maintain restrictions on the liberty of people who had not been criminally convicted of a crime but whose medical condition—which could be cured or taken under control—caused a normally criminal act. The legislation was introduced in response to controversies arising from the easing of restrictions on a man who had beheaded a

fellow passenger on a bus and a doctor who had stabbed his two young children. Both had been found not criminally responsible for their actions and both had been deemed by medical professionals to be no longer a risk to the community, subject to monitoring.¹⁴⁷

8.2.4.8. Legal Processes and Symbolism: Summary

The Harper administration did not attempt any comprehensive change in legal processes. The functioning of the justice system operated as found. Changes that were made were tough on crime in direction but affected relatively few people. The only change that appears to be part of an integrated policy process are the changes in the *Protecting Canadians from Online Crime Act* in which the government responded to a changing technological and social environment with a package of changes to criminal law. Other changes appear to be more symbolically responsive to public controversies. The reverse onus for bail in cases involving the use of firearms and the changes to dangerous offenders' legislation originated from the Conservative Party of Canada's 2006 election platform. The changes to provisions governing arrests made by citizens and the treatment of those found not criminally responsible were made in explicit response to cases of an extremely rare but highly controversial nature. As such, they were ideal candidates for symbolic legislation as the government promised to prevent events that were unlikely to occur with any regularity in any event. Finally, in the legislation dealing with bail provisions and those found not criminally responsible, the legislative changes had the explicit objective of maintaining carceral or quasi-carceral sanctions for people who have not been convicted of any criminal offence. In both cases, the government was careful to insist that the policy goal was public safety rather than punishment.

8.3. Forging Political Consensus and Symbolism

The passage of legislation is one stage in the process of enacting a governmental program. If there is political will to create long-lasting transformative change, chances of success are increased if proponents work to forge a broad political consensus so that a subsequent government will not overturn the legislative initiative. It will also create and strengthen institutions that will work to ensure a continuation of the policy direction.¹⁴⁸ The record of the Harper administrations in pursuing the tough-on-crime program was weak in both these areas.

As outlined in discussion of the passage of specific pieces of legislation in chapter 5 and in the discussion of the timing of legislation, opposition parties supported most items in the tough-on-crime legislative program. In the two minority Parliaments, passage was predicated on obtaining support from at least one opposition party. This was almost always available. The basis existed for forging a broad political consensus by accentuating the points of agreement. Almost always, however, members of the Harper administrations accentuated cleavages in order to argue that the opposition parties were “soft on crime.” The introduction of legislation was very often presented as an ultimatum in which the choices were immediate passage or portrayal as being opposed to the safety of Canadians. On occasion, alleged obstruction of legislation was fabricated. For example, mandatory minimum sentences for sexual offences against children were initially passed during the Martin Liberal administration. The Harper administration made no effort to increase these mandatory minimum sentences until it introduced Bill C-54 on November 4, 2010, or 1,676 days after the first parliamentary sitting day of a Harper administration. Despite being unopposed by any opposition member, even to the extent of calling for a recorded vote, the increases in the minimum mandatory sentences were not passed prior to Parliament being dissolved for the 2011 general election. The lack of passage was blamed on “obstruction from the Ignatieff-led Coalition – true to its soft-on-crime ideology”.¹⁴⁹ The platform proclaimed “enough is enough” and promised that “a Stephen Harper-led majority government will bundle these bills into comprehensive legislation and pass them within the new Parliament’s first 100 days.”¹⁵⁰

Opposition members regularly complained that Conservative members were more interested in creating cleavages for partisan advantage than in the expeditious passage of legislative initiatives. The politics of cleavage reached a rhetorical culmination when the Minister of Public Safety responded to a technical question on increased powers to police for the interception of electronic communications by telling a Liberal member, “He can either stand with us or with the child pornographers.”¹⁵¹ Maltzman and Shipan argue that inter-party consensus and participation in the legislative process is a key predictor of the long-term durability of legislative initiatives.¹⁵² The parliamentary tactics of the Harper administrations were clearly biased in favour of short-term partisan advantage over the longevity of its initiatives. In consequence, one of the top-ranked instructions given by Prime Minister Trudeau to the Justice

Minister following a change in government in 2015 was to “conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade.”¹⁵³

In addition to forging partisan consensus, those implementing a legislative program can create and strengthen institutional support for the program’s continuation.¹⁵⁴ In the United States, the federal fiscal support embodied in early tough-on-crime legislative initiatives expanded political constituencies of police and corrections workers which became actors in lobbying for additional punitive measures,¹⁵⁵ such as the implementation of California’s “three strikes” law.¹⁵⁶ As discussed earlier in this chapter, one indicator of the symbolic nature of the Harper administration’s tough-on-crime program was the relative absence of a fiscal commitment. This had the additional contra-factual effect of a failure to expand the size and political weight of occupational groups with a self-interested reason for promoting additional punitive measures.

8.4. Conclusion

For the Harper administrations, the tough-on-crime program contained a rich vein of potential symbolic acts to be mined as it sought to build and maintain enough political support to form a majority government. The Conservative members formed government with an accumulated stock of outrages that could be symbolically addressed. On many of these items, there was substantive overlap in interpretation with the platforms of other major parties. Quick passage of a reasonably comprehensive package was likely possible even in a minority Parliament. In marked contrast to the tough-on-crime initiatives, this occurred in the implementation of the Conservatives’ fiscal or taxation and democratic reform platform commitments.¹⁵⁷ Esselment characterizes the slow progress of this legislation as having become “bogged down”.¹⁵⁸ More likely, the slow pace of reform was at least partially intentional as the platform was disaggregated to produce a series of symbolic acts. As the platform commitments were eventually passed, the normal unfolding of events periodically generated controversies in which people were outraged or frightened by the unusual and despicable acts. The Harper administration was alert to these opportunities to pass legislation that often affected very few people but which provided a symbolic statement of the government protecting the safety of Canadians.

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- ¹³² Shaw, "Law on the Use of Police Dogs," 344-346.
- ¹³³ Bill C-2, 39th Parliament, 2nd Session, Clause 37.
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- ¹³⁵ Bill C-2, 39th Parliament, 2nd Session, Clauses 39-53.
- ¹³⁶ Bill C-2, 39th Parliament, 2nd Session, Clause 43.
- ¹³⁷ CPC, *Stand Up*, 23.
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- ¹⁴⁰ Bill C-26, 41st Parliament, 1st Session.
- ¹⁴¹ Lam and Cho, "Under the Lucky Moose," 147-162.
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9. Conclusion: The Dog That Did Not Bark

This dissertation began with the observation of a disconnection between the stated intent of the Harper administrations' criminal justice policies and the substantive result. In the 2006 election, the CPC made getting tough on crime one of the central features of their election platform. To a degree, they were joined by the Liberal Party and the NDP. At least in English speaking Canada, there appeared to be a consensus among political strategists that voters were concerned about the harm arising from criminal acts and that increased incarceration levels were required. This commitment to getting tough on crime was reflected in the legislative program of the Harper administrations as a large volume of tough-on-crime bills were introduced and passed. Despite this, on a per capita basis, incarceration rates in Canada remained stable while on a per-offense basis, incarceration rates increased across Canada, but with a high degree of variation between provinces. Canada did not witness the massive growth in incarceration experienced in the United States for two and a half decades beginning in the early 1970's. As a result of this observation, two interdependent research questions were posed:

1. Given the volume of tough-on-crime legislation, why did the Harper administrations have a muted substantive impact on incarceration rates?
2. Given the modest substantive effect, why did the Harper administrations continue to make tough-on-crime legislation a cornerstone of their political agenda?

9.1. Key Empirical Findings

The first empirical task faced in the conduct of this study was to assess whether the stability in incarceration rates reflected stability in the disposition of criminal charges or whether it was a statistical artifact of factors such as population changes, rates of criminal offending or a

change in the composition of criminal offences. I argue that the substantive effect of the legislative changes appears muted rather than non-existent. When accounting for the ongoing drop in the rate of reported criminal offences, incarceration rates increased slightly during the Harper administrations' tenure. The modest increase in incarceration rates began prior to Harper's assumption in office. When examined by guilty cases rather than by population or the number of offences, the data suggests that there was a small increase in the likelihood of a person convicted of a criminal offence being incarcerated. This was offset by a reduction in the average length of incarceration. The net result was a modest decline in the total level of incarceration per person convicted. The clear exception to this general finding of either stability or softening in the response to those convicted of criminal offences was in the trafficking, importation or production of illicit drugs. The toughness of the response to these offences increased during the tenure of the Harper administrations. The other probable exception to the stability or softening of response to people convicted of sexual offences against children. In this case, the available aggregate data is ambiguous. However, drug offences and sexual offences against children constitute only a small portion of total criminal offences, charges, and convictions. The primary empirical conclusion is that there was only modest substantive change in carceral outcomes during the Harper era.

The conclusion that the initial observation of relative stability in incarceration rates resulted primarily from stability in treatment rather than being a statistical artifact arising from changes in population or rates of criminal offending justified detailed examination of the causes of this muted outcome. The findings were can be subsumed under two headings. The first is that the federal government lacked the power to directly dictate outcomes in the Canadian criminal justice system. The second is that the actions of the Harper administration were not always consistent with the stated objective of getting tough on criminals.

