

Observing Youth Punishment in the Social Systems of Law and Education

by

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## **Abstract**

This dissertation explores youth punishment in Canada in the social systems of law and education. My research contributes to work in the sociologies of youth, punishment, education, and law, youth justice, and social systems theory. The present study is guided by a concern that there is a need for a meaningful account of youth punishment in social systems. It specifically focuses on three problems in the sociological study of youth punishment: a gloomy state of theorizing; the absence of a more frontally distinct analysis of youth punishment beyond the realm of exclusion; and the underdevelopment of inter-systemic and intra-systemic features of youth punishment. This study confronts these issues with an exploratory qualitative analysis of how punishment operates in the social systems of law and education. The questions guiding this work include: 1) how are youth punished in the systems of law and education, and 2) in the context of youth punishment in social systems, are the social systems of law and education linked, influenced or coupled, and if so, how?

My project is different from other scholarship in the field as it relies on insights from Niklas Luhmann's contemporary social systems theory. This theory argues that social systems operate communicationally and the world is made up of functionally differentiated systems. This framework points me to study the legal and educational communications of punishment. This perspective foregrounds the inter-systemic and intra-systemic features of youth punishment in law and education. While many important contributions focus on the effects of punishment (exclusion, harshness, inequality...) and what (over)determines punishment (race, culture, morality, fears, politics...), my work addresses the absence of an empirical and theoretical understanding of youth punishment from the point of view of social systems.

My research highlights the peculiarities of punishment in the social systems of law and education, and shows how punishment can connect social systems. I expose how there are distinctly educational and distinctly legal features of youth punishment. First, I present a suite of intra-systemic features of punishment in law. The peculiarities of youth punishment in law are captured with law's focus on offering protection, distinguishing fools from fiends, observing the character and associated consequences of youth behaviour, and pursuing accountability. Second, I show the peculiarities of youth punishment in education by documenting education's focus on the locality of behaviour, school climate, and progressive discipline. Finally, I analyse how education and law are able to influence each other, which means that law can productively make use of education and education can productively make use of law.

My study provides the opportunity to be cognizant of the day-to-day workings of legal and educational punishment and the interactions between these two systems. This research shows that more attention could be paid to both the peculiarities of different social systems where punishment unfolds and the connections between social systems when punishing.

Keywords: punishment; youth; youth punishment; social systems

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## **Glossary of terms**

EA: *Education Act* (ON)

EJS: Extra-judicial sanction

Non-EJS: Non Extra-judicial sanction

OPA: Oldrose Police Agency

PD: Progressive Discipline

WPS: Westston Police Service

YCJA: *Youth Criminal Justice Act*

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## **Chapter 1: Introduction**

My dissertation explores youth punishment in Canada. Since the work of Durkheim (1933, 1938, 2004), studies of punishment have been used to tell a story about society. These studies show how punishment is impacted by and impacts the nature of economic and political relations, or explicate how values and morals are socially important when punishing (Garland 1990, 2001, Simon and Sparks 2013). The ubiquity and variety of punishment shows that it may be gentle or harsh, it could be used to control crime/misbehaviour or to communicate social condemnation, it may take place in law or in schools, and it may operate publically or in secrecy. Common among scholars, service providers, practitioners, the public, and governments are concerns and interests in the forms, intensities, logics, and boundaries of punishment.

Many observers of youth punishment use media hype as a starting point. For example, Canadian headlines proclaim: “Breaking the Youth Crime Cycle: New Strategies Aiming To Rehabilitate Young Offenders Have Mixed Results” (Ellwand 2016); “Quebec Honour Roll Student Fights Expulsion For Bringing Pocket Knife To School” (Shivji 2016); “Criminal Offenders Under 12 Should Not Walk Free In Canada (Leamon 2016); or “Provide A Vaccination Record Or Be Suspended, Students Warned” (CBC 2016). These news stories show variety in the targets for punishment, the problems in need of punishment, and the ability for punishment to touch criminal justice, school, health (vaccination reference), and science (rehabilitative reference).

Minaker and Hogeveen (2008, 3-4) note that the criminal justice variety of youth punishment is a “hot topic”, it “pervades popular consciousness,” it is “insidiously

saturated in the public imagination” catching the attention of citizens and politicians alike. This is because people get caught in the “ethos of punishment, believing more austere methods of punishment will curb the tide of youth crime and violence”. The pervasiveness of youth punishment has the potential to touch large numbers of people among those who are legally punished adults/youths, and those victims/survivors, practitioners, or service providers trying to dispense some variety of it. Others may be familiar with punishment as proponents/opponents of it. Common among all observers are questions related to who it is applied, when it is applied, and how it is applied. These are all important issues of the scope (when, how and what?), the scale (how much?), the source (from whom/what?), and the target (for who/what?) of punishment.

One of the principal objectives of this dissertation is to ask questions about punishment in a theoretically meaningful and empirically grounded way. I am preoccupied with presenting a sociology of youth punishment in modern social systems. Specifically, I want to open a path to discover the operations of youth punishment in the social systems of law and education. There are good reasons to focus on law and education as sites of punishment. Practically speaking, law and education are uniquely positioned and have a great potential to touch the lives of huge swaths of young people. And as my literature review demonstrates, focusing on law and education addresses the need to explore the multiple sites and meanings of punishment, the need for topical and theoretical development in the sociology of youth punishment, and the need to bridle explorations of punishment within and across social systems.

While law and education may have formalized goals and operations when it comes to punishing, exploring and exposing the features of punishment are also

important for the sake of transparency and explanation. My work serves to study youth punishment, use social systems theory empirically, and make a contribution to the sociology of youth punishment.

In what follows, I show the need for theoretical and topical development in the study of youth punishment. I begin by outlining some of the general trajectories used to study punishment and penal developments in the social sciences. I also lay the foundation to justify my core research objects, which are: punishment, youth, and social systems.

In this work, I develop the argument that punishment is both something that is distinctly educational or distinctly legal, but at the same time punishment in law and in education can influence each other. My argument is developed over three substantive analytical chapters where I show both the peculiarities of youth punishment in law and education, and I show how law and education are able to do more in their respective systems by referring to each other's operations to create their own work.

My study provides the opportunity to not only be cognizant of the day-to-day workings of law and education but also the interactions between these two systems. By foregrounding the communication of punishment in law and education, I am able to: capture norms of punishment and behaviour in law and education; and investigate the relationship between law and education in the context of punishment. As such, my contribution engages the sociological questions of not only how punishment operates in the system of law and the system of education, but also the relationship between these two systems. As for the need to study education, the focus on criminal law in studying punishment is one problem that I can empirically and theoretically challenge by exploring punishment in education.

My project relies on insights from Niklas Luhmann's social systems theory. This perspective allows me to add to the current suite of theories and interpretive approaches used in the sociological study of punishment, but certainly not replace them. Adopting a social systems perspective notably means to describe the present – modernity – as organized by functionally differentiated systems of communication instead of social actions, cultural practices, experiences, and dominant moralities (Luhmann 1995).

While I discuss below the need to study punishment, systems, and youth, having the inquiry at the level of complex social systems provides a unique path study punishment. Systems theory argues that society is currently made up on many communication systems and this is a condition called functional differentiation (Luhmann 1995). Social systems, for instance law, education, politics, economics and so on are communication systems, constituted and working in and through communication. I show how social systems theory provides conceptual tools and a framework to study legal and educational communications. Systems theory does not lead my study to a “bookkeeper’s science” based on categorization or one that is concerned with universal laws but one that is devoted to studying multiplicity, differences, and making second-order observations (Andersen 2008a, 20, Luhmann 1995).

I take a novel approach to study youth punishment by focusing on communication as the unit of analysis. My approach is notably different from the study of actors, and indeed, this is a sociological shift that tries to move beyond well-worn ideas about actors, agency, people, and actions to systems of communication. While focusing on communication as the unit of analysis can be debated in sociology, doing so allows me to work past the problems I observe in the field and it provides some novel solutions to

complex sociological problems. This is done all while remaining sociological in the sense of the questions asked, the techniques used, the observations made, and the commitment to explanation. The theory also provides the scaffolding to study the complexities, decisions, and nuances of education and law without relying on political, moral, or economic distinctions to make sense of law and education. Of course, I am not suggesting that economic, moral, or political analyses are wrong or misguided, I just point out the consequences and show how there are limits to understanding and exploring punishment because of perspectivism.

#### Research needs in the study youth punishment

The sociology of punishment has made major strides in historicizing punishment, describing its functions, mapping relational dynamics, and describing the larger social forces and social effects (Garland 1991, Morrill et al. 2005). A key principle in studying punishment is recognizing that it has meaning beyond the narrow confines of the criminal legal system. Accordingly, punishment is neither synonymous with nor limited to criminal legal system operations (Tonry 2011). However, the intricacies have been unrealized in the development of a sociology of youth punishment. To take seriously the multiple sites, forms, and consequences of punishment, I work towards developing an approach to study youth punishment in law and education.

To my knowledge, studying punishment by looking within and across law and education has not been done in the Canadian context. My work therefore adds a Canadian study to the US-centric body of scholarship that tends to explore punishment in education through the extension of the criminal law (e.g., Hirschfield 2017). In fact, one of my principal reasons for studying law and education is to inject debate into the current law-

education relationships where education seems to be colonized by law (e.g., Simon 2007). I also study education to create the opportunity to develop and use a framework to study systems/work with systems theory so other systems-based analyses of punishment can take place in the future.

The current body of criminological and sociological research helps identify the issues, scope, and scale of youth punishment, but it tends to be criminal justice centric, and it tends to lack theoretical development (Phoenix 2016). What remains largely absent in existing scholarship is a meaningful discussion of the plurality of punishments targeting youth, a theoretically meaningful thesis of youth punishment, and an inter/intra-systemic empirical research program on (youth) punishment. These issues fuel a “gloomy state” of theorizing youth punishment in modern society because of redundancy and the lack of theoretical development (Phoenix 2016, 123).

While I explore the critique of the “gloomy state” of theorizing youth punishment more fully below, this has led me to be interested in asking questions about how youth punishment operates and who gets punished to tell a story about different social systems. My questions feed the development of a theoretically meaningful and empirically grounded thesis about youth punishment. When I pose questions about how youth punishment operates, my goal is to expose the operations of punishment for the purpose of transparency, and to expose its scope and scale.

By studying youth punishment in law and education, I expose the black-box of youth punishment. I expose the internal operations of punishment and draw attention to how youth and punishment are conceptualised in and between different social systems. These are precisely my contributions in this dissertation. My research explores and

presents how law and education each have their own peculiarities when it comes to punishing youth. But at the same time, they are capable of making use of each other. This type of analysis allows me to draw attention to both the inter-systemic features of punishment and the intra-systemic features of punishment in law and education. My analysis packages a suite of fundamental considerations about punishment when I show how law focuses on ideas such as protection and youth as fools or fiends and my analysis of education exposes how education focuses on ideas such as school climate and progressive discipline when punishing.

When I study punishment, I am inspired by the “more mundane question of how it’s all done” by asking about what punishment does and how it operates, rather than what it is and why it exists (Valverde 2003, 11). Accordingly, my work is guided by asking:

- 1) How do law and education define, envisage, or limit youth punishment?
- 2) How is youth punishment selected? And what are the contemporary processes for punishing youth in law and education?
- 3) In the context of youth punishment in social systems, are the social systems of law and education linked, influenced or coupled, and if so, how?

These questions matter to sociologists, policy makers, educators, judges, politicians, parents, youth, and legal practitioners because they: expose the conditions of punishment in modern society; unearth the logics that come to rationalize, justify, or condone expanding or limiting of punishment; and can help develop meaningful accounts that advance sociological understandings, conceptions, and concepts related to punishment. These questions are worth asking because they expose the systemic operations that impact youth, impact the way that youth are thought of in law and education, and impact the way that systems punish. The craftings of youth and youth

punishment are important for it can limit or expand conceptualizations, solutions, operations, and institutions for youth.

**Core research objects: What am I observing and what are my preliminary assumptions?**

I have three core objects of analysis: youth, punishment, and social systems. To clarify my empirical, topical, and theoretical starting points, I describe why I study youth, punishment, and social systems.

*Why youth punishment?:* I am concerned about and inspired by the state of a theoretically meaningful and empirically grounded thesis of youth punishment in modern society. While it is widely accepted that institutions such as families, churches, schools, and neighbourhoods do the “heavy lifting of instilling and reinforcing social norms” (Tonry 2011, 384), exposing how the “lifting” operates in law and education in Canada has not been fully developed. Providing a theoretical framework for studying punishment in society, and blending studies on youth, punishment, education, and law will be the original and significant contribution of this thesis. To my knowledge, no Canadian or international work brings together these fields: to topically study the operations of punishment between social systems; to theoretically advance an approach for a meaningful thesis of youth punishment in society; or to analyse how youth punishment operates.

Studying punishment addresses the concern that it is poorly understood (Garland, 1990). Studying punishment is interesting to me because, even if punishment fails instrumentally in achieving its stated goals in its institutionalized forms (i.e., the prison as/for offender reform), there is still insight gained from how it works, who it impacts, what considerations impact punishment, and what it ‘claims’ to be doing. These goals,

operations, and reasons are not always obvious and need to be exposed/explained/described. Punishment is also interesting to me because youth punishment is normally studied through its more severe strategies like prison (Cox 2011, Tonry 2011, Muncie 2004) or transfers to adult court (Allen and Superle 2016, Feld 1993, Myers 2003, Piñero 2013b) which are often the exception. Consequently, this hides other legal punishments (e.g., community sentences and diversion) and punishment in other systems (e.g., in education).

Following Phoenix's (2016, 125) recent work, I find the state of theorizing youth punishment to be lacking because it repeats the same theoretical questions: "how can we account for this 'new youth justice system', its hybridity, its contradictory policy landscape, the seeming abrogation of welfare principle in relation to children, its punitive characteristics and its effects. The answer: by using a governmental, penal governance or youth governance approach" (Phoenix 2016, 126). Certainly, this is not the only question and not the only perspective from which to observe youth punishment. This leaves punishment in different social systems, the inter/intra-system dynamics, the sources, logics, meanings, and operations of youth punishment obscured, overlooked, overdetermined, hidden, and otherwise undertheorized. I identify and formulate the issues of redundancies and blind spots to add to this critique to inform my study of youth punishment.

I undertook this project to develop an approach to address current blind spots in the sociology of youth punishment. I am curious about where punishment is crafted, what it creates, and its scope, scale, and consequences. I am concerned that youth punishment remains obscure because it is difficult to sociologically identify and explain what it is,

how it operates, and with what structures and processes it relies upon. As I will show below, this is because most of the explanatory efforts are spent on mapping what impacts it and what over-determines it. In this sense, I build on important work in the sociology of punishment that has mapped the creation and continuation of punishment as a reflection and a creation of dominant morals, economics, practices, sensibilities, and powers (see Garland 1990) and examined historical and current culture, racialize, gender, and class-based beliefs about groups of people (for instance Wacquant 2009, Whitehead and Arthur 2011).

Building on recent critiques of the field, my literature review shows a number of problems. First, I show how most theorizing about youth punishment tend to import or universally apply explanations of adult punishment to those about youth. This means that there is a common condition or a common experience that characterizes the punishment of youth and the punishment of adults. Consequently, what is unique to youth punishment, the meanings of a distinct youth punishment, and how youth punishment operates becomes obscured and somewhat indistinguishable.

Second, I show how theoretically, punishment tends to be described as a heteronomous operation. Consequently, theorizations of punishment are incapable of being autonomously crafted in different systemic contexts. This means that punishment is seen as being steered or influenced by other social forces (morality, economics, politics...) which tend to ignore unique context dependent operations of punishment. This obscures the inter-system and intra-system features. Accordingly, I explore and identify elements of youth punishment that are endogenous to the context where it operates.

These two problems are further complicated with the underdevelopment of institutionally non-penal (Phoenix 2016) and non-criminal legal system based responses to youth lawbreaking or misbehaviour. Identifying institutionally non-penal dynamics of youth punishment aims to show that the law/criminalizing processes may not be penal (e.g., diversion, programming...). With this critique, non-criminal legal system approach means that there are other legal approaches (i.e., the law of education) relevant to punishment and there are other systems (i.e., the system of education) that have something to offer in a study of punishment. For that reason, I want to explore and expose different sites and characteristics of youth punishment.

For example, when I explore punishment within and across systems, I offer a broader reading and interpretation of punishment that may operate beyond the violation of law schema. For instance, to adopt the language of education, I focus on how progressive discipline as a strategy of education is used to punish for violating behavioural expectations in education. When I observe law or education, I am challenging the notion that punishment is only visible in relation to the criminal law. I am more interested in how law and education have their own notions of punishment.

To fashion an approach and open up the theoretical and empirical boundaries of punishment, I do not see punishment as an outcome of law breaking but, it is part of a suite of operations and meanings within social systems. I frame punishment in relation to the social system where it can operate, where it can be threatened or actualized. My approach aspires to identify and explicate elements of punishment in social systems. And, my approach explores some basic formal distinctions to guide observations of punishment in modern social systems. Accordingly, I have an opportunity to study youth

punishment and its multiple manifestations both empirically (e.g., penal versus institutionally non-penal responses) and theoretically (e.g., in systems of law and education).

I clarify and apply a conception of punishment that works in the context of law, while also being applicable to punishment within other social systems. My approach is to study punishment communicationally. To study punishment communicationally means to study it in different systemic contexts or different social systems. To study punishment communicationally does not mean that I study it from the typical affirmative or expressive qualities of sanctions. Rather, studying punishment communicationally provides me with the opportunity to observe the particularities of the selection to punish in law and in education because it is expected that there will be multiple system-specific communications. I prefer to see how punishment does not exist outside of the systemic communications that constitute it. So, to study punishment communicationally is not to prioritize one system over the other, as communicative features of punishment are system specific. I privilege and expose the different communicative elements of punishment in law and education.

Working to offer a conception of punishment, I also apply parts of Carrier's (2011) conception of social control to study punishment. Using this point of reference, I see punishment operating in law and education as force, power, and influence. Accordingly, I work with a conception of punishment that captures punishment's influence, punishment's power, and punishment's force. This conception serves to clarify and expand what can be studied when we study punishment and where exactly punishment can be observed. This is substantively useful in my study as it allows me to

observe what education calls intervention, school climate, and progressive discipline and it allows me to observe what law terms diversion, protection, and accountability. Finally, my conception also allows me to add to the suite of explanations and analytical tools used to study of punishment.

*Why youth?:* I study youth because they occupy a large segment of the population and according to Canadian population projections, there will be an increase in the number of youth in Canada in the next fifteen to twenty years.<sup>1</sup> This warns of a potential increase in the targets of punishment, as concerns mount from publics, criminal justice institutions, parents, educational professionals, and politicians. I also study youth given the social commitment to specialised institutions for youth (schools, law, hospitals...). A growing population combined with pockets of specialization leaves me concerned and curious about the assemblage of conversations, intentions, promises, and operations mobilized in the construction of youth, their behaviour, and punishment.

I also study youth for they are important in their own right (Empey 1982, Hammersley 2016, Sutherland 2000). Following Giroux (2009, 27), I understand “children constitute the primary index through which a society registers its own meaning, vision and politics” and consequently registers different constructions in and by different systems. A lot of research focuses on youth because they are exploited, oppressed, objects of fear mongering, and generally (politically) demonized (Hogeveen 2007, Hogeveen and Freistadt 2012, Hogeveen 2005, Giroux 2009, 2008b). It can be said that children are crafted as innocent and evil (Park 2014), but as Giroux (2009, 28) explains,

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<sup>1</sup> See Statistics Canada. (2016). Projected population and Components of projected population growth. Dataset: CANSIM tables 052-0005 and 052-0006. Accessed September 2016

the latter part may take priority as young people are no longer valued for their potential to become contributing citizens in a democratic nation, but instead:

[...] the complex machinery of pedagogy, media and politics is now largely mobilized to demean and punish rather than protect and nurture children. For many young people the future is bleak; the roles now open to them, as defined by commodity markets, shift between slacker employees and flawed consumers, or simply fodder for the human waste-disposal industry.

I see an opportunity to expose and explain the current meaning of youth in systems (e.g., education, media, politics, law...).

These logics and these functions are certainly not the only ones affecting youth. The questions I pose and the assumptions that I bring to my study involves seeing how these ideas are differently created with differential consequences in different systems. So, there are system differences that have not been explored and I try to add nuances by rejecting the homogenous view about the role, status, and characteristics of youth and punishment.

I also study youth because of their applicability and relevance to adults. Craftings of youth are relevant to adults insofar as they provide a source of creativity, innovation, and change. While there may be theoretical and empirical work that challenges the promises to treat youth differently and more humanely compared to adults (Pinero 2006, Piñero 2013a), the idea that there can be more humane treatment is relevant across systemic contexts. Studying operations in different contexts also makes it possible to identify and analyse the conditions of possibility for creativity.

Consider recent scholarship tracking the implementation of the *Youth Criminal Justice Act*. This work convincingly shows the positive outcomes of treating youth

differently from adults and trying to remedy systemic problems including a harsh penal system and the over incarceration of youth. There is consensus that changing the approach to understanding youth, to understanding youth criminal justice, and to understanding youth punishment impacts outcomes (Alain and Desrosiers 2016, Corrado, Alain, and Reid 2016). If changes in youth punishment could inform change in the adult punishment, it is imperative to explore, understand, explain, and assess the sources, types, structures, and operations of youth punishment. If the approach to youth punishment is read as a formula for generally reducing the over reliance on incarceration, it is essential to understand the complexities, nuances, and the operations of youth punishment.

*Why Social Systems?:* Studying punishment in social systems is important as the work is situated within a theory of society, which gives an alternative to picking away at parts of punishment with case studies; for instance the punishment of one-off but horrific youth crime (see for instance Scraton 2007). I hope that this will help me map an understanding of punishment *in* society as explored *in* law and education.

Social systems theory excels at capturing the close, subtle, and mundane selections which I use to study punishment in law and in education. It also offers an original description of modern society and what is possible in communication. This angle has not been extensively used to study punishment. Systems theory allows me to observe and analyse systems on their own terms. Systems are built and differentiated based on their own terms and resources. What systems theory offers, and what makes it compelling, is that it has a bank of concepts to be applied universally to parts of society, and even sociology itself. This allows me to study punishment communicationally and study punishment in law an education. This also allows me to show how punishment is

not only distinctly legal, but punishment can also be distinctly educational. I am then able to showcase the intra-systemic features of punishment. My central claim is that punishment in social systems is structured by the communications in law and education.<sup>2</sup>

Social systems theory observes modern society as differentiated according to different subsystems that have a specific function. Some of the subsystems include the economy, law, science, politics, education, art, and religion. Seeing society as a collection of differentiated subsystems means that “society no longer has a centre or apex from which communication in society can be controlled” (Vanderstraeten 2004, 256). Instead, subsystems are functionally differentiated which simply means that labour tasks in society or economic structures no longer guide the communication of society, but the defining feature of modern society is the evolution of operations of autonomous or autopoietic subsystems. Because there is no single entry point to systems theory, my strategy will be to work with concepts and explain the consequences of these concepts for my study.

Communication is an important concept from social systems theory. In this perspective, communication is inherently social and communication becomes the object of analysis. For systems theory, communication is the common and the irreducible element of all social systems. I can say that social systems are communications systems. And I can also say that social systems are not rooted in action or individuals, but the communication of meanings (Luhmann 1995).

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<sup>2</sup> I develop this idea more below. To study punishment communicationally means to study it in different systemic contexts or different social systems. To study punishment communicationally does not mean that I study it from the typical affirmative or expressive qualities of sanctions. Rather, studying punishment communicationally provides me with the opportunity to observe the particularities of the selection to punish in law and in education because it is expected that there will be multiple system-specific rationalities or peculiarities that are communicated in law and education.

All social systems have their own network or set of communications to communicate meaning. Systems do not interact or communicate with other systems or with its environment, but they interact through a process of structural coupling. I examine structural coupling more fully in my theory chapter and chapter eight, but I focus on communication of social systems as this is what constitutes systems. The legal system is constituted by legal communications and educational system is constituted by educational communications (Luhmann 1995). To illustrate, consider communication in law that sets up and translates issues using a legal lens to establish things like: rules of admissibility of evidence; processes for fact-finding; *mens rea* in criminal matters; and so on. Exploring and exposing these communications for each system provides a theoretical point of reference for my empirical work.

Most development in the area points to “variations of the theme of ‘system and environment’” (Luhmann 2012, 31) which for my project means that the openness/closure of systems like law and education in their operations of punishment is a central theoretical puzzle. The consequence of this framework means that we do not start the analysis with people or with families or with children/youth who are linked to the operations of punishment. Instead, the starting place is with differentiated subsystems. This is concretely seen in the assumption of social systems theory that all social systems share basic similarities, be it economics, law, science, or education. All of these systems rely on an operatively defined conception of systems, where they consist of self-referential operations that distinguish the system from its environment (Luhmann 1995).

Social systems theory points me towards a constructivist understanding of reality and consequently, a constructivist understanding of modern social systems. This

positioning is commonly described in systems theory and by its followers as radical constructivism (Carrier 2011, King 2007, Luhmann 2012, Moeller 2006, 2012). Radical constructivism means that reality emerges from constructions made by an observer, it is not a given, it is not waiting to be explored, and there is not a singular vision or “one reality” but plurality (Moeller 2006, 70). The perspective erases the distinction between how the world is and how it is observed, which is to say that “the world as it is and the world as it is observed cannot be distinguished” (see Luhmann 2002, 11). In clarifying the epistemological boundary of the theory, it can be said that reality is a product of the differences selected by systems, there is not a single world out there just waiting to be explored by analysts (see Moeller 2006, 71).

Luhmann (2000, 6) describes how the world is “a horizon in the phenomenological sense.” For this reason, “there is no possibility other than to construct reality and perhaps to observe observers as they construct reality” (Luhmann 2000, 6). Illustrating this perspective with my empirical object means that punishment cannot be anywhere other than in the communications or discourses that are used to constitute punishment. But to be clear, the theory of social systems does not rely on creating notions of punishment out of nothing but it signals that social systems (law, education, and so on) will give the world meaning/construct it.

In summary, there is much to be gained from using social systems theory. First, this perspective allows me to question and expose the current way that punishment is conceptualized in law and education. Notably, it allows me to abandon any symbolic role of punishment in social systems and foreground the peculiarities of punishment or the creation of particular realities of punishment in different social systems. This is because

the constructivist approach helps me observe how punishment and its essence can only reside in the communications that come to constitute it in different systems. Further, the constructivist approach allows me to move past advocating for a particular approach to punishment, or a particular issue in need of punishment, to always return to pointing out how and where different social systems are deeply implicated in creating the conditions and goals for punishing young people.

Second, while this theoretical lens is developed in the sociology of law (see for instance Cotterrell 1984, Deflem 1998, 2008, King and Thornhill 2005, Luhmann 1990, 2004, Teubner 1989, 2001, Philippopoulos-Mihalopoulos and Webb 2015) and has also been taken up in the context of organizational studies (Bakken and Hernes 2003), public policy/administration (Andersen 2008a), and international relations (Jeager 2004), it remains under used in the study of crime, social control, and punishment.<sup>3</sup> The autonomous system does not mean the system exists without an environment (Luhmann 2012, 2004, 1995). It also does not mean that the juridical system (or politics, or education...) operates independently and free from external influence. Rather, as Teubner (1989, 739) explains, autonomy merely presents a vision that “law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations...” This framework permits new paths to observe law and education from the inside and analyse punishment as part of system-specific operations.

Third, I also use social systems theory to address its silence in Anglophone scholarship and to give me a framework to study punishment within and across systems.

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<sup>3</sup> For a list of exceptions, which come primarily from Francophone scholarship, see Carrier (2008, 173)

Using social systems theory further allows me to apply it empirically and make a theoretical critique of existing works on youth punishment, the sociology of punishment, and punishment in education. Fourth, systems theory gives me analytical tools, a language to discuss my observations, and a language to mount critiques. My use of systems theory allows me to broaden the interpretation and study of punishment that typically use the disciplinary framework (Foucault 1995, Shearing and Stenning 2003, Garland 1990, 1991, 1997) or moral regulation/governance framework (Curtis 1997, Frauley 2012, Gray 2013). In the discipline perspective, punishment in schools and punishment in law are theoretically seen to be tailoring bodies to fit modern roles. In this approach, the juridical conceptions of punishment and punishment in schools can be analysed as part of the micro-level power relations that produce and reproduce knowledges, subjectivities, and domination by creating a kind of student or criminalized youth (Foucault 1995). This is done through all-steering disciplinary power that operates through hierarchical observation and normalizing judgements. It goes on to create a certain kind of individual – the criminal youth, the good student, the disruptor – that can be trained, classified, normalized which leads to inclusion and/or exclusion.

The all-steering disciplinary powers are not just state level processes but include all efforts that guide freedoms and foster self-governing processes (Foucault 1995, Hannah-Moffat 2001, Rose 1990). This framework has been inspiring sociological and criminological research for approximately forty years, and as I show below, its theoretical tools have similarities with other approaches used to study punishment. With my framework, I want to offer a different set of tools to study youth punishment.

## The puzzle of punishment in law and in education

This dissertation explores how the social systems of education and law understand punishment and how the punishment of young people operates in Canada. In this sense, it is an analysis of the prominent and “less prominent locations of punishment” but remains focused on the many forms and locations of punishment (Galanter and Luban 1993, 1397). I also break down artificial boundaries that place punishment as a legal phenomenon that is steered by the dominant political flavour of the day.

The opportunity for empirical and theoretical development is clear. Existing knowledge in Canada does not articulate the “how” and “to whom/for what” of youth punishment in a theoretically meaningful and empirically grounded way. While it is possible to identify case studies of youth being punished in law or youth being disciplined in schools (Greene et al. 2010, Kupchik, Green, and Mowen 2014, Mears et al. 2016, Rudman et al. 1986, Raby and Domitrek 2007), little is known about how punishment works in and across these different systemic contexts, the types of behaviours that are punished, the strategies, rationales and/or the operations of punishment, and the (inter-/intra-) features, similarities, and differences when it comes to punishment in education and law.

My work takes a different theoretical and empirical focus because, like Fine (cited in Meiners 2007, 14), I worry there has been a fetishistic focus on those who experience discrimination, or depending on other dominant theoretical tastes, the focus has come to emphasize inequality, racism, sexism, ableism, and other substances of sociological analysis. Some other accounts pinpoint how (youth) crime and punishment are politicized (Pitts 2001, Garland 1990, Tonry 2013, Tonry 2016) and globally, this may be

characterized as a “complex agglomeration of competing and contradictory policies, including retribution, responsibility, rights, restoration, and rehabilitation, which simultaneously exhibit strong exclusionary and inclusionary tendencies” (Muncie 2005, 36). These focal points have overlooked opportunities to study operations of punishment within and across different systems.