9.1.1. Empirical Findings of Systemic Limitations on Federal Powers

Two key limitations on the power of a federal governmental administration to achieve outcomes desired by the federal government were identified. The first was the manner in which the courts adjudicated individual cases. The second was the manner in which provincial

governments administered the aspects of the justice system under their jurisdiction, with specific reference to the direction given to prosecutors.

Judges are responsible for evaluating the facts of each case against the legislatively prescribed sentencing ranges, the objectives of sentencing enumerated in Section 718 of the *Criminal Code of Canada* and past decisions. It was found that judges offer a different set of justifications for the adjudication of individual cases than do legislators involved with establishing the range of permissible sentences. The judicial approach of weighing the facts of the current case against the facts and sentences of past cases results in judicial change being slower and more incremental than politically driven change. This crystallized in a number of cases where the Harper administrations' prescribed mandatory minimum sentences were found to be in violation of the *Charter of Rights and Freedoms* on the basis of comparability with sentences imposed in the past.

The examination of interprovincial incarceration rates and case outcomes revealed variation between provinces even with a common legislative framework. This difference in carceral outcomes is consistent with different directives issued to prosecutors. For tough legislation passed by the federal government to have tough outcomes, there must be tough policy direction to prosecutors. The centrality of this was illustrated by the comparative case study of Ontario and Manitoba. In Ontario, where prosecutors were not issued tough direction, incarceration rates remained stable. In Manitoba, where prosecutors were directed to respond to legislative changes in a tough fashion, incarceration rates doubled.

9.1.2. Empirical Findings Pointing to Goals Other Than Getting Tough

While the members of the Harper administration often proclaimed their commitment to tough measures and introduced a large volume of legislation that had the stated intention of toughening Canada's response to convicted criminals, their actions were not always consistent with a program of getting tough.

The most important disconnection between the proclaimed goal of getting tough on crime and governmental action was in the allocation of resources. Locating, arresting, convicting and

incarcerating those who commit criminal acts is expensive. The Harper administration appeared unwilling to provide the financial resources necessary for a tough-on-crime program to be implemented. Its financial commitment to police, courts and corrections was lower than the commitments American governments were willing make in getting tough. Even where money was spent in corrections, transparency was limited. A 2006 election commitment to fund additional police officers was renegeged upon.

In the absence of a major fiscal commitment to implementing its tough-on-crime program, the members of the Harper administration relied primarily on legislative change. Even here, actions were sometimes inconsistent with the stated goal of toughness. The legislative program was divided into many components and introduction was spread over many years. Once legislation was introduced into Parliament, passage was sometimes pursued in a very desultory fashion, even where support or acquiescence from opposition parties existed. Announcements of action appeared often take precedence over acts to secure passage in an expeditious fashion. The substance of the legislation sometimes promised little substantive effect. Existing offences were subdivided to create new offences; laws were proposed to increase punishments for high profile, but very rare, offences; and mandatory minimum sentences were stipulated that were within the sentencing ranges already being imposed by the courts. Taken together, it appears that much of the Harper administrations' criminal justice legislation was driven by the desire to create the impression of toughness rather than to actually increase carceral outcomes.

9.2. The Evidence and its Limitations

A multi-faceted argument was made in this dissertation. This necessitated the utilization of a wide variety of data sources to be used as evidence. The four most important were the surveys and compilations of administrative data conducted by the Canadian Centre for Justice Statistics and reported in Statistics Canada's CANSIM series (acts of those committing crimes, police and the courts); the record of legislative acts presented on the Parliament of Canada's *LEGISinfo* website (legislative acts of elected officials); the *Hansard* record of parliamentary debate (utterances by elected officials); and the compilation of judicial decisions compiled by the

Canadian Legal Information Institute (CANLII) (a combination of utterances and acts by judges).

9.2.1. Statistics Canada's Criminal Justice Statistics

Statistics Canada's presents data on incarceration, criminal offences reported to the police, and the results of court decisions in a series of sortable CANSIM tables. Analysis is limited to the categories established by Statistics Canada and is confines the user to descriptive statistics. Linkage between the data sets is impossible (i.e., tracking a case from offence to charge to court appearance to incarceration). Some of the data sets report on the basis of a calendar year while others report on the basis of the governmental fiscal year. This makes the means that rates combining data from different reporting series can only be estimates.

The data on incarceration admissions and inmate census are appear accurate since they report on the counting of things that are easily countable. The statistics on criminal offences almost certainly under-report the actual incidence of criminal acts since they are based on individuals filing a complaint when they are victimized.

The aggregate data on court results based on the ICCS is the most problematic since provinces began reporting at different times; coverage is incomplete because superior courts in several provinces still do not report; the complexity of the possible mixture of charges and past criminal records of those convicted cannot be controlled for; the election decisions by prosecutors for hybrid offences is not reported; and there is a lag between the commission of the offence and the disposition of the case. In this dissertation, I made the necessary assumption that the volume of cases mitigate against unobserved changes in these factors from biasing results. However, like all assumptions, this could be false. As a result, the analysis of trends in toughness in sentencing should be treated with some caution. However, these findings produce results are generally consistent with the more reliable data on incarceration.

9.2.2. Record of Legislative Acts

The Parliament of Canada tracks action on each stage of the legislative process. A high degree of certainty can be attached to the recording of these acts.

9.2.3. Record of Legislative Utterances

The Parliament of Canada records, transcribes and provides French/English translation for all recognized speakers in both House of Commons and Senate debate and in committee hearings conducted by both legislative bodies. Arguments made in second reading speeches were coded and counted to identify the importance of different substantive arguments. Speeches and testimony of committee witnesses were also read to identify expressions of salient arguments. While problems of audibility and potential for minor editing exist, the largest problem with this source of data is the purpose to which it was put in this dissertation. The words being uttered and the justifications mounted during legislative debate was treated as an indication of the ends being pursued through legislative acts. As discussed in chapter 4, parliamentary debate often consists of the articulation of arguments that are arrived at in other forums and directed at audiences outside of the legislative body. It is possible that in some cases these statements are intended to conceal or distort the actual motivations for the legislative act. A richer source of data would be watching recordings or having access to the minutes of other deliberative bodies such as cabinet or party caucus meetings. These, however, are both legally and legislative inaccessible to researchers. In order to address the problem of utterances that are possibly intended to obscure rather than illuminate, I adopted the strategy of presenting both the arguments and acts in order to identify discrepancies.

9.2.4. Court Rulings

Relevant judicial decisions were selected from the CANLII data base collection (2,311,347 cases as of April 30, 2018)¹ using a combination of keyword search and snowball sampling techniques. Coverage of cases is complete for the Supreme Court but becomes less complete the lower the level of court. As a result, the analysis in this dissertation is likely missing cases, particularly at the trial court level.

The primary source of evidence for the substantive content of judicial rulings was the aggregated data compiled the ICCS and discussed above. The decisions examined were primarily analyzed as the utterances by judges and approached with the same combination of coding and selective identification of quotes used for the analysis of utterances by legislative actors.

9.3. Theoretical Implications of Empirical Findings

This dissertation was informed by the systems theory of Niklas Luhmann and the theories of symbolic action developed by Murray Edelman. The explanatory power of these theoretical constructs will now be evaluated against in the empirical findings.

9.3.1. Luhmann and the Problem of Systems Boundaries

For the purpose of this dissertation, the essential aspect of Luhmann's systems theory is that society is composed of a number of discrete systems each of which operates according to its own communicative code and systems logic. Each system processes the actions of other systems according to its own internal logic in an attempt to maintain the integrity of its own system's boundaries and processes. One result is indeterminacy. As the political system chooses to deal with a perceived problem with the passage of legislation, the implementation and interpretation of this solution moves to other systems, most notably the system of law or the courts. These systems process the new legislative input according to their own logic with results that may be different from that envisioned by the political system. From this theoretical formulation, I suggest that one reason for the modest substantive effect of the Harper administrations' legislative program was systemic limitations on the ability of a federal government administration to impose its will on the Canadian criminal justice system. Two systemic issues were dealt with, namely the court system and the system of the administration of justice.

The record of the Harper administrations' criminal justice initiatives before the courts supports Luhmann's general theoretical propositions. Legislative initiatives were processed by the courts using different criteria than the political system. Even where words were the same, meanings appeared different. Proportionality for the courts meant the consistent treatment of like offences. For those in the political system, the concept was both broader and more imprecise as political actors attempted to establish proportionate penalties for unlike offences. Legislative initiatives were regularly modified or rejected by the courts through rulings on a series of cases, while controversial court rulings generated new political issues inviting legislative responses. The stresses between the two systems were evident in the volume of legislation modified or overturned by the courts, and by the unusually high level of acrimony between the federal

government administration and the judicial system. In this, it is worth noting that the federal government's power to appoint judges as vacancies occur is not a tool sufficient for the political system to impose its will.