Building my thesis, producing a theoretical framework for studying punishment in society, and blending studies on youth, punishment, education, and law will be my original and significant contribution to knowledge. I want to offer insight into how the systems of law and education craft youth punishment. My empirical and theoretical background draws on the sociology of punishment, social systems theory, critical criminology, contemporary understandings of youth, and the sociology/criminology of education.

While many scholars of punishment reject a deterministic view of punishment, it has been difficult to view punishment as a highly contingent and system-specific artefact. So law and education are not only the places where to study punishment, but they are also theoretically understood and empirically treated as the locations where punishment and youth are produced. This means that I can demonstrate that ideas, practices, operations, and crafting of youth punishment cannot be assumed to be inextricably linked, mutually constituting, and hybridized. Instead, my approach carefully explores the intra-systemic and inter-systemic features of punishment in law and education.

I mobilize discourse analysis strategies to study punishment in a theoretically informed fashion (see Andersen 2003). Consistent with my constructivist orientation, my work is not concerned with presenting the correct reality but I am concerned with

exposing and explaining the intra-systemic and inter-systemic features of punishment in law and education (see Luhmann 2012, 13). My exploratory qualitative analysis engages the communicative make up of punishment in law and education. My work draws on a suite of documents, statutes, legal cases, rules, case files, codes of conduct, memorandums, training materials, and similar secondary data produced in and by law or education. I analyse and expose the requirements and goals of punishment in law and education (intra-systemic features) and the points of influence between law and education (inter-systemic features) in the realm of selecting punishment.

### Overview of the chapters

I study youth punishment through the intra-systemic and inter-systemic features that the social systems of law and education give to punishment. Some of the achievements in my work include: creating an analytical path to study youth punishment in different systems; exposing the considerations and goals that systems use when punishing; identifying the links between law and education in the context of punishing youth; showing the empirical value of working with social systems theory; and presenting a set of steps to work with law to do research and collect empirical data. While other important contributions prioritize punishment's hybridity, effects, consequences, locations, and quantitative expansions, these have importantly revealed features and problems with punishment while backgrounding a detailed analysis of the present peculiarities of punishment. To use Pitts' framing, we have run the risk of being too grand, too bland, and too abstract (Pitts 2008) or as I prefer, not enough of the peculiarities, the present operations, the system-specific intricacies, and not enough attention to the options of punishment (Phoenix 2016). I will now sketch my chapters.

First, I build upon existing criminological and sociological literatures on youth, education, and punishment to explore the ways that different social systems (i.e., law and education) engage punishment. I establish the opportunity to study youth punishment and its multiple manifestations both empirically (e.g., penal versus non institutionally penal responses) and theoretically (e.g., in systems of law and education). In my review of the literature, I have three principal concerns. First, I am concerned that there is not a sociologically meaningful thesis of youth punishment in modern society. Second, I show how little attention is given to how youth and punishment are conceptualised in different social systems. Finally, I am concerned that the variety of youth punishment has been overlooked in Canadian punishment scholarship.

I am concerned how most approaches share the common understanding that models, logics, and operations of punishment are transferred. For instance, politics steers law or law steers education. This obscures system-specific operations, system connections, and it makes the nature of punishment overdetermined. I offer a reading of the punishment literature which shows the need for a perspective to observe law and education from the inside. I show that there are important elements in law and education that tell a story about how punishment operates within and across social systems.

In chapter three, I highlight the potential contributions of social systems theory to empirical research and I present, explain, and apply some key concepts from the contemporary social systems theory of Niklas Luhmann. My review of the literature left me in need of a theoretical approach to overcome issues with the interpretive approaches informing the study of youth punishment and in need of a scaffolding to study

punishment in law and in education. I use systems theory because it excels in capturing minute and internal operations, and inter-system dynamics.

Chapter four brings together my review of theory and my troubling of the literature on youth punishment to offer a conception of punishment. I am principally concerned with opening up relations within and across systems to observations and illuminating punishment inside social systems. To do this, I use a set of basic distinctions to guide my observations (see Carrier 2011). I present and explain some basic distinctions informing observations of punishment: power; force; and influence. The power, influence, and force schema maintains a meaningful connection to punishment, one that is theoretically meaningful in the context of my work, and provides structure for my empirical observations. These distinctions serve to clarify how I can study the intra-systemic and inter-systemic features of youth punishment.

In chapter five, I present my methodological approach to study youth punishment. I explain how I collected my data and how I deployed my analytical procedures. I argue that I not only research law, but I research with law. My principal methodological contribution involves framing/using the law as a tool for research and I do this by using law to access system records, using access to information legislation, and using an unknown part of the *YJCA* to access youth legal system records for research or statistical purposes. From a systems perspective, this highlights the strategies for translating research puzzles into legal puzzles to access data.

In chapters six through eight I present my empirical themes to craft my core argument: systems of law and education interpret punishment internally and they are able to influence each other in the context of punishment. My analysis shows how education

and law have different features, operations, considerations, and goals when it comes to punishment. There are, what I call, programs of punishment in education and programs of punishment in law. But, at the same time, there are novel connections between the two systems. This allows me to showcase an analytical framework to describe intra-systemic and inter-systemic features of youth punishment.

My chapter on punishment in law shows how law is able to organize and make sense of complexities with legal programs of punishment. These programs include the nature and consequences of conduct, a type of young person as a fool or fiend, the principles worth considering when punishing, and a promise of protection as a legal goal when punishing young people. My chapter on punishment in education displays how education relies on a different set of programs for punishment. Education's programs of punishment include considerations related to the school climate, context, and progressive discipline. In my final substantive chapter, I illustrate how law and education can influence each other, they can irritate each other, and discussing these points of contact shows how education uses law and how law uses education (and punishment), on their own terms.

In my final chapter, I review my core empirical, theoretical, and methodological contributions. I read across the findings and discussions in my study to showcase the core insights gained from my research. I show how my empirical findings explain how systems theory can uncover how youth punishment operates in law and in education and how these two systems can be linked. I also highlight how the virtue of my approach lies in identifying the distinct penological considerations when it comes to punishing youth. And, I highlight the interpretive variety I brought to studying punishment, the strategies

for researching with law, and the value added from using social systems theory. My core findings provide insight into punishment and its analysis, social systems, youth, and doing research with law. I close with some paths for future research that can continue to foreground the peculiarities of punishment within and across social systems.

## **Chapter 2: Contextualizing Current Understandings of Youth, Education, Law, and Punishment**

In this chapter I describe the histories of youth and punishment. First, I show how the child, youth, young people or adolescence is a characterization of the 18<sup>th</sup> century. This led to a new category of person which has implications for defining what is important, how it is understood, and the contemporary experiences of youth. In showing this historical characterization, I demonstrate how youth/childhood is socially constructed and the differences used to constitute them. Second, I map developments in youth law. Finally, I describe the development of the modern education system. My goal is to quickly historicize and show the current understanding of my core research objects.

I then review the core contributions in the sociology of punishment and punishing youth. In support of my research program, I show that while there are important analyses of youth punishment, there is a lack of youth specific theorizations. I also expose the challenges of current research that focuses on what impacts/over-determines punishment and the under-development of non-institutionally penal/non-criminal justice system based punishments. My goal is to show that it is worth studying youth and paying attention to the different social contexts where they can be punished.

### [A historical understanding of youth](#)

Conceptions of the child, youth, and young people are coloured by innocence, immaturity, and future potential were a creation of the 18<sup>th</sup> century. While it is difficult to nail down a specific date of “invention” (Gottlieb 1993, 157-158), it can be convincingly shown that modern notions differ from ancient and biblical-based thinking about children as property (Woodhouse 1998). As changes have taken place in industry, social

revolutions, class relations, and developments in science and medicine so too did changes occur with new “subject categories” (O'Malley 2003, 1) including children and youth. Caputo (1987, 126) describes how this includes the emergence of middle class definitions of children as “innocent and sensitive beings who required nurturance and protection.”

Sutherland, a Canadian youth historian, describes how children transform from workers, sources of wealth, and sources of property to “a seed of divine life for them [parents] to nurture and tend” (Sutherland 2000, 17). According to Empey (1982), historical change in the value of the child came to mean that “children have value in their own right and that because of their sweetness and simplicity they require careful preparation from the harshness and soon hopefully this of the adult world.” This helped inform the differentiation of youth from adults in the legal system, helped entrench childhood as a special status (Empey 1982, 8), and can be linked to changes in infant mortality and educational reform (Sutherland 2000). So, the changing conceptions of children have played a role in the social existence/trends experienced among youth.

There is consensus that childhood has, as Muncie (2004, 214 citing Rose 1989, 121) claims, “become ‘the most intensively governed sector of personal existence’. The continual casting of children in a double bind of in need of support and control has enabled virtually every aspect of their lives to be subject to inspection, surveillance and regulation.” These needs and various conceptions of youth and childhood may in fact tell more of a story about adult notions of childhood. This underscores the need to consider the voice of the child (see for instance Raby 2012), and as shown above, the unexplored role of different social systems.

Fluctuations in theoretical and empirical tastes have led to discussions and critiques of efforts to save children, discussions of the possible impact of labelling children, and critical theorizing about youth and risk (Akers and Sellers 2013, Armstrong 2004, Giroux 2009, Hughes 2011, Kemshall 2008, Mann et al. 2007, Platt 1977, Platt 2008). This means that a large subfield of critical theorizing about youth tends to focus on youth as objects of social control and as subjects of risk. Hogeveen and Minaker (2012) show that awareness of risks are used to predict crime patterns, identify youth at risk, inform treatment programs, and offer a broader ordering of the social world based on who and/or what is risky. Risk is therefore able to achieve a forward looking outlook on the world, using risk to inform the future.

Also presenting grand themes about youth in modern society, Giroux (2009) explains that youth have transformed from an object of promise and potential, to one of suspect and commodity. Youth are not at risk, but they are the risk and a consequence of market demands and the fall of social policy, youth are now subject to a variety of punitive measures which controls them through punishment, surveillance, and makes them the objects of control logics. Youth are caught in the middle of neoliberal logic and the privatization of social problems leaving them demonized and seen as dangerous. The fallout of this is that youth, at least in Giroux's (2009, 28) analysis, are being shaped by market interests in their current collective experience and in their futures. All of these analyses point out the time and space constructions of youth and political consequences experienced by youth but, left underexplored are the ways that youth are crafted and are difference instigating in different systems, which includes law and education.

## Youth in the law in Canada: Federal and provincial insights and observations of criminal and educational law

It is common place to assert that punishment is not just legal, but at the same time, legal punishment is not just criminal punishment. My principal argument in reviewing legal aspects of youth punishment is that criminal aspects of youth law are not the only source of information about the legal punishment of youth. So, I can observe the law of youth punishment in the *Youth Criminal Justice Act* (S.C. 2002, c. 1) and in the *Education Act* (R.S.O. 1990, c. E.2).<sup>4</sup> This opens up the study of punishment to different types of law to offer a more nuanced understanding of legal aspects of punishment.

To highlight this plurality in legal punishment, I briefly describe the current legal punishments of youth by drawing on the law of criminal punishments (read as *YCJA*) and the law of education (read as *Education Act*). I have two goals: I want to describe some of the context of legal descriptions of punishment; and I want to unsilence the law of education as a source of legal information about youth punishment.

Criminal legal systems around the world distinguish between adult and youth, which means that children and youth are not held legally accountable to the same degree as adults (Goldson and Muncie 2006, Muncie 2004). The consensus in Canada is that 1857 was the first time legislation distinguished between youth and adults (Ménard 2003, Trépanier and Tulkens 1995, Piñero 2013b). In Canada, the structure of criminal legal operations related to youth and adolescence have changed considerably over time.

One starting place for the criminal law's self-description of youth punishment is to show how law makes it legal to make legal descriptions, qualifications, or differences based on age. The criminal law currently uses three age-based distinctions of

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<sup>4</sup> *Youth Criminal Justice Act (YCJA). Education Act (EA).*

accountability (Bala and Anand 2009). This includes children who are under 12, youth who are between the ages of 12 and 17 years old, and adults who are 18 years of age or older. Those who are under 12 are immune from criminal liability. Youth, from the age of 12 to 17 are legally understood to be accountable, although a limited model accountability, under the *Youth Criminal Justice Act*. Finally, for adults or those 18 years of age and older, the law requires full legal accountability. Accordingly, law sees the possibility for youth punishment to be a function of age (see *Youth Criminal Justice Act* (S.C. 2002, c. 1). However in my study when I investigate law, I am generally interested in those who are punished between the ages of 12 and 17.

While there are interesting historical discussions of youth criminal justice (Alvi 2012, Bala and Anand 2009, Bell 2007, Piñero 2013b), the current approach to youth criminal law in Canada began in 2003 when the *Youth Criminal Justice Act (YCJA)* came into force. This approach introduced significant changes, in fact a regime change, geared towards addressing concerns about the use of court, the overuse of custody, disparity and unfairness in sentencing, and substantive outcomes for young people (Canada 2013). The *YCJA* purports to offer proportional responses to youth crime by ensuring that the seriousness of the criminal legal system response reflected the seriousness of the offence and the degree of responsibility of a young person, while also trying to re-socialize young people convicted or accused of committing crimes (Alain and Desrosiers 2016). This means that judges need to consider alternatives to custody, police must consider alternatives to formal processing/diversion for all youth, custody cannot (should not) be used to deal with social problems like homelessness, and a set of complex and differentiating legal terms are used to describe principles, processes, and outcomes for

youth criminal justice in Canada (e.g., conferencing, extrajudicial measures, serious violent offence, intensive rehabilitative custody and supervision, gateways to custody...).

While the *YCJA* is commonly seen to be implemented differently across the provinces (Corrado, Alain, and Reid 2016), it is often celebrated for having coherent and directive principles and objectives (Roberts, Carrington, and Bala 2009). Perhaps the most notable dimensions of the *YCJA* include an approach to formalize informal processes, and change the overarching structure/purpose of sentencing youth in Canada.

While it is easy to identify concrete problems with the operations of youth justice and youth punishment in Canada, for instance increase in girls incarcerated, aboriginal overrepresentation, the eclipsing of the rate of youth in detention compared to the rate of youth sentenced to custody while the crime severity index declines (Corrado, Alain, and Reid 2016), the current legislative framework is a “qualified success” (Roberts, Carrington, and Bala 2009). Notably, success is evidenced with outcomes of reduced incarceration rates and increased diversion candidacy among youth in Canada. But of course, this description does not capture the nuances of possible theoretical explanations of youth criminalization and punishment that take place inside and outside of the criminal legal system. Further, left out are descriptions of how it all works, where instead analysts choose to focus on a few good indicators to show success to the detriment of a more complex narrative about youth punishment. For this reason, studying legal punishment and the punishment of youth is needed. This takes me to educational law.

The criminal law is not the only type of law relevant to youth. Because this dissertation addresses the vacuum where youth punishment and law is generally welded to the criminal legal system, I present punishment related material in education law.

Education law is a provincial matter in Canada.<sup>5</sup> In Ontario, the Ontario *Education Act* (R.S.O. 1990) consists of 14 parts along with the number regulations. Some of the regulations of the Ontario *Education Act* include rules on the purchase of milk, the development of learning plans, access to school premises, school attendance, and trans-fat standards. I am concerned with part 13 of the *Education Act*: Behaviour, Discipline and Safety.

A significant part of education law in Ontario is dedicated to the maintenance of a safe learning environment. The general approach to student discipline is described:

... [not as] a mathematical equation with a predictable result box, rather, each situation must be judged on its own merits. There has never been room for zero-tolerance policies in any matter related to student discipline. No two students and no two situations are alike. Although bound by the restrictions of legislation when deciding discipline, administrators remain unfettered in their ability to determine suitable yet fair consequences through their use of discretion, progressive discipline, sound judgment and a healthy degree of empathy (Hill 2013, viv).

Historically, school boards have their own policies which led to inconsistencies across schools in the provinces. The current legal framework in education law began in 2000 with a commitment to safe schools, positive school climate, and support for students to reach their potential. In September 2001, the *Safe Schools Act* (S.O. 2000, c. 12) was implemented in publicly funded schools in the province of Ontario with a promise to keep schools safe. Highly publicized incidents with weapons in Ontario schools were seen to be the catalyst for this legislation (Anderson and Jaafar 2003). The 2001 law contained a code of conduct with lists of behaviours which required a mandatory

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<sup>5</sup> Unlike criminal law matters which fall squarely within the purview of the federal government but are administered by the provinces, the Constitution Act of 1867 makes education a provincial matter (Mackinnon and Milne 2015).

suspension, expulsion from a school board, or full expulsion. While it was not zero tolerance per se, in a strict legal sense, it did contain discretionary provisions and some mitigation factors listed in regulations. The law allowed school boards to add more infractions to policies for suspension or expulsion, hence, making it legal for school boards to list discretionary or mandatory responses (Bhattacharjee 2003).

In 2007, Bill 212 was brought forward after the review of the Safe Schools Act. In February 2008, a renamed *Progressive Discipline and School Safety Act* put forward amendments based on the information from the Safe Schools Action Team (SSAT) and the Ontario Human Rights Commission reports. In this law, zero tolerance phrases were replaced with a new concept called progressive discipline. Progressive discipline neutralizes zero tolerance and redefines who could suspend/expel (teachers could no longer expel students and there were no longer full expulsions from all Ontario boards). The law was also seen to be more (at least in its intentions) restorative, rehabilitative, and less punitive with emphasis on prevention and early intervention (Hill 2013, 6). The school board took over expulsions and only the principal could suspend. Other changes included: increased attention to mitigating factors; alternative programs for expelled/suspended students; retaining student status when expelled; and conflict resolution as part of the curriculum (Roher 2007).

In 2009, education legislation changed how school board employees would address incidents that negatively impacted the school climate and listed activities that may lead to suspension or expulsion. This meant that teachers or other school staff had to respond to incidents (if safe) and report them to the principal. Once an incident was known by the principal, it became his/her duty to determine the course of action, if any,

and to notify parents of the student to be disciplined or the parents of students harmed. The addition of the school climate to the legislation meant that incidents could be reported that happened off school property and these could lead to suspension or expulsion. This offers new legal definitions of conduct and responses to it.

Finally, the most recent amendment to the *Education Act* came into effect in 2012. The *Accepting Schools Act* focused on changes to policies and procedures related to bullying and safety in schools. Bullying provisions were amended and school boards were required to “prevent and address inappropriate and disrespectful behaviour among students including bullying, harassment and discrimination... [with the intention] to promote respect and understanding for all students and to promote positive school climate that is inclusive and accepting” (Hill 2013, 15). The law offers a new definition of bullying which was broadly defined as “aggressive and typically repeated behaviour by a pupil where” (*Education Act* 1990) it has an effect on harm, fear, distress, creates a negative environment, creates a power imbalance, and targets factors such as age, strength, size, peer group power, social status, and so on. The development of education law shows how it is legal to impose codes of conduct and it is legal to prescribe responses to misbehaviour in schools (e.g., suspension, expulsion...).

Similar to criminal legal approaches, there has been a partial oscillation among models of dealing with behaviour in school. Notably, there was a shift from get tough approaches to school safety which does not consider the factors surrounding actions (American Psychological Association Zero Tolerance Task 2008, Kajs 2006, Milne and Aurini 2017) to more blended approaches that consider factors surrounding an incident. This not only shows that legal approaches (criminal and educational) change, but there is

some indication that a movement from zero tolerance to progressive discipline can increase educational outcomes (e.g., graduation rates) (Winton 2012) in the same way that it is accepted that the *YCJA* impacted the youth custody rate.

My discussion above shows how there are different legal approaches, and while there may be some thematic similarities, they are differently important sources of information on how behavioural expectations/legal dimensions of youth punishment/behaviour can be seen in educational and criminal law. In this sense, both education law and criminal law can be used as empirical sites to study the communications and selections of legal punishment.

#### [A brief history of education](#)

Education and its subsystems of schools, which are distinct from the law of education, are well developed in Canada. Education has the capacity to touch a large number of students, but at the same time it is a large source of goods, services, and employment (Canada 2014). While the various levels of education produce their own complexities, rules, norms, communications, and selections, I want to present a brief history of public education. I want to engage the dominant understandings about the role of school/education in society and the relationship between education and other social systems.

In this project, I refer to formal education as: education that takes place in schools. Barakett and Cleghorn (2008, 2) define formal education as “the set of organized activities that are intended to transmit skills, knowledge, and values as well as to develop mental abilities.” In a little over one hundred years of formal public education, it expanded from local and voluntary pursuits to: large formalized institutions of collective

instruction (Curtis 1997); producers of particular skills (Becker 1964); transmitters of cultural capital, that are often taken for granted but nevertheless are practice under the promise of career and social advancement (Wotherspoon 2004).

In Ontario, there are two years allocated for kindergarten<sup>6</sup> which can start at age four. Elementary school offers grades one to eight and begins at age six. Secondary schools round out the public education system in Ontario and offer grades nine to 12. The public school system in Ontario has about 195 school days from September 01 to June 30, and the length of the day is no less than five hours. I have generally focused on the senior elementary school and high-school aged youth when studying schools.

There are sociological understandings and explanations of public school education. These provide meaningful explanations of modern education, its qualities, and its relationships to behavioural expectations. While these narratives are important, I want to move beyond generic promises that education will produce good future citizens/people or it is merely another institution of oppression. I am interested in education to reveal why it is important for social life, how education operates, and the meanings that education communicates.

### [Explaining modern education in Canada](#)

One of the consequences in the shift from individual instruction to collective instruction was the development of school room governance strategies for large numbers of pupils. For Curtis (1997), at least one of these strategies included backgrounding physical violence to foreground and increase reliance on moral and emotional discipline.

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<sup>6</sup> This group is generally not included in my research. However, reflecting on the empirical portions of my work, the age groups in education are less spelled-out than those in relation to law. For instance, when it comes to law, age groups are needed to define degrees of criminal responsibility. However, in education, age groups are not as explicitly used. This can mean that ideas may apply to the whole of the pupil body, those in kindergarten to those and secondary school.

In this way, governance in schools qualitatively changed but at the same time, it was steered by ruling class ideals and capitalist development. Educators came to “hide the hand” of educational power (Curtis 1997, 20) by favouring psychic and emotional strategies for securing order and obedience in schools. Another perspective posits that education is an important dimension of the economy, where monetary and neoliberal visions of social ordering see education as an essential ingredient in economic growth. Quite simply, there is a value placed in humans with the vision that “the more and better education that individuals possess, the better their returns in financial rewards and the better the national economy flourishes” (Gillies 2011, 225).

Yet other analyses of education see it as reproducing social structure, specifically class structure, by making educational based differences (i.e., based on merits, or academic competencies) a hidden reflection of broader class backgrounds that existed long before someone entered school (Bourdieu and Passeron 1990). As Bourdieu and Passeron (1990, 158) explain: there are educational differences based on class differences, and schools can transform social inequality into educational inequality. This means that inequality permeates different social spaces and social practices. A different interpretive approach to studying education identifies how education is a trifecta of security effects, a site of regulation, and a space to prepare the labour market (Frauley 2012).

A different emerging discussion engages governance and neoliberal themes to explain how education is linked to crime control. This could be read as the efforts of schools/education to regulate behaviour and bodies (see for instance Raby 2012; Simon 2007). While I present the education and crime control link below, studies of education

provide important insight into the larger social structures and social order. This is seen among efforts to link education to inequality and class or logics of organizing government according to free-market principles. While the major empirical blind spot noted by many is the inability of the sociology of education to consider the voices and views of students (Hammersley 2016), the omission that I want to highlight is the lack of theoretical engagement with the core social functions of schooling/education in the context of punishment. The silence touches order, behaviour, and processes of defining behavioural expectations in education.

Vanderstraeten (2004) contends that the sociology of education has “lost its sense of direction” but there are theoretical fruits worth exploring. The fruits are not the consensus building or communal purposes of education, but on the self-organization of education. While many of the explanations above underscore the value placed on young people, school specific achievements like career development, grades, skill development, and expected behaviour all touch on how to advance within the system of education (Luhmann 1989). As Vanderstraeten explains: “educational interventions produce almost automatically a situation in which particular patterns of behaviour are acceptable, while others are not. Outcomes of the interventions are compared with what was expected. Even if goals are not specified, these activities are likely to bring forth some sort of implicit or explicit evaluation...” (Vanderstraeten 2004, 264). So, I explore how, in what contexts, and the meaning through which education defines and responds to behavioural expectations and what types of expectations are conveyed (Baraldi and Corsi 2017).

To clarify, my review points out how I can expect there to be unique understandings/conceptualizations of punishment that have particular meanings within

the system of education. For instance, Luhmann (1989, 101) describes how “[a] person can do well or poorly in exams, be commended or rebuked, received good or bad grades, be promoted or not, be admitted to the events courses or schools or not. Finally, he or she can graduate or not.” If we take just the idea of the development of a career and its link to education, there are unique conditions of possibility and structural restrictions for this to take place. Consider grades, grades are only important within the context of promotion and making achievements within school. In the same way, classroom misbehaviour, trouble makers, and progressive discipline (current phrasing of responses to student problems) are also communicational achievements within the context of education.

#### Conclusions on studies of law and education

My review serves to clarify the spaces for my analysis of punishment. The law of punishment is not limited to criminal legal dimensions and punishment can be observed within and across law and education. I have shown that legally speaking, there is a story in criminal law and education law about youth and punishment. Two different types of law illustrate the different themes, legal languages, approaches, and sources of law that are worth considering when studying legal dimensions of youth punishment. The historical discussion of education similarly paints unique pasts and identifies different sets of themes, languages, approaches, and sources of information.

Next, I will review the core theoretical tools that have been used to study punishment to identify some current empirical and analytical problems. Guided by my concern with the lack of a theoretically meaningful thesis of youth punishment, I demonstrate how explanations of adult punishment are merely transposed upon explanations of youth punishment. This allows me to mount a critique of the theoretical

redundancy among the tools that are available to study youth punishment. I then provide a theoretical solution to these issues in Chapters Three and Four.

### **Topical and theoretical touchstones in youth punishment, youth punishment in education, and the sociology of punishment**

My study builds upon existing criminological and sociological literature on youth, education, and punishment. I explore the ways that different social systems (i.e., law and education) have come to understand and operate with their own notions of punishment. I empirically assess and expose the operations of punishment in law (criminal law and education law) and education.

In my review that follows, I have two principal concerns. First, I am concerned that there is not a sociologically meaningful thesis of youth punishment in modern society. This is not to say that youth punishment has not been studied but I am concerned that the punishment of youth cannot be distinguished from the punishment of adults. I am also concerned that too much social inquiry has focused fetishistically on discrimination (see Meiners 2007, 14) and other substances (almost exclusively power and governance) of punishment, to the detriment of other analyses of youth punishment. Revealing and addressing this blind spot is one of my theoretical and empirical contributions to the field.

The lack of a meaningful thesis of youth punishment is compounded when little attention is given to how youth and punishment are conceptualised in different social systems. The internal workings of punishment in different social systems are overlooked in part because of current theoretical tastes and theoretical tools. Current approaches show how punishment (and by implication all social systems) are heteronomous and are steered by another system. Quite simply, most approaches share the common

understanding that models, logics, and operations of punishment are merely transferred, from one system to another by one system responding to the pressures of another. For instance, politics steers law. This obscures system specific operations and system connections and it essentially makes the nature of punishment overdetermined and dedifferentiated.

I take the position that heteronomous elements and the substances of punishment may be complementary, but do not need to be assumed to be the steerers of punishment and do not provide the only gateway, theoretical tool, or explanatory approach to describe and interpret punishment in modern society. Punishment is something that is socially produced and has meaning within different systemic contexts. I want to show how the study of punishment is bankrupt of a perspective that explores how punishment of youth is internally created by law and education.

Thus, I challenge and provide an alternative reading to the idea that important elements steer, govern, push or force punishment to produce penal operations. I do not merely challenge for the sake of offering a theoretical critique, I also suggest a different reading of the sociology of punishment and a research program to overcome the critiques I present. I offer a reading of the punishment literature which shows the need for a perspective to observe law and education from the inside. I want to show that there are important elements in law and education that tell a story about how punishment operates within and across social systems. This opens up for discovery the role of social systems in creating and maintaining their own operations. For my contribution, the first step is to look to the system to see how punishment works in the specific contexts under investigation.

Finally, I am concerned that the variety of youth punishment has been overlooked in Canadian punishment scholarship. While it is widely accepted that there are many sites of punishment, the multiple sites, operations, logics, and qualities of youth punishment in Canada tend to be hidden. This is my secondary empirical contribution to the field of youth punishment. Concretely, this allows me to capture the range in the space (education and law) and the form (suspension/expulsion/progressive discipline or diversion/custody and supervision) of punishment.

In summary, I have an opportunity to study youth punishment and its multiple manifestations both empirically (e.g., penal versus non institutionally penal responses) and theoretically (e.g., in systems of law and education). My goal is to open up these explanations (i.e., address no meaningful thesis), theoretical assumptions (i.e., confront heteronomy), and sites (i.e., law and education) for sociological analysis.

Below, I review the substantive literature in the field and close with a sketch of a theoretical path to address my concerns. I show how approaches to studying youth punishment have overlooked a system-based perspective that engages the systems of law and education. Further, I illustrate how studying punishment in education has been largely influenced by studying the links between education and crime control. Finally, I show how the promise of the sociology of punishment is not fully taken up in a way to advance the sociology of youth punishment. This allows me to challenge the boundaries of punishment with an empirical and theoretical path that sees multiple punishments, specifically seeing how punishment is juridically/legally crafted and how punishment is educationally crafted.

### A sociology of youth punishment?

Simon and Sparks (2013, 2) contend that the sociology of punishment involves “interpreting the forms of punishments in terms of the [various] conditions of society in which those forms arise....” These conditions are social, political, cultural, moral, emotional, and historical. This framing assumes that conditions that give rise to punishment are something external/or some stimulus instigates it. Seemingly, this characterization seems incapable of following constructionist argumentation and identifying multiple punishments; specifically how punishment is juridically/legally crafted and how punishment is educationally crafted.

My questions can frame an epistemological critique based on a shift from identifying conditions that allow punishment to observe how and when punishment is juridically observed and how and when punishment is educationally observed. This is to observe the endogenous conditions of punishment in different contexts. To observe is to consider and provide “a framework to explore [intra and] intersystemic relations which refuses a vertical, linear domination” (Carrier 2007, 137) of systems by other systems, or of systems by other morals, cultures, discourses, politics, emotions, and so on. Quite simply, punishment is a social construct and there needs to be more attention paid to the systemic contexts and uses of this social construct. So punishments are not just fed by the political, cultural, moral, emotional, and historical but it is also system specific.