Supreme Court judges appointed by Harper voted against the government's interpretation of legislation on a majority of occasions. The sample is too small to be definitive, but it appears that the longer a Harper appointment was on the Supreme Court, the more likely he or she was to align with other judges than with the political interpretation of legislation. In the end, the Harper administration was deferential to the courts in accepting the results of Supreme Court decisions rather than using other constitutional or legislative powers to directly challenge the court's authority. Once the government had removed a problem from the political system by passing legislation and announcing a problem as solved, there appeared to be little appetite for selecting the same problem once again for continued political controversy and solution. The system of law clearly operated to maintain the boundaries and internal processes. As one result, the substantive impact of much of the legislation was muted. However, as Habermas points out, the range of tolerance within the functioning of systems means that change can be induced without creating a systems crisis.² While the courts appeared to have functioned to achieve autopoiesis, this should not be taken to imply the ongoing existence of a steady state. The operation of the political system during the Harper administrations did result in some changes to the decisions of courts, just as the operations of the courts affected political decisions.

The more substantive problem exposed in Luhmann's theoretical construct revealed in this analysis of the Harper administrations' criminal justice policies arises from the actual boundaries of systems themselves. Luhmann suggests that "the state is the self-description of the political system."³ The positing of the unity of the state and political system creates jurisdictional boundaries as a lacuna in analysis. As was discussed in chapter 7, a limitation on the powers of the Harper administrations' ability to impose a tough-on-crime approach in a unified way across Canada was the constitutional authority over the administration of justice by provincial governments and the resulting differences in the exercise of prosecutors in different provinces. The system of politics is not embodied in "the" state but in several state systems each with jurisdictional boundaries that are constitutionally delineated and vigorously defended. Each

provincial government adopted a somewhat different response to the Harper administrations' legislative initiatives, ranging from active support to resistance. As a result, the effect of the federal legislative regime was experienced in a differential fashion across Canada.

The effect of the operations of the system of law (courts) and a portion of the system of politics (provincial governments) on the Harper administrations' justice policies supports a systems-based explanation of the muted impact of the legislative initiatives. That is, the Harper administrations did not have more of a substantive effect because they lacked the power to impose their will. The implementation of their agenda was in the hands of others in different systems or subsystems.

Unresolved with this approach is the question of effort. Changes to Canada's criminal justice regime do not appear to have arisen in response to problems generated in other systems, most notably the economic. Further, the political emphasis on getting tough on crime originated during a period of declining crime rates. To address this question, I begin by noting Habermas's argument that Luhmann bases the autonomy of the political system as a system on a differentiation between the administrative system and the legitimation system.⁴ This is held to present a problem by downplaying in the process of communication in both the identification of problems and the legitimization of decisions.⁵ Luhmann's identification of the essential coding for the political system as the exercise of power and resistance hearkens back to Simmel's conception that a relationship of superiority and subordination is an essential feature of human relationships even when lacking any sense of programmatic content.⁶ This ultimately causes Luhmann's conception of the political system to become sterile. Problems are identified by the political system, processed according to a coding designed to maintain relationships of domination and subordination, and politically resolved by passing legislation that proclaims the problem to be resolved by moving it out of the political system. All of this leaves unaddressed the essential questions of why these particular problems were selected and why the particular responses were chosen. The closest Luhmann comes to dealing with this is a passing mention of the specificity of parliamentary democracy in a political system and the role of political parties therein. He notes that

Once the organization of political parties is consolidated, there is an organizational guarantee that no matter what the issue to be decided is, there will always be an opposition. The opposition is no longer disciplined by different alternative decisions but by the prospect of taking over government and of having to present a programme (which is feasible or, at least, acceptable and which could find sufficient political support).⁷

This brief formulation introduces a cleavage into the system of politics. Within this system, different groupings labelled political parties compete for active support, or at least acquiescence, for the right to be in a position of power rather than subordinate and oppositional. This raises the possibility that the actions of a government administration are designed to maintain its position of superiority within the political system (in relation to other parties) as much as to maintain the legitimacy of the political system as a whole. The identification of this possibility is as far as Luhmann's systems approach takes us. To explore the record of the Harper administrations' criminal justice policies, we now explore this avenue using Edelman's concept of symbolic action.

9.3.2. Edelman and Contradiction Between the Efficacy of Symbolic and Substantive Action

In earlier chapters, I argue that there was a level of symbolism in the Harper administrations' tough-on-crime legislative initiatives. Legislative commitment was largely unaccompanied by fiscal commitment. The unfolding of the legislative program was slow and piecemeal, with the announcements accompanying the introduction of legislation appearing to be more important than actual passage. This is a practice that has been continued by the Trudeau administration with the limited number of initiatives to reverse tough measures passed during the Harper era.

In the Harper era, legislation was primarily focused on sentencing rather than on criminal procedures that might have had more actual substantive effect. Even with the number of bills introduced and passed, the treatment of the vast majority of criminal offences—including those of most relevance to the protection of the person and property of Canadians—was not directly affected. As time went on, the legislative agenda became increasingly driven by controversial

cases. In short, there is clear support for the proposition that there was an element of symbolic action in the Harper administrations' legislative program.

From Edelman, I postulate that these symbolic actions were directed toward achieving the goal of building acquiescence to being ruled. The question that arises is "Acquiescence to whom or what?" Is it acquiescence to a relationship of domination and subordination of the political system as a whole (legitimization of the system) or is it acquiescence to rule by a particular group operating within this political system? As Luhmann hints, does the partisan organization of the political system in a parliamentary democracy transform the dynamic of rule and opposition into a struggle for acquiescence to the rule of a particular party rather than the legitimization of the system as a whole? The members of the parliamentary opposition during the Harper administrations had a clear and consistent answer to this question. On a very regular basis, they criticized tough-on-crime legislation as part of the Harper administrations' strategy to mobilize and maintain political support for Conservatives. The opposition members claimed that partisan advantage was the primary purpose of legislative initiatives. When they perceived this as the acquiescence strategy of the government, the opposition members themselves made choices. They were not inevitably pushed into opposing the legislation. As was demonstrated in chapter 6, the members of opposition parties employed a range of strategies including active support for legislation, symbolic tokenistic opposition, deflection, and attempts to "out-bid" on toughness. A generalized critique of the overall tough-on-crime approach was accompanied by effective acquiescence to individual legislative initiatives. This acquiescence appears to have extended past the temporal boundaries of the Harper administrations, as the successor Trudeau administration has not reversed any of the tough-on-crime legislation passed during the preceding decade.

Edelman postulates an inverse correlation between the importance attached to symbolic acts and substantive results, particularly resource allocations.⁸ At one level, that appears to have occurred with the Harper administrations' tough-on-crime legislative initiatives. Throughout its terms and into the election campaign in which it was eventually defeated at the polls, the Harper administrations devoted political energy to advancing the proposition that they were, in marked contrast to its partisan opponents, tough on crime. As it approached electoral defeat,

Conservative members were proposing new, largely symbolic, tough measures to differentiate from their political foes. However consistent the Conservatives were in pursuing this strategy to create ongoing acquiescence to their rule, the strategy itself appears to have become less effective over time.

One reflection of this was the declining importance of tough-on-crime proposals in the election platforms of the major national political parties. In 2006, tough-on-crime measures were core components of the CPC platform and important parts of the Liberal and NDP platforms. By 2015, tough elements were present, but not central. A decline in the power of tough-on-crime measures to mobilize partisan support appears to have been recognized by all national parties. Further, the Conservatives, who had invested political energy into transforming fear of crime into acquiescence to their rule, were defeated. In 2015, the NDP platform was considerably tougher than that of the Liberals, but the party was less successful in generating political support. Contrary to Edelman, a sustained program of symbolic mobilization on an issue produced declining returns in generating acquiescence.

There are likely two major reasons for the diminution of the success of tough-on-crime symbolic action. The first is the experience of Canadians regarding crime itself. Unlike the beginnings of the American increased use of incarceration, the emergence of tough-on-crime politics in Canada occurred during a long-term decline in reported crime rates. This decline continued during the Harper administrations' terms in office. The actual experience of being a victim of crime became less and less salient to most Canadians. The ability of symbolic action to mobilize fear appears to lose its potency as the substantive basis of these fears declines over a long period of time.

The second reason is that the Conservatives' use of both rhetoric and symbolic actions to mobilize political support on the basis of a fear of crime created a trap for themselves that became more dangerous the longer their term in power. Their basic narrative was that the safety of Canadians was endangered because of soft-on-crime policies of previous Liberal governments. Their tough legislative measures focused attention both on the danger and promised solution. At a certain point, the public is faced with either believing that the crime

problems have been solved and dangers reduced or being susceptible to an argument that the Conservative policies had failed. One way or the other, length of incumbency undermines the ability of a particular government to continue to use tough-on-crime initiatives as a basis for maintaining acquiescence to its rule. Edelman's argument that substantive policy ineffectiveness serves to increase the potency and effect of symbolic action does not appear to be supported by the example of the Harper administrations' justice policies.

9.4. Policy and Sociological Practice Implications

Tough-on-crime rhetoric and tough symbolic action for the purposes of being seen as tough ended fairly abruptly with the 2015 election. Since then, tough measures have been presented as being measures to achieve social justice rather than penal justice. The volume of tough proposals, both in the form of government and private member's bills, has declined dramatically. When looking at the rise and fall of tough-on-crime politics in Canada, I am reminded of the narrative structure and pacing of kabuki theatre, with a slow scene beginning with the rise of and various permutations of the Reform Party using fear of crime as a central part of their appeal for political support, the slow adoption of this approach by all major national political parties, a period of intense and dramatic action, and the short, abrupt ending. For all the rhetoric and legislation, relatively little substantive change is visible. It is tempting to dismiss the entire episode merely as symbolic play-acting by politicians attempting to generate support for their party and acquiescence to their rule. It would, however, be a mistake to do so.

While I have argued that the substantive effect of the Harper administrations' legislative package was modest, it should not be implied from this that there was no effect. Sentences have gone up for some offences, most notably drug trafficking, production, and importation. The range of sentencing options has been restricted in ways that will produce perverse and harmful outcomes for some individuals even if the aggregate effect is small. Canada's criminal justice system did become tougher, even if in a different order of magnitude than in the United States. The abrupt ending of the use of tough-on-crime measures to build political support has not been accompanied by any rollback of the measures, even the most egregious, passed during the Harper administrations. For example, changes to Canada's system of pardons or record suspensions

were not part of the 2006 Conservative platform and explicitly did not form part of the Harper administrations' early plans. The legislative changes arose because of a single controversial case. On the one hand, it was a classic case of symbolic action—but one that did have some effects on people whose criminal activity was far in the past. Despite this, and despite the explicit recognition by the Trudeau administration of harm being caused, two years have passed without even the introduction of proposals for change.

Even with the end of tough-on-crime politics, Canadian justice policies appear to be a one-way valve. It seems far easier to generate tough legislation than to reverse the flow of punitive measures. If social and political circumstances change such that tough measures are once again perceived as a viable method of building political support for a political party, new tough measures will begin from a higher level of punitiveness than was the case slightly over a decade ago.

9.4.1. The Difficulty and Indeterminacy of Change

The muted effect of the Harper administrations' tough-on-crime agenda illustrates the limitations of a government to impose, by political and legislative means, specific outcomes in the handling of those accused of committing criminal acts. There is not a single justice system, but rather systems of legislation passing, enforcement and adjudication. In Canada, each of these are fragmented by the jurisdictional boundaries inherent in a federal state. During the years of the Harper administrations, this systemic complexity appears to have contributed to the muting of the effect of legislation that had express punitive intent. However, it is possible that the existence of multiple systems can amplify rather than mute substantive impact. During the Harper era, the government of Manitoba, within a system of politics bounded by its own geographical and jurisdictional boundaries, chose to pursue its own tough-on-crime policies simultaneous to those of the federal government. The result was a increase in incarceration rates within that province. The results of the Harper era legislative change were very different in Manitoba and Ontario. It cannot be assumed that one result is inevitable.

The writing of this dissertation occurs against the backdrop of a growing recognition in the United States that the level of incarceration in that country has become too high for both

moral and pragmatic reasons. This recognition has not yet produced a sustained attempt at national politically driven change, but it is possible this impulse will emerge. The Canadian experience outlined in this dissertation point to some political and policy challenges inherent in the task of reducing American incarceration levels. The first is the power of tough-on-crime appeals for political support. In several successive Canadian federal elections, all major political parties made tough-on-crime commitments a major part of their appeal for electoral support, at least in English speaking Canada. Support (demand) for specific tough-on-crime initiatives can emerge very quickly in response to high profile, controversial cases even if these types of cases are very rare. The second challenge is the increased fragmentation of the jurisdiction over criminal justice in the United States as compared to Canada. Instead of one criminal code and eleven jurisdictions responsible for some aspect of the administration of justice and the operation of carceral institutions, in the United States there are fifty-one of each. This magnifies the possibility that some systems will pursue tough-on-crime initiatives. Finally, there is more similarity between the systems of politics and law in the United States than in Canada. Judges and prosecutors in Canada are appointed with a high degree of security of tenure, while in the United States most are elected. A comparative analysis of the justifications provided for decisions was beyond the scope of this study, but it is reasonable to suggest that different systems imperatives will produce different behaviours within these systems.

In the end, the fundamental policy implication of this dissertation is the recognition of complexity in causing changes in the response to criminal acts. Whether someone believes incarceration rates are too high or too low, whether they believe the response to those convicted of criminal acts is too tough or too soft, causing directive change requires much more than the passage of a piece of legislation. The operations of several distinct but closely coupled systems work to produce indeterminate results.

9.4.2. The Relationship Between Ends and Results

As was discussed in chapter 2, a substantive portion of the literature dealing with the Harper administrations' response to the handling of criminal acts is flawed in that it begins by assuming that Canadian incarceration rates increased during this era. The authors of this work set

out to explain what had not happened. In addition to a lack of rigour, such analysis is an indication of problem of sociological analysis embedded within a sociological conception of an act. As discussed in chapter 3, Parsons posited an act as a type of activity oriented to the achievement of a particular end. However, as Parsons noted, almost every act can be divided into several unit acts. He argued that these unit acts will be unified by a commitment to an ultimate end. As such, consistency of effort is expected. If action is successful – that is, if it achieves the desired ends – a congruence between ends and results will be achieved. From this expectation, the trap of treating stated intention as equivalent to substantive result is created.

The findings of this dissertation challenge the Parsonian expectation of unity of purpose between the ends of the unit acts and the ultimate act. Informed by Luhmann, I argue that different actors involved in producing a final substantive result are not guided by the same ends. In this case, political actors in the national political system may have differing ends than those in provincial political systems. Those adjudicating individual cases have somewhat different ends than those involved in creating the legislative framework. There is, in short, no unified chain of unit acts guided by a single normative end. The problem of consistency becomes more acute when, informed by Edelman, it is observed that even the same actor may have different ends for different unit acts. It cannot be assumed that the series of unit acts, even by the same person, will be guided by a single ultimate end. In this instance, this point was illuminated by the potential contradiction between the ends of creating acquiescence to the exercise of political power and the ends of substantively getting tough on those who commit criminal acts. Intentions cannot be imputed from results, and results are not necessarily an accurate reflection of intentions.

9.5. A Note on the Author's Normative Position on Incarceration

Whether for the stated purpose of deterrence, incapacitation, denunciation or rehabilitation, punishments for criminal acts are in fact punishments. They are intended to cause physical or psychic pain to the individual who is the recipient of the punishment.⁹ That is the nature of punishment.

This dissertation was about the infliction of pain on those convicted of committing criminal acts, and the political claim that the level of this pain should be increased. I attempted to

conduct an analysis of the record of the Harper administrations' dispassionately. However, I personally believe that the self-conscious and deliberate infliction of individual pain by the state is an activity that is sometimes necessary because some acts by individuals cause harm to others. Further, responses such as incapacitation can be undertaken with a non-punitive purpose but will inevitably have punitive effect. It is also possible to impose punishments that are both morally wrong and pragmatically unnecessary or harmful. Therefore, the imposition of punishments should be done cautiously and judiciously. Attempting to judge the "right" level of pain for an individual offender is a complex and difficult matter of evaluating facts and prioritizing sometimes contradictory objectives. Establishing and implementing policies that shape the aggregate level of state-imposed punitive pain is even more complex and difficult. Conceptually, this level of pain can be too little, about right or too much. Deciding what level of incarceration conforms to each of these standards involves both pragmatic and ethical considerations. I do not pretend to have the answer to this question from either a personal or policy perspective. I believe that the incarceration levels in some states in the United States are clearly too high both from a pragmatic and ethical perspective. However, I simply do not know if the level of state-induced punitive pain in Canada is too little, about right or too much. As a result, I neither agree nor disagree with the overall stated objectives of the Harper administrations' criminal justice policies. When evaluating individual pieces of legislation, some appear to make a reasonable amount of sense on both pragmatic and ethical grounds. Other legislative initiatives, to me, fail one or both of these tests. When looking at the record as a whole, it seems to me that the fears this type of political action and legislative program had the potential to create a pathological and immoral level of incarceration were not groundless. To date, these fears have not come to fruition, but I share the common conclusion reached by Webster and Doob who strongly opposed the stated goals of the legislative program and Kheiriddin who supported them. I too believe that the long-term results are still indeterminate.

¹ Canadian Legal Information Institute, "Scope of Databases," <https://www.canlii.org/en/databases.html> (accessed April 30, 2018).

² Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1973), 3.

³ Luhmann, *Social Systems*, 463.

⁴ Habermas, *Legitimation Crisis*, 132.

⁵ Habermas, *Legitimization Crisis*, 140.

⁶ Georg Simmel, "Superiority and Subordination as Subject Matter of Sociology," *American Journal of Sociology* 2, no. 2 (1896): 167-189.

⁷ Luhmann, *Law as a Social System*, 367.

⁸ Edelman, *Symbolic Uses*, 26.

⁹ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 17-34.

10. Epilogue: The Trudeau Administration's Criminal Justice Policies

In earlier sections, the Harper administrations record on criminal justice has been examined against its own rhetorical standard, against the policies adopted in the United States, and against an ideal type construct of the essential features of a tough-on-crime policy. Against each standard of comparison, the Harper administration produced relatively muted results and, in many cases, appears to have taken actions for symbolic rather than substantive reasons. The defeat of the Harper administration in 2015 and its replacement with the Liberal administration led by Justin Trudeau offers a fourth basis of comparison—that is, with the successor regime to the Harper administration. This epilogue will briefly survey the criminal justice policies of the Trudeau administration from its assumption of office on November 4, 2015, through to December 31, 2017.