A corollary of studying systemic contexts is the plurality of punishment. There are multiple forms and multiple sources of punishment in modern society, all of which need careful scrutiny. Foregrounding punishment allows me not only to enhance knowledge and awareness but this also reveals information about society, management,

inequalities, confinement, and the delivery of punishment. In this sense, studying punishment leads to some universal questions related to: how it changes; what shape it takes; how is it practiced; what it means; who gets it; and who/what does it?

My study develops a sociology of youth punishment. I intertwine studies of youth justice, youth discipline/youth regulation in education, and the sociology of punishment and I use the youth justice studies to show the need for theoretical and empirical development. I use the literature on school discipline to show that punishment can be observed in schools. Further, I use longstanding themes in *how to study punishment* to justify adding education to the typical political and legal framing used in punishment studies. I use the the sociology of punishment to follow the tradition of engaging the “functions punishment fulfills, the effects it produces and the meanings it communicates” (Daems 2011, 806) to empirically study punishment in different systems.

Finally, I point out theoretical stagnations with studying punishment (which I call heteronomy). By this I mean that the sociology of punishment makes visible the various forces acting on punishment while simultaneously preventing observations of the impact and role of elements endogenous to the (criminal legal, educational...) systems and punishment. I propose a theoretical solution to this problem by drawing on systems theory (Luhmann 1995, 2004, 2012, 2013).

### **Studies of youth punishment: Theoretical and explanatory deficiencies**

My approach to review the topical literature is not to pick on one theme/approach/theory. Instead, my intention is to read across the approaches to show their limits and their contributions. My goal is also to expose the possibility of operations of punishment in multiple systems. The question guiding this work is: what framework

enables me to show what is punished and how punishment operates in different systemic contexts (i.e., youth vs adult systems; education vs. legal systems) in modern society?

Recently, Phoenix (2016) offered a critique of youth justice studies in England and Wales, arguing that the current theoretical understanding is underdeveloped and, the inherent complexity of youth justice along with important empirical developments are flattened due to the current theoretical understandings. Phoenix takes issue with the overreliance on governmentality theorizing, and a narrow understanding of youth justice. My dissertation engages this point as I am instigating (further) debate about the ways that youth punishments are theorized and studied in sociology and criminology. While Phoenix does not promise to offer a complete picture of the theoretical challenges in studying youth justice and youth punishment, her critique is an invitation to present some additional theoretical and topical concerns and show that these issues are not unique to England and Wales.

I concur with Phoenix's (2016) assessment of the theoretically flat nature of youth punishment and the overuse of the governance framework, but a few other stagnations are missed. Specifically, there is no invitation to decouple youth justice from law and as a consequence, uncouple punishment from criminal law. This concretely means that there is no invitation to explore punishment in other types of law. I started to show this above with the lack of observations of youth punishment in other systems. Second, while the theoretical critique of governance relies on its overuse, at least one clear theoretical alternative is needed. It seems that the theoretical critique is based on an annoyance of the same theses – or a redundancy – in youth justice. This presents an opportunity to engage

Phoenix's challenge with a theoretical alternative to open the forms of punishment to sociological inquiry.

### Youth punishment research in Canada

Youth punishment research in Canada tends to focus on criminal legal youth punishments. This work engages the political and legal dimensions of punishment to show how politics impacts law. While it is generally accepted that multiple forces and tendencies shape youth criminal justice and punishment in Canada (Doob and Sprott 2006, Hartnagel 2004), grounding studies in law and politics does not pave the way for more topical and theoretical development.<sup>7</sup> The problem with this approach is that it is unable to engage the larger norms that constitute the operations of youth punishment and the forms of youth justice and punishment. It also leaves out the generally accepted plurality of punishment (Tonry 2011) and obscures any inter/intra-systemic relationships in punishment. This leaves unexplored the possibility for juridically dependent and educationally dependent punishment in Canada.

Research also shows how the nature of youth punishment is partly determined by headlines perpetuating fears of youth crime and violence. These stories are good at hiding historical and current inequalities, abuse, neglect, racism, and power imbalances (Hogeveen and Minaker 2012). But at the same time, social characteristics, lived experiences, inequalities, power dynamics, and other substances of sociological analysis are the object for studying youth punishment. For instance, current discussions of punishment focus on the increasing (political) punitiveness of youth punishment in

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<sup>7</sup> The multiple forces are also seen in the narrative of the emergence of youth criminal justice where various external dimensions including rights based discourses, social sciences of rehabilitation, public pressures, and concerns about over incarceration led to reform (Alvi 2012, Bala 2002, 2003, Bala and Anand 2009, Bell 2007, Campbell 2005, Davis-Barron 2009, Doob and Cesaroni 2004, Hogeveen 2005, Hogeveen and Smandych 2001).

Canada and other western jurisdictions. The supposed punitiveness has led to an unanswered critique that the study of political punitiveness (Hogeveen 2005, Mann 2014) is different from studying law and its administration (Doob 2006, Doob and Spratt 2006).

There are consequences for this understanding/approach. The approach can be summarized as: analytically engaging political communications on/about punishing and assuming that these provide an indication of the larger operations of law. But, it can be said that a linear model (Paterson and Teubner 1998)<sup>8</sup> is used to describe youth punishment where politics steers law and law steers administration. Alternatively, there can be other logics steering politics (e.g., neo-liberal governmentality), law (e.g., culture) and administration (e.g., institutional histories and structures). While it may seem as if there is only one way to study punishment, my project tries to show that this is not the only way.

While there may be an opportunity for more theoretical development, it would be an overstatement to say that there is no empirical and theoretical work on the punishment of youth in modern society. Some researchers have produced rich descriptions of youth law and punishment (Bala and Anand 2009), transformations in the logic of youth justice (Corrado, Gronsdahl, and MacAlister 2007), and general trends in the operations of youth criminal legal punishments (Allen and Superle 2016, Moyer and Basic 2004). These are good starting points but they tend to be theoretically and empirically seized on a politically determined punishment or the scope and intensity of youth punishment.

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<sup>8</sup> Paterson and Teubner (1998) use the same argumentative structure but do not focus topically on youth punishment. They use this critique to offer a systems theory analysis of the offshore oil and gas industry. They describe a horizontal model where there is a political goal then a legislative act, followed by a legal norm and motivation of implementation, followed by staff which impacts social behaviour, and ultimately informs deviation/sanction. The systems for this process is fully developed in Paterson (2000) to include systems such as politics, engineering, management, and regulation.

In a recent special issue of *Social Justice*, penal policies targeting young people have been analysed, especially in the context of the punitive role played by schools, courts, and community programs. In this analysis, neoliberal logics and practices are overwhelmingly used to theorize the development of the current state of youth punishment and this explains the punitive colours of youth justice in the United States (Myers and Schept 2015). In this sense, youth punishment is generally about its intensification and its politically over-determined nature. Quite simply, politics is seen to be colonizing legal notions of punishment (law). However, it is not clear if the study of youth punishment is one of law, punishment, or politics. It is also not clear how punishment in different contexts can be explained outside of a common neo-liberal guiding logic or if neo-liberalism and its tenets are totalizing.

Also in 2015, *Canadian Criminal Law Review* focused on legal dimensions of youth punishment in Canada to highlight unknown/underexplored parts of the statutory framework (Alvi 2015). This work maps the different views/information that could be relevant in the application of youth law including, youth with mental health, youth in child welfare, family and community support for youth, and youth with addiction. It also reviewed more doctrinal aspects of law related to pre-trial release, the admissibility of statements, the accessibility of youth justice records, and youth responsibility.

Another contribution has mapped the operations, programs, and policy themes with the application of the *Youth Criminal Justice Act* in Canada. This work shows the heterogeneity and complexity of Canadian youth justice policy, practices, and issues while also mapping some of the everyday practical realities of youth mental health, youth overrepresentation, youth treatment, youth diversion, youth criminalization, and youth

punishment in Canada (Corrado, Alain, and Reid 2016). Quite simply, law is important but the administration of the law across Canada has the ability to ameliorate or perpetuate new and old problems in youth justice. So while there are similarities and differences across the provinces and territories, youth punishment scholarship is still not able to benefit from a clear theoretical framework nor can it be decoupled from the law. This closes off the possibility for punishment outside of law.

Finally, a 2008 issue in *Current Issues in Criminal Justice* discussed the criminalization and punishment of children and young people. This collection shows how demonization and criminalization have a negative impact on youth and are generally used to study targets for criminalization and punishment (e.g., communities with economic downturn) and in various locations (e.g., in schools), and among certain groups (e.g., among minorities and marginalized groups, and among the poor) (Giroux 2008b, Harrikari 2008, Hasey 2008, Maruna 2008, McAlister 2008). This clearly demonstrates how youth can be socially excluded, and as a consequence, lose autonomy and participation in schools, communities, and social settings (Scraton 2008). Instead of autonomy and participation, young people are a source of fear mongering or they are “folk devils”. As Scraton (2008, 11) explains, this tells us that there are:

Complex relations between adults and children - in families, in schools, on the street, in prisons [which] cannot be understood without consideration and analysis of the structural and institutional dynamics of power. Power vested in adulthood, manifested in economic dependency, in political exclusion and in ideological construction. It is a power that allows and sustains the ownership of children in the private realm, that polices, regulates and criminalises their movements and freedoms in the public sphere.

Accordingly, youth participation is controlled and youth can be a source of anxiety. Common among all of the dedicated contributions is a focus on the scale (i.e., intensity of punishment) and the source (i.e., legal and political) of punishment.

Left unknown are the larger communicational features and selections of different forms of punishment. This opens the theoretical critique that the substances of youth punishment are often discussed to the detriment of engaging selections and communications of youth punishment (critique adapted from Liu 2015). Rather, substances (power, inequality, (in)security) of punishment are generally seen to be the most important analytical objects. This blind spot needs further empirical and theoretical explanation.<sup>9</sup>

Another issue relates to how current interpretive frameworks use theses and concepts of adult punishment to be symbolic of a greater common experience. This is because adults and youth are lumped into the same procedural/institutional environment or they are the same type of criminalized subject – paradoxically they are different but the same. My concern is that there will be a dedifferentiation between adult and youth. This is seen when analysts focus on a universal procedural/institutional environment that is characterized by: the prison, probation, parole and youth justice as different regimes to fulfil the same purpose when they produce a disciplinary technology of the body (Foucault 1995); uncertainties and insecurities as potential (or actual) sources of harm which breed demons such as unruly youths, consumers of illicit substance, thieves, sexual

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<sup>9</sup> There are a few exceptions. Youth punishment may be about managing time (Pratt 1990), infiltrating adult philosophies (Piñero 2013a) and subjective understandings (Whitehead and Arthur 2011). More development in the area will allow me to move beyond the work that documents where youth are punished like adults (see Bateman 2011b, a, Bishop 2000, Feld 1993, Myers 2003, Piñero 2013a) or assumes that the same social, economic, political, moral or cultural practice leads to the same process of criminalization and punishment.

predators or the disruptive neighbours which leads to new laws, new surveillance techniques and new policing tactics (Ericson 2007); or universal economic forces that act on youth and adults by creating social situations of which people have little or no control (Alvi 2012, 80). The common condition is further evidenced when youth and adults are lumped into the same criminalized or controlled subject including: the *criminalized or dangerous other* (Garland 2001); a *castaway category* (Wacquant 2009); a *manageable population* (Feeley and Simon 1992); a source of *vulnerability and insecurity* (Kupchik 2010, Simon 2007); and *the risky* (Alvi 2012).

These contributions importantly explore youth criminalization and punishment with a concern about who gets punished, the spaces where punishment is dispensed, and some of the social consequences of criminalization and punishment. It is youth and marginalized subgroups who get punished, the law is the space for punishment but it may also include schools and communities, and some of the social consequences include fear mongering, inequality, marginalization, and so on. But a tension remains: on one hand, research implies that there are distinct units of analysis yet does not offer a clear framework to study these units, but on the other, a linear model (i.e., where politics impacts law, where the same institutional context that impacts adults is impacting youth...) is never questioned and has never had an alternative. My position is that we need to take seriously distinct units of analysis, distinct spaces, and different forms of punishment.

In summary, reading across the field shows that there is room for theoretical and topical development. This is because of the overwhelming focus on the substances of punishment to the detriment of communications and selections of punishment. I want to

observe law, and education, and be sensitive to the differences that make a difference in operations of punishment. Having explored some of the legal and political themes and having presented a critique of this approach, I now present some of the themes coming from punishment in education scholarship.

### [Punishment and education: Criminal justice impacts on other systems](#)

Historical studies of modern education highlight the substances of education and the nature of one type of punishment. Axelrod (1997) explains how education shapes and has been shaped by a conglomeration of class, racial, gender, ethnic, cultural, and political factors while Manzer (1994) sees the history of education to be played out by economic, political, and ideological factors.

Other work shows how the development of formal schooling has emerged as a site for adults to make claims about “children's time and space” while also trying to shape their “minds and bodies, as well as the character and conduct, of young people” (Rousmaniere, Dehli, and De Coninck-Smith 1997, 3). Also important is the placement of formal education/schooling as a key mechanism of social ordering that plays a role in social reproduction, economic productivity/prosperity, labour markets, and (self) discipline (Frauley 2012). Historical work also shows how the emergence of the school, discourses of pedagogy, practices of schooling, and subjectivities of pupils, teachers, and administrators are part of governance, state formation, and class struggle (Curtis 1997) or of punishment along the lines of discipline and governance (Curtis 1997, Hunt and Wickham 1994, Foucault 1995).

In addition to historical changes and the larger social importance of schools, research on school punishment in Canada has also addressed the issue of corporal

punishment (Axelrod 2010, Bartman 2002, Shmueli 2010).<sup>10</sup> This conversation of punishment in education/schools in Canada had largely died-off since the Supreme Court of Canada ruled<sup>11</sup> on the issue in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4.<sup>12</sup> The corporal punishment debate raises issues about the scope and scale of punishment, the use of physical force/violence in school punishment, and its legal and moral legitimacy.

While these are historically informed paths to follow in Canadian work, a growing international literature compares prisons/crime control and schools. This work explores how schools have become implicated in and directly influenced by crime control models. In this way, the discussion lands on how schools (help) define criminals, help instigate criminalizing processes, and reproduce a crime control paradigm. Just like the sociology of punishment, this work tells a story about the forces acting on current models of school punishment. This generally leads to more control, more discipline, more severe responses or more [insert alternative descriptor punishment, its scope, its scale] with the

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<sup>10</sup> Corporal punishment is broadly the purposeful “infliction of pain or confinement as a penalty for an offence” (Hyman 1990, 10) and accordingly captures a range of processing from spanking to detention.

<sup>11</sup> The court upheld spanking/corporal punishment when it is “reasonable under the circumstances” and it is intended to be for educative or corrective purposes. However, the debate has been reenergized when the Truth and Reconciliation Commission (2015) called for the repeal of section 43 of the *Criminal Code* where it states: “Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.”

<sup>12</sup> In this case, the constitutionality of a parent or teacher’s ability to use corrective force (i.e., spank) and not be charged with assault was challenged on the basis that it violated a child’s constitutional rights. In a split decision, the court held that corrective force could be used by parents and teachers and, such force was not against the rights of the child. Further, they held that corporal punishment must be used for educative or corrective purposes (para. 24), the child must be “capable of benefiting from the correction” (para 25) and this means that it cannot be applied to a child under two, and it must be reasonable in the circumstance which is guided by international treaty, the circumstance of the discipline, social consensus, expert assessment/evidence and legal interpretation. In so doing, the s. 43 provisions are said to ensure that parents and guardians of children are not unduly criminalized and that the family stays intact. In this way, how the court sees children is not only important for the subsystem of criminal law but also for the family.

greatest consequences being borne on the racially and economically disadvantaged. There are other explanatory trails detailing what is impacting punishment in education.

It is not just crime control logics that impact punishment in schools. For instance, some theorize school punishment to be largely impacted by the market when economics and unemployment impact the fiscal sustainability of education. When schools do not have enough money, disciplinary policies follow a criminal justice track (Hirschfield 2008) or tend to get students “into deeper trouble today than in the past” (Irby 2013).<sup>13</sup>

What remains unknown is how punishment operates in education in Canada outside of a broad casting of education as discipline and responding with crime-based issues. Further, what remains undeveloped is a theoretical critique of this work and unexplored is a theoretical bridge among understandings of punishment in social systems.<sup>14</sup> This theme is further illustrated below with my continued review of the nature of school punishment and the influence of criminal justice logics in schools.

### [Punishment in education: Criminal justice and political determinants](#)

My interest in punishment in schools is captured by the wide sets of conduct/behavioural expectations that are set, reinforced, and (potentially) challenged in

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<sup>13</sup> This presents an interesting but unresolved puzzle about how education is contributing to its own fiscal shortcomings and not even realizing it. It is implied that criminal justice and other services are taking monies from education but, education continues to give work to the criminal justice agencies by redefining school conduct that needs official (i.e., criminal) intervention. *Governing through crime* (Simon 2007) explains this in part as the crime control policies taking over other domains not traditionally impacted by crime control but, left unexplained is how education can become passive in this process.

<sup>14</sup> There is a strong literature that aims to develop the ideal kinds of schools, the type of teaching, the categories of the student experience, and the type of student that needs to be developed and practiced. These are more clearly seen among discourses of peacekeeping, peacemaking and peacebuilding, critical pedagogy and the future of democracy that is challenged by militarization, corporatization and right-winged ideology of school operations (Brickmore 2004, 2006, Freire 1998, Giroux 2009).

education.<sup>15</sup> These may range from the defiance of authority, fighting, possessing weapons or drugs, disruption, poor performance, lateness, or truancy and they may include a number of responses including notifying parents, recommendations for services, suspension or expulsion (Kupchik 2010). Despite the variety of responses and conduct possibly captured by school punishment, the criminalization of school discipline or punishment in schools tends to be studied through the forces that are acting on schools; the same critique as the sociology of punishment applies to punishment in education.

My theoretical critique focuses on moving beyond well-worn ideas and interpretive strategies that focus on discipline and political economy. While these expose important conditions and discourses of punishment in education, the features of punishment and considerations for punishment outside of heteronomous dynamics are left unexplored, unexplained, and un-interrogated. Let's explore this claim further.

Recently, punishment has been seen as an overreaction, ignorant of real student and institutional problems, counterproductive and absent of larger teaching moments because of its intensity (Kupchik 2010). This is seen concretely when schools operate: as a pipeline for prisons (Gonsoulin, Zablocki, and Leone 2012); through zero tolerance and the rhetoric of safety (Hanson 2005); as a puppet of current political and economic shifts (Garland 2001, Hirschfield 2008, Hirschfield and Celinska 2011, Simon 2007); through mandatory law enforcement referrals (Simon 2007); through fear and insecurities (Kupchik 2010); and through crime control logics (Hirschfield and Celinska 2011). These theses offer critiques of the scope, scale, and content of school punishment.

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<sup>15</sup> I include education because: it has been overlooked in Canada; current work reproduces the idea that punishment in education is a product of forces acting on it; it has an undeveloped systems theoretical perspective; and it provides a space to build a unique archive of educational data.

It is generally argued that schools are becoming a battle ground for processes of criminalization, through more formal, and more exclusionary modes of control that use the criminal law. Upon closer inspection, interpretive approaches and empirical efforts present how manifestations of punishment in education are actually criminal justice. Logics and operations of criminal justice are taking over the schools and crime control takes over the traditional school discretion. For Giroux (2008a), school management transforms school problems and behavioural problems into problems of crime, which can be referred to as the criminalization of schools. Quite simply, criminalization becomes a language to define youth in society, including in the school system. This has wider implications for the way that punishment is handed out, exclusion is practiced, the perception of students of the unemployed and disadvantaged minorities, and the conception of school (i.e., failure) and non-school (i.e., gangs) problems (Hirschfield 2008, Hirschfield and Celinska 2011, Simon 2007). Hirschfield (2008, 80) explains this process and expands the list of its consequences when he characterises it as a shift:

...in the definition and management of the problem of student deviance. Criminalization encompasses the manner in which policy makers and school actors think and communicate about the problem of student rule-violation as well as myriad dimensions of school praxis including architecture, penal procedure, and security technologies and tactics.

Schools, administrators, and the education system learn from crime control (Simon 2007). The crime-school link is also part of a larger social context (Hirschfield 2008) where politics, economics, and cultures rule. In this case, the steering/impacting is done by the troubled economy, financial crises, attacks on social welfare, and the decline of rehabilitation ideals (Garland 2001). It is implied that exclusion and punishment are used as an alternative to providing quality and evidence-based goods and services, one of these

is education (Hirschfield 2008, Hirschfield and Celinska 2011, Kupchik 2010, Simon 2007). At the same time as these cultural and economic forces are at play, there is a parallel vision that politics is also exerting a force on education, schools and the classroom based on things like group membership (Bourdieu and Passeron 1977).

For Hirschfield (2008) schools use more formal processes, actuarial tools, and zero tolerance policies. With these policies, it is the “nature of the offense” that matters the most not discretion of decision-makers (Hirschfield 2008, 82). This means that suspensions and expulsions are used with increasing frequency with more criminal justice system/zero tolerance logics. Another quality of school criminalization is schools import technologies of discipline and security into schools. It may also be that schools no longer use these practices just among the urban, low income and coloured students but a culture of control may be reproduced in all schools (Kupchik 2009).

Further, discipline in schools reflects morality and hierarchy, creates future differentiated workers, and cultivates self-discipline with rules that capture minorities, and that are “not completely transparent, straightforward or benign, but reflect tensions in the way that “we understand discipline, young people, and the roles of schools” (Raby 2012, 247). Canadian research focusing on rule-making in schools shows how rules are not transparent or straightforward and tend to capture minority groups (Raby 2012, 247). This work blends literatures on classroom management, moral education, critical pedagogy, governmentality and the sociology of childhood to explore the creation of rules in schools, especially through the voices of students. Or, yet another set of practices/trends is the use of zero tolerance and wide-ranging behavioural programs which have curriculum content that teach “power, control, and authority” (Robbins and

Kovalchuk 2012). This highlights a (hidden) curriculum that are not subject to formal tests but nevertheless require mastery among the students.

These processes of discipline and crime control have implications for students and for other institutions of control. The crime control inspired approach in schools may serve to teach students about militarized processes and police states (Giroux 2008a); serve as a pipeline from prisons to schools (Gonsoulin, Zablocki, and Leone 2012, Sharma 2016); serve to provide discipline for all students, regardless of social status (Simon 2007); make crime control an objective of education (Simon 2007); make schools look, sound, operate, and feel like prison (Simon 2007, 81, Hirschfield 2008), and teach other institutions, not just education, how to be guided by crime (Garland 2001).

As a corollary, research about education is unable to offer education's own characterization, definition and understanding of punishment but only mirror other understandings. And, by implication, criminal justice and politics are unable to learn from education. This tends to place politics and law at the top of a hierarchy where the system that teaches can only learn, it cannot teach and it cannot have its own internal constructions. While the nature of punishment in schools impacts students, how these processes of punishment impact the system is unclear. Another unexplored path includes describing what/how systemic communications define punishment and behavioural expectations. To my knowledge, there are no studies exploring these theses in Canada and more importantly, no studies using systems theory as a source of different theoretical and methodological tools. While I do not aim to test the core claims advanced above, my critique helps justify including the system of education in a study of youth punishment.

In summary, schools capture wide sets of conduct/behavioural expectations that are set, reinforced, and (potentially) challenged. I have shown how education scholarship focuses on the historical dimensions of punishment in education, a certain type of punishment called corporal punishment, or the new characteristics of education that sees it being steered by the economy and criminal justice. As such, missing is an analysis of how punishment and expectations are created and maintained in education.

### **The sociology of punishment: Blind to youth and critiquing the forces**

I began by challenging the existence of a sociology of youth punishment. I have shown how explanations lump adults and youth together and there is a tendency to focus on legal aspects of punishment that are generally determined by politics. Inspired by the wider literature of the sociology of punishment, there are more nuances to add.

The sociology punishment draws on bodies of social theory to explain dynamic and diverse features, functions, meanings, practices, and effects of punishment. So while practitioners and legislators of punishment may work as if punishment is about crime control, sanctioning, and preventing crimes, sociologists of punishment aim to point out how punishment may actually be reinforcing norms, reflecting class-based interests, and training bodies to the modern era. These lines of inquiry point to different theoretical explanations, which include: punishment and social solidarity; punishment and political economy; punishment and power; punishment and the (de)civilizing process; and punishment and the penal field.

I explore the paths to study youth punishment within these five dominant perspectives. My goal is to present a theoretical critique by arguing that the dominant perspectives point analysts of punishment towards studying the heteronomous forces of

punishment (that is forces outside of punishment). This means that there is no way to observe the internal dynamics, the autonomy of different systems in the context of the operations of punishment. This leads me to then develop a communicationally informed analysis of punishment in social systems in the following chapters.

### The core theses of the sociology of punishment

The social solidarity school argues that punishment is a normal social process that establishes and reinforces social solidarity by being “an integral part of all healthy societies” (Durkheim 1982, 65-75). Punishment is argued to be “a visible symbol or index, an empirical indicator, of the nature of society, moral phenomenon and type of social solidarity” (Whitehead 2010, 29), an “expression of outrage” that reaffirms the transgressed value (Zedner 2004, 77), a “ritualized attempt to reconstitute and reinforce existing authority relations [that are] carefully staged and publicized” (Garland 2001, 79-80), and a structure for the way we think about criminals, how we feel about crime in society and ultimately how punishment is dispensed in society by influencing and providing motivation for punishment (Garland 1990, 195-196).

These ideas are contrasted with the political economy school which explains how punishment is reflected in and is guided by the nature of government, the modes of production, prevailing economic forces, and class struggles. The task is to show how forces of production and changes in the economy help determine punishment. Early works (see Rusche and Kirchheimer 1939) showed the relationship between the labour market, economics, and punishment, arguing that crime and punishment are used to control surplus populations, which specifically targets the poor (see also Garland 1990, Melossi 1989, Whitehead 2010). The major consequence is a universally controlling

nature of punishment (with economics and politics) over the poor (see for instance Wacquant 2009).

Another perspective points to the internal working of punishment and qualitative penal change. This is commonly referred to as the punishment and power thesis. This work shows how the birth of the prison is linked to the changing nature of power relations. The qualitative change in punishment includes the regulation of bodies, the deprivation of liberty, totalizing and constant supervision, and programs that focus on the soul of offenders with the goal of inducing docility and obedience (Foucault 1995). Punishment aims to transform the soul of the criminal through disciplinary power. Using a variety of strategies to shape thoughts and behaviours (Foucault 1990, 1995, Hunt and Wickham 1994), disciplinary power is positive and productive (Foucault 1995, Garland 1990) by making people through internal processes adhere to behavioural norms. This can be seen in schools, churches, factories and prisons “as techniques possessing their own specificity in the more general field of other ways of exercising power” (Foucault 1995, 23).

A different approach uses the idea of the penal field to point out the practices of punishment that are fueled by social-structural dynamics and individual decision makers. This means that punishment is both a macro social-structural and a micro phenomenon of individual decision-making. Within this structured area, there are a certain number of common patterns. At the same time, actors operating within the penal field will make conscious decisions and act spontaneously or habitually (Bourdieu 1977). Garland (2001, 5) uses this idea to explain how major transformation in punishment are a consequence of transformations in other fields, institutions, and social actors. This is concretely seen

when punishment is steered/influenced by crime control practices, informal controls in everyday life, the state of the manufacturing sector, stronger racial and ethnic divides, changes in family structure, the proliferation of the mass media (Garland 2001), and more specific elements like judicial training, working experience, and background (Hutton 2006).

Finally, punishment can be studied as a reflection of the values and sensibilities of the civilized world. The (de)civilizing interpretive framework highlights what is acceptable and what is characterized/carried out by state processes of monopolizing control, social interdependencies, and psychic internalizations and sensibilities. (De)civilizing shows how social processes like punishment, bathing, and eating can change and display links between the structure of society and the structure of behaviour (Elias 1994, xv, see specifically Garland 1990, Garland 2001, Pratt 1998, Vaughan 2000). These changes are explained as a shift in psychic process and a shift in larger socio-historical processes of culture. When studying punishment, this framework shows how changes in values, cultures, sensibilities and signs and symbols impact punishment (Pratt 1998, 91). Its value is found in being overly concerned about the forms of punishment and our feelings towards it, along with how sensibilities and culture feed penal practices.

Important questions could be asked about youth with the works above. The social solidarity perspective leads me to ask questions about the different moral forces of youth punishment and/or the types of passions/content of the passions that inform youth punishment. The political economy school makes me ask about how youth constitute another type of poor or underclass and how their participation in the economy/their preparation for participation in the economy (i.e. through school and training) impacts

their representation among the punished. Studying youth punishment in the power perspective, I could investigate and historicize the techniques of power like probation and juvenile justice in the Canadian context that come to observe, categorize, and correct.

On the other hand, studying the penal field draws me to the distinct environments where punishment unfolds. This could lead to an analysis of how different actors, for instance judges, occupy certain positions, have dispositions, and are impacted by taken for granted assumptions when deciding to punish. Yet further, the civilizing process for studying youth points me towards the subtleties among cultural values and structural processes in Canada. I could track changes in these over time especially as it relates to other social, political and economic transformations. In addition to providing new questions to study the punishment of youth, these approaches signal a need to not look at punishment as crime control – where crime is the stimulus and punishment is the response. I can accordingly build on the insight that if it is not instrumental, then it can have system specific/internally created achievements. I can further build on this insight by including education as one of the sites for punishment, not just the criminal legal system.

While I do not want to downplay the value and importance of these contributions, my primary concern is that punishment can only be understood based on what impacts it, which points me to observe morality, economics, sensibilities, the power of the norm, and practices. So, these perspectives offer useful and important explanations of punishment. This can be understood as the heteronomous understanding of punishment because of the privileging of what impacts punishment by some force outside of punishment and outside of where punishment operates. As such, these perspectives are unable to see, explain, or

expose the inner side of systems in constituting punishment. I take the position that heteronomous elements and the substances of punishment may be complementary, but do not need to be assumed to be steering punishment and do not provide the only gateway, theoretical tool, interpretive strategy, or explanatory approach to describe punishment in modern society. With my critique, punishment is bankrupt when it comes to a perspective that explores how punishment is internally created by law and education.