In the 2015 election campaign, the CPC focused on their record of fiscal and economic management. However, tough-on-crime proposals played an important secondary part in their appeal for support. Predominately, this appeal was based on past actions and orientation in changing a justice system that “had its priorities backward: it focused on the so-called ‘rights’ and concerns of criminals while victims and their families were left outside looking in.”¹ This tough record was used to differentiate itself from the Liberals who were alleged to “allow the sale of marijuana in corner stores, making it more accessible to children” and the NDP’s “dangerous ideologically driven criminal justice policy that puts the so-called ‘rights’ of criminals ahead of the rights of victims.”² Despite the rhetorical positioning, the CPC platform’s specific policy proposals were relatively muted and not universally tough in approach, as the platform included assistance for parents in dealing with drug consumption by their children and resources for suicide prevention in the “safe streets” section. Tough proposals were focused on

dealing with criminal gangs, protecting seniors from financial fraud, and passage of a handful of pieces of tough legislation introduced in Parliament just prior to the election call.

The NDP platform described the Conservative record on crime as “failing,” leaving “middle-class families less safe.”³ In contrast to the Conservative approach of legislative initiatives, the promised NDP tough approach centred on providing more resources for law enforcement. The centrepiece was an unacknowledged revival of the unfulfilled 2006 Conservative promise for federal funding for 2,500 more police officers.⁴ The Liberals avoided any general critique of the Harper administrations’ justice policies. Their central proposal was the legalization of cannabis. This signature soft proposal was posed in tough language, with a promise to “create new, stronger laws to punish more severely those who provide it to minors, those who operate a motor vehicle under its influence, and those who sell outside of the new regulatory framework.”⁵ Other Liberal tough proposals centred on domestic violence and the use of firearms to commit crimes.⁶ In 2015, tough-on-crime issues were not abandoned, but were a faint echo of the 2006 campaign.

With the election of the Trudeau administration, the strategy of using tough-on-crime legislation to build acquiescence to the rule of the party in power appears to have abated, at least temporarily. The introduction of tough legislation continued, albeit at a much slower pace. Legislation making the presence of hate in crimes against transgendered people an aggravating factor in sentencing⁷ was passed expeditiously with the Conservative members split on the issue.⁸ Legislation with the stated objective of combating human trafficking was introduced on February 9, 2017,⁹ but as of December 31, 2017, has not been brought back for second reading.¹⁰ Measures to expedite the criminalization of drugs, allow customs officials to inspect more packages, and make asset forfeiture easier have been passed,¹¹ while measures that will limit the ability of those accused of sexual assault to present a defence¹² have received third reading in the House of Commons and were before the Senate as of December 31, 2017.

These tough provisions are not presented as an overall tough-on-crime strategy. Indeed, sometimes the tough provisions are hidden. The tough drug measures were contained in legislation that also eased the approval process for safe drug injection sites. This soft measure

was highlighted by both Liberal and Conservative members in the debate on the legislation.¹³ Tough measures are also presented as progressive responses required to combat social ills, such as violence against transgendered people¹⁴ or women.¹⁵ There is not enough evidence to identify a trend, but it appears that while the Harper administrations' tough measures focused on carceral sanctions, the Trudeau administration is more inclined to use the forfeiture of assets as a sanction.¹⁶ It also appears to be more likely to reduce the ability of an accused to present a defence.¹⁷

A change in political approach to tough-on-crime measures is also reflected in private member's bills. During the first two years of the Trudeau administration, 29.79 percent of CPC private member's bills contained tough-on-crime proposals, down from 47.91 percent during the Harper administrations. During the Harper administrations, 6.99 percent of NDP private member's bills contained tough-on-crime measures. In the first two years of the Trudeau administration, this dropped to one percent. Liberal members remained consistent, with 17.24 percent of their private member's bills introduced while in government containing tough-on-crime measures compared with 17.69 percent while they were in Opposition.¹⁸

As noted in chapter 8, the new Prime Minister's 2015 mandate letter to the Justice Minister directed her to review the legislative program implemented during the period of the Harper administrations. Little has emerged from this mandated review. As of December 31, 2017, a period in which Parliament sat for 252 days, not a single piece of tough-on-crime legislation passed during the Harper administrations' terms in office has been repealed or amended.¹⁹ On October 21, 2016, or sitting day 95 of the First Session of the Forty-second Parliament, legislation to increase judicial discretion in imposing victim surcharges was introduced.²⁰ On June 19, 2017, or sitting day 197, amendments to the Harper era legislation restricting conditional release and early parole were introduced.²¹ Neither of these legislative initiatives have been brought back to Parliament for second reading. In some cases, action has not even included the introduction of legislation. In January 2016, the Public Safety Minister described the Harper government's changes to the legislation governing pardons as "punitive" and the result of a "certain ideology." Changes were promised.²² Over 19 months passed before any action was taken. Instead of introducing legislation, the Public Safety Minister released

results of an online poll indicating that Canadians supported making it easier for people convicted of minor crimes to obtain pardons.²³ The record suggests an element of symbolic (in)action in rolling back the tough-on-crime legislation inherited by the Trudeau administration.

The Trudeau administration has also introduced measures to abolish criminal sanctions that predate the Harper administration. On November 15, 2016, legislation was introduced to abolish the criminal sanctions against most instances of anal intercourse.²⁴ The Justice Minister said at a press conference that the criminal code provisions being abolished were “discriminatory” and “outdated”.²⁵ In the subsequent 145 parliamentary sitting days through to December 31, 2017, the legislation has not been brought back for second reading.²⁶ Forty-three parliamentary sitting days after the introduction of the legislation to decriminalize anal sex, the provisions were included in an omnibus bill to formally rescind eight laws that had previously been declared invalid by the Supreme Court.²⁷ The legislative summary explained:

Although some provisions of the *Criminal Code* are no longer in force because courts have found that they violate the Charter, the provisions themselves remain in the Code until they are amended or repealed by Parliament. Bill C-39 carries out this update to the Code, along with some consequential and coordinating amendments.²⁸

While the sanctions against anal intercourse had not been reviewed by the Supreme Court, they had been ruled unconstitutional in Ontario in 1995,²⁹ with this supported by the courts in Quebec, British Columbia, Nova Scotia, and Alberta.³⁰ The legislation abolishing the so-called zombie laws has not been returned to Parliament for second reading. Thus the Trudeau administration has twice introduced—but not advanced—legislation to remove from the criminal code sanctions that have no legal effect in five of Canada’s ten provinces, including the four most populous.

The only unequivocal soft legislation in which the Trudeau administration has moved past first reading has been legislation to expedite expunging criminal records for those convicted prior to 1969 of same-sex intercourse.³¹ This legislation was introduced on November 28, 2017, and received third reading in the House of Commons 11 sitting days later. As of December 31, 2017, it was before the Senate.³²

The cornerstone of the Trudeau administration's softer positioning on justice issues is the legalization of the purchase and possession of cannabis for recreational use. In fulfillment of a commitment made in the 2015 Liberal election platform, the Trudeau administration introduced Bill C-45, the *Cannabis Act*,³³ on April 13, 2017. This was parliamentary sitting day 166 of the First Session of the Forty-second Parliament. The legislation received third reading on November 27, 2017, or 73 sitting days later. At the time of writing, Bill C-45 is being debated in the Senate. The legislation was propelled through Parliament in a determined fashion over the objections of Conservative members. Time allocation was invoked twice, and there were nine recorded votes associated with the passage of this legislation.³⁴ In parliamentary terms, both the government and official Opposition exhibited determination.

The legalization of possession of cannabis for recreational consumption could have a impact on the number of Canadians being convicted of a criminal offence. In the 10-year period from 2007 to 2016, an average of 23,987 people per year were charged with cannabis possession. This represented 3.85 percent of all individuals charged with an offence against the *Criminal Code* or other federal statute during this period.³⁵ Removing criminal sanction for the possession of cannabis for personal recreational consumption could be—and is portrayed as—a soft-on-crime initiative.

That being said, cannabis legalization is being implemented with tough elements. Possession of up to 30 grams of “dried cannabis” becomes legal. Possession of 31 grams is an offence with a maximum penalty of five years less a day of incarceration. This penalty is identical to the maximum penalty currently stipulated³⁶ except for a limitation of the maximum penalty of a fine of up to \$1,000 and six months incarceration for possession of less than three kilograms.³⁷ In short, in the process of “legalizing” cannabis possession, the maximum carceral penalty for possession of an amount between 30 grams and 3,000 grams is being increased by 1,000 percent. Abrupt lines between legal and illegal are a common feature of Bill C-45. For example, cultivating up to four plants is legal. Cultivating five plants is illegal with a maximum sanction of up to 14 years' incarceration. Mandatory minimum sentences are abandoned, with the Harper administrations' distinctions of seriousness for specified behaviour while offending, such as using children in trafficking and using a residence without the permission or knowledge

of the owner, and are converted into aggravating factors to be considered during sentencing. Bill C-45 is a paradox in being both soft and tough on crime simultaneously. The contradictory nature of the Trudeau administration's flagship soft initiative is illustrated by numerous police forces demanding budget increases to pay for increased resources needed to enforce the provisions of Bill C-45.³⁸

In summary, after over two years in office and 252 parliamentary sitting days, the Trudeau administration has not passed a single measure with the stated purpose of reducing carceral results by undoing legislation passed during the Harper administrations. The legislation legalizing the possession of cannabis, once passed and proclaimed, could have an impact on incarceration. However, given the punitive provisions in the legislation, it is by no means certain that this will necessarily be in a soft direction. With other legislation, the Trudeau administration has emphasized soft elements of legislation to obscure hard provisions. This administration has used both hard and soft legislative provisions to express support for both women in general and for people who have hitherto faced discrimination as a result of their sexual orientation. Legislation containing hard provisions have been pursued with more vigour and dispatch than those containing soft measures. The Trudeau administration's legislative program is sufficiently modest and new such that evaluation of systemic limitations on its powers is impossible. However, it appears that the Trudeau administration, like the Harper administrations, uses the introduction of justice legislation as a symbolic act to create and maintain acquiescence to its own rule.

¹ Conservative Party of Canada, *Protect Our Economy: Our Conservative Plan to Protect the Economy* (Ottawa: CPC, 2015), 103.

² CPC, *Protect Our Economy*, 103.

³ NDP, *Building the Country of Our Dreams*, 40.

⁴ NDP, *Building the Country of Our Dreams*, 40.

⁵ Liberal Party of Canada, *Real Change: A New Plan for a Strong Middle Class* (Ottawa: Liberal Party of Canada, 2015), 55.

⁶ Liberal Party of Canada, *Real Change*, 50-54.

⁷ Bill C-16, 42nd Parliament, 1st Session.

⁸ Parliament of Canada, Vote 126. 42nd Parliament, 1st Session, Sitting 95. (October 18, 2016).

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- ⁹ Bill C-38, 42nd Parliament, 1st Session.
- ¹⁰ Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8734953>.
- ¹¹ Bill C-37, 42nd Parliament, 1st Session.
- ¹² Bill C-51, 42nd Parliament, 1st Session.
- ¹³ Parliament of Canada, *Edited Hansard*, 42nd Parliament, 1st Session, Number 130. January 31, 2017.
- ¹⁴ Parliament of Canada, *Edited Hansard*, 42nd Parliament, 1st Session, Number 092. October 18, 2016.
- ¹⁵ Parliament of Canada, *Edited Hansard*, 42nd Parliament, 1st Session, Number 195. June 15, 2017
- ¹⁶ Bill C-37, 42nd Parliament, 1st Session; Bill C-38, 42nd Parliament, 1st Session.
- ¹⁷ Bill C-37, 42nd Parliament, 1st Session; Bill C-51, 42nd Parliament, 1st Session.
- ¹⁸ Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/Home.aspx?Language=E&ParliamentSession=42-1>.
- ¹⁹ Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/Home.aspx?Page=1&ParliamentSession=42-1>.
- ²⁰ Bill C-28, 42nd Parliament, 1st Session.
- ²¹ Bill C-56, 42nd Parliament, 1st Session.
- ²² Alison Crawford, "Public Safety Minister Vows to Overhaul 'Punitive' Criminal Pardons System," *CBC News*, January 20, 2016, <http://www.cbc.ca/news/politics/liberal-criminal-justice-pardons-1.3412533>.
- ²³ Alison Crawford, "Government Hears Support for Making It Easier, Cheaper to Obtain a Criminal Pardon," *CBC News*, October 10, 2017, <http://www.cbc.ca/news/politics/pardons-record-suspensions-parole-board-canada-1.4341976>.
- ²⁴ Bill C-32, 42nd Parliament, 1st Session.
- ²⁵ Kathleen Harris, "Liberals to Revamp 'Discriminatory' Age Law for Anal Intercourse," *CBC News*, November 15, 2016, <http://www.cbc.ca/news/politics/justin-trudeau-names-advisor-on-lgbt-issues-1.3851301>.
- ²⁶ Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8587634>.
- ²⁷ Bill C-39, 42nd Parliament, 1st Session.
- ²⁸ Maxime Charron-Tousignant, Robin MacKay, and Julia Nicol, *Legislative Summary of Bill C-39: An Act to Amend the Criminal Code (Unconstitutional Provisions) and to Make Consequential Amendments to Other Acts*. (Ottawa: Library of Parliament, June 5, 2017), https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C39&Parl=42&Ses=1&Language=E#a1.
- ²⁹ *R. v C.M.*, 1995 ONCA 8924.
- ³⁰ Charron-Tousignant, MacKay, and Nicol, *Legislative Summary of Bill C-39*.
- ³¹ Bill C-66, 42nd Parliament, 1st Session.
- ³² Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9273414>.
- ³³ Bill C-45, 42nd Parliament, 1st Session.
- ³⁴ Parliament of Canada, *LEGISinfo*, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8886269>.
- ³⁵ Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violation*, CANSIM 252-0051.
- ³⁶ *Controlled Drug and Substance Act*, S.C. 1996 c. 19 Sec. 4.
- ³⁷ *Controlled Drug and Substance Act*, S.C. 1996 c. 19 Sec.5.
- ³⁸ Stephanie Taylor, "Legal Cannabis Will Cost Regina Police More Than \$1 Million Per Year, Report Says," *CBC News*, February 10, 2018, <http://www.cbc.ca/news/canada/saskatchewan/saskatchewan-cannabis-police-costs-1.4529311>; Bill Cleverly, "Legalized Pot Expected to Have 'Significant Impact' on Police Work," *Victoria Times-Colonist*, November 1, 2017, <http://www.timescolonist.com/news/local/legalized-pot-expected-to-have-significant-impact-on-police-work-1.23080665>;

“HRP, RCMP Seek Significant Budget Increase Ahead of Pot Legalization,” *CTV News Atlantic* (February 16, 2018), <https://atlantic.ctvnews.ca/hrp-rcmp-seek-significant-budget-increase-ahead-of-pot-legalization-1.3806814>; Mary Campbell, “Does Legal Pot = Higher Police Budget,” *Cape Breton Spectator*, June 14, 2017, <https://capebretonspectator.com/2017/06/14/cbrm-police-marijuana-legalization/>; David Giles and Wendy Winiewski, “Policing Legalized Marijuana in Saskatoon Expected to Cost \$500,000,” *Global News*, April 20, 2018, <https://country105.com/news/4157923/saskatoon-police-legalized-marijuana-cost/>; Michael Spratt, “Just Say No to the Police,” *Canadian Lawyer*, March 12, 2018, <http://www.canadianlawyermag.com/author/michael-spratt/just-say-no-to-the-police-15451/>; “Fredericton Police Expect Pot Legalization to Cost 2% of Budget,” *CBC News*, April 10, 2018, <http://nouzie.com/fredericton-police-expect-pot-legalization-to-cost-2-of-budget/>; “Who Will Pay for Increased Costs When Pot Is Legal, Chief Wonders,” *Sudbury.com*, April 19, 2018, <https://www.sudbury.com/local-news/who-will-pay-for-increased-police-costs-when-pot-is-legal-chief-wonders-898429>; Meghan Potkins, “Calgary Police Want More Money and Training Before Marijuana Is Legalized,” *Calgary Herald*, March 29, 2017, <http://calgaryherald.com/news/local-news/calgary-police-seek-clarity-and-funding-for-front-line-training-in-advance-of-marijuana-legalization>.

Appendix: Statistics Canada Data Tables

On June 4, 2018 Statistics Canada launched a major redesign of its website and organization of data. This redesign included a renumbering and, in some cases, a renaming of the data tables that form a portion of the empirical evidence presented in this dissertation. Following is the concordance information for the data tables utilized in this dissertation.

CANSIM table identifier	<i>Product descriptor post June 4, 2018</i>
<i>Adult Correctional Services, Average Counts of Adults in Provincial and Territorial Programs, CANSIM 252-0005.</i>	<i>Average counts of adults in provincial and territorial correctional programs, Table: 35-10-0154-01.</i>
<i>Adult Correctional Services, Average Counts of Offenders in Federal Programs, CANSIM 252-0006.</i>	<i>Average counts of offenders in federal programs, Canada and regions, Table: 35-10-0155-01.</i>
<i>Youth Correctional Services, Average Counts of Youth in Provincial and Territorial Correctional Services, CANSIM 251-0008.</i>	<i>Average counts of young persons in provincial and territorial correctional services, Table: 35-10-0003-01.</i>
<i>Adult Correctional Services, Custodial and Community Admissions to Provincial and Territorial Programs, CANSIM 251-0020.</i>	<i>Adult Admissions to Correctional Services. Table: 35-10-0014-01.</i>
<i>Adult Correctional Services, Custodial and Community Admissions to Federal Programs, CANSIM 251-0028.</i>	<i>Adult admissions to federal correctional services. Table: 35-10-0022-01.</i>
<i>Adult Correctional Services, Operating Expenditures for Provincial, Territorial and Federal Programs, CANSIM 252-0018.</i>	<i>Operating Expenditures for Adult Correctional Services, Table: 35-10-0013-01.</i>
<i>Crime Severity Index and Weighted Clearance Rates, CANSIM 252-0052.</i>	<i>Crime Severity Index and Weighted Clearance Rates, Table 35-10-0026-01.</i>