Thus, I challenge the idea that important elements for punishment steer, govern, push or force punishment to produce penal operations. I want to overcome the blind spots in current understanding of punishment and I want to mount a novel theoretical challenge: observing the forces, energies, and fuels for punishment can be succinctly summarized as an overarching theme of heteronomy. The focus on forces turns empirical work into a science of cataloguing and weighing the forces and substances of punishment. This leaves a different and unexplored path open to analysis by pursuing questions on understanding and description of the elements and operations endogenous to law and education, or the inter-systemic and intra-systemic features of punishment in law and education. To my knowledge, an alternative framework has not been theoretically, topically or methodologically applied to the study of punishment in social systems. And, from this alternative interpretive strategy, there has been no work in Canada showing how youth punishment operates in law and education.

The alternative that I want to propose involves working with the autonomy thesis of contemporary social systems (see for instance Cotterrell 1984, Deflem 1998, 2008, King and Thornhill 2005, Luhmann 1990, 2004, Teubner 1989, 2001). The autonomous system does not mean to exist without an environment (Luhmann 2012, 2004, 1995). For

example politics does not exist in a world without law. It also does not mean that the juridical system operates independently and free from external influence; as Teubner (1989, 739) explains how autonomy<sup>16</sup> merely presents a vision that “law [or education] autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations...” This permits internal observations of systems, not just the external observations of forces. Such an approach posits that there is internal determination while still offering an account of relations between the system (i.e. the legal systems) and the environment (i.e. the legal system’s environment).

Focusing on social communications within the context of this framework has a number of other consequences. Not only do I untangle and discount the possibility for consciousness to directly impact the social world, but I also do not assume that people are the primary agents for social processes like punishment, I do not assume that there’s a direct output-based relationship between social groups and systems (e.g., law and education), and I challenge the ability to identify concrete causes of social processes to instead focus on the communications and conditions of possibility. These theoretical themes will be more fully engaged and mobilized within the context of the study of a study on punishment in the theory chapter below (see chapter three).

My review of field allows me to build on a “powerless”<sup>17</sup> (Liu 2015) vision of the sociology of youth punishment to provide a theoretical alternative to the dominant power/inequality (and heteronomy) approach. Such an approach provides a way to

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<sup>16</sup> In this case, autonomy of law.

<sup>17</sup> Following Liu (2015), I am not suggesting that power is not important or that we need to be more ignorant of it but I am suggesting that more efforts can be put into outlining, describing and explaining the structural or communicational features of youth punishment in Canada.

classify – in the same way that I do with heteronomy/autonomy – the themes in current work. The power/inequality approach in the sociology of law is said to focus on substances, things like race, power, gender, inequality and in so doing makes these so salient that it:

[...] takes for granted the formal structures and processes in which those substances are embedded. The powerless approach fully acknowledges the importance of power relations for studying law in action, but it aims at understanding the legal system by finding the persistent structural and processual forms of law [and education (my addition)] that transcend the particularistic and critical orientations in contemporary [macro sociological research] (Liu 2015, 8).

This is what is happening with the sociology of punishment. When I am arguing that an autonomous perspective is overlooked, I am highlighting the opportunity to explore structures, processes and forms of the systems but I use the language of systems theory to capture the communicative elements and selections of the systems.

While I am not dismissive of powers, races, inequalities, sanctions, economies, cultures, moralities and emotions and so on, I choose to look at punishment from within the system where it is created. Communicative elements and selections provide this alternative path. The existing reluctance to engage in the social structure of law has been harshly critiqued, without clear responses, rebuttals or tools in existing sociologies of punishment.<sup>18</sup> In this way, sociologies of punishment are weak sociologies of law that operates in silo-like research areas that have not clearly engaged with other scholarly developments. I try to engage with the current blind spot of the social structure of law, which I apply to the sociology of punishment, because it is rooted in the fact that:

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<sup>18</sup> Given that Liu (2015) is discussing the trend in the sociology of law, the debates on this point in the sociology of law will be explored further in this work.

Sociologists observe the law from outside and lawyers observe the law from inside. Sociologists are only bound by their own system that, for instance, might demand that they conduct “empirical research”. Lawyers, likewise, are only bound by their system; the system here, however, is the legal system itself. A sociological theory of law, therefore, would lead to an external description of the legal system. However, such a theory would only be an adequate theory if it described the system as a system that describes itself (and this has, as yet, rarely been tried in the sociology of law). . . . So far, however, in this exercise, only problematic formulae have been advanced, such as “law and society”, which formulae promote the misconception that the law could exist outside society. [...] The sociological object (just as much as the legal one) is one that observes and describes itself (Luhmann 2004, 59-60).

So, what is needed is a research program to unpack the structures, processes/communications, and selections of youth punishment in social systems.

### **Conclusions from the literature review**

I have worked to establish the need for a perspective that observes youth punishment in law and education. So, in reviewing the literature, I have exposed how explanations (i.e., address no meaningful thesis), theoretical assumptions (i.e., confront heteronomy), and sites (i.e., law and education) create an opportunity for a new sociological analysis of youth punishment. Theoretically and empirically speaking, little attention has been given to how youth punishment is conceptualized in different social systems. I am concerned about the lack of a thesis of youth punishment, the current explanatory tools that leave me recycling notions of what steers and what determines punishment, and the common experience of punishment that leaves me pointing out the same conditions/elements that are found in the punishment of adults. My promise is to provide a perspective and engage youth punishment in law and education. My goal is to

reveal, expose, and explain the inter-systemic and intra-systemic features of youth punishment.

These problems I identified above have led me to ask questions about the contemporary processes for punishing youth, specifically how youth are punished/targeted for punishment in education and law. In answering these questions, I foreground the systems to tell a story about youth, law, and education, and to describe the couplings between the two systems. I will now develop my theoretical starting point.

### **Chapter 3: Paving a Theoretical Path to Study Punishment in Social Systems**

In this chapter I present, explain, and apply some key concepts from the contemporary social systems theory of Niklas Luhmann<sup>19</sup> and I highlight the capacity for social systems theory informed empirical research. My chapter allows me to visit and clarify concepts from systems theory and show how it can be used to contribute to observations of social systems in modern society. Perhaps more originally, it provides me with a path to answer questions about youth punishment, solve theoretical puzzles about punishment, and study punishment in law and education communicationally.

My dissertation is not about defending and mobilizing some disciple-like following of social systems theory. Such an approach is neither called for by systems theory nor by the social sciences. My theoretical comrade helps me frame questions, informs me where and how to observe the world, poses some puzzles, gives me a language to discuss my approach, my observations, and my findings, and promotes a coherence in my narrative of youth punishment.

Systems theory offers multiple entry points, a complex account of modern society, and a rich background to explain and explore aspects of modern social systems. Systems theory as a theory of society makes it possible to understand and be put to use to investigate any sociological topic (Baraldi and Corsi 2017, Moeller 2006). For my study, social systems theory makes it possible to study, expose, and explain the intra-systemic

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<sup>19</sup> This chapter is the theoretical part of what I am observing, or the groundwork, if I can call it such. I later use this groundwork to clarify a conception of punishment (Chapter 4) where I articulate what I mean when I say that I am studying punishment, specifically by studying punishment as studying power, force, and influence.

and inter-systemic features of punishment in law and education. Specifically, it is possible to analyse the following aspects of the punishment of youth: the considerations of punishment in social systems; the goals of punishment in social systems; the coupling features/abilities of social systems; and the meanings of punishment in social systems.

Instead of rhyming-off theoretical tenets, I present some of the initial scaffolding needed to talk about, think with, and do research with social systems theory. I begin with some general comments about social systems theory and then I tackle its role in empirical research. I engage the difference between system and environment and describe concepts such as communication, autonomy, programming, and structural coupling. This allows me to: 1) provide an alternative to the dominant theoretical frameworks used to study punishment and conceptualize youth punishment in social systems; 2) to address my critiques of the field with theoretical tools of social systems theory by mobilizing solutions to the theoretical (e.g., heteronomy), topical (e.g., a sociology of youth punishment), and empirical (e.g., looking at law and education as endogenous sources of punishment) critiques I levelled above; and 3) show that social systems theory can be empirically useful. This thesis provides an illustration of how some of the theoretical tools and starting points can be productively mobilized to study punishment within and across social systems.

### **The theory of social systems**

My theoretical approach is informed by Niklas Luhmann's social systems theory. While Luhmann may be one of the most "important and original sociologists of the 20<sup>th</sup> century" (Knudsen and Vogd 2015a, 3) and his work has been described as the "best description and analysis of contemporary society presently available" the uptake of his

work is lethargic. In fact, “the majority of people—not only in the wider public, but also in academic circles—have apparently failed to notice this, and why Luhmann’s name remains far less prominent and less well known than that of Hobbes or Marx, or Foucault or Habermas” (Moeller 2012, 3). While issues of style, accessibility, and translation are often used to explain this lethargy (Borch 2011, Dubé 2017, King and Thornhill 2005, Moeller 2012, 2006), there are paths to empirically study youth punishment.

### Observing modern society

Luhmann’s take on modern society, which unlike Parsons who assumed social systems have a shared value and perform functions for system maintenance, did not involve seeing collectively shared values (Luhmann 1970, 113 as cited in Knudsen and Vogd 2015b, Luhmann 1995). Instead, systems were operatively defined by their self-referential operations which enable systems to distinguish themselves from their environment. As Luhmann explains (1995, 13): “there are systems that have the ability to establish relations with themselves and to differentiate these relations from relations with their environment.”

The consequence of self-referential operations is that there are no pre-given or predetermined structures, identities, or functions. This theory allows me to observe systems with the intention of better understanding and describing operations carried out by the systems themselves, specifically carried out by education and law. This task involves asking questions about how law and education come to see, define, limit, and frame the role of punishment in its own respective operations. At the same time, it allows me to study their links in a theoretically meaningful way.

Unsurprisingly, systems theory has not been applied in the sociology of (youth) punishment. So, I have an opportunity to show that social systems theory can be both used and useful in a study of punishment. But practically speaking, working with social systems theory allows me to draw attention to the different aspects of punishment in different social systems. Social systems theory observes observations. So using social systems I observe law's observations and I observe education's observations.<sup>20</sup> I focus on communication so I can clarify my unit of analysis and distinguish how my approach informed by systems theory differs from other sociological studies. I study communication about the operations of the punishment of youth in law and in education. Some comments about systems theory and empirical research and the concepts of systems theory are required.

### Systems theory and empirical research

While there have been some empirical mobilizations of Luhmann's work,<sup>21</sup> there remains unanswered calls to do more systems theory inspired empirical work (see for instance Gur 2012, Paterson and Teubner 1998, Seidl 2006, Seidl and Mormann 2014). Answering these pleas and addressing the stigma that grand theories are somehow "useless for social research" (Ziegert 2005, 49) or at least claimed to be a less

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<sup>20</sup> However to clarify, when I focus on observations and the operations related to youth punishment in law and education I am not studying youth punishment in and through the experiences or conditions related to race, gender, socioeconomic status, and other objects of sociological inquiry. Rather, when I study punishment, the object of study is communication.

<sup>21</sup> Core themes have been engaged in special issues (see introductory notes of Messner 2013, Seidl 2006, Wolf et al. 2010), explained in some monographs and articles (Borch 2011, King and Thornhill 2005, Moeller 2006, 2012, Osterberg 2000, Viskovatoff 1999) and applied in specialized studies/domains/problems (Albert and Hilkermeier 2004, Bakken and Hernes 2003, Febbrajo and Harste 2013, King and Thornhill 2006, Lee and Brosziewski 2009, Mingers 2006, Nobles and Schiff 2013b). The major contributions in English speaking and reading scholarship engage organizations (see for instance Bakken and Hernes 2003, Besio and Pronzini 2010, Buchanan and Bryman 2007, la Cour et al. 2007, Martens 2006, Seidl 2006, Seidl and Mormann 2014) and law (see for instance Banakar 2003, Carrier 2007, Deflem 1998, 2008, King and Thornhill 2005, Krieken 2007, Nobles and Schiff 2013a, b, c, Valois 2013, Wandall 2008) with the lens of systems theory.

popular/desirable option for research are important contributions of my work. Notably, this is because they are not the hallmark of new and innovative scholarship among the young and emerging academics (Valverde 2014).<sup>22</sup>

For systems theory, sociology is a science of describing and observing. Indeed, it is about describing and making second-order observations. For me, observing and observing communications is inherently empirical. On a related point, I am not testing theory with empirical material and engaging with the falsifiability of systems theory and its tenets. Instead, I want to show how, where and under what circumstances social systems theory can be “apt or inapt, clear or vague, fruitful or useless” (Coser 1956, 7). If I use Coser’s (1956) standard, my study is about searching for some guiding logics to do research, I am searching for the conditions for things, events or ideas by asking what is the case? Why this one? Why not the other one? And, what is behind it? (Luhmann 2012, 12-17). These questions open up empirical observations.

I now show how this framework is apt for letting me access punishment as a communicative operation, giving me concepts/tools such as distinction and observation, and guiding my interrogation of punishment as something that is formed and takes shape in systems. I am not claiming that I have a better access to reality, but I can certainly present one. I am also not claiming to offer a set of processes leading to a happy ending, in the sense of no prescription for what to look at or analyse, but I can certainly reveal some of the possibilities.

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<sup>22</sup> Further, classifying my work as a contribution to socio-legal scholarship, engaging this task further addresses the view that there is a “dwindling capacity” for empirical work that can be attributed to pragmatic challenges, the lack of training in methods, the ability to do legal research without legal training, and the need for full theoretical engagement (Banakar and Travers 2005, 23)..

## Concepts from systems theory and paths to study punishment in law and education

What are systems in Niklas Luhmann's version of systems theory? All development in this field has been variations of distinguishing the system from its environment. Systems are not something whole made of parts (Meyer, Gibson, and Ward 2015) but systems distinguish themselves from their environment. Exploring this distinction,<sup>23</sup> environments are inherently complex and part of the operations of social systems is to reduce the complexity of the environment. For example, law is able to reduce the complexity of its environment by having more specialized units/subsystems like civil law, criminal law, tort, and so. Systems such as law, education, politics, economics, represents their own mass of differentiation allowing them to form systems. Meyer and colleagues (2015, 342) clarify the system/environment distinction by explaining:

[...] in order for the system to emerge it must be able to demarcate itself from its environment by observing *what the system is and what is its environment*. But the system cannot observe the whole universe; indeed, it must generate and select *what is the 'relevant' environment*, and in doing so the system is said to produce its environment as its environment. In this way the system is both internal and external to itself. It might seem strange to talk of systems being able to observe-a reification almost. But nonetheless, in Luhmann's approach this is what they do. Understanding his view that there are systems and their inner environment that are watching us and which we do not have direct access to is a fundamental step in grasping just how radical his theory is... [and the practical policy implications that ensue] if indeed we want our research (undertaking and

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<sup>23</sup> Indeed, I could have also begun discussing the role of distinction or difference. Instead of analyzing things or objects or actions, Luhmann's substitute is distinctions. So, social systems theory analyses distinctions. A distinction means to indicate one side and not the other, leaving one side marked and the other unmarked. For example law distinguishes between illegal and legal, science can distinguish between rigorous and junk, or politics can distinguish between minority and majority. These more "concrete" distinctions are useful for explanation but the basic distinction seen throughout systems theory is the distinction between system and environment (Luhmann 2013).

communicated in the scientific system) to impact on policy (communication undertaken in government).

Systems theory is able to observe and theorize communications in and between systems, which includes communications about punishment. Using the tools of social systems theory to focus on communications in law and education about punishment, as well as communications between law and education about punishment, allows me to present the meanings, messages, goals, and requirements about youth punishment.

### [Social systems theory and studying punishment: System and environment](#)

Contemporary social systems theory invites us to investigate the relationships between the social systems of law/education and its environment in an original way. It is not that law, education, or other social systems are completely independent or autarkical, but there are theoretically meaningful relationships between the system and the environment. The recursive use/organization of particular differences comes to constitute social systems. For example in the context of law, law as a social system is constituted by the difference of illegal/legal. This self-constituted recursive organization is called autopoiesis. The differences that are used by social systems display the nature of what can potentially be crafted as, in the case of law, legal/illegal.

For social systems theory, law and education have their own view of the world, construct their own meanings, and they are differentiated and differentiating from other systems. When speaking of social systems theory, “all development in recent systems theory can be seen as variations of the theme of ‘system and environment’” (Luhmann 2012, 31). Luhmann’s perspective is differentiated from other systems theorizing by distinguishing the environment-centred perspective from the system-centred perspective. The former emanates from Parsons’ account of systems but it is still highly inculcated in

contemporary sociology (Dubé 2010, Inglis and Thorpe 2012). The latter springs from Luhmann's work and relies on self-reference/autopoiesis.

The environment-centred perspective argues that the environment impacts operations of the system. In this sense, systems are open as they interact with their environment which is distinguished from systems that are closed and do not interact with their environment (Dubé 2010). Thus, something outside of the system directly impacts system operations which forces systems to operate on the logic of input and output whereby input from the environment instigates output from the system (Dubé 2010, 52, Inglis and Thorpe 2012, Luhmann 1995). Said differently, the system can acquire energy across system and environment boundaries (Bailey 1994). We could speculate that in the case of punishment, this theoretical point of view could document how and the conditions under which education is impacted by law, takes up its ideas, and practically, mobilizes crime-like detection and response processes. This logic is inspired by Parsons' theoretical framework whereby: systems adapt to the environment; systems have techniques to solve problems; systems cooperate with people and allow for cooperation between people; and norms allow people to gather as a team (Inglis and Thorpe 2012, 49).

The environment-centred perspective is problematically unable to account for the system selective use/reference to the environment, it does not count for ignorance towards environmental input, and it does not account for the structures of systems that control input and output of the system (Dubé 2010). Alternatively, the system-centred perspective asserts that the system is selectively related to the environment by input that is created and maintained on the system's terms (Jonhill 2003, 23, Luhmann 1995, 2004). The environment does not provide the energy and information for the system (Luhmann

1995, 177) but it is constitutive of the system (Luhmann 1995, 176). The environment is too complex for the system – and in fact is more complex than the system (Luhmann 1995, 182) – so the system needs to make sense of it on its own terms to create order. The system manages complexity which allows the system to make a distinction between it and the environment (Gershon 2005, Luhmann 1995). This shifts the conversation away from unfolding a simple input-output binary and redefines the open and closed nature of systems for a more complex theorization.

Accounting for a system-centred relationship, Luhmann (2012, 19) asserts that, systems do not “ingress to the environment” but the system only processes information based on structures established by the system and through select linkages to the environment through structural couplings (Luhmann 2012, 1995). As such, systems do not take up information like a sponge but systems are argued to be operationally closed and cognitively open. Thus, the sponge analogy must consider the density of material in the sponge, its composition and structures that control and create uptake to begin to understand the system. In this way, the operational frontiers of a system are not directly impacted by the environment. Rather, the system sets its own boundaries by distinguishing what is inside the system and what is outside of the system (Luhmann 2012, 51-54; Luhmann 1995, 176-178).

The environment does not produce operations in the system and the environment does not produce change (Seidl 2004, 3). With this position, the possible preconditions of system operations are not concealed but brought forward (Luhmann 1995, 202). For example, consider the legal system where legal communications are only meaningful and used operationally in the legal system in the same way that scientific communications are

only used operationally within the system of science. This is the shift which leads to the system constructing itself and its own realities (Moeller 2006, 16), as “[e]verything that happens belongs to a system... and always at the same time to the environment of other systems” (Luhmann 1995, 177).

The relationship between the system and its environment can be recast, framing systems as autopoietic or autonomous, which means systems reproduce themselves and they reproduce/produce their own boundaries. This means that systems are responsible for distinguishing themselves from their environment. All of their operations are internally created. For example the legal system is able to reproduce itself by referring to legal communications in the same way that the education system is able to reproduce itself by referring to educational communications. The environment-system distinction serves to illustrate that education and law can be understood as different, meaning distinct, kinds of social systems.

Education operates through the distinctions of what is relevant and what is irrelevant for education while law operates through the distinction between what is relevant and irrelevant for law. Studying both law and education from this perspective reveals the inner workings of each social system, particularly as it relates to punishment. This is fruitful in the study of punishment because it privileges a closer examination of law and education’s creation of punishment, it avoids the translation problem, where punishment gets translated into sociological concepts, it provides me, as an analyst, a “way of thinking, based on the internal dynamic of a process of self-reflections” (Febbrajo 2013, 3). Let’s consider this in the context of current understandings of punishment.

Sociological studies of punishment bridge the social contexts, the theoretical nuances, and the practical operations of punishment. This may touch on the decisions to punish, the discourses enabling punishment, or the cultural, economic, organizational, social or political contexts informing punishment. While these efforts have led to important advancements in the sociology of punishment, working hard to detail social, political, economic, or cultural contexts has an important and commonly overlooked corollary. This focus transforms law and legality, education and educational into sociological concepts that overlook the distinct role of law, legality, education, and educational in decisions to punish within and across social systems.

When it comes to punishment, law could justify the prohibition of assaulting another person based on social science (e.g., assault causes disruption in communities), based on medicine (e.g., assault poses a physiological and potentially developmental risk for those who are assaulted), or based on education (e.g., assault these to disruption and chaos to learning in the school community). The point is that law only cares to know about behaviour that it can frame with its own norms of legal and illegal. Of course there are other prisms through which the legal system can view assault, but in selecting one of these elements, law is always interpreting assault through its own perspective.

In the example of assault, this is an act of legal creation where law justifies prohibition based on what is illegal, because for law, it is legal to impose the distinction between legal and illegal. And, following the same logic, other systems like education similarly are able to constitute and organize the way in which the world is given meaning, their way in which their world is constructed. The point is that law and education in the context of my study are not seen as the same sociological objects, and consequently

punishment is not the same in law and education. This allows me to explore the vision of punishment that is created in and by law and education.

The options in punishment are also illustrated in that it may be something short or long term, it may vary in its intensity, its consequences, its experiences, and its origins. Concretely, this may be manifested as a symbolic one day in custody followed by a period of probation for a youth who pleads guilty to assault causing bodily harm. It may be manifest in being quadriplegic as a result of a car accident that left a police officer deceased but nevertheless, it is legal to see a period of custody when “a court officer can simply touch him on the shoulder, say you were in custody and now you are out of custody” (R. v. S.K., 2015 ONSC 7649 at pg. 34). It may be manifested in expulsion from a school board after bringing a weapon to school and making threats. Its consequences may be seen in the inability to play on a sports team because of punishment at school, or its consequences may be seen in the inability to be employed as a cashier after being convicted of fraud.

I am interested in exploring the legal and educational framework that makes punishment possible. If we step inside the court room, inside the police boardroom, inside of the principal’s office, or inside the school board there are differences in how policy develops, violence on the streets unfolds, disruption in the classroom happens, bullying on the playground manifests, or theft in the community occurs. These differences present some of the variety/complexity of crafting punishment. For law and for education, something structures the punishment that is selected. In education and in law, punishment takes on a world of its own. It is a world that is created and observed in law’s terms, or education’s terms. A study of why punishment is selected, wherever it is selected in

contemporary society, how it is selected, and to what extent, requires a bridge between the system where it is selected and its environment.

I have started to present some tenets and consequences of social systems theory. Discussions of autonomy and system/environment differences demands further explanation of concepts in social systems theory. These other concepts include: communication; programs; and structural coupling. Explaining these concepts informs my observations of elements endogenous to law and education when studying punishment and these also give me a vocabulary to talk about the inter- and intra-systemic features of systems.

### Communication

An essential claim in Luhmann's systems theory is that societies/systems consist entirely of communication. Communication is the operation of social systems, systems generate communication with communication and this is because they are autopoietic and meaning-constituting. It is helpful to start by describing what communication is not, communication is not the transmission of information. Instead, it is the selection of information, utterance, and understanding. This analytical starting point challenges perspectives that privilege actors/people. Systems theory sees society as producing themselves and their own elements – these events or elements of systems are communications. This can be a disturbing/challenging visioning in Luhmann's sociology. This leads to one of Luhmann's many radical contributions insofar as he dismisses humans and actions as the basic sociological element (Luhmann 1995; Moeller 2006, 2012). Instead, society is composed of communications, nothing more. This begs the question, what is the role of communication?

Communication in social systems theory has special meaning. Communication is the unit of analysis in systems theory and it is the study of communication that guides sociology. This differs for other analytical approaches because sociology traditionally focuses on actor interactions, motives, intentions, shared values, or some type of goal-oriented or rational calculation. What communication gives is some direction. So when the sociologist observes and analyses communication, they are not analysing some raw activity but they analyse communication when “its constituted elements have been meaningfully associated or connected by an observer” (Lee and Brosziewski 2009, 40). Indeed for Luhmann, because of the inaccessibility of intention as a unit of analysis and because not all actions are part of society, something else is needed to explain social systems. This is where he turns to communication.

So what is communication? Communication consists of a synthesis of information, utterance, and understanding (Luhmann 2002, 157). It can also be said that communication is the triple unity or the synthesis of three separate selections: the selection of information; the selection of utterance; and the selection of understanding. Information speaks to the selection from a number of possibilities which distinguishes between what is communicated and the horizon that is not. Communication is about or on something. For instance, a topic is selected, for example punishment, that marks a boundary and excludes other topics.

Utterance represents the delivery of the distinction which can allow for a focus on why something is communicated. Information can be thought to be uttered and this may give rise to things such as motives, reasoning, intention, justification, and so on. It too is a selection, selecting some content and leaving out others. Understanding (or

misunderstanding) “...grasps a difference between the information value of its content... [and] ...the reasons for which the content is being uttered...” (Luhmann 2002, 157). This articulation of communication places it as an active process of interpretation. This enables a distinction to be made between what is communicated, how it is communicated and why it is communicated (Rasche and Behnam 2009, 246).

Communication allows observers to solve the problem of a “bottomless pit” (Lee and Brosziewski 2009, 39) of focusing on social action where it is impossible to know where action begins and ends. Communication allows me to pinpoint what and how meaningful elements are associated and connected by an observer. This leads to a theoretical account of communication that is: abstract, difficult to simplify, and theoretically sophisticated.

For social systems theory, humans do not communicate, only communication communicates. The goal of communication is to continue communication, not achieve a particular objective like consensus or truth or justice or equality. If communication’s goal is to promote further communication, it must be privileged in research. Certain types of communication may exist to ensure continued communication – for instance, disagreement, conflict, scandals controversy, harm, and so on. The possibility of different types of communication means that legal, educational, economic, scientific or other types of communication can be observed.

Luhmann (2002, 106) explains further: “We can think of society as the all-encompassing system of communication with clear, self-drawn boundaries that includes all connectable communication and excludes everything else.” While this is a different starting point for sociological inquiry, the goal is straight forward: by focusing on

communication, the theoretical and epistemological consequence is that psychological determinism of social systems is rejected. This means that perception of actors in law and education are different from communication. Communication of the system is observable whereas individual perception, consciousness, or intentions are not. And in this sociological inquiry, communications that can be observed and studied in communications that are the basic elements that constitute social systems is what is left to be explored.

To offer empirical and analytical insight into the functioning of law and education, my theoretical orientation points me to observe the communications/discourse of law and education. Communication not only defines what I examine, but it shows the relative importance of communication in social systems. In this way, I see the communications of these different systems as belonging to the respective system.

Communication challenges the linear model where we no longer accept that humans communicate, but only communication communicates (King and Thornhill 2005; Luhmann 2004, 1995; Moeller 2006, 2012). So I can reconsider the hierarchical models of communication, reformulate explanatory models based on action, rewrite humanist and anthropocentric models of society, and create a distinction between social and psychic systems (Moeller 2006, 2012). Focusing on the last assertion, the distinction between social and psychic systems is important because Luhmann does not deny the existence of humans but he certainly challenges the ability for the sociologist to access the psychic system; on this basis the psychic system operates on the level of consciousness whereas social systems operate on the level of communication (Luhmann 2004, 2002).

Carrier (2007, 128) clarifies the psychic/communication system distinction as it simply “supposes that when I pronounce this very sentence, I cannot enter into the listener’s head to know the meaning that was given to it. Of course, I can ask about it, but that does not resolve the problem at hand.” The problem being, what we understand, or at least what we think we understand is our own construction. In this way, at the level of communication of social systems, what the system understands is its own construction. Extending the logic of this to the problem punishment, I cannot assert when and where punishment is right or wrong. However, I can sociologically observe how communication comes to be legally and educationally distinguished and constructed within systems. Instead of taking communication as a given, this further emphasizes the importance of interpretation (and different interpretations for that matter) in Luhmann’s theory.

Understanding social systems as systems of communication becomes important when reflecting upon punishment. Firstly, the communication of law must reflect legal matters and not necessarily the understanding of a single practitioner (Nobles and Schiff 2013). This ensures that legal matters are not conflated with scientific, political, or economic issues. Secondly, understanding social systems as systems of communication ensures that there is no integration of the psychic system and the social system (Luhmann 2002). So narratives of tension or harmony between law and education must be reframed; at this point in the review of concepts, education and law are two systems of communication. Without the shift to communication there is a lot at stake. This can be seen if lawyer and law or scientist and science are conflated. Such a conflation does not differentiate between psychic and social systems which can create an anthropocentric essentialist claim whereby a single lawyer is a reflection of the legal system.

As social systems, the law only consists of legal communications and the system of education only consists of educational communications. These communications are ultimately selected according to the social systems binary code. For law the code is formed by the opposition/the binary of legal/illegal. For education, the code is formed by the opposition/the binary of conveyance/non-conveyance (Baraldi and Corsi 2017, Luhmann 2004). Every time the social system, be it law or education, selects communication, they can only assign one value to it. When the system cannot assign a value to it, it is not part of the system but part of its environment. This is how systems protect themselves from irritation/steering from other subsystems. Ultimately, these codes are used to set up programming of decision-making structures in law or in education (see below).

I want to point out some additional consequences of this understanding of communication. Communication in this perspective means that systems do not communicate with other systems, so intersystem events are not input from another system but are creations in the system itself. For example, when it comes to education, education is only constituted by educational communications, and only educational communications can reproduce the education system. Other communications will only be handled in education inasmuch as they can be seen to be/created as educationally relevant. So, they need to be translated for that specific system by that specific system. In the same way, legal communications in a courtroom are not simple inputs into law. Instead they have to be constituted in and by the legal system, which may take place in decision-making processes. This draws attention to how information is processed in a by systems, how communications are constructed in social systems, and so on.

## Social systems theory and studying punishment: Autonomy and autopoiesis

I want to be able to talk more specifically about systems and their relationship to their environment(s). This involves putting forward the idea that social systems are autonomous. One way to think with autonomy is to see the interactions between systems – be it culture, law, economy, science, or education – as plural and more complex. To my knowledge, this perspective has not been used to study or theorize youth punishment, but the autonomy perspective is not new to sociology (see for instance Cotterrell 1984, Deflem 1998, 2008, King and Thornhill 2005, Luhmann 1990, 2004, Teubner 1989, 2001).

The autonomous system does not mean to exist without an environment (Luhmann 2012, 2004, 1995), for education does not exist in a world without law or vice versa. This clarification makes my discussion of autonomy fit with the system/environment differences described above. Autonomy, does not mean that there are autarkical or totally independent systems, but it merely refuses to think of systems as being “totally dominated by normative forces that are external to it” (Carrier 2010, 17). In fact, systems cannot exist without an environment (Luhmann 2012, 2004, 1995) and autonomy does not mean that juridical, or legal, or educational systems operate independently and free from external influence. As Teubner (1989, 739) explains, autonomy merely presents a vision that “law [and education] autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations....” This allows for access to the internal observations of systems, not just the external observations of forces. Such an approach posits that there is internal determination while still offering an account of

relations between the system (i.e. the legal systems) and the environment (i.e. the legal system's environment).

The larger consequence of autonomy, actually speaks to the creation of order and the source of order. It challenges the assumption that order is externally produced. So when it comes to punishment in social systems, the order of punishment is not produced by something that is outside of punishment. To be clear, what is external to punishment is still important (the system/environment discussion has made this point) but the importance is not determined by some external criteria. This can be illustrated with a norm that is internally created and historically contingent based on a sense of what is normal/abnormal or legal/illegal.

This provides the basis to study punishment and law in their own right, not as some vehicle for entrenching (while also being entrenched by) moral, economic, political, power or cultural elements that are extraneous (i.e. outside of) to law and punishment. This however does not mean that the elements form other theories informing the sociology of punishment ought to be abandoned or are not worth considering. Rather, reconciling the elements of the above discussed theories of heteronomy with those in a theory of autonomy will be a central part of further theoretical development in my thesis and future work.

The autonomy perspective foregrounds the structures of systems. The concern addressed by this perspective is that oftentimes, important sociological concepts like race, power, gender, inequality are foregrounded in a way that silences other dimensions of contemporary social systems. The consequence of this is that studies of heteronomy "takes for granted the formal structures and processes in which those substances are

embedded” and overlooks the “persistent structural and processual forms of law [and education (my addition)] that transcend the particularistic and critical orientations” in sociological research (Liu 2015, 8). Similarly, Cotterrell (1998, 175) decried the silencing of law in sociological studies when he explained:

As sociology tries to understand law, law disappears, like a mirage, the closer the approach to it. This is because as sociology interprets law, law is reduced to sociological terms. It becomes something different from what it (legally) is; or rather, from what, in legal thought, law sees itself as being. How can legal ideas be understood sociologically without, in the process, being turned into sociological ideas? The 'legal point of view', as Robert Samek called it in a neglected discussion of related themes disappears; subsumed into a sociological viewpoint and lost. It cannot be grasped sociologically because it is not sociological. It is a specifically legal point of view.

In both cases, the analyst could be interested in what is meaningful from a sociological point of view (that being how legal ideas are translated sociologically) while also observing how legal ideas are meaningful in and for a legal point of view. I am not muting the importance of exposing sociological dimensions of legal practices or sociological concepts related to education. But I am highlighting the possibility that education and law can be lost. The puzzle, at least theoretically speaking, is to put the law and the education back into studies of punishment.

When closed, autonomous systems have their own function and structure. Quite simply, different systems/subsystems are defined differently and they observe society based on their own function. The different function faced by each system confronts a particular puzzle or problem in society. So religion, art, media, economy, and law all have their own puzzle. For example, the function of politics is to make collectively binding decisions, the function of law is to stabilize behavioural expectations, and science

is to make knowledge. In these examples, law, politics, and science all differ from their environment.

### Social systems theory and studying punishment: Programs and couplings

I will now outline some concepts that help me explain and explore the operations of systems. All systems have their own code or their own type of mission which is empirically useful to pinpoint or limit the scope of observations. But when science determines between true or false or law selects between illegal and legal, the code itself is not enough to allow the system to select. It can be said that the system needs content. There needs to be criteria for the system to attribute the code. These criteria are called programmes and these programmes inform observations of the intra-systemic features of punishment in law and education. Systems can also be irritated by each other without systems ingress or being directly transformed by what is in its environment. The possibilities for irritation or the linking processes possible with structural coupling are also explored to study inter-systemic features of law and education.

### Programs

I have described how systems operate based on codes (law: legal/illegal; education: conveyance/non-conveyance). But, the code needs content. For example, think about the impossibility of the criminal law to determine if something was illegal/legal without notions of intent, actus reus, mens rea, detection, and so on. Programs in social systems theory allow for a theoretical explanation of conditions of actions or goals (Luhmann 1995, 204). A program is a distillation of conditions for correct (that is correct in the legal or educational systems) decision making (Seidl and Mormann 2014) or as Luhmann (1995, 317) describes, programs are “complex conditions of the correctness”.

Law and education have their own programs, allowing the communication of law or the communication of education to continue.

Programs are not self-evident. In the context of my study they consist of various meanings that can be actualized (or remain virtual) to construct punishment in law and in education. So, when I observe legal communications of punishment, it is possible to expose, explore, and present the elements of decision-making that make punishment possible. Similarly, when I observe educational communications of punishment, it is also possible to expose the elements of decision-making that make punishment possible in education. That is, theoretically speaking, to expose the programs that make punishment possible.

Let me illustrate the value of a program. Luhmann (1995, 317) explains that rebuilding a motor is a program, a surgical procedure is a program and accordingly, in the context of this work, programs outline the conditions for systems to specify the conditions for punishing youth. Other examples include: investments as programs of the economy or theory and methods as programs of science (Baraldi and Corsi 2017). Luhmann (1995, 318) explains how programs can be seen in:

The reconstruction of an automobile engine under specific limitations, the preparation of a department store for an “end of the season” sale, the planning and performance of an opera, the transition from a colony to an independent state, and the reduction of the amount of pollution in a lake – there is no lack of examples. Thanks to the degree of abstraction involved in establishing expectations, the complexity of such programs can be very high. There are one-time programs, but also programs for ongoing and repeated use.

I am interested in programs that are repeated, specifically those that are repeated in law and education for the selection of punishment. Or, quite simply, those programs which

facilitate the punishment of youth. The advantage of programs is that they give content to the analysis, as it would be scientifically unenlightening, theoretically flat, and methodologically boring to map what is legal and educational (for instance, not moving beyond it is legal to punish because law says so or it is educational to suspend because the school's handbook says so). The programs fill the determination of legal/educational with content allowing education or law to apply its code (King and Thornhill 2005).

Social systems theory gives analysts two types of programs – programs based on requirements (conditional programs) and programs based on goals/objectives (goal programs) (Luhmann 1995). As Seidl and Becker (2006, 28) explain: “Programmes are decision premises that define criteria for correct decision making. They may have an ‘if—then’ format—‘if this is the case, then do that’ (conditional programme); or they may define some goals to be achieved with the decisions, for instance increase of market share (goal programme).” For example, if assault then sentence to probation but not federal custody. Other examples may include, if there is a severe crime, then a harsh sentence, or, if there are acts of bullying at school, then training, loss of privileges, and a suspension.

These programs act like plans. For example, it is through the criminal law program that if someone steals a loaf of bread, then it can be translated into a legal reality with the criminal law's programs. Programs can be empirically explored, tested, and identified are active in social systems, and as Luhmann put it they are “the hard core of the [system]” (as cited in Valois 2013, Chapter 4, para 21). I use the concept of programs to show the content of what is legally and educationally translated and crafted. This

allows me to empirically present core themes of youth punishment in social systems while simultaneously presenting these themes in a theoretically meaningful way.

The concept of program captures the conditions for decision making – this is to say that a program spells-out/defines/pre-determines selections of what is possible and impossible. This allows me to identify and organize the conditions that make it possible to punish youth in law and in education. What programs have to offer is some restructuring of communication. As Luhmann (2000, 18) clarifies:

If one wanted to let the horizon of what might possibly occur flow out into complete indeterminacy, information would appear to be arbitrary rather than a surprise. No one would be able to do anything with it because it offers nothing that might be learnt, and because it cannot be transformed into redundancies which restrict what can be expected next. This is why all information relies on *categorizations which mark out spaces of possibility; within these spaces, the selective range for what can occur as communication is prestructured [...]* [P]rogrammes are additionally required which will divide whatever can be expected as information, or remains without an informational value, into fields of selection such as sports or astrophysics, politics or modern art, accidents or catastrophes.

Programs allow me to highlight what is privileged by the system with respect to youth punishment. How the law comes to format, construct, define or understand youth punishment tells an important story about the system's interventions in punishment. By examining what is included in communication, I am able to demonstrate the regularities and the constraints in communications about youth punishment. I can then ask: what is predetermined? What is included and what is excluded in correct decision making for punishment? So as I observe legal (and educational) communications as a researcher, I

am interested in what the systems' structures enable to be selected. Let me explain further.

This formula outlines some of what may be possible, but the empirical task remains to identify the content of these programs by systematically observing the operations of punishment in law and in education. This reveals the intra-system nuances in a meaningful way.<sup>24</sup> So what is added? Harste (2013) outlines the complexity of modern systems and systemic phenomenon when there are infinite phases, phrases, concepts, operations, and so on. We are left with difficulty comparing and contrasting, exploring and exposing, but what systems theory offers – and what I use are its understandings of programs – is a schema to assess these differences. The contribution of the program lies in theoretically articulating and empirically identifying the conditions for the selection of punishment in different systems.

### Structural coupling

Systems theory provides theoretical tools to assess inter-system relationships. Systems theory can capture the influence that one has on the other. From the language of systems theory, this is structural coupling.

Structural couplings are vital to the operations of social systems, because without them there is a crippling inability to address or identify illustrations of and opportunities for transformation, learning, or evolution. Structural coupling allows for the consideration of these ideas outside of a hierarchical relationship. Systems are able to

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<sup>24</sup> For example, consider the news media and its programs. News operates on the code of information/non-information but programs tell us that there needs to be programs to fill the code with content. There may be different programs or program strands to account for the differences between news, advertising, and entertainment. To illustrate, part of the program of news involves: surprise (something unexpected); conflict (some type of uncertainty or antagonist); quantities (number informed differences); and norm violation or scandal (Moeller 2006).

irritate each other, without having any direct access to the environment of the other system. Valois (2013, chapter 4, para 32) explains how:

Structural couplings are thus as important as the recursive production of operations, because they make it possible “to construct order from noise” and to reproduce regularly and redundantly the models to be used in future operations. Without this redundancy and this regularity, the legal system simply could not perform its function of stabilizing normative expectations and provide the security and foreseeability on which other social sub-systems, especially the economic and the political systems, rely in their own operations. To give but one example, without the crystallization of the legal concept of property, many operations of the economic system could not be executed and lined up as efficiently as they must be to ensure its autopoietic reproduction. By stabilizing society's normative expectations, the law contributes directly to the autopoietic reproduction of the whole social system.

To remain consistent with closure, communication between systems would not be seen on the level of input/output but at the level of communication that will be selectively taken up by differentiated social systems. This process is explained as structural coupling which are “highly selective connections between systems and environments” (Luhmann 1992, 1432). Moeller (2006, 35) clarifies this when he notes that there are degrees of coupling and some systems can be tightly coupled. For example politics and economy “can be “connected” in such a way that the operations of one system more or less continually “aim” at the operations of the other system[...] Structural coupling does not violate the operational closure of systems, rather it establishes specific interrelations between different autopoietic processes (see also Luhmann 2004, 1992).

The process of structural coupling consists of reciprocal influence, selective connections between systems and environments and interpretations on the systems’ terms. This is synchronicity between systems but not a synchronization (or cause and

effect descriptions) of systems (Luhmann 2004, 383). Accordingly, structural coupling builds on the idea that systems have boundaries but, systems are able to interact and may be mutually interdependent. This is to simply say that there are boundaries, but there can be points of contact within and across social systems. It is worth explaining this concept with an example. Van Assche and Verschraegen (2008, 274) explain:

A university, for instance, establishes a structural coupling between the educational system and the scientific system by simultaneously making decisions in the world of scientific research and the world of education. A planning firm not only makes economic decisions concerning payments and future profits, it also makes aesthetic decisions about design, legal decisions about zoning plans and political decisions about how to react to other political decisions. The structural couplings made by organizations (such as planning firms) do not destroy the operative autonomy of the coupled systems, because what is economically profitable, aesthetically pleasing or legally correct will still be determined by reference to the recursive network of economic, aesthetic or legal communications, respectively. *Yet, the couplings represent a possibility to coordinate different processes of communication (in the field of spatial organization, for instance) and to influence the conditions of the operations of other function systems. That is, organizations can stimulate the different systems to 'irritations'; 'they disturb the system in a manner which is then given an internal form with which the system can work'* (Luhmann, 1992: 75). Economic decisions on payments and profitability in a planning firm will influence the aesthetic decisions the architects make, yet the available budget cannot in a direct way steer or determine what kind of design will come out. Although payments are a necessary condition for architectural design, they cannot assure that a certain building or plan will be made.

In the same sense, in the realm of law and education, communications may be able to/may need to coordinate so that systems influence each other. These points of coordination/irritation/influence are an open empirical puzzle. What is translated, what

operates within and beyond systems, and what types of translation processes occur between education and law is worth exploring further.

What remains interesting with structural coupling is that different systems are operating in and through different projects, but structural coupling explains how and where and with what consequences intersystemic points of contact produce obligations in the other system (Teubner 1989). What I am hinting at here is what Teubner (2000, 409) describes as ultracyclical movement between different systems. System boundaries are transcended, this occurs when systems make use of each other.

So, working with structural coupling adds an inter-systemic analysis. I want to assess inter-system relations in a theoretical frame that does not see input and output but sees how links can be maintained among systems. This means that there is not a search for how education and law communicates with each other or steers each other. Rather, systems can share language, meaning, and concepts and so on but, the systems still work on their own terms (Moeller 2006, 22-25). When I talk about coupling or synchronicity, this does not mean that systems are purposively and in a co-collaborative way working towards a common goal, but that they can influence each other. Or to use language that captures my empirical object, communications about punishment can be channelled<sup>25</sup> “to and from other systems” (Febbrajo 2013, 1).

Unlike some understandings of punishment which suggest that criminal justice infiltrates logics or protocols at schools, my empirical analysis documents the

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<sup>25</sup> This channelling also highlights how and under what conditions inter-system influence can occur. This is not causal, so just as walking presupposes gravity, gravity does not contribute to moving shoes, legs and bodies on a sidewalk (King and Thornhill 2005, 33). And, just as law may presuppose education, it is not mean that law leads to principals deciding to not or to call the police when there is an argument at school.

coordination and interrelations between law and education in new ways. This is how law (can) make sense of education as part of its environment and vice versa. This is an alternative explanation of connections “to and from systems” of law and education by showing how punishment is a *bridge that connects them*.

When it comes to law and education, they can influence each other, they can irritate each other, and discussing these points of reference rethinks punishment, rethinks the colonizing of one system over the other, and rethinks intersystemic points of contact. It also provides an empirical and theoretical alternative to understand punishment, it is able to “separate and link system[s] at the same time” (Febbrajo 2013, 5). The linking of systems with punishment shows how it can be a “common platform” to structure communications to and from systems. These links, as Baghai (2015, 125) describes, allow systems to “take certain features of one another into account and rely on them for their own operations”. This is my empirical and theoretical contribution.

For the sake of illustration, think about the multiple systems that can offer communications about punishment: law can talk about punishment in terms of illegal/legal sentence of a fine; economics can talk about punishment as payment/non-payment of a fine, or media can talk about punishment in terms of newsworthy/not newsworthy. From the perspective of social systems theory, punishment for law and for education does not limit them from looking at their surroundings (that is, their environment) to see what else it perceives to be relevant. In these instances, systems communicate about punishment in their own terms, not to each other in terms of punishment. Given these differences, I remain curious about how this can take place in the context of education and law.

Consider the following: bullying in school becomes egregiously violent and a principal calls the police; police send a truant student back to school where she is given detention; police locate youth smoking marijuana and the police report it to the school principal, police do not (or perhaps do) lay charges or do not (or perhaps do) offer a diversion program, but the principal suspends the students. In all of these examples, law is either observing education or education is observing law.

Looking across systems, the empirical puzzle points me to observe how each system observes its environment. This means that I observe how law and education observe each other, and how these observations come to influence the system's selections in the context of punishing youth. With these few examples, it can be asked: What is going on? How can the differential or simultaneous operations of punishment be explained? Is this steering? Is this alignment? What vocabulary or analytical tools in systems theory allows this to be theorized and explored?

### **Conclusions from the theoretical framework**

I have shown what the systems perspective can offer to the study of punishment. My review of the research shows how few studies explore the conditions of youth punishment in law and in education, all while trying to theorize the possibility of bridging law and education. Practically, systems theory: provides an alternative to the dominant theoretical frameworks used to study punishment; provides some solutions to my problems of heteronomy, a sociology of youth punishment, and a sociology of punishment that looks at different systems; and offers a starting place mobilize its ideas with the intention of showing it has empirical value. Further, I have an opportunity to

empirically explore, observe, and theorize the inter-systemic and intra-systemic features of law and education when it comes to youth punishment.

My work is distinguished from the dominant approaches to study punishment. I am not the first to explore punishment from the starting point that the discipline thesis is inadequate because it essentializes punishment and misses its variety of forms (Pratt 1990). More recently Phoenix (2016) has expressed the limited explanatory and empirical power of studying discipline of youth. She explains how the governmentality framework: “when applied to youth justice ultimately constitutes the field of analysis (i.e. the organizations and social actors) as overdetermined by political rhetoric and government strategies that exist for the purpose of aligning government with neo-liberal economics” (Phoenix 2016, 128). I want to forge a path with social systems theory to study punishment to address the critiques that I have levelled above.

Practically, I am challenged with the lack of a single entry point and a single narrative when I come to describe the value of social systems theory. Confronting this issue, I have decided to present some of the assumptions, positions, concepts, and consequences of making sociological observations with systems theory. Social systems theory helps me clarify and build an approach to get at the inter-system and intra-system dynamics of punishment in law and education. Social systems theory provides a starting point, a language to describe system operations, and an opportunity to use systems theory empirically. I now shift to offer a conception of punishment. I want to clarify what exactly I am studying/observing when I say that I am studying punishment. I draw on parts of social systems theory to engage notions of power, force, and influence as concepts that help me observe punishment within and across law and education.

## **Chapter 4: Punishment's Power, Force, and Influence**

### **Studying punishment: A Path to Address Current Theoretical Pitfalls**

I have laid out the topical and theoretical problems related to the study of punishment. These problems include: importation/lumping; heteronomy; criminal-centric studies; and the underdevelopment of non-penal/non-judicial (Phoenix 2016) and non-criminal legal system based responses to youth lawbreaking or misbehaviour. These problems show how there is blindness to the specifics of youth punishment and theoretically there is perspectivism.

A framework is needed to make sense of the multiple forms, locations, features, and processes of punishment in social systems. My goals are to: provide a lens to examine punishment within and across systems; view punishment broadly; and create a theoretically meaningful account of youth punishment in modern society. I am not aiming for a grand overarching model, I want a conception of punishment to capture the “multiplicity of interpretations and show how they interrelate” (Garland 1991, 157).

I see punishment in and through the operations of contemporary social systems, in and through the vocabularies of communication, differences, systems, and environments. I see its various systemic contexts/sources (education and law) and its various dimensions (e.g., diversion vs. sentencing). What I want to observe and document enriches understandings of youth punishment, challenges punishment as a crime control mechanism, and points out the distinctive features of punishment.<sup>26</sup>

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<sup>26</sup> The implications of this are far ranging. First, it starts to clearly point out the complexity of modern punishment. Second, it exposes the internal/systemic aspects of punishment and rethinks seeing punishment

In fashioning an approach to open the theoretical and empirical boundaries of punishment, I have three assumptions. First, punishment is not just an outcome of law breaking. Rather, there are operations and meanings of youth punishment within and across social systems. This means that in this thesis, punishment is not a singular response to a breach of a common norm (for instance, hitting a classmate) but it is something that can be seen in relation to law (hitting a classmate = criminal assault in law) or in relation to education (hitting a classmate = against the code of conduct for all members of the school). Because punishment is more than a response to law breaking, it is productive to offer a conceptualization of what can be seen as punishment and then use this to guide observations of punishment in different systems. This gives me a constant frame of reference to track different locations to observe, address, and resist punishment.

My second assumption is that punishment is not just exclusionary. I prefer to see varieties of punishment, both in scope and scale. By looking beyond exclusion, it is possible to observe how and under what conditions different social systems create and maintain punishment. So the question is not about the relationship between the punished and not punished (e.g., exclusionary vs non-exclusionary), but how punishment is selected over some other systemic difference. And, in the case of educational offenses that also coincide with criminal offenses, how a response comes to be framed as legal or educational. At the same time, not limiting observations of punishment to exclusion allows me to analyse legal approaches such as extra-judicial sanctions (EJS). Or, in the case of schools, it allows me to analyse educational approaches that do not involve suspensions or expulsions.

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as a means to an end (Garland 1991). Finally, it provides a basis to investigate development in youth penalty that have been overwhelmingly overlooked (see Phoenix 2016 for critique).

Third, punishment within and across systems are not equivalent to the common criminal/criminalizing notions of punishment. I resist this criminal-contamination or criminal-centric observation of punishment by not presupposing that all forms of punishment have the same structure, process, and effect as those related to crime. I prefer to think about and observe different forms of punishment in their own way. This means that I observe how law observes punishment and I observe how education observes punishment. Practically speaking, I want to see more of the processes and distinct spaces of punishment

My resistance to criminal contamination does not mean that I cannot observe inter-relations between law and education. Rather, I just see this in a theoretically different way. There may be influence, or operations may be pointed at another system, or there may be synchronicity, but there is not criminal contamination. To use the same example as above, in the case of educational offenses that also coincide with criminal offenses, I am left asking: how the responses are legal or educational? When it is possible to call the cops? How is the choice made to or not to?

When describing elements of punishment, I think about and discuss punishment communicatively, seeing communications of and about punishment as an important site to examine it in contemporary society. This means that what is punished, how punishment works, its various types, who gets it, who contests it, and its justifications are ultimately umpired in and through communication. With a communication-based starting point, I now turn to conceptualize punishment and provide some concrete illustrations of it. In sum, I present an opportunity to study youth punishment and its multiple

manifestations both empirically (e.g., penal/juridical versus non penal/juridical responses) and theoretically (e.g., in systems of law and education).

My contribution to the study of youth punishment is to make visible how the systems of law and education craft youth and youth punishment, to explicate the programs of punishment in systems, and to make known the meanings of punishment and youth. Quite simply, I foreground the processes for doing punishment and its consequences in an attempt to explore, expose, and demystify legal and educational punishment.

In this section, I describe some basic distinctions that can guide observations of punishment. I want to show what law's punishment and education's punishment may entail. I begin by showing that there is little consensus on what punishment is and what it is not. I suggest that punishment needs to be conceptualized in terms of its source/the social systems what it operates.<sup>27</sup> One way to do this is to develop analytical scaffolding, something to guide observations of punishment.

### Conceptualizing punishment: Influence, power, and force

It is puzzling that there is little consensus on defining punishment when there is consensus that punishment is an important object of study and investigations of punishment have been crystallized in various fields using a variety of sociological methods (Simon and Sparks 2013). The concept generally lacks precision. For example, Pires (2013, 139) points out that: "it is no longer known what distinguishes this concept

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<sup>27</sup> As I outlined above, my description and analytical framing of punishment shows how punishment is not just a feature of the criminal law, but is feature in other types of law, as well as other systems. But to do so, to make these observations, means having a framework to pinpoint punishment within and across systemic boundaries.

[my translation]”. So, there are problems beyond those I described above, there is also a problem of identifying what it means to punish.

It can be said that the concept is poorly constructed, inadequately discussed, and generally taken for granted. Part of this is because the study of punishment is heavily steered by an analyst’s theoretical tastes, focusing on questions of how it changes, where it unfolds, what shape it takes, how it is practiced, what it means, who gets it, who does it, and the consequences it creates. It also tends to be loaded with explanatory, normative, and practical baggage. One of these is the heavily anthropocentric positioning (e.g., both in its focus on humans and its focus on actors) that tends to leave unexplored the forms of punishment, the modes of punishment, how and why it functions, and with what social conditions (see for instance Pratt 1990, 221).

The lack of consensus when defining punishment is an invitation to be creative in conceptualizing punishment. There is an opportunity to engage a theoretically meaningful approach to observe punishment within and across social systems. I see the lack of consensus as an observation problem, so what is needed is more clarity and variety when making observations of punishment.

Presented with this observation problem, Carrier (2011) provides a typology of the modes of operation of social control that analysts can observe.<sup>28</sup> This is a scaffolding

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<sup>28</sup> I decided to use this conceptualization for a number of reasons. First, it’s sufficiently broad to allow me to capture punishment across social systems. It is common in the sociological literature on punishment to describe it as a response to crime and crime control, and depending on theoretical tastes, punishment comes to be mediated, enhanced, or tempered based on norms, conventions, culture, economics, and morality (see for instance Simon and Sparks 2013). This coupling of punishment with crime limits my analysis of punishment in and across different types of law and in and across different systems. Second, the conception is not system specific. It also, as Carrier (2011) explains, does not mute the possible force of punishment by privileging and foregrounding how and with what effects power touches all of us. Third, this conception provides a theoretically informed solution to recent critiques in the sociology of law and in the sociology of youth punishment that have tried to move beyond Foucauldian-inspired analyses of punishment (Liu 2015,

to make observations of punishment, bring more clarity, and offer variety in observations of punishment. It allows me to present a conception of punishment that responds to the critiques I presented above. And, it allows me to think about punishment in its intra- and inter-systemic contexts.<sup>29</sup>

Building on dimensions of social systems theory and offering a critique of the governmentality perspective to study punishment, Carrier (2011) distinguishes between social control operating as influence, power, or force. In the context of my work, I can mobilize these three distinctions to engage punishment operating as, influence, power, or force. To my knowledge, the typology has not been empirically applied to make observations of punishment, specifically youth punishment. In my study, when I look within and across the social systems of law and education, there may be different uses of punishment in different social systems: as influence, as power, and as force.

The influence, power, and force schema can guide observations of punishment and inform observations both within and across social systems. Empirically, showing the role and conditions of influence, power, and force is the descriptive and analytical task of this dissertation. In this conceptualization, influence refers to instances of punishment that do necessarily operate through threats and force. Power refers to the “non-actualized capacity to impose sanctions” (Carrier 2011, 341) while force refers to failed power or the actualization of a sanction. Accordingly, I am guided by applying basic formal distinctions of influence, power, and force (Carrier 2011).

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Phoenix 2016). Finally, following Daems (2011), the conceptualization captures the “effects it produces and meanings it communicates.”

<sup>29</sup> Another way to think about the steering critique would be to describe the sociologies of punishment to be principally concerned with the inter-sociological elements that come to guide punishment. This is to the detriment of a conception of punishment that accommodates both inter- and intra- elements.

I will explain these concepts and provide some concrete examples below. My strategy is to pose a question about studying punishment and show how these concepts help my study. This is conceptual work that helps me pinpoint and clarify what is empirically explored when I study youth punishment in Canada.

### Punishment's power

How can multiple options available for punishment be studied? What can be analysed about the capacity to suspend or warn in education, or what can be assessed about the capacity to impose a period of probation, investigate and expel, or impose a period of custody and supervision? A concept is needed to classify and study: 1) the capacity to punish; and 2) the accumulated options that are available for selection when punishment occurs in law and in education. The concept of power can guide observations of youth punishment to address these questions.<sup>30</sup>

I use a concept of power that draws on social systems theory. Luhmann suggests, when foregrounding the importance of differences in the operations of systems, power rests of the non-actualized or the virtual possibility of mobilizing capitalized sanctions (Luhmann 1975, 24 as cited in Carrier 2011, 340). Some have criticized the sanctions in Luhmann's account of power, calling it a conceptual short-circuit because it positions power negatively (Borch 2005, 161). However, this critique comes from a narrow reading of Luhmann's power as reinstalling juridical-political notions of power which are contra-Foucault where power is not sanctioning for non-compliance. The concept of power used here, which is to access power sociologically and tie it to negative sanctions, points out

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<sup>30</sup> Some criticize the lack of a concept of power in systems theory. As King (1993) notes, this comes from readers who see power as existing between individuals or groups and the strength of physical, political or economic oppression of others based on differences. In the theory (see summary in King 1993), power is a medium, as defining meanings, as reconstructing the environment.

that there can be positive sanctions. From my perspective, the concern about focusing on negative sanctions is resolved in this study because I use the model of punishment's influence, power, and force to bring plurality to the analysis of punishment. There is plurality because I am not just concerned with sanctions as this notion of power can be simply seen as contingent; the negative sanction is one manifestation. In this light, the negative sanction of power is one manifestation, which mutes the critique that it is narrow.

Power is a capacity to impose a sanction. This positioning of power as capacity is absent in the mainstream Foucauldian concept (Carrier 2011). The power to impose a sanction can help point out what is available for punishment, something that can be actualized. While it can be actualized, it does not have to be for it to be considered power. A sanction invites me to engage with the forms of punishment, asking specifically what is available. The power or capacity for punishment allows me to have a broader conception of punishment, consider recent developments (e.g., diversion), and recognize punishment's options both from the most severe in intensity to the more mundane and every day. Hence, it deals explicitly with the problem in other studies of punishment that cannot capture the variety or developments (e.g., diversion vs. incarceration).

By focusing on sanctions, it must be asked: what constitutes a sanction in the context of studying punishment? A sanction can be thought of as what can be threatened. It can come from any system. Education may threaten to remove a privilege, or physically remove from a school setting for a period of time (suspension) while law may threaten to send to a program for arson prevention (diversion) or may impose a period of supervision in the community (probation). My examples show two other features of

observing sanctions: there can be multiple sanctions; and it opens up the analysis to issues of scale/intensity. And, my illustration of sanctions shows that it is not limited to negative sanctions as, the only way for there to be negative sanctions is there also to be positive ones.

Consider the following example. Power can focus on the threat or non-actualized possibility for suspension, expulsion, loss of privileges, or contact of parents in education or the use of diversion programming, a fine, probation, or custody in law. I study power as a way to observe the accumulated options for punishment and the overall capacity for it – but it does not have to be actualized (or imposed, practiced, or decided as others may wish to see it) for there to be power. Power allows me to identify and offer a rich description of the capacities to punish in law and education and position the power in each system as the starting point.

Having clarified what power offers, I am concerned with the systemic usage of power, interested in what is considered possible through communications of power (Newnham 2015), but I am not concerned with what can actually be achieved with power. This quite simply means that I view power as communications of the capacity to mobilize capitalized sanctions. As a capacity, it is possible to look within and across systemic contexts to look at the different and differentiating capacities for power. This allows me to expose otherwise ignored aspects of punishment. I will now present a few illustrations of punishment as power.