<i>Adult Criminal Courts, Cases by Median Elapsed Time in Days, CANSIM 252-0055.</i>	<i>Adult criminal courts, cases by median elapsed time in days, Table: 35-10-0029-01.</i>
<i>Adult Criminal Courts, Guilty Cases by Amount of Fine, CANSIM 252-0062.</i>	<i>Adult criminal courts, guilty cases by amount of fine, Table: 35-10-0036-01.</i>
<i>Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody. CANSIM 252-0059.</i>	<i>Adult Criminal Courts, Guilty Cases by Mean and Median Length of Custody. Table: Table 35-10-0033.</i>
<i>Adult Criminal Courts, Guilty Cases by Most Serious Sentence, CANSIM 252-0057.</i>	<i>Adult Criminal Courts, Guilty Cases by Most Serious Sentence, Table: 35-10-0031.</i>
<i>Adult Criminal Courts, Number of Cases and Charges by Type of Decision, CANSIM 252-0053.</i>	<i>Adult criminal courts, number of cases and charges by type of decision, 35-10-0027-01.</i>
<i>Estimates of Population: Canada, Province and Territories, CANSIM 051-0005.</i>	<i>Population Estimates, Quarterly. Table: 17-10-0009-01</i>
<i>Homicide Survey, Gang-Related Homicide, by Region, CANSIM 253-0008.</i>	<i>Victims of gang-related homicides. Table: 35-10-0075-01.</i>
<i>Incident-Based Crime Statistics, by Detailed Violations, CANSIM 252-0051.</i>	<i>Incident-based crime statistics, by detailed violations, Table: 35-10-0177-01.</i>
<i>Police Personnel and Selected Crime Statistics, Canada, Provinces and Territories, CANSIM 254-0002</i>	<i>Police personnel and selected crime statistics, Canada, provinces and territories, Table: 35-10-0076-01.</i>
<i>Youth Custody and Community Services (YCCS), Youth Commencing Correctional Services, by Initial Entry Status, CANSIM 252-0009.</i>	<i>Youth commencing correctional services, by initial entry status, Table: 35-10-0004-01.</i>

Source: Statistics Canada. *Concordance between CANSIM Table numbers and the new product ID.* (June 4, 2018). <https://www.statcan.gc.ca/eng/developers/concordance>.

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Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17.

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Thirty-ninth Parliament, First Session

- C-2. An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability (*Federal Accountability Act*).
- C-9. An Act to amend the *Criminal Code* (conditional sentence of imprisonment).
- C-10. An Act to amend the *Criminal Code* (minimum penalties for offences involving firearms) and to make a consequential amendment to another act.
- C-17. An Act to amend the *Judges Act* and certain other acts in relation to courts.
- C-18. An Act to amend certain acts in relation to DNA identification.
- C-19. An Act to amend the *Criminal Code* (street racing) and to make a consequential amendment to the *Corrections and Conditional Release Act*.
- C-21. An Act to amend the *Criminal Code* and the *Firearms Act* (non-registration of firearms that are neither prohibited nor restricted).
- C-22. An Act to amend the *Criminal Code* (age of protection) and to make consequential amendments to the *Criminal Records Act*.
- C-23. An Act to amend the *Criminal Code* (criminal procedure, language of the accused, sentencing and other amendments).
- C-25. An Act to amend the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the *Income Tax Act* and to make a consequential amendment to another act.
- C-26. An Act to amend the *Criminal Code* (criminal interest rate).
- C-27. An Act to amend the *Criminal Code* (dangerous offenders and recognizance to keep the peace).

- C-32. An Act to amend the *Criminal Code* (impaired driving) and to make consequential amendments to other acts.
- C-35. An Act to amend the *Criminal Code* (reverse onus in bail hearings for firearm-related offences).
- C-48. An Act to amend the *Criminal Code* in order to implement the United Nations Convention against Corruption.
- C-57. An Act to amend the *Immigration and Refugee Protection Act*.
- C-59. An Act to amend the *Criminal Code* (unauthorized recording of a movie).
- S-3. An Act to amend the *National Defence Act*, the *Criminal Code*, the *Sex Offender Information Registration Act* and the *Criminal Records Act*.

Thirty-ninth Parliament, Second Session

- C-2. An Act to amend the *Criminal Code* and to make consequential amendments to other acts (*Tackling Violent Crime Act*).
- C-13. An Act to amend the *Criminal Code* (criminal procedure, language of the accused, sentencing and other amendments).
- C-17. An Act to amend the *Immigration and Refugee Protection Act*.
- C-24. An Act to amend the *Criminal Code* and the *Firearms Act* (non-registration of firearms that are neither prohibited nor restricted).
- C-25. An Act to amend the *Youth Criminal Justice Act*.
- C-31. An Act to amend the *Judges Act*.
- C-53. An Act to amend the *Criminal Code* (auto theft and trafficking in property obtained by crime).

C-361. An Act to amend the *Criminal Code* (law enforcement animals).

S-3. An Act to amend the *Criminal Code* (investigative hearing and recognizance with conditions).

Fortieth Parliament, Second Session

C-14. An Act to amend the *Criminal Code* (organized crime and protection of justice system participants).

C-15. An Act to amend the *Controlled Drugs and Substances Act* and to make related and consequential amendments to other acts.

C-19. An Act to amend the *Criminal Code* (investigative hearing and recognizance with conditions).

C-25. An Act to amend the *Criminal Code* (limiting credit for time spent in pre-sentencing custody) (*Truth in Sentencing Act*).

C-26. An Act to amend the *Criminal Code* (auto theft and trafficking in property obtained by crime).

C-31. An Act to amend the *Criminal Code*, the *Corruption of Foreign Public Officials Act* and the *Identification of Criminals Act* and to make a consequential amendment to another act.

C-34. An Act to amend the *Criminal Code* and other acts (*Protecting Victims from Sex Offenders Act*).

C-35. An Act to deter terrorism, and to amend the *State Immunity Act* (*Justice for Victims of Terrorism Act*).

C-36. An Act to amend the *Criminal Code* (*Serious Time for the Most Serious Crime Act*).

- C-42. An Act to amend the *Criminal Code (Ending Conditional Sentences for Property and Other Serious Crimes Act)*.
- C-43. An Act to amend the *Corrections and Conditional Release Act* and the *Criminal Code (Strengthening Canada's Corrections System Act)*.
- C-45. An Act to amend the *Immigration and Refugee Protection Act*.
- C-46. An Act to amend the *Criminal Code*, the *Competition Act* and the *Mutual Legal Assistance in Criminal Matters Act (Investigative Powers for the 21st Century Act)*.
- C-52. An Act to amend the *Criminal Code* (sentencing for fraud) (*Retribution on Behalf of Victims of White Collar Crime Act*).
- C-53. An Act to amend the *Corrections and Conditional Release Act* (accelerated parole review) and to make consequential amendments to other acts (*Protecting Canadians by Ending Early Release for Criminals Act*).
- C-54. An Act to amend the *Criminal Code* and to make consequential amendments to the *National Defence Act (Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act)*.
- C-55. An Act to amend the *Criminal Code* (Response to the Supreme Court of Canada Decision in *R v Shoker Act*).
- C-58. An Act respecting the mandatory reporting of internet child pornography by persons who provide an internet service (*Child Protection Act (Online Sexual Exploitation)*).
- C-59. An Act to amend the *International Transfer of Offenders Act (Keeping Canadians Safe Act (International Transfer of Offenders))*.
- S-4. An Act to amend the *Criminal Code* (identity theft and related misconduct).
- S-5. An Act to amend the *Criminal Code* and another act.

Fortieth Parliament, Third Session

- C-4. An Act to amend the *Youth Criminal Justice Act* and to make consequential and related amendments to other acts (Sébastien's Law (Protecting the Public from Violent Young Offenders))
- C-5. An Act to amend the *International Transfer of Offenders Act (Keeping Canadians Safe (International Transfer of Offenders) Act)*.
- C-16. *Keeping Canadians Safe (International Transfer of Offenders) Act (Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act)*
- C-17. An Act to amend the *Criminal Code* (investigative hearing and recognizance with conditions) (*Combating Terrorism Act*)
- C-21. An Act to amend the *Criminal Code* (sentencing for fraud) (*Standing Up for Victims of White Collar Crime Act*)
- C-22. An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service
- C-23. An Act to amend the *Criminal Records Act* and to make consequential amendments to other acts (*Eliminating Pardons for Serious Crimes Act*).
- C-23A. An Act to amend the *Criminal Records Act (Limiting Pardons for Serious Crimes Act)*.
- C-23B. An Act to amend the *Criminal Records Act* and to make consequential amendments to other acts (*Eliminating Pardons for Serious Crimes Act*)
- C-30. An Act to amend the *Criminal Code* (Response to the Supreme Court of Canada Decision in *R v Shoker Act*).
- C-38. An Act to amend the *Royal Canadian Mounted Police Act* and to make consequential amendments to other acts (*Ensuring the Effective Review of RCMP Civilian Complaints Act*).