There are multiple instances where law can mobilize sanctions. This involves a capacity to not sanction. Let me illustrate. In the criminal law, punishment's power may be seen in the capacity to divert, the capacity to sentence, the capacity to sentence

severely, the capacity to sentence leniently, and so on. In education law, punishment's power may be seen in the capacity to give notice to parents, the capacity to investigate and suspend, or the capacity to expel. Finally, punishment's power in the social system of education may be seen in the capacity to remove extracurricular privileges or to suspend. These examples of power are characterized by the fact that they only exist as a possibility. This is not an exhaustive list but it highlights some of the capacity for law and education to impose sanctions.

### Punishment's force

The concept of force also guides my observations. In addition to studying the capacity for punishment, I can also ask: How and under what conditions youth punishment is actualized? What is being done in punishment, under what conditions is it imposed, selected, or actualized, and with what logics?

Force is different from power. Drawing on a social systems perspective, force can be observed as an "expression of the failure of power" (Luhmann 1986, 119 as cited in Carrier 2011, 341). Force, unlike power, is not about the capacity for a sanction but, it is the actualization of a sanction. Punishment operating as force has the ability to more clearly distinguish options and conditions for punishment. What I mean by this is that force, when observed as the actualization of a sanction, exposes the variety of imposed sanctions along with the conditions that lead to the failure of power. For example, education has the power to impose the negative sanction of sending correspondence to a parent or contacting a parent directly if a pupil is truant. Education's power of engaging parents makes possible negative sanctions, for example when the sanctions for being absent and the expectation to attend class on time regularly are communicated in the

school's handbook. However, there can be punishment's force when the power to call home or send correspondence is actualized because attendance expectations have been disappointed. In this context, power's capacity failed, which can be followed by punishment's force. And, this makes force possible in the future when education reflects upon its options when faced with another truant. This is one illustration of force in the context of education. Empirically, my task is to identify force in law and in education. To make a link with the other concepts, this means to map what happens when power fails by identifying the sanctions that are actualized.

Consider another example. Instances of punishment's force may be seen when the first time graffiti artist is offered a diversionary program for mischief to public property. Force may also be seen when a youth who destroys his bedroom is charged, prosecuted, and sentenced to probation for mischief. Force may also be observed when the high school student is suspended from school for two days and is not able to participate on the school's basketball team after she attends a school dance intoxicated by alcohol. These negative sanctions are actualized with the forced participation in a diversion program, the forced criminal justice system processing and a sentence of probation, and the forced exclusion from the school and the school team.

Distinguishing force from power adds nuance to what is empirically and theoretically observed as punishment. By focusing on power and force, it can be seen how and under what conditions the possibilities of punishment (the capacity/power and the actualization/force) come to be. These concepts also help me explain what can be observed inside systems. Or, these concepts allow me to engage with the intra-systemic

features of punishment in different social systems. The final concept I present considers the inter-systemic possibilities of punishment.

### Influence on punishment

The sociology of punishment is interested in who and what drives punishment. Armstrong and McAra (2006) refer to this as an interest in the audiences of punishment. The audiences capture who or what drives punishment as “discrete object[s] of knowledge” (Armstrong and McAra 2006, 8). Typically, personhood and identity are the audiences used to constitute punishment which may include the victim, the offender, the public, and the national community. But for me, this is only part of the process. To my knowledge, there has been no attempt to identify how systemic contexts can be audiences of punishment. And, while there is work on the impact of law on education, there is no work on the role of education on law. Using my perspective, the challenge of the audiences theme is to identify more inter-system nuances and ask about what drives punishment without assuming drivers come from the outside.

Power and force in law do not capture the possibility that power and force in law may coincide, concur, or deviate with power and force in education, or vice versa. This concurrence, coinciding, or deviating occurs based on how each systems sees – or influences – the other.<sup>31</sup> If punishment between systems is ignored, there would be theoretical and empirical blind spots. Theoretically, it is difficult to study system boundaries and the role of systems in constituting punishment. For example, it would be difficult to theoretically establish legal punishment without clear boundaries of it. Empirically, without another concept my study would be unable to consider the

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<sup>31</sup> Drawing from the language of my theory chapter above, structural coupling and influence are used interchangeably.

possibility for schools to call the police, unable to observe the decision to do so, and unable to see how something can be simultaneously and perhaps differently observed by law and by education. For example, it is possible that educational offenses will also coincide with criminal offenses. This opens up the analysis to how responses are framed as legal or educational, for instance: when is it possible to call the cops to school or not? How is the choice made to or not to? And, it can work the other way, where in the case of a legal offence which coincides with an educational offence: how are responses framed as educational or legal?

I want a concept that can capture how one system can play a role in punishment in another system. By referring to influence, I offer something different from steering. But first, for there to be influence, there must be operations that take place in different social systems. Operations within social systems do not mean that others cannot be aware or cannot observe these operations. This simply means that there can be differential treatment of something in education based on the fact that it's punishable, there can be differential treatment in law based on the fact that something is punishable, and there can be differential treatment in education or in law. Differential treatment, which remains an open empirical question in the context of youth punishment in law and education, takes place when law or education uses its own operations to be sensitive to or at least aware of what is going on around it. So, I present influence as a concept to capture the duality, the differential impact of systems.

Influence refers to “promoting a particular vision” of what can be punished, what is known as youth, or what takes place in different systems. Influence can be thought of as a “means to structure” that which is possible, a language game that can be mobilized to

define legalization, criminalization, punishment, and youth (Carrier 2011). Influence can be thought of as a system using in its own terms objects/operations in its environment (such as crime, which is a legal construct that can be used in education, or progressive discipline, which is an educational construct which may be criminalized). Influence is different because it is not necessarily backed up by or does not have the support of threats/power and force. Rather, law makes use of educational norms and education makes use of legal norms.

Let me illustrate my concept with an example. Let's suppose that two young people are fighting on the street. Police pass by, observe the altercation, and after a short investigation, it is clear that there is one aggressor in an unprovoked attack. Simply put, from the perspective of law, there has been a breach of the normative expectation not to assault another person. In maintaining this normative expectation, it is possible for the law to construct the altercation as illegal, therefore making it legal to use probation, custody, a fine or other legally relevant mechanisms. In so doing, the law can maintain the expectation that assault is illegal and threaten/actualize force. Now, reconsider the narrative, however it now takes place at school. Instead of police passing by, they may or may not be called by a witness, the victim, or a staff member. Alternatively, police may be in a school but do not respond with legal tools, not initiating the criminalizing process because of how education comes to see the fight when education removes a privilege or suspends. In this example, the empirical challenge is to expose the ways that an assault is differently but simultaneously observed by both law and education, and how education's operations differ based on what is possible from law's operations and how law's operations differ based on what is possible from education's operations.

An empirical question applying this concept may ask: are law and education linked, and if so how? How does punishment influence? Or, how does law/education influence punishment in other systems? While influence will be explored empirically, the benefit of influence is that it does not mean that punishment in one system causes an operation in another system. Further, influence does not mean/assume that law's strategies, techniques, or punishments are automatically taken up by education, and vice versa. Rather, influence can acknowledge that there is some type of stimulus or irritation outside of system boundaries that, can be considered, according to the systems own operations.

Empirically in the material below, punishment's influence will engage more concretely with the inter-systemic features of law and education in the context of punishment. This provides access to a vision for what needs to be addressed legally and in what way it operates within the scope/limits of the law. This analytic can also be applied to education.

In summary, punishment's influence captures the selection and mobilization of communications about punishment that are not necessarily backed up by force or power. It involves the presentation of a particular vision about how inter-systemic features are worth exploring between law and education. I will conclude with some comments about influence, power, and force and spell out what is gained by using this framework.

### **Concluding the typology of punishment**

I study punishment from the point of view that it needs to be conceptualized in terms of its source/the social systems in which it operates. As a result, punishment can be

studied beyond its consequences, causes, or effects. I have offered some conceptual work to show what I will use to guide my empirical observations.

I am studying punishment through the presence of capitalized sanctions (power), the actuality of sanctions (force), and the means of structuring (influence). In describing the influence, power, and force of law's and education's punishments (applying Carrier 2011), I have a typology that is not welded to a one social context. This allows me to illustrate more clearly the differences between law and education and study the inter-systemic and intra-systemic features of punishment.

Researchers of punishment celebrate exposing, exploring, questioning, critiquing, explaining, and observing different manifestations of punishment. I have offered a framework to study the inter-systemic and intra-systemic operations of punishment in a theoretically meaningful way. I want to pinpoint what can be gained from my approach. First, I have used these concepts to be more precise when it comes to talking about and studying punishment. One reading could be that I use influence, power, and force as concepts to replace a ubiquitous notion of punishment. Second, these concepts allow me to talk to and talk with others in the sociological study of punishment. For example, I am able to talk with and challenge Foucauldians by observing power as a sanction and something that is contingent, instead of something that needs to be observed in its positive manifestations. I can also converse with the criminal-centric or steering-based observers of punishment by distinguishing the inter- and intra-notions of punishment. Finally, I have also used these concepts for the sake of using social systems theory in empirical work.

## **Chapter 5: Studying Youth Punishment in Canada: Stories of Legal and Educational Encounters, Data, and Researching With Law**

I am preoccupied with presenting a sociology of youth punishment from the perspective of social systems theory. To do this, I adopt an approach that is totally different from affirmative, goal-based, or expressive qualities of punishment by studying punishment communicationally.

Studying legal and educational communications, I aim to sociologically understand the conditions and goals for decision-making regarding punishment. That being said, if I paint a representation of law's and education's punishment, I am highlighting the system's own structures and processes for punishment. My work shows how education and law create and follow their own traditions and logics and how systems have their own responsibilities or considerations and goals when selecting/threatening/actualizing punishment.

I invite observers/sociologists of punishment on a journey to take into account the internal mechanisms of law and education, be it the system's routines, patterns, goals, or requirements. This approach allows me to describe sets of legal and educational models of punishment, or various self-descriptions of punishment, that have been internally created by law and education. This takes seriously what systems themselves, specifically education and law, have to say about punishment. And, as described above, it engages with the inter-systemic and intra-systemic operations of punishment in empirically and theoretically meaningful ways. A secondary objective of my research is to show both

how systems theory can help study youth punishment and how systems theory can be used empirically.

I will now describe the strategies I used to collect data and the qualitative techniques I used to analyse my data. To set up my methodological discussion, there are some sociological, spatial, temporal and topical boundaries that help orient my project and clarify my empirical objects.

*Sociologically*, I am concerned with the communications and selections of punishment. I am concerned with how punishment operates within and across social systems. This concern invites me to think about sociologically meaningful boundaries between law and education and leads me to engage with theoretical ideas related to systems and their environments. I can then more clearly engage with the elements of punishment and the role of law and education.

*Temporally*, I focus on the present, which is broadly limited between 2014 and 2016 and I do not replicate existing historical work (Piñero 2013a, b, for a history of childhood more generally see Feld 1999). In selecting a timeframe, it is a challenge to avoid privileging one system by arguing 2003 is important because of legal changes to the *Youth Criminal Justice Act*. Instead of picking one year, I assume that the present can be studied in a theoretically meaningful way.

*Spatially*, my data collection focused on two regions in Eastern Ontario. I identify these areas only in the context of where I look for specific policies, programs, memos, and so on. I do not identify the specific area in Eastern Ontario to maintain anonymity

obligations.<sup>32</sup> In the text below, where relevant, I refer to two towns as Oldrose and Westston. Oldrose can be characterized as a large metropolitan area that includes a large, multicultural, and urban centre. It has a large city centre with suburban areas. Industry consists of high technology, government, retail, health and education, manufacturing, and tourism. Westston can be characterized as a small city with adjoining rural towns. Industry consists of agriculture, retail, and some health and education. I want to clarify that I am not studying Oldrose and Westston *per se*, but I merely use these geographical areas as a spatial boundary for collecting empirical data. I am interested in how Oldrose and Westston collectively provide insight into the operations of law and education.

Law and education make up the empirical corpuses for my work. This frames what I examine, identifies what and how I will explore the world, and points to where I look for data. I used as a hybrid approach that blends elements of textual and structural traditions<sup>33</sup> to gain insight into the operations of law and education based on their ordinary presence and the “stock of ideas” they provide (Inglis and Thorpe 2012, 88). I accumulated legal and educational material to comb, to read and reread, to organize and reorganize, to order and reorder, to extract and apply themes.

Bellow, I describe where I looked for data. I make the argument that I not only research law, but I research with law. My principal methodological contribution involves framing/using the law as a tool for research. When researching with law, I describe how the law provides strategies to access important sources of data. This allows me to

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<sup>32</sup> I have guaranteed confidentiality and anonymity so I use pseudonyms.

<sup>33</sup> There are also traces of the phenomenological tradition which highlights a concern for the “ordinary, mundane contexts” of everyday life that make it possible for systems to operate (Inglis and Thorpe 2012, 86). This focuses not on how individuals perceive the world but how systems make sense of the world through their own recursive processes of communication. Within this framework, examining the “stock of ideas” needed to operate (Inglis and Thorpe 2012, 88).

describe the type of data that I worked with while also analytically clarifying a strategy. The strategies to find, access, and accumulate data are presented in four acts. Finally, I conclude with a discussion of my analytical strategies.

#### Law: Legal encounters with data

I come to define and identify legal data by selecting topically relevant content that is able to distinguish what is legal and illegal. When studying law, my concrete empirical material will be identified and selected from statutory law, reported legal cases, and cases files of criminal-legal youth cases. Indeed, law is not just on the books (statute), so I also canvassed and collected reported cases (i.e., cases found on Quicklaw and CanLii) and cases processed through the youth criminal legal system in two jurisdictions. These are all legal communications of the legal system that describe legal operations and provide a window to observe how it is legal to punish in law.

I am concerned with how youth punishment is created. Because my interests in law transcend the criminal law, I assessed the *Youth Criminal Justice Act* and the *Education Act* (ON). Using these statutes, I purposely engaged with craftings of youth, discipline, punishment, expectations, and behaviour. This also included overarching objectives/purposes of the law, and the specific techniques, options, and decisions available for punishment in law.

I also studied reported legal cases where the *Education Act* and the *Youth Criminal Justice Act* were cited. These cases report legal decisions rendered in Ontario courts and some administrative bodies. The inclusion of administrative bodies is relevant in the context of studying education because there is a legal recourse to appeal an expulsion from school to the Child and Family Services Review Board in Ontario.

Studying statute and reported cases reveals legal operations in the context of how punishment unfolds and who is punished. Left unexplored are the narratives of who/what is punished. This presents the more mundane, every day and less formal cases that still craft youth punishment. To explore these elements, I also collected randomly selected criminal case files from Oldrose and Westston. This is legal data showing real cases going through the youth criminal legal system.

#### Education: Educational encounters with data

When studying education, my empirical materials were identified and selected from provincial educational briefs, school policies and procedures, and school board/school records. I define and identify education data by selecting topically relevant content that is able to distinguish what is conveyable and non-conveyable in the processes of formal education. I studied education from provincial educational briefs from the Ontario Ministry of Education. The Ontario Ministry of Education administers the publically funded elementary and secondary school education system in Ontario. I collected province-wide briefs that capture the curriculum, elementary and secondary school education plans, and student/staff codes of conduct.

I also collected policies and procedures at the local school and school board level. I selected two school boards in Eastern Ontario, the Upper Canada District School Board and Ottawa Carleton District School Board. The Ottawa Carleton District School Board is among the top 10 largest school boards in the province of Ontario, with over 70,000 students. The Upper Canada District School Board is geographically one of the largest school boards in Ontario serving over 12,000 km<sup>2</sup> and over 26,000 students. The daily operations of school boards are said to be guided by a number of policies and procedures

and these provide insights into how punishment operates and who/what is punished. Policies are general governing principles that are publicly displayed and regularly updated to guide the daily operations of the school board. Procedures are more substantive guides to the implementation of policies. My inclusion of policies and procedures pointed me to focused on: safe schools; progressive discipline and positive student behaviour; the code of conduct; bullying prevention and intervention; student suspension or expulsion; and promoting positive student behaviour.

### **Researching with law: Law as a methodological tool for getting access to data**

I will now describe the concrete strategies I used to collect data. I also make the argument that I not only study law in this project, but I study with law because I use law as a research tool. In studying with law, law is a methodological tool for getting data. I therefore take the opportunity to explore a methodological and conceptual framing of researching with law. This opens up the legal system and its functionaries as objects of research and tools to do research.

Researching with law requires researchers to translate empirical problems into legal problems, use legal framing to access institutional records/secondary data, and expose this data so that it can be analysed with social scientific methods. Using the law to access data is not a new approach, especially in the context of freedom of information legislation. Freedom of information (FOI) legislation or access to information and privacy (ATIP) legislation provides a path to disclose records of federally and provincially regulated bodies. This means that legislation allows Canadians to demand records from certain types of systems, for instance the system of law and education/schools.

Typical discussions of FOI/ATIP are coloured by strategies for using FOI legislation, the typical barriers experienced when using the legislation, negotiation techniques with gatekeepers of the records, and the challenges for transparency and democracy when the records are limited (Mopas and Turnbull 2011, Piché 2011, 2012, Spivakovsky 2011, Walby and Larsen 2011a, b). While I am similarly interested in the mechanics and outcomes of access to information, I want to add to these conversations by exploring law as a research tool, as a method, and a space to do research.

Legally, statute describes how “every person has a right of access to a record or a part of a record in the custody or under the control of an institution” (Freedom of Information and Protection of Privacy Act 1990, s. 10). Practically, this means that researchers can petition for access “any record in the custody or under the control of an institution” (s. 69.1) with certain exceptions. Petitioning for access to records involves completing a form requesting records from the body that may hold them, identifying a time period for the relevant records, describing the nature/context of the petitioned records, and paying five dollars. In this sense, curiosity about youth punishment in systems of law and education is translated into a request for records that touch punishment and are in the custody of school boards, schools, ministries of education, ministries of community safety or attorney general, or other relevant bodies.

Using access to information requests is not the only legal strategy for researching with the law. Part of my data set includes case files of young people formally and informally processed in the criminal legal system. These legal case files describe the relevant legal evidence and narratives needed for the legal system processing. This processing may include formal processing where prosecution is possible or, it may

include the formalized informal processing of Crown selected youth diversion under the *Youth Criminal Justice Act*. Getting access to these files involves another researching with the law strategy, a strategy that involves using a generally unknown part of the *Youth Criminal Justice Act*.

The *Youth Criminal Justice Act* has a series of detailed provisions on youth records. Generally, youth records are accessible only where legally permissible. The statutory regime creates tight controls over these records outlining the types of records created, who may have access to these records, and timelines for the destruction of these records. The statutory gateway for access states:

119 (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:

[...] (s) any person or member of a class of persons that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access to the record is

(i) desirable in the public interest for research or statistical purposes, or

(ii) desirable in the interest of the proper administration of justice.

Accordingly, law makes it legal for researchers to have access to records such as: court files (s.114), police records (s. 115), and government records (s. 116). Practically speaking however, it is my understanding that based on conversations with court staff workers and Crown prosecutors that there are few youth court records produced by the courts and by Crown prosecutors in my study sites. However, the legal case is formally called the police file and this includes all of the information/evidence collected against an

accused young person. This evidence, or legal communications, are crafted/collected regardless of whether or not the young person is diverted or the young person is prosecuted are processed through some other means.

### **Acts of data collection: Working with open source and with law**

I have organized my data collection procedures into four different acts. I begin Act one by describing the sensitizing strategies I used to become acquainted with the field and get a sense of some of the data that may be available. In Act two, I describe the open source searching and collecting strategies I used for publicly available material. In Acts three and four, I describe the strategies for researching with law when I submitted access to information requests and when I made a formal application to youth court.

#### **Act one: Sensitizing strategies**

I began my data collection in autumn of 2015 by conducting online searches using library catalogues, Ontario government and Federal Government of Canada statute depositories, and search engines. This involved engaging open sourced professional blogs, professional associations, government departments, local schools, and school boards. These searches provided a sensitizing strategy to identify the types of secondary data sources may be available and they allowed me to develop system-specific language to talk about, and talk with the system about retrieving data.

I also read parts of the most recent annotated versions of the *Education Act* and the *Youth Criminal Justice Act* (Tustin and Lutes 2016, Munoz 2015). Consulting annotated versions allowed me to become familiar with broad principles in statutory interpretation and legal operations, key developments in youth law and legal principles, and important cases. This also allowed me to have some historical context in the statutory

frameworks and assess whether or not there has been recent changes/additions/deletions to statutory law. Generally, there has not been a recent tide change in the statutory operations.<sup>34</sup>

These preliminary searches allowed me to create a list of keywords of system specific concepts. These keywords are useful in framing access to information requests and framing my legal application under the *Youth Criminal Justice Act*. After my initial searches, I created a working list of data that I expected to obtain from law and education. Initially, my timeframe for searching included the last five years of statute, case law, policy, institutional records, and so on. Being cognizant of the fact that I am not trying to produce a historical project where I map changes in the system of law and the system of education, and considering the mass of records, case law, and policy documents that I was accumulating, I decided to look for data between 2014 and 2016.

#### Act two: Open source

Consulting open sources provided some early sites for data collection. Using open sources for law, I collected the text version of the *Education Act*, the *Youth Criminal Justice Act*, and case law. Using open sources for education, I collected codes of conduct, policies, procedures, and educational priorities.

Open source law: Legislation is publically and freely available in Canada. Studying the legal aspects of punishment, statute included the *Ontario Education Act*, and the *Youth Criminal Justice Act*. The *Ontario Education Act* provides the statutory foundation for education in Ontario, and who are enrolled in the publicly funded system

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<sup>34</sup> For instance, I am not undertaking a research project at a time like when the *Youth Criminal Justice Act* was first implemented, in 2003, marking a fundamental regime change in youth law in Canada. Certainly, in the context of the *Youth Criminal Justice Act*, there was change in 2012 with the addition of deterrence and denunciation as a consideration at sentencing (Bala 2015). On the other hand, there is also change in the *Education Act* that I reviewed above in my literature review (see Chapter 2).

of education. Substantially, it consists of 14 parts. The *Youth Criminal Justice Act* is the statute describing how the youth criminal Justice system operates in Canada. It applies that those who are at least 12 years old but less 18 than who have allegedly committed a criminal offense in Canada. It consists of nine substantial parts.

Not all parts of the statutes were considered in the analysis. For the *Education Act* I purposively selected materials touching the overall purpose and objectives of education law, sections regarding school attendance, and part 13 sections related to behaviour, discipline and safety. For the *Youth Criminal Justice Act* I similarly selected content related to the overall objective or purpose of the law, part one related to extrajudicial measures, part three on judicial measures, part four on sentencing, part five on custody and supervision, and part six on publication, records and information.

In addition to statute, I also collected reported case law. Reported cases are available through the Canadian legal Information Institute (CanLII) and Carleton's QuickLaw subscription. The search parameters for retrieving cases included: Ontario reported judgements; judgements were reported between January 1, 2014 and December 31, 2016; cases that cited the *Youth Criminal Justice Act* or *Education Act* in Ontario and involved the young person as an accused or principal party to the case. Secondary searches were conducted using the sensitizing concepts discovered from Act 1. Some of these included: "suspension", "discipline", "progressive discipline", "expulsion", "bully", "youth sentence", "diminished moral blameworthiness", "accountable/accountability", "demeanour", "remorse", and "young person/young/youth/child". After eliminating cases that were not relevant, I randomly selected 50 cases.

### Act three: Submitting access to information requests

I submitted a number access to information requests to school boards, the provincial attorney general, and youth related ministries. This act of researching with law not only allowed me to study law, but also education. My inquiry was initially broadly framed. I asked for lists of documents, memorandums, PowerPoint decks, policies, and procedures on how to deal with youth misbehaviour, how to discipline, courses of action for misbehaviour, progressive discipline, programming options, dealing with difficult situations in the classroom, and how to punish. After asking for lists of documents/records, I was able to follow up with a more specific request based on the titles of the records produced.

I retrieved memorandums, PowerPoint decks, policies, procedures, training material, and professional development material on how education crafts, communicates, or formulates possible responses to students misbehaviour in the context of education/schools. For example, these educational aspects are seen in PowerPoint decks that outlines scenarios of student misbehaviour and responses to it in the classroom. I was also able to retrieve memorandum, policies, handbooks and training material about how law and education handles misbehaviour.

### Act four: Making legal applications

Finally, to access the more mundane, every day cases of youth punishment, I collected case files from two jurisdictions in Ontario. This is legal data and it has the benefit of showing how the criminal legal system sees the concrete chains of events and circumstances of young people in legal conflict and more so, the nature of legal intervention. This allows me to build a sample of cases processed through the youth legal system, which compliments accounts found in policies, procedures, statute, and case law.

To get a sample of real cases, I made an application pursuant to section 119(1)(s)(i) of the *Youth Criminal Justice Act*. This section of the *YCJA* makes it possible to access records produced in the administration of youth criminal justice for research and statistical purposes, when it is in the public's interest. One type of record that is consistently produced in all cases where youth are charged is a crown prosecution/disclosure package.

I made an application in the youth courts in Oldrose and Westston for an order providing access case files for research and statistical purposes. I filed a 48 page document with the court and served a copy of the document on the Crown Attorney and the local police agency. The document contained: a title page describing the application, the authority, the reason for the application, and my contact information; an introduction outlining the nature of the application; a summary of the relevant provisions under the *Youth Criminal Justice Act*; a summary of case law; summary of facts which included my academic background and my contribution to research; and written submissions. The written submissions made the argument that I have a valid research interest in records and there is a valid public interest in granting me access to these records. I also outlined how I would use a strong set of ethical procedural protections, which social science also demands, to safeguard these records. Combined, my application and written arguments supported my case to access records for research or statistical purposes.<sup>35</sup>

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<sup>35</sup> My application also had six appendices. Appendix A provided a short list of relevant case law and monographs for the court and the respondents. Appendix B provided a short research proposal outlining the scope of my project. Appendix C consisted of an affidavit from my supervisor outlining the nature of my work, its contribution to knowledge, and ethical safeguards. Appendix D consisted of the Carleton University research ethics Board clearance for using secondary sources. Appendix E consisted of a proposed order and appendix F consisted of some possible conditions the Court may wish to impose in granting an order. Finally appendix G outlines contact information for myself, my faculty supervisor, and the Carleton University research ethics Board.

I have made this application in the past and, to my knowledge, I have one of the only orders and reasoning from a judge in Ontario granting access to use records for research and statistical purposes. I shared this decision with the court, with the Crown, and with the police agency.

I began by filing my application in one jurisdiction. I avoided having simultaneous applications in different courts for two reasons. I wanted to test my arguments to see how they would be received by the court to get a sense of how my application process is going to proceed. Second, I wanted to avoid scheduling conflicts between different courts. I made my first application in early May 2016. There were a couple of appearances just to arrange scheduling and timing, which led to scheduling two hours of court time to hear oral arguments for my application. On the day that the oral arguments were to be made, the Crown raised an issue that the police had not been given notice. While I did serve notice to the police, I did not fulfil an affidavit of service and I did not ensure that when I serve these documents they made their way up the administrative chain towards the relevant office of legal counsel. So, my hearing was postponed.

Before the hearing was postponed, I was able to engage the court and the Crown on the nature of my project. This was however met with resistance. I was abruptly stopped and reminded that the courtroom was not a social science course. I continued to describe the need for case files, the value of the contents of the files, and what I plan to do with them. Having used these files for research in the past, I explained the value in them and I explained the limits of basic trends provided by the Canadian Centre for Justice Statistics. I faced more resistance when there was an assertion that I probably

would not be up to find much content in the files, I would not be able to produce reliable findings when I was only seeking approximately 50 files, and information cannot be gleaned from case files because it is as much about the local culture and services available to youth than it is the contents of cases. So my legal arguments about access were ultimately challenged with law's reference to standards of social science and law's attempt to place me as an outsider by using its own impressions of the case files to reflect upon the value for science.

I later served the appropriate notices and obtained the affidavits of service but my progress was postponed for two months. Concerned about timing, I filed an application in another jurisdiction. Having two applications in the pipelines, I then had a number of discussions with counsel over the telephone to see if we could negotiate the terms of an order for accessing records. I was trying to arrive at a joint position between with myself and the record holder, and then we could seek the judge's approval.

The main issue involved the record holder maintaining institutional control of the records and vetting the records so that they were free of personal identifiers. To save counsel the trip from Toronto to argue the issue in court, I accepted to allow the local police service to keep control of the records and have the records vetted of personal identifiers. Together, we then drafted an order outlining the period of access, the timeframe for accessing records, how the records could be vetted, how the records could remain within the control of the police service, and how I would be granted time to review and make notes of the records.

On consent, a court order was granted in both jurisdictions that I applied for access to records under the *Youth Criminal Justice Act*. In both cases, I drafted a

proposed order with the legal counsel of the record holder's and we made joint submissions to a youth justice court. One jurisdiction was for completed cases within the last calendar year. In the other, 60 cases were accessed of which half were diverted by the Crown and the other half were not diverted (charged and prosecuted or charged and withdrawn or charged and discharge).<sup>36</sup>

When working with the files, I began by reading through all of the files to get a sense of how they are structured. This allowed me to create a loose coding frame of the consistent and repeated information in each file. When taking notes I used voice recognition software to dictate whole paragraphs. As I was dictating, I would write theoretical and topical ideas in a workbook. Generally my notes maintained the order, the content, and the style of how the case files are created. After reading through all the case files once and taking notes, I read through all of my notes highlighting in Microsoft Word areas that did not make sense, had a typo, or had missing information. I returned to the case files to re-read them while verifying the areas that needed clarification.

I read and transcribed detailed notes from 96 cases (60 from one jurisdiction and 36 from another). In the jurisdiction where I recorded 60 cases, 30 were diverted by the prosecutor and 30 were heard in youth court. In my discussion below, these are OPA or Oldrose Police Agency files. In the jurisdiction where I read 36 cases, 11 were processed through youth court and 25 were diverted by the Crown. In my discussion below, these are WPS or Westston Police Service files. Table 1 summarizes my four acts of data collection.

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<sup>36</sup> When drafting the order, I ensured the court order had a line stating that my notes were taken based on my "expertise and training" which "can be of a quality and quantity needed to undertake and engage professional and scholarly research." A final element of the order involves me destroying my notes and notifying the record holder within five years.

In conclusion, I have outlined the strategies I used and explained how I have worked through sensitizing strategies, canvassing open source data, submitting access to information requests, and making legal applications. My data collection strategies have shown how law is not just an object of research, but law can also be a tool for doing research. I want to close by exposing the similarities and differences in my data.

The different sources, types, forms, contents of my data may underscore the inability to compare and contrast themes, forms, semantics, and meanings that are emerging within law and education. However, this erroneously assumes that systems produce the same types of records, systems all have the same understanding of behaviour, and records are translated and open for research in parallel ways. Instead, I see the differences in the data as a strength. The differences illustrate how the different systems articulate problems which are observable through records created by the system. In summary, differences in the data tell important stories about institutional records and self-descriptions of each system. Because law is not education and education is not law, it is not surprising that law and education have different sources, types, and forms of data.

Theoretically, the data are communications created in and by difference systems. These are communications that can be observed by analysts (Luhmann 1995, 2013). Scientifically, the social sciences would describe the data as secondary data. Secondary data is used to describe textual data or objects created by a person or system that are later used for research. In the context of my research, all of these secondary data are created in, by, and for a particular social context. The social context relates to youth misbehaviour, and crafting youth punishment in law and education (Berg and Lune 2012, Babbie and Benaquisto 2010, Maxfield and Babbie 1998).

**Table 1: Summary of data**

	<b>Law</b>	<b>Education</b>
<b>General:</b> Timeframe	2014 to 2016	2014 to 2016
<b>General:</b> Type of materials	<p><b>Primary data:</b> Nil</p> <p><b>Secondary data:</b> Statutory law Statutory regulations Case files</p>	<p><b>Primary data:</b> Nil</p> <p><b>Secondary data:</b> School policy School procedure Codes of conduct School training material on misbehaviour</p>
<b>General:</b> Sources	<p><b>Online/Publically available:</b> Statutory repositories (e.g., Canlii/Quicklaw) Legal case databases (e.g., Canlii/Quicklaw)</p> <p><b>Agencies:</b> Local police agencies (accessing case files) Local court (application to access case files)</p>	<p><b>Online/Publically available:</b> School board/school websites Ministry of Education of Ontario Website Legal case databases (e.g., Canlii/Quicklaw)</p> <p><b>Agencies:</b> Local school boards, Ministry of Education in Ontario, Ministry of the Attorney General of Ontario, Ministry of Children and Youth Services, and Ministry of Community Safety and Correctional Services Ontario</p>
<b>General:</b> Preliminary inclusion criteria	<p>Legal data Within timeframe (above) Pertains to youth/young people in the context of their behaviour, identity, or expectations</p>	<p>Educational data Within timeframe (above) Pertains to youth/young people in the context of their behaviour, identity, or expectations</p>
Act 1: Sensitizing	<p><i>Education Act</i> <i>Youth Criminal Justice Act</i></p>	Codes of conduct

Act 2: Open source	Cases	Codes of conduct
Act 3: Access to information	Police issues in schools handbook	Policy and procedure Codes of conduct (School board and school) Training material
Act 4: Legal applications	Case files, two jurisdiction Jurisdiction 1: 36 cases (7 non-diverted, 28 diverted) Jurisdiction 2: 60 cases (30 non-diverted, 30 diverted)	

## Imagining the research process

### Data analysis procedures

My data totals over 2,000 pages. The unity among these 2,000 pages touches on how punishment operates and how punishment is selected or threatened. This has allowed me to gain access to the internal legal and educational logics, limits, patterns, and irregularities.

I am doing exploratory qualitative work. I am concerned with describing, in thick and rich detail, the meanings and themes associated with the punishment of youth in law and education. I want to expose how punishment may be handled on a daily basis, to understand how patterns are produced (Hutton 2006), how the phenomenon is constituted, and what meanings are produced. As Green (1961, 76) explains, qualitative work is important given that:

Statistical analysis possesses the virtue of presenting in broad outline the network of factors reducing variation in penalties for crime. But like a skeleton which, to be sure, discloses inferentially a great deal about the nature of the living organism, it lacks breath and polls. It does not provide any direct insight into the world of meanings—the penal philosophies, the theories of crime causation, the conceptions of human nature— by which the judges

rationalise their sentences. The quality of the wholeness of each case is necessarily sacrificed in statistical analysis— a detailed picture of the specific behaviour constituting the criminal charge; picture of the specific behaviour constituting the criminal status adducted in mitigation or aggravation of the penalty, filtered through the statistical sieve.

In my study, the references above to crime can be substituted for education. Thus, in my study, my analytical strategy is to create a sieve that stops punishment's communications, and allows the analyst to subject them to inspection.

I will now describe my analytical procedures. I used textual analysis strategies to comb the archives of law and education that I gathered. I see texts as products of social systems. They are part of larger social events that come to structure or otherwise organize social processes in the social systems (Fairclough 2003). The texts that I collected provided me with detailed accounts of the effects, structures, processes, and meanings that are created, operated, challenged, and changed within the context of the punishment of young people in law and education.

#### [Encounters, coding, and the analytical strategy](#)

My intention is to explore, expose, and examine the ideas that evoke, privilege, make possible, enable, operate, modulate, enhance, or temper youth punishment. The themes and substantive discussions that I present are the most illustrative, trustworthy, and representative of the collection of communications used to identify, target, and expose youth to punishment in law and education.

My analysis occurred in two phases: phase one consisted of analysing legal and educational data in their own spheres; and phase two consisted of analysing across systems, exploring links between education and law. I am identifying requirements for

youth punishment, references to youth punishment, and the links between punishments in different systems. This allows to me describe how punishment in law and how punishment in education operate.

All of the material was first organized. My strategy was to put the material into similar buckets. The bucket is a metaphor to capture the electronic or actual grouping of like material with like material. I used the similarities in the empirical material to do this initial organization. For instance, I grouped all of the codes of conduct together, I grouped policies on behavioural issues, I grouped sentencing decisions, I grouped statutes, and so on.

My first analytical step involved open coding. I read my materials while developing open descriptive categories to identify themes/semantics/distinctions/links in the text. For example, from the literature on education I could see where suspension/exclusion was selected. These early codes allowed me to identify some patterns, get acquainted with the stories told in the data, write early memos and reflections, identify content touching on how youth are punished in law and education, and identify the links between the system of law and education. This initial step of creating descriptive categories also allowed me to indicate keywords, themes, ideas, and logics mobilized in the communications of law and of education. While extracting descriptive categories, I also looked for relations among the categories. After this initial reading, I was left with 25 categories in law and 27 categories in education.

When coding, I had a bank of questions informed by my overarching research questions. Categories were developed (things like: accountability; adult sentence; progressive discipline; harm; impact; justification; formal; exclusion; parents, purpose,

life history, lucky, risk, violence, character, aggravating factors, protections; and so on). I then conducted a second reading of the data to extract the content that was most surprising, patterned and repetitive, and essential to the communications about punishing youth in law and in education. One of the strategies I used to assess/explore/test the essential nature of an element would be to ask: what happens if this element/idea/difference was not present? Would the system still be able to operate? What is the impact on punishment? What does this expose/hide? These question help guide me to key ideas, themes, and forms of communication to get at how punishment operates. I am interested in pinpointing what and how materials are used to make sense of education and law (Boiko et al. 2011).

I organized this material case-by-case, statute-by-statute, policy-by-policy, and so on. This allowed me to organize core themes/semantics for each system. Based on my initial organizing buckets, I then read across the material to identify links, nuances, anomalies, intricacies, and additional examples. For example when coding the legal material, think of this as reading each part of law and coding, then reading and coding across all of the different legal material. I began to identify important distinctions like needs/no needs, criminal history/no criminal history, bully/not a bully, bullying/conflict, accountability/not accountable, consequences for society/for the young person, and so on. My coding strategy was guided by semantic and coupling analysis (Andersen 2003).

My coding strategy was informed by two analytical strategies. This is an iterative process that means that I did not code in isolation. I coded using content that “pops out” of the data, themes from the literature, and theoretically meaningful concepts. My

overarching questions, my theoretical puzzle, and these analytical strategies helped me (re)code, review, explore, and expose elements in the empirical material.

When studying systems, systems need conceptual pools of communication for punishment and the empirical task is to build on form analysis to describe these pools. These pools provide a “supply of themes... reserved specifically for the purpose of communication” and these concepts are called semantics (Luhmann 1995, 163). Semantics tell us about how and with what content systems operate. Said differently, semantics can be understood as the “supply of stored rules for processing meaning” which are characterized by “repeatability of semantic forms enabling a certain durability and a memory of selections that have been previously made” (Stäheli 1997, 129-130). Seemingly, it produces something that is there for quick and readily understandable communications by organizing meaning. This can be formally articulated as semantic analysis, which involves exploring the concepts available for communication and analysing the “conceptual pool of communication.”<sup>37</sup>

When I was reading, organizing, sorting, and coding my materials, semantic analysis helped guide me to identify, assess, expose, and observe the pools of communications and concepts that are used in the operations of youth punishment. And, this strategy gave meaning to these pools of communication. Basically, the semantic analysis was a strategy to capture the ways that a concept is able to activate any number of operations. So the task then becomes one of organizing the core concepts for punishment and the core expectations. This directly targets the chaos of punishment, offering structures and organization to it (adapted from Andersen 2003, Andersen 2008a,

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<sup>37</sup> Andersen (2011, 254) further describes semantics as “condensed and repeatable forms of meaning available to communication.”

b). Following Andersen (2008, 21), I do this analysis by asking: “how are meaning and expectations formed and how do these become condensed and generalized in concepts that together establish certain semantic reservoirs for systems of communication[?]”.

My other discrete research question asked about the links between systems. But, in asking this question, I am working to rethink the infiltration thesis, and the steering of punishment by other social forces (for instance the steering of law by politics and tough on crime rhetoric or the steering of punishment in education by zero tolerance/law and order informed policies). I turn to the idea of coupling analysis to guide me. This analysis explored inter-system relations in a theoretical frame that does not see input and output.

I used coupling analysis to search for the links or irritations between law and education. Coupling analysis therefore points to where there are communications about (but not to) each other. This can be thought of as a shift in focus from the elements of systems of communication and punishment to the way that communication can become channelled “to and from other systems” (Febbrajo 2013, 1). This highlights not only the differentiation between law and education but that systems are differentiating. This channelling also highlights how and under what conditions inter-system disruption and irritation can occur. This is not causal, so just as walking presupposes gravity, gravity does not contribute to moving shoes, legs and bodies on a sidewalk (King and Thornhill 2005, 33). And, just as law may presuppose education, it is not that law leads to the principal’s attention on youth violent crime. Or just as education presupposes deviations from a behavioural norm by young people, it is not that education leads to diversionary interventions from law.

I wanted to capture the idea that multiple systems can offer communications about punishment. For example, law can talk about punishment in terms of illegal/legal sentence of a fine, economics can communicate elements/operations of punishment as payment/non-payment of a fine, or media can talk about punishment in terms of newsworthy/not newsworthy. In all of these instances, system of communication can talk about punishment in their own terms, not to each other in terms of punishment. As Andersen (2008a, 26) explains: “The fact that systems cannot communicate with each other but can in turn observe each other enables structural couplings between them... [merely] provide[s] the systems with a continual flow of disorder in response to which the systems are able to create and change themselves.”

The consequences of my strategy are straightforward: systems of communication can, on their own terms, include some things that it sees as important and exclude others. This also means that when it comes to the interrelations among systems, there can be synchronicity but not synchronization (Luhmann 2004, 383).

### **Conclusions from stories of legal and educational encounters, data, and researching with law**

My major methodological contribution involves not only researching law but researching with law. This allowed me to articulate a novel process for getting data and enabled the collection of an enormous package of legal and educational materials.

I want to close with a theoretical reflection. In my description of punishment above, I argued for a different research program, one that looks to study punishment beyond what steers it. Curiously, the mechanics of accessing data to undertake this study can be seen as law doing a lot of the steering of data collection. Notably, my arguments

related to researching with law have shown law's ability to steer the framing of a strategy to access data. However, I want to flag the importance of a systems perspective. I do this to clarify that I am not critiquing the forces that steer punishment all while relying on a steering-based logics to collect data. For instance, it is only in framing a research problem legally that legal data can be collected. Or alternatively, in the context of education's data, it is in framing the accessibility of education data legally that a pathway is created for it to be shared and exposed.

Perhaps, my researching with law can be seen theoretically as the coupling of law and science. In this instance, science had to make use of legal norms to get access to data. Doing research with law articulates how these legal norms come to shape what science describes to law to get case files. At the same time, law had to make use of the norms of science by seeing the research purpose pursued in my project. Exploring the coupling ability of law and science beyond the narrow confines of accessing data could be explored in future research.

## **Chapter 6: Law's Punishment: Conduct and Its Consequences, Promises of Protection, Fools or Fiends, and Accountability**

In this chapter, I focus on how law observes, analyses, (re)constructs, and tempers youth punishment. My analysis points out the role of law in elaborating, defining, and operating youth punishment. I privilege how youth punishment is crafted and the programs of youth punishment in law.

It is common place to focus on the “punitive” aspects of youth punishment. For example, exclusion from schools, rigid or onerous legal sentences with conditions in the community, or exclusion coloured by a period of custody and supervision. These illustrations represent select (perhaps even extreme) developments in legal youth punishment. It is possible to explore other developments, both spatially and temporally (Matthews 2005), to illustrate the opposition, diversity, contradictions, and tensions in youth punishment (Matthews 2005). For this reason, punishment is not just exclusion, time in custody, or an operation of law following egregious violence. Threatening or actualizing a sanction is how I see punishment and by focusing on the legal representations of punishing youth, I expose and explore how the legal system constructs youth and the types of sanctions that are used and operate in law.

In legal communications, *programs of youth punishment* emerge to structure content that can be legally communicated which outlines both the requirements for punishment and the goals/objectives of punishment. The requirements of punishment, or the conditional programs of punishment, determine the decision-making or selection process of punishment by building elements that make punishment possible. At the same

time, a different type of program, a goal program, helps establish objectives that orient systems towards to future by defining a goal (Dubé 2017, King and Thornhill 2005, Luhmann 1995). Programs allow me to capture not only what is needed for there to be punishment, but when there is punishment, with what goals and requirements it is threatened or actuated.

In my analysis of legal communications, I have constructed four categories that combine the meanings/themes that legal communications attribute to youth punishment. This tells a story not only about youth punishment in law, but how youth punishment is part of the production of the legal system. I show how the programs of punishment in law operate in and through: the character and consequences of conduct; the promise of protection; the fool or the fiend, and the factors law privileges when punishing youth; and accountability.<sup>38</sup>

### **Character and (possible) consequences of conduct law observes**

The first program of punishment highlights the character and possible consequences of conduct. This allows law to observe a collage of behaviours. For example, the conduct may involve: “three offences, procuring a person under the age of 18 years to provide sexual services for consideration, receiving a financial or material benefit from the sale of sexual services and advertising the sale of sexual services” (R. v. J.L., 2016 ONCJ 594 para 1); “taking solar lights and smashing them from various backyards along [Linoel Street]” (WPS Non-EJS Case 1), “ripping the sign off the wall in the carwash bay” (WPS EJS Case 21); stealing a “mickey of Capt. Morgan's spiced rum, a value of \$14.95” (WPS EJS Case 23); taking a “wallet and its contents, BlackBerry, cell

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<sup>38</sup> EJS case means that the case was diverted. Non-EJS case means that the case was prosecuted.

phone and a fake Rolex...” and forcing the owner of the wallet into a vehicle while “they punched him demanding his personal identification number to his debit card” (OPA Non-EJS Case 5); or a group attack upon a number of Youth Services Officers in the common area of Cottage 5B at the Roy McMurtry Youth Centre” (R. v. T.C.J., 2015 O.J. No. 3731 para 1).

There are many other types of conduct. Common among all of them is conduct where a young person has breached a normative expectation. For example, law may observe a disturbance after a young person entered a library swore, used the word “fuck” and proceeded to “accuse [Charles] of stealing something”. The attacker/accused then “pulled him back and started punching [Charles] really hard” where the fight then went down to the floor where Charles continued to get hit with a “closed right fist, repeatedly” (WPS Non-EJS Case 7). Or in another instance, law may observe threatening conduct when a text message is received that an accused is going to beat “the the (sic) shit out of him” and warning that “you're not just fucked your (sic) dead” (WPS EJS Case 8). In a different text messaging incident, the reader is threatened when a screenshot states that: “if I ever see you again, I swear I will beat the fuck out of you and also I’m fucking in love with him and if you do anything again, you'll be dead” (WPS EJS Case 30).

Law may also observe threats that cause an “unacceptable risk to the physical or mental well-being of others” (Appellant v. Respondent School Board (Education Act s.311.7), 2016 CFSRB 56). Or in a different incident, law may observe how:

The pupil is sixteen years of age and was a student at [ ], (the “School”). On [ ], 2012, the pupil was suspended from the School after he verbally threatened to kill a female student. On February [ ], 2013, the pupil was expelled for engaging in serious or repeated misconduct by threatening death to another

student at the School (Appellant v. Toronto Catholic District School Board (Education Act s.311.7), 2013 CFSRB 23 at para 9-10)

These introductory illustrations display how conduct either increases or decreases the possibility of a sanction which ranges from suspensions (Appellant v. Respondent School Board (Education Act s.311.7), 2016 CFSRB 56), to formal diversion programs where completion is mandatory (WPS EJS Case 8), to eight months' probation and a conditional discharge (WPS Non-EJS Case 7). But, conduct does not occur in isolation. Conduct is paired with consequences. Working in tandem, conduct and consequences allows law to make observations that are both the product of a standardized assessment of conduct and contextually informed.

Law observes conduct that is “offending behaviour” (*Youth Criminal Justice Act* (YCJA) 2003) or “inappropriate behaviour” (*Education Act* 1990). In the *Youth Criminal Justice Act*, offending behaviour provides the starting point with not explicit illustrations of it. In the *Education Act*, “inappropriate behaviour” is spelled out to not exhaustively include “bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia” (*Education Act* 1990, s. 300.0.1.2). These behaviours may be presented formulaically or they may be the initial starting point to present the narrative of observing behaviour or provoke law’s need to observe.

The behaviours observed by law may be observed formulaically where law is concerned with issues of: timing (when did it happen?), identity (who is the perpetrator/accused young person?), and legal problem (what was the conduct?). The formula describes how:

On or about the 14th day of October... Did, being at large in undertaking entered into for a justice and being bound to comply with a condition thereof, namely reside at an address approved by [vetted name] or her designee

[vetted name] and be amenable to the routine and discipline of such residence, fail, without lawful excuse, to comply with the condition, contrary to section 145 subsection 3 of the *Criminal Code of Canada* (OPA Non-EJS Case 1).

And, another legal observation describes how a young person:

...did, on or about the third day of September 2015... Steal from [Lukas Collingtons]<sup>39</sup> for the purpose of preventing resistance to stealing, use violence and threats of violence to [Lukas Collingtons] and thereby commit robbery, contrary to section 344, subsection 1 of the *Criminal Code of Canada* (OPA Non-EJS Case 2).

And, legal observations may describe how a young person: “did steal from The Source... The merchandise of a value not exceeding \$5000, and the property of The Source, contrary to section 344, clause (b) of the *Criminal Code of Canada*” (OPA Non-EJS Case 23); “stabbed the victim to death after a night of drinking” (R. v. A.S., 2016 ONSC 3940); or committed “aggravated assault in an incident which... caused serious injuries, physical and psychological... from which she is still suffering” (R. v. C.N., 2016 ONCJ 582 at para 2).

These illustrations highlight the distinction between that conduct which was observed to be contrary to the *Criminal Code* and conduct that was not. In the case of *Education Act* examples, inappropriate behaviours violate the behavioural expectations in the *EA*. These observations clarify that a normative expectation has been violated.

Other normative expectations can be useful starting points for law. Law may observe a young person: remove E-cigarettes from a shelf and conceal them in a pocket (OPA EJS Case 12); lurking in the cedar hedges of a residence and taking household articles (OPA EJS Case 13); choking a group home resident (OPA EJS Case 15);

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<sup>39</sup> All names were vetted in my empirical material. The names that I use here are randomly generated and are used to enhance the readability of the narratives. Genders have been verified by referencing the pronouns from the empirical material.

“forcefully removing the security tag [on clothing items] and concealing the items in their backpacks (OPA EJS Case 19 and 20); or pulling ““knife from his pocket and struck [striking] in a single motion Mr. Tessier in the left side of his upper chest area” (R. v. J.D.S., 2014 ONSC 228 at para 2)”. Some others include youth who: “stomped on the victim's left foot and threatened to punch the victim, before grabbing the victim's wallet and fleeing West” (OPA Non-EJS Case 2); “punched and threw him in the bathroom where he was punched kicked and whipped with the square plastic end of a PlayStation cord (OPA Non-EJS Case 4); “slapped the right buttock [of a passing runner]” leaving a “substance [that] looked to her to be semen” (OPA Non-EJS Case 11); flew into a rage, yelling swearing, and at church volunteer and “threaten[ed] to “blow the church up”” (OPA Non-EJS Case 12); possessed “a green leafy substance known to be marijuana” (WPS Non-EJS Case 8); sent a text message to a school mate saying “you’re a pussy and I’m going to be the shit of of (sic) you tomorrow” (WPS EJS Case 9); ran away after “ripping street signs up” (WPS EJS Case 10); placed leaves, twigs and paper bags inside of tires, lit the tires on fire and destroyed a shed (WPS EJS Case 12); slashed car tires leaving “knife mark in the top of the tire approximately 1 inch wide” (WPS EJS Case 13); or ripped “the sign off the wall in the carwash bay” (WPS EJS Case 21).

These examples further illustrate the many different legal communications of conduct. In all of these instances, a normative expectation is disappointed and there is a clear illustration of the variety of behaviour observed by law. While I could group conduct based on targets (property, safety, violence), or based on some quantification of harm (minor, severe), law is principally concerned with the violation of the norm and the consequence is secondary. And, in terms of ordering, the consequences do not clearly

emerge in empirical material without there first being issues of conduct. So, conduct that breaches a normative expectation is what binds the collage of issues above ranging from a young person attempting to choke his mother by grabbing her around the neck (WPS case 15) to murder by stabbing (R. v. A.S., 2016 ONSC 3940).

I will now demonstrate how the conduct of young people is distinguished alongside the consequences. Some of these consequences were presented above, for example, when conduct involves an “aggravated assault in an incident which... caused serious injuries, physical and psychological... from which she is still suffering” (R. v. C.N., 2016 ONCJ 582 para 2). I want to create the analytical distinction that not just the character of conduct counts for law. The character of conduct is the precursor to observing consequences. But, the consequences are not attributed in a linear way that predicts the severity of punishment. Rather, consequences permit law to make contextual observations and not just observations based on the standardized assessment of conduct.

While some may prefer to discuss the severity of conduct opposed to consequences (e.g., Wandall 2009), I opt to observe consequences as it provides a wider lens to richly describe law’s attribution of significance to the conduct instead of a severe/not severe binary. And, referencing consequences opens the analysis to see multiple targets for these consequences which would be lost if I worked with a concept like severity. My empirical material allows me to highlight two types of consequences: consequences attributed to the situation/ from the conduct of young people; and consequences borne upon young people from law.

## Consequences of conduct

The conduct law observes and attributes to young people have consequences. These consequences present a constant duality: consequences from the conduct of young people; and consequences coming from law's sanction. So, law can create and observe consequences that are both attributed to youth and attributed on youth. This duality allows me to show that when it comes to punishing youth, law not only assesses consequences but law creates consequences and law communicates this division in threatening or actualizing punishment.

In many instances, law's reference to consequences leads to pointing out examples of the harms caused by the conduct of young people. In this sense, there are consequences attributed to young people and law observes how these consequences touch others. For instance, with the conduct of S.K., the consequences are illustrated when "the death of Constable Styles is deeply felt by his immediate and extended family and friends. However, the community has also suffered in the permanent loss of an individual that dedicated his life to keeping the peace and ensuring the safety of its members" (R. v. S.K., 2015 ONSC 7649 at pg 15). The case goes on to describe how:

This case can be described as an unfolding tragedy with life changing consequences for all involved. A police officer has been killed in the line of duty. He leaves a young wife and young children. His parents, brothers and sisters, and all family members are shattered and devastated. The community is moved, shocked, and in some cases angered because of the circumstances surrounding his death (R. v. S.K., 2015 ONSC 7649 at pg 15).

In another instance, law describes how threats and telling someone that they should "watch 1000 ways to die and get some ideas" leaves someone feeling "very afraid that [the accused] and/or her friends are going to find them and beat [her] up as she has said she would in the past." The case goes on to describe how "[Charlene] Stated that she

no longer wants to go out in public and recently locked herself in her room because she didn't want people to know how fat and ugly she was” (OPA EJS Case 1). And, in another illustration of the consequences law observes how a teacher was “really shook [...] to the point that she started to have a meltdown” after a student “went on a tirade in front of other students and staff.” The tirade came after a student was told to stop running in the hallway, which lead to the young person yelling “what the fuck... why did you touch me... who the fuck do you think you are ... don't touch me ... fuck you” (OPA EJS Case 4). Loss, fear, and shock illustrate the consequences that are attributed to the conduct of young people.

The consequences may be experienced on a spectrum. On one end of the spectrum, the consequences of conduct may mean a mailbox is damaged and “Elderly man cannot afford to have his mailbox replaced” (WPS EJS Case 19) or when a toy gun is displayed at school, it may leave law observing how a young person “felt that this was a joke, and he was laughing the whole time” (WPS EJS Case 18). Or, law may observe consequences brought by bullying and as such dedicate a week in November to be “proclaimed as Bullying Awareness and Prevention Week” (*Education Act* 1990, s. 300.0.2). On the other end of the spectrum, consequences may be more than material and sentimental. In the case of theft of some solar lights and a bird feeder, law may observe how despite the fact that the property was not of much monetary value, the owners are “concerned about our safety and privacy” and concerned that the spray paint that was found points to the fact that “some damage could have been done” to their house. These become future concerns if boys responsible for the theft “take further action” against their home and put their safety at risk (WPS Non-EJS Case 1). Law is also able to infer consequences. Law’s

observations of conduct highlight consequences when law describes how:

The absence of evidence of harm does not mean that there is evidence of no harm. To the contrary, the nature of the offence is such that an inference of harm should be drawn. This flows from the sexual nature of the offence, the fact that the victim was a very young child, and the degrading, disgusting nature of the act performed by the offender (R. v. I.R., 2014 ONSC 4086 at para 30).

Even when the sentiment, tangible loss, or affective dimensions of consequences are not observed, law can create the consequences that coincide with the conduct.

Finally, in other instances, the consequences may be spelled out in the physical or emotional harm caused when: the “actions of A.M. have completely impacted and changed my life and I cannot begin to explain the feeling of paralyzing fear and self-loathing that have taken over me in different times in my life” (R. v. A.M., 2015 ONCJ 507 at para 32); “Charlie suffered extremely serious injuries, necessitating two surgeries and causing pain which lasted at least six months after the attack” (R. v. W.R., 2015 ONCJ 441 at para 8); “the tragic consequences of the actions of R.S. cost Jaivoan Cromwell his life. His mother lost her son” (R. v. R.S., 2014 ONSC 4279 at para 41); the victim of a sexual offence “struggled emotionally with the disclosure and the after effects of it” (OPA Non-EJS Case 10); and a physical attack resulted in significant injuries – [including] a broken jaw, a concussion, a cut on the corner of his right eye which required stitches along with red marks, bruising and swelling all over his back, arms, neck and face (OPA NON-EJS Case 4). In all of these illustrations, law observes the conduct and its consequences. When it comes to selecting punishment, the consequence-conduct program shows one requirement for correct decision-making.

### Consequences for a young person:

Having outlined the consequences borne upon others, I want to revisit the observation in *R. v. S.K.*, 2015 ONSC 7649 at page 29, which pointed out how: “This case can be described as an unfolding tragedy with life changing consequences *for all involved.*” In capturing “all involved” it includes the young person. Expanding on this idea and nuancing my discussion of the consequences that coincide with law’s observations of conduct, law also sees the consequences for young people. And in the *S.K.* case, the consequences for the young person are described as: “The quality of his life is changed forever and the catastrophic injuries he sustained have reduced his life expectancy by 25 years. His medical needs are such that his parents, who have provided unconditional support for their son, will continue to do so for the rest of their lives.” The consequences for young people are an additional part of the requirements that make punishment possible.

Law observes the consequences for young people when in a case of shoplifting the young person “was very emotional, crying, and begging not to call his parents as they would be very disappointed and upset....” The young person goes on to describe how: “he does not work but is well cared for at home, he has all items he needs at home and has access to money from his parents. He stated that he is attending school and is on a soccer team that he is very involved in. He stated he doesn't have time for programs or to work but he takes a soccer very seriously.” In this instance, when taking soccer seriously, and because he “did show remorse for his actions but was more embarrassed about the disappointment toward his family” the consequences for the young person of being charged criminally are seen by law, as a potential limit to the “ability to travel abroad or

continue his soccer.” Tempering the consequence of the possible sanction, diversion is offered instead of a criminal prosecution (OPA EJS Case 5).

In a different reflection of the consequences of law’s observations and selections when it comes to young people, law describes how: “I acknowledge in closing no small level of difficulty in attempting to fashion a fit sentence for offences that occurred when A.M. was a young man evidently far removed from the adult he appears in many respects to have become. I acknowledge as well the impact his incarceration will have upon his family” (R. v. A.M., 2015 ONCJ 507 at para 35). It is further explained how:

A.M. lost his job [...] after the instant charges were laid, and his conviction virtually ensures he will no longer be able to work in his chosen field. Had he been prosecuted as a youth, she submits, his life would have unfolded much differently. His record would have been sealed, and the public and professional shaming he has endured as a result of these charges would not have happened. In other words, he has been punished in a very real and permanent manner (R. v. A.M., 2015 ONCJ 507 at para 10).

However, “it is equally clear that the impact of his actions upon his victim have not ceased, even after all these years, and hopefully this sentence will help hold him accountable for his offences against her” (R. v. A.M., 2015 ONCJ 507 at para 35) and for this reason, eight months in custody and four months community supervision is imposed.

It can be expected that law is concerned with normative expectations that have been violated. Law is concerned with conduct that allows it to observe the assault, the theft, the threat, and so on. All of this conduct is paired with consequences and when law’s program highlights consequences, it demonstrates how law can not only see those created by or attributed to young people, but at the same time law can pinpoint the consequences borne upon young people. Law seems to observe consequences broadly and as such, consequences are worth considering further.

I have shown how consequences will touch others but are attributed to a young person and how law can see the consequences it can create. For example, I could ask why is it and under what conditions does law see a sanction as harmful but threatening a sanction as helpful. Through law's reflection of consequences, the consequences that law sees and those that law creates gives law the ability to ratchet up or tone down punishment.

### **Law's promise of protection/intervention**

Punishment in law promises to protect. This protection is seen in a dual protection from youth and a protection for youth. Protection from youth signals how communities and schools are protected from the misconduct of youth with law's power and force. Protection for youth points out the broader tempering elements of law which are part of law's operations, including the application of law's power and force.

#### [Protecting the public and schools](#)

The *Youth Criminal Justice Act* provides the legal basis for criminalizing youth in Canada. Examining the *YCJA*, protection is clear in the declaration of principles. Section 3 of the *Youth Criminal Justice Act* reads:

3(1) The following principles apply in this Act:

(a) the youth criminal justice system is intended to *protect the public by*

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,

(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;[...] [my emphasis]

The *Youth Criminal Justice Act* presents a clear vision that protection of the public is achievable with holding accountable, promoting prevention, rehabilitation, reintegration, and meaningful consequences.<sup>40</sup> This declaration does not specify when the public will be protected but based on the promise of protection below, this is short-term protection of the public.

The *Education Act* also provides the legal basis for legally sanctioning inappropriate behaviours. In the *Education Act* and its regulations, protection is communicated in the context of protecting pupils from risk and maintaining safety. The access to school regulations describe how: “A person is not permitted to remain on school premises if his or her presence is detrimental to the safety or well-being of a person on the premises... (*Education Act* 1990, O. Reg. 474/00, s. 3 (1) and O. Reg. 471/07, 3(1)). And, there can be exclusion from school premises when: “The pupil’s continuing presence in the school does not create an unacceptable risk to the safety of any person” (*Education Act* 1990, O. Reg 472/07).

Protection also takes a role in other instances of law’s operations. For example, there may be suspension for bullying if “the pupil’s” continuing presence in the school creates an unacceptable risk to the safety of another person” (*Education Act* 1990, s. 310(1)(7.1)(ii)). And, when it comes to protection in the *Education Act*, there is a legal requirement for principals to notify parents if a pupil has been harmed at school, and among other things, disclose: “the steps taken to protect the pupil’s safety, including the

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<sup>40</sup> Bill C-10 came into force in October 2012. This was part of the Conservative government's omnibus crime bill and it changed previous versions of the *Youth Criminal Justice Act* to include “the youth criminal justice system is intended to protect the public by”, continuing to articulate ideas of accountability, rehabilitation, and crime prevention. However, this change has made protection of the public one of the primary goals of youth law. Historically, “long-term protection of the public ”was part of youth legislation but the current iteration makes short-term protection of the public a priority, and put protection of the public at the top giving it priority over other logics, ideals, or goals (Tustin and Lutes 2016).

nature of any disciplinary measures taken in response to the activity” (*Education Act* 1990, s. 300.3(4)(c)).

When I highlight law’s focus on protection, it is important not to read protection as incarceration or some form of exclusion. Certainly, this can be part of protection but it is not the sole manifestation of protection in law. So, when looking at the criminalizing aspects of law, protection is a priority, but it is one among many. Reading protection broadly is important because there can be instances where law’s decision can have a detrimental impact on the goal of protection. Specifically, when it comes to criminalizing youth, it has been observed that rehabilitation can protect the public more than a sentence of custody. As Justice Keast describes in *R. v. P.-S.(Z.)*, 2009 ONCJ 580:

[42] The ultimate purpose of a sentence, be it a fine, probation or even jail, is the protection of the public. Punishment is not given purely to exact a punitive measure (which is what some people think it should be), but for the specific purpose and goal of protection of the public. This distinction is important. Many assume jail automatically is in the public’s interest and protects the public. It does not. There are many circumstances wherein jail, strictly from a punitive perspective, will make matters worse and the public will not be protected.

[43] The sentencing process is complex and requires a careful balance of many factors. The easy answer is simply throw jail at a problem. A measured approach involves using jail in appropriate circumstances to ensure protection of the public is met – not simply to respond to an emotional desire to be punitive. Jail, when used appropriately can actually fuel rehabilitation – which is the ultimate protection of the public. I have actually had people thank me for putting them in jail! Jail was a learning tool and can be if used appropriately.

For this reason, protection of the public is not automatically achieved with exclusion. So a narrow vision of protection must be avoided. However, protection seems to open up the gamut of sanctions that can be actualized, almost opening up everything.

Protection seems to make available any selection that can be deemed to be legally relevant/meaningful to pursue protection. I like to think of this as law's awareness of its goal (protection) with wide latitude on how to get there. Law, from the perspective of the *YCJA*, can protect by promoting, supporting, and making: law promotes rehabilitation and reintegration, supports prevention by referring to programs, and holds accountable with proportionate measures. And, to return to the idea of consequences presented above, the reference to "learning tool" further illustrates law's ability to craft consequences for its selection of a sanction.

Temporally, protection references short-term protection. When protection of the public is privileged, it is also seen in different stages in legal operations. At the pre-trial stage, detention may be necessary for "protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence" (*YCJA* 2003, s. 29(2)(ii)). While the general pursuit of the protection of the public is clear as a principle of youth criminal law and pre-trial detention, the purpose of sentencing also activates protection.

With sentencing, protection becomes *long-term protection of the public*. The *YCJA* describes how the purpose of sentencing is: "to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby *contributing to the long-term protection of the public*" (*YCJA* 2003, s. 38, my emphasis). When it comes to sentencing, the task of protection is echoed in *R. v. R.S.*, 2014 ONSC 4279 at para 43 when the judge describes how:

[43] I must attempt to find a sentence that accords with the general principles of the *YCJA* and achieves the protection of the public by promoting fair and proportionate accountability and respect for the law, by promoting the rehabilitation and reintegration of this young person into society and by supporting the prevention of crime by addressing the circumstances underlying the offending behaviour (*YCJA* s. 3(1)(a)).

And the judge goes on to describe:

[50] In fashioning an appropriate sentence in this case I am conscious of the principles in s. 3(1)(c) of the *YCJA* that within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration. In addition, the measures should respond to the needs of young persons with special requirements. R.S., as a result of his level of development has special needs. A sentence must be fashioned to protect the public by addressing those needs.

The protection of the public is an important consideration, but it is merely one. For example, the sentencing process is seen to be holding young people accountable by imposing just sanctions, giving meaningful consequences, and promoting rehabilitation, which are “thereby contributing to the long term protection of the public” (*R. v. J.L.*, 2016 ONCJ 594 at pg. 9; *R. v. T.C.J.*, 2015 OJ No. 3731 at para 148). The *YCJA* (s. 83(1)) further describes how: “The purpose of the youth custody and supervision system is to contribute to the protection of society [...]” And, when it comes to law's conditions imposed on a young person additional conditions can be imposed that: “support and address the needs of the young person, promote the reintegration of the young person into the community and offer adequate protection to the public from the risk that the young person might otherwise present (*YCJA* 2003, s. 97(2)).

The long-term protection of the public warrants more discussion. The transformation of the goal of protecting the public, from the short term to the long-term curiously comes when more of law's sanctions can be actualized. The goal of protecting the public mysteriously becomes a long-term objective only when there has been enmeshment in law to the point where there is a determination of a sentence. This is inherently limiting and I discuss these limits more below.

While I am illustrating that protection is an essential selection for law, it is not just a standalone theme, it operates in and through notions of rehabilitation and reintegration, and accountability (these will be presented in a standalone discussion). Illustrating that there is more at play, but that protection is key, *R. v. S.K.*, 2015 ONSC 7649 at page 12 describes how protection is rolled up with a collection of other ideas. Specifically, the case law articulates a tension:

While I appreciate the focus of the *YCJA* is on the young person and his or her rehabilitation, the interests of society as a whole are still relevant to the issue of sentencing. Put another way, while the focus of the *YCJA* may be 'offender-centric', it is not 'offender-exclusive'. The interest of the young person must be balanced against the societal interests in ensuring that young persons who commit serious violent offences are subject to meaningful penalties that will help protect the safety of the community at large (*R. v. J.S.R.*, 2009 CanLII 18884 (ON SC) paras 71 and 72).

Helping to protect the safety of a community suggests that it is not a guarantee and it is not the only mechanism, suggesting that sentencing and law's imposition of a sanction is nuanced. The protection program is not just a guiding principle or an overarching pursuit in law's sentencing process but it also colours the more concrete conditions that may be imposed. By this I mean that it provides the justification for particular sanctions.

For example, protection provides justification for particular sanctions when there are conditions “necessary [...] in order to prevent a breach of that condition or to protect society” (R. v. R.S., 2014 ONSC 4279 para 57) or when “protection of the public requires a lifetime prohibition” from possessing a firearm (R. v. R.S., 2014 ONSC 4279 at para 60). Protection may even be used to impose an adult sentence as it provides the leverage to assert: “I am not satisfied that a youth sentence, even if coupled with an IRCS<sup>41</sup> order, would adequately hold M.W. accountable for his actions nor would it provide the necessary level of protection to society” (R. v S.B, T.F. & M.W., 2014 ONSC 3436 at para 58). And, an adult sentence may be needed in a second degree murder because a youth sentence would: “not be an appropriate sentence either for the protection of the public or for P.J.'s rehabilitation and reintegration into society” (R. v. P.J., 2016 ONSC 3061 at para 63).

I have illustrated above how protection is a goal in the law of punishing young people. It provides a program opening up a large realm of possible sanctions to be actualized. When protection takes shape in law, it may be for the short term or it may be for the long term. This temporal variety can be used to manage the goal that law sets and the selections to achieve those goals. For example, while protection does not automatically lead to exclusionary or ‘harsh’ sanctions, varying between the long-term or the short-term allows law to temper or vary the sanction that is threatened for actualized. So, the goal of protection, and its temporal aspirations, allows for variety in punishment.

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<sup>41</sup> IRCS or Intensive Rehabilitative Custody and Supervision is a “therapeutic” sentencing option under the *YCJA*. It is available for youth suffering from a mental illness or disorder, psychological disorder or an emotional disturbance and who are convicted of murder, attempted murder, manslaughter and aggravated sexual assault. It may also be available for youth convicted of a third violent offence where the youth caused or attempted to cause serious bodily harm and for which an adult would be liable to a jail term of more than two years.

Notably when it comes to sentencing, long-term protection of the public is announced. This seems to close off the potential for long-term protection of the public in the context of threatening sanctions (threaten a charge, threaten to detention), actualizing alternative sanctions (diversion), or actualizing detention (bail/youth judicial interim release). Long-term protection of the public is closed off: when an arson awareness program is completed at the local fire department after a couch is burned because a young person is playing with a lighter (OPA EJS Case 25); when an apology is written after the theft of a garden gnome (WPS EJS Case 11), or when a threatening Facebook message warning “stay away from my boyfriend or I’ll beet (sic) your ass” is met with contacting parents by a principal and police (WPS EJS Case 30). In closing off long-term protection of the public, law presupposes that protection as a long-term goal can only be achieved in the sentencing process, which comes with the actualization of any number of legal sanctions ranging from custody and supervision to probation (*YCJA* 2003).

### Protecting youth from law’s potential

Law is not just protecting the community, the school environment, or other pupils from youth, but law protects youth from law’s potential. Curiously, the law creates protections for youth that go hand-in-hand with the law’s threats or actualizations of sanctions. For example, in addition to protecting the public, the *YCJA* describes how the criminal justice system for young persons is separate from adults, or “completely sealed off” (R. v. K.P.D., 2015 ONCJ 88 at para 19) and it emphasizes “enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected” (*YCJA* 2003, 3(1)(b)(iii)).

I will develop the idea that the legal scheme not only protects the public, but also young people. In this way, law sees its own consequences. This *protection for youth from law's potential* is seen in the context of identity/privacy, the distinction between the adult and youth system, the involvement of adults/parents, and the limits to custody.

The identities of youth are legally protected by law, making it prohibited to publish the name of a young person or any other information that would identify the person dealt with under the *Youth Criminal Justice Act (YCJA 2003, s. 110)*.<sup>42</sup> In reported judgements, readers are reminded of the identity protections when the headnote warns against publishing by citing sections 110(1) and 111(1) and section 129 of the *YCJA* (see for instance *R. v. T.W.-H.*, 2016 ONCJ 194; see also: *R. v T.J.A.*, 2016 ONCJ 314; *R. v. V.R.C.*, 2016 ONCJ 389; *R. v. W.R.*, 2015 ONCJ 441; *R. v. S.C.*, 2015 ONCJ 584; *R. v. K.C.*, 2015 ONCJ 236; *R. v. A.M.*, 2015 ONCJ 507) or by citing procedural rules of the *Education Act* (see for instance *Appellant v. Dufferin-Peel Catholic District School Board (Education Act 1990, s.311.7) 2015 CFSRB 54*). Other privacy and identity protections in law not only affirmatively protect identity but also offer protection by restricting access to the system's communications.<sup>43</sup>

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<sup>42</sup> Interestingly law protects the identity of youth but at the same time, makes exceptions. For example, protecting the public if a young person “poses a significant risk of committing another violent offence” justifies lifting the publication ban (*YCJA 2003, s. 75(2)*).

<sup>43</sup> For example, *R. v. L.N.H.C.*, 2016 ONCJ 144 at para 9 describes how: “The restrictions on access to Youth Records are intended to reflect the principles of “limited accountability” and “protection of the privacy” of youth that are in section 3 of the Act, and thereby to minimize the stigmatization of youths and increase the likelihood of their rehabilitation”. This partly clarifies the protection and its background. Similarly in circumstances of *Education Act*, there are discussions of efforts to protect privacy/identity. For example, law describes how “Pursuant to Rules 30.1 and 30.2 of the Board’s Rules of Procedure parties and their representatives must not use, share, discuss or disclose any Board documents or decisions or any other documents or information provided or used in this application with anyone including through the media or on-line. The Board prohibits the use of any of this information for any purpose outside of the Board’s proceedings, except with an order of the Court or the Board, as appropriate” (*Appellant v. Respondent School Board (Education Act s.311.7), 2016 CFSRB 14 at para 50*).

Protection is also established by distinguishing youth punishment from that which applies to adults. Law protects young people by processing and ultimately punishing them differently. The power and force available for adults are somewhat tempered or altered because they are available for youth which conveniently provides a justification for sanctioning. Youth are protected because they are punished different from adults.

To put it differently, youth are protected because there is different punishment. This protection of youth is seen with the *YCJA*'s principle that the "criminal justice system for young persons must be separate from that of adults" (*YCJA* 2003, s. 3(1)(b)) which includes how they are processed and where they are detained (*YCJA* 2003, s. 30(3)). Protection is rooted in the age-based distinction that youth are different because they are between 12 and the day before their eighteenth birthday.

Protection is also seen in the sentencing process described in s. 38(2)(a) of the *YCJA* which mandates that "the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances." Punishment in law not only requires a different approach, but the calibre of sanctions imposed on adults is a litmus test for law's approach to protect and punish youth. Law protects by creating differences from adults and by using adults as a gauge, something for which the intensity of force or what is threaten cannot exceed a similarly situated adult. This separation is the fundamental distinction in law that allows for the operations of the youth criminal legal system.

Reflecting on the 'no greater than similarly situated adults' protection, law may be mindful that: "There is in my view little fear of that happening in this case. If A.M. was charged as an adult and convicted of the offences herein, in my view the minimum

sentence appropriate would be a penitentiary sentence, and not necessarily one at the lower end of that scale” (R. v A.M., 2015 ONCJ 507; see also R. v. D.D., 2002 CanLII 44915 ON CA at para. 44). So automatically, because the sanction differs between adults and youth, the processing of youth maintains law’s coherence vis-à-vis intensity.<sup>44</sup>

Similarly, the difference from an adult is clear in law when solving the sentencing puzzle. The starting point is the difference between adults and youth and the consequential differences needed to be considered when punishing young people. For instance, R. v. I.R., 2014 ONSC 4086 at paras 1-2 illustrates the difference by posing a question and then solidifying the path for a young person:

What is the proper sentence for the offender, who is now 30 years old? Should the offender be sentenced as a young person or an adult?

This is a challenging case. It is now 12 years since the offence was committed. The offender is an adult; yet he must be sentenced on the basis of an offence committed when he was 17 years of age. There have been changes in

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<sup>44</sup> In this instance, an adult may be sentenced as a youth. An interesting discussion about the importance of the defense ensues. R. v A.M., 2015 ONCJ 507 explains how:

[35] I acknowledge in closing no small level of difficulty in attempting to fashion a fit sentence for offences that occurred when A.M. was a young man evidently far removed from the adult he appears in many respects to have become. I acknowledge as well the impact his incarceration will have upon his family. This sentence will clearly not meet the principle of timeliness contemplated within section 3(1)(b)(iv) (timely intervention) & (v) (promptness and speed...given young persons’ perception of time) of the YCJA. However, it is equally clear that the impact of his actions upon his victim have not ceased, even after all these years, and hopefully this sentence will help hold him accountable for his offences against her.

And, being a young person at the time of the offence is what counts for law. That is the difference that makes a difference in sentencing. So, even those people sentenced for offences when they are adults, but for criminalized conduct committed when they were a young person, law reminds its observers that:

I first wish to emphasize that DH was a youth when he committed these offences, and must be sentenced accordingly. His crimes must be regarded not as the actions of the man he is now, but as the actions of the youth he was at the time. The principles of the Youth Criminal Justice Act govern. Thus, regardless of his status as an autonomous adult today, the sentence DH receives must be based on the principle of diminished moral blameworthiness or culpability. Pursuant to the Act, he is to be held accountable through the imposition of a sentence which is consistent with the Declaration of Principles in section 3 of the Act, and the purposes and principles of sentencing set out in sections 38 and 39 of the Act (R. v H(D) 2014 ONCJ 254 at para 10).

the offender's life, including subsequent criminal convictions.

Having considered the evidence on the sentencing hearing, and the submissions of counsel, I find the offender should be sentenced as a youth, rather than as an adult. At the same time, I find that the proper sentence is a term of incarceration, due to the violent nature of the offence.

The excerpt illustrates how the differences between youth and adult are maintained. Law also observes what would be on the table to be selected as punishment for adults when selecting appropriate punishment. In similar instances, it becomes important to acknowledge that "The offences are very serious. An adult could expect to go to jail for a much longer period [for internet luring and child pornography]" (R. v. R.W., 2016 ONCJ 325 at para 37). And, in the case of an adult co-accused that was sentenced to "two and a half years imprisonment for these offences" leaves the law precluded "from imposing a sentence longer than 2 and a half years in this case [of sentencing co-accused youth]" (R. v. T.C.J., O.J No. 3731 at paras 158 to 159). Even though in this case: "The offences that were committed [...] are extraordinarily serious. This was an entirely unprovoked, senseless, calculated, brutal and sustained attack on five defenseless Youth Services Officers. The harm caused by this attack was significant, both in terms of the physical and the psychological effects upon the victims [...]" a ceiling based on what the adult received provides a protection in terms of the quantity of a sanction.

The idea of protection and differentiating from adults warrants further discussion. Protection allows punishment and it does not close off the overall idea of legal intervention. Protection addresses issues of scale when it comes to law's potential. Further, when differentiating between adults and youth, generally not using law's potential becomes a core element of the notion of protection. However, because there are

differentiated processes in law, notions of protection can be easily mobilized. Law is able to use the adult/youth difference to claim it is protecting from punishment, but it is only protecting from being treated like an adult. Notably, there seems to be little protection from law inside of youth based legal notions. I am trying to highlight how law's protection is, at best, partial. I want to call into question the relative "protective value" of law's interventions. There is a difference between adult and youth so law can punish, and a difference in intensity, so again, law can punish.

Finally, law has a swath of protections that can temper the law's threatened and actualized sanctions. These protections provide tick-box like operations for law to fulfil when punishing. Some of these involve protections from sanctions/protections from custody and protections by way of parental involvement. Law seems to make it possible to protect youth from custody by setting limits on detention. For example, young people may not be detained before they are sentenced "as a substitute for appropriate child protection, mental health or other social measures" (*YCJA* 2003, s. 29 (1)). And similarly, youth may not be sentenced to custody as a social measure, meaning that they cannot be sent to custody as "a substitute for appropriate child protection, mental health or other social measures" (*YCJA* 2003, s. 39(5)).

When it comes to threatening or actualizing custody of a young person, law needs to meet specific criteria. The consequence of the criteria – which are also known as gateways to custody – serves to protect from involvement in the youth criminal legal system's most exclusionary and severe sanctions. Not only do gateways to custody have

to be met, but “reasonable alternatives” must not be a suitable sanction for a young person.<sup>45</sup> R. v. J.D., 2015 ONCJ 550 at para 58 illustrates how:

Section 39 is often coined the gateway to custody subsection. A young person can only be sentenced to custody if one of the gateways is breached. Even then s. 39(a) through (c) requires that the court consider all alternatives to custody raised at a sentencing hearing which are reasonable in the circumstances and determine that those alternatives or combinations thereof are not reasonable and fail to accord with the principles and purposes set out in s. 38 before custody be imposed. If I apply a s. 39(1)(d) finding, even then I am to consider the purpose and principles in s. 38.

And the gateway becomes a point of debate where law must make a distinction to see if it is a case for “the gateway for custody test under both Section 39(1)(a) and 39(1)(d) of the *Youth Criminal Justice Act*” (R. v. N.E., 2015 ONCJ 767 at para 13) or if it is “not a case where one of the gateways to a custodial sentence is open under section 39(1) of the Act” (R. v. J.L., 2016 ONCJ 594 at pg. 8).

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<sup>45</sup> This specific portion of the *YCJA* is describes: 39 (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

- (a) the young person has committed a violent offence;
- (b) the young person has failed to comply with non-custodial sentences;
- (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or
- (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

- (a) the alternatives to custody that are available;
- (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
- (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

The involvement and notification of parents also seems to provide protection for young people. In both the *YCJA* and the *Education Act*, there are provisions for notifying parents when youth make contact or are enmeshed in the legal system. This may involve law's description of reasons (*Education Act*) or law's formal notification to parents (*YJCA* 2003).

In summary, law's program of protection and intervention allows law to see protection of public and schools, while simultaneously protecting youth from the law's potential. In both instances, the program of protection sets up a goal for law, orienting law towards the future. The goal can be pursued concretely when law frames sanctions as part of the goal for short-term or long-term protection of the public. The goal can also be pursued when law threatens or actualizes a sanction, while also protecting youth by limiting the use of custody, involving parents, using sanctions that are no greater than those for adults, and so on. The double-barrelled protection and the differences used by law for protection allow me to expose law's goals when punishing.

### **Fool or the fiend, and the factors**

When I began my data collection to access case files, I had conversations with a provincial crown attorney opposing my application to access records. I discussed above how my application was initially opposed. If granted, the Crown and judge expressed how there would be little information for me to analyse. For example, the judge described how the case may simply recite how a youth was charged after a mischief incident, a short foot pursuit, and a young person eventually being caught by police which leads to a criminal charge. The Crown similarly expressed... "Kyle, our work is really about distinguishing the fools from the fiends..." and this may not be accessible in the case

files. Little did I know at the time that this conversation would be useful to contextualize another program of youth punishment.

Legal communications construct punishment in and through basic factors and the fools or the fiends. These legal observations inform the path to correct decision making by showing law's consideration of important conditions. These legal communications allow law to threaten or actualize a sanction. For law, this program is able to accomplish/create a profile or type of a young person. These are not hard rules, so different weight can be given to determining the presence of a fool or fiend, and the factors of the case.

The fools or the fiend and the factors allow me to observe law's crafting of a particular type of young person and the factors that colour their current and historical situation. On one hand these observations for law consist of a "critical determination" as to "whether or not one can classify the accused as an "outlaw." If he falls in that category, a penitentiary-like sentence obviously would be appropriate" (R. v. D.P.M., 2015 O.J. No. 4448 at para 32). This may be illustrated with concerns for the continuity of behaviour when there are challenges with a young person's: "ability to control his behaviour and aggressiveness" (R. v. S.B., T.F & M.W., 2014 ONSC 3436 at para 57), pattern of "uncontrollable behaviour" (WPS Non-EJS Case 4), state of "ongoing behavioural issues" to the point where he was "extremely agitated at one point attempted to choke his mother by grabbing her around the neck (WPS EJS Case 16) or behaviour leaving a parent "at a loss" over the behaviour, or leaving a parent at their "wits end". Even so, when "Officers attempted to speak with [Yvon] he was rude and uncooperative.

He told officers to screw off, and that he did not [illegible] to speak with police” (WPS EJS Case 14).

While on the other hand, a young person’s conduct can be characterised by “a stupid, impulsive act, borne of exuberance of youth and a misguided need for ‘image’ before the offender’s peers” (R. v. D.B., 2004 O.J. No. 6284 at para.15), coloured by “immature choices” (R. v. P.J., 2016 ONSC 3061 at para 40), textured as a troublemaker who would “often have tantrums and be argumentative as a child” and had “always been immature, to his chronological age, by at least three years” (R. v. R.W., 2016 ONCJ 325 at para 21). I will now explore the fool or the fiend and the factors further.

### The fiend

The creation of fiends shows how law creates a particular type of young person. When it comes to fiends, the need for a sanction is more immanent. As a fiend, a young person is crafted to have exhibited or be exhibiting problematic traits, behaviours, and responses. Conduct may be patterned, it may have egregious consequences, it may be violent, and it may set up the potential for the fiend to continue his/her conduct. The fiend may be captured in an incident of violence when a young person is described to be “an active and enthusiastic participant” (R. v. J.D., 2015 ONCJ 550 at para 77) in “blows and strikes” to the head and “the torrent of violence that followed” which included the use of “threats, jeers, taunting, giggling, humiliating and chastising behaviour.” Or, in a different incident of violence, the fiend is described to have “played a very active role” as he “delivered 30 punches or other strikes with his hands and three blows with his foot to Youth Services Officers” (R. v. T.C.J., 2015 OJ No 3731 at para 158).

When questioning a young person about a sexual offence, the fiend is used to try to provoke an inculpatory conversation. The fiend is contrasted with a mistake, or a one-off occurrence, or someone who may have just been foolish.

[Detective:] So you're either a monster in this society who is targeting kids for sexual purpose or it's a situation where opportunity knocked and you had an erection as a teenage boy and you made a mistake. People make mistakes, and if that's the case I'd much prefer to know you as a guy that made a mistake then somebody that I need to be worried about for the rest of my career hanging around parks, targeting children. Cause she didn't lie. So what is it?

C.T.: It's nothing. I've never taken my pants off in front of her. I've never done anything to that. [ . . . ]

[Detective:] ... Like, I don't know, there's gotta be something to explain this. It's gotta be something, and if you're not a predator I have to worry about, then this is a mistake you've done and it's a one-time thing. If it's a one-time thing then you know what, take some accountability for it. Come to terms with it.

Law continues to search for the requirement, a fool or a fiend. For law, it becomes a strategy to categorize, to prompt a difference between the fool and the fiend. The interview continues, using the distinction to try to provoke more discussion:

[Detective:] [...] Like you were 16, 17. At the end of the day, [C.], are you somebody that I need to be concerned about around children?

C.T.: Definitely not.

[Detective]: Okay. So I don't have to worry about that then you let me know why I don't have to worry about that, because right now I'm teetering on worrying about it. And I'm, I'm concerned. I'm not gonna say too much, but I'm concerned, okay. So either this was a one-time thing between you and [K.] and you made a mistake and let her touch your penis or you should be, like, flagged forever as being somebody that, that we need to be concerned about around children. You tell me. (R. v. C.T., 2015 ONCJ 299 at paras 9-10)

So, the intensity of conduct and the search for inculpatory statements can shape the fiend.

Other elements used to search for the fiend can be seen in law's search for patterned behaviour, deceit, and escalation. For example, law sees how conduct "cannot be characterized as an isolated incident showing bad judgment, but must be characterized as a deliberate course of criminal conduct" (R. v. R.S., 2015 ONSC 3607 at para 22). Similar assessments are made when young people are seen to: "Be a compulsive liar when it comes to trying to get out of trouble. He is very respectful and I believe he knows the kind of behavior that is expected in an attempt to mitigate his behavior" (OPA EJS Case 11). The case goes on to describe how:

Both boys admitted their involvement in the theft and appeared remorseful, however only [Charie] showed any real emotion when told of the potential gravity of the path he has chosen.

While waiting for [Emale's] mother to arrive, he approached me saying the he was concerned about his mothers' reaction. When I asked him why, he said that in the past she has smacked him after he has done something bad. There was never any injury and it was on the body. He said it happens when his mother drinks.

Based on his history and his behaviour with me, I find it difficult to believe the voracity (sic) of this claim, as he did not say that he was being assaulted or beaten. It was described in the disciplinary context as well. [Emale] also claimed to have spoken with another employee of the school (not his counselor) about it said she is always good at giving him advice but that he didn't seem to understand it. [Emale] came across as a very intelligent individual. He seems to know what to say and when with regards to being confronted with his actions.

The fiend is part of law's creation of the youth, and his/her historical propensities. I now move to explore the other side of the distinction, the fool.

### [The fool and crisis](#)

In contrast with the fiends, law observes youth as fools or youth in states of crisis. In so doing, law creates a profile for a young person that is sensitive to the situation, the

idiocy or triviality of conduct, the lack of sophistication, the presence of impulsiveness, the uniqueness of the situation, and/or some acute turning point or experience of a young person. The fools and the crisis also seem to pinpoint the temporariness of the situation.

The fool is illustrated when, recounting the chain of events that led to the death of a police officer when he was dragged by a young person fleeing a traffic stop, law observes how: “I find fleeing the traffic stop and causing Constable Styles’s death was *an impulsive and irrational act*, but not an act of viciousness or malevolent or gratuitous violence” (R. v. S.K., 2015 ONSC 7649 at pg. 16). In this case, “the accused at the time of the offence was a 15-year-old teenager who, *by his own folly, is rendered a quadriplegic* [my emphasis].” In another instance, law observes the fool when it is described how boredom takes over. Twelve months’ probation and 30 hours of community service is selected for the youth person who:

[...] in his basement set a couch on fire. The accused was playing with the lighter because he was bored and have nothing to do. The accused sparked a lighter and kept a flame and the couch caught on fire.

The accused friend saw the couch on fire and threw his bottle of iced tea on it thinking the flame was out. The accused and his friend observe the couch continuing to smolder and they both ran over to the washing machine and grabbed water and began throwing it on the couch. The accused and his friends flipped the couch and the accused took a wet scarf and began to hit the couch. The accused friend asked his brother to call 911 to have the fire department attend (OPA Non-EJS Case 25).

Law also describes how a young person may be uncooperative after he is breaching his probation order. The fool comes out when the law illustrates how the young person will not answer questions, does not cooperate, and uses profanity. The chain of events describe how:

.... [Jean-Francois] was immediately uncooperative and began to yell and swear in the street. He kept asking what he did and how he breached his probation. I reiterated several times... that he was under arrest for breaching his probation, specifically his curfew. He