- C-39. An Act to amend the *Corrections and Conditional Release Act* and to make consequential amendments to other acts (*Ending Early Release for Criminals and Increasing Offender Accountability Act*).
- C-43. An Act to enact the *Royal Canadian Mounted Police Labour Relations Modernization Act* and to amend the *Royal Canadian Mounted Police Act* and to make consequential amendments to other acts (*Royal Canadian Mounted Police Modernization Act*).
- C-48. An Act to amend the *Criminal Code* and to make consequential amendments to the *National Defence Act* (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*).
- C-49. An Act to amend the *Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act* (*Preventing Human Smugglers from Abusing Canada's Immigration System Act*).
- C-50. An Act to amend the *Criminal Code* (interception of private communications and related warrants and orders) (*Improving Access to Investigative Tools for Serious Crimes Act*).
- C-51. An Act to amend the *Criminal Code*, the *Competition Act* and the *Mutual Legal Assistance in Criminal Matters Act* (*Investigative Powers for the 21st Century Act*).
- C-52. An Act regulating telecommunications facilities to support investigations (*Investigating and Preventing Criminal Electronic Communications Act*).
- C-53. An Act to amend the *Criminal Code* (mega-trials) (*Fair and Efficient Criminal Trials Act*).
- C-54. An Act to amend the *Criminal Code* (sexual offences against children) (*Protecting Children from Sexual Predators Act*).
- C-56. An Act to amend the *Immigration and Refugee Protection Act* (*Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act*).

- C-59. An Act to amend the *Corrections and Conditional Release Act* (accelerated parole review) and to make consequential amendments to other acts (*Abolition of Early Parole Act*).
- C-60. An Act to amend the *Criminal Code* (citizen's arrest and the defences of property and persons) (*Citizen's Arrest and Self-Defence Act*).
- C-61. An Act to provide for the taking of restrictive measures in respect of the property of officials and former officials of foreign states and of their family members (*Assets of Corrupt Foreign Officials Act*).
- C-617. An Act to amend the *Criminal Code* (mischief relating to war memorials).
- S-2. An Act to amend the *Criminal Code* and other acts (*Protecting Victims From Sex Offenders Act*).
- S-6. An Act to amend the *Criminal Code* and another act.
- S-7. An Act to deter terrorism and to amend the *State Immunity Act* (*Justice for Victims of Terrorism Act*).
- S-9. An Act to amend the *Criminal Code* (auto theft and trafficking in property obtained by crime) (*Tackling Auto Theft and Property Crime Act*).
- S-10. An Act to amend the *Controlled Drugs and Substances Act* and to make related and consequential amendments to other acts (*Penalties for Organized Drug Crime Act*).

Forty-first Parliament, First Session

- C-2. An Act to amend the *Criminal Code* (mega-trials) (*The Fair and Efficient Trials Act*).
- C-10. An Act to enact the *Justice for Victims of Terrorism Act* and to amend the *State Immunity Act*, the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Corrections and Conditional Release Act*, the *Youth Criminal Justice Act*, the *Immigration and Refugee Protection Act* and other acts (*Safe Streets and Communities Act*).

- C-12. An Act to amend the *Personal Information Protection and Electronic Documents Act* (*Safeguarding Canadians' Personal Information Act*).
- C-19. An Act to amend the *Criminal Code* and the *Firearms Act* (*Ending the Long-gun Registry Act*).
- C-26. An Act to amend the *Criminal Code* (citizen's arrest and the defences of property and persons) (*Citizen's Arrest and Self-Defence Act*).
- C-30. An Act to enact the *Investigating and Preventing Criminal Electronic Communications Act* and to amend the *Criminal Code* and other acts (*Protecting Children from Internet Predators Act*).
- C-31. An Act to amend the *Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act*, the *Marine Transportation Security Act* and the *Department of Citizenship and Immigration Act* (*Protecting Canada's Immigration System Act*).
- C-36. An Act to amend the *Criminal Code* (elder abuse) (*Protecting Canada's Seniors Act*).
- C-37. An Act to amend the *Criminal Code* (*Increasing Offenders' Accountability for Victims Act*).
- C-42. An Act to amend the *Royal Canadian Mounted Police Act* and to make related and consequential amendments to other acts (*Enhancing Royal Canadian Mounted Police Accountability Act*).
- C-43. An Act to amend the *Immigration and Refugee Protection Act* (*Faster Removal of Foreign Criminals Act*).
- C-51. An Act to amend the *Witness Protection Program Act* and to make a consequential amendment to another act (*Safer Witnesses Act*).
- C-54. An Act to amend the *Criminal Code* and the *National Defence Act* (mental disorder) (*Not Criminally Responsible Reform Act*).

C-55. An Act to amend the *Criminal Code* (Response to the Supreme Court of Canada Decision in *R v Tse Act*).

C-65. An Act to amend the *Controlled Drugs and Substances Act (Respect for Communities Act)*.

S-7. An Act to amend the *Criminal Code*, the *Canada Evidence Act* and the *Security of Information Act (Combating Terrorism Act)*.

S-9. An Act to amend the *Criminal Code (Nuclear Terrorism Act)*.

S-16. An Act to amend the *Criminal Code* (trafficking in contraband tobacco) (*Tackling Contraband Tobacco Act*).

Forty-First Parliament, Second Session

C-2. An Act to amend the *Controlled Drugs and Substances Act (Respect for Communities Act)*.

C-10. An Act to amend the *Criminal Code* (trafficking in contraband tobacco) (*Tackling Contraband Tobacco Act*).

C-12. An Act to amend the *Corrections and Conditional Release Act (Drug-Free Prisons Act)*.

C-14. An Act to amend the *Criminal Code* and the *National Defence Act* (mental disorder) (*Not Criminally Responsible Reform Act*).

C-24. An Act to amend the *Citizenship Act* and to make consequential amendments to other acts (*Strengthening Canadian Citizenship Act*).

C-26. An Act to amend the *Criminal Code*, the *Canada Evidence Act* and the *Sex Offender Information Registration Act*, to enact the *High Risk Child Sex Offender Database Act* and to make consequential amendments to other acts (*Tougher Penalties for Child Predators Act*).

C-32. An Act to enact the *Canadian Victims Bill of Rights* and to amend certain acts (*Victims Bill of Rights Act*).

- C-35. An Act to amend the *Criminal Code* (law enforcement animals, military animals and service animals) (*Justice for Animals in Service Act (Quanto's Law)*).
- C-42. An Act to amend the *Firearms Act* and the *Criminal Code* and to make a related amendment and a consequential amendment to other acts (*Common Sense Firearms Licensing Act*).
- C-44. An Act to amend the *Canadian Security Intelligence Service Act* and other acts (*Protection of Canada from Terrorists Act*).
- C-51. An Act to enact the *Security of Canada Information Sharing Act* and the *Secure Air Travel Act*, to amend the *Criminal Code*, the *Canadian Security Intelligence Service Act* and the *Immigration and Refugee Protection Act* and to make related and consequential amendments to other acts (*Anti-terrorism Act, 2015*).
- C-53. An Act to amend the *Criminal Code* and the *Corrections and Conditional Release Act* and to make related and consequential amendments to other acts (*Life Means Life Act*).
- C-56. An Act to amend the *Corrections and Conditional Release Act* and to make a consequential amendment to the *International Transfer of Offenders Act* (*Statutory Release Reform Act*).
- C-60. An Act to amend the *Criminal Records Act*, the *Corrections and Conditional Release Act*, the *Immigration and Refugee Protection Act* and the *International Transfer of Offenders Act* (*Removal of Serious Foreign Criminals Act*).
- C-69. An Act to amend the *Criminal Code* in response to the Supreme Court of Canada decision in *R v Nur* (*Penalties for the Criminal Possession of Firearms Act*).
- C-70. An Act to amend the *Controlled Drugs and Substances Act* and to make related amendments to other acts (*Protection of Communities from the Evolving Dangerous Drug Trade Act*).

C-71. An Act to amend the *National Defence Act* and the *Criminal Code* (*Victims Rights in the Military Justice System Act*).

C-73. An Act to amend the *Criminal Code* (offences in relation to conveyances) and the *Criminal Records Act* and to make consequential amendments to other acts (*Dangerous and Impaired Driving Act*).

S-7. An Act to amend the *Immigration and Refugee Protection Act*, the *Civil Marriage Act* and the *Criminal Code* and to make consequential amendments to other acts.

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C-14. An Act to amend the *Criminal Code* and to make related amendments to other acts (medical assistance in dying).

C-16. An Act to amend the *Canadian Human Rights Act* and the *Criminal Code*.

C-28. An Act to amend the *Criminal Code* (victim surcharge).

C-32. An Act related to the repeal of section 159 of the *Criminal Code*.

C-37. An Act to amend the *Controlled Drugs and Substances Act* and to make related amendments to other acts.

C-38. An Act to amend the *Criminal Code* (exploitation and trafficking in persons).

C-39. An Act to amend the *Criminal Code* (unconstitutional provisions) and to make consequential amendments to other acts.

C-45. An Act respecting cannabis and to amend the *Controlled Drugs and Substances Act*, the *Criminal Code* and other acts.

C-46. An Act to amend the *Criminal Code* (offences relating to conveyances) and to make consequential amendments to other acts.

C-51. An Act to amend the *Criminal Code* and the *Department of Justice Act* and to make consequential amendments to another act.

C-56. An Act to amend the *Corrections and Conditional Release Act* and the *Abolition of Early Parole Act*.

C-66. An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other acts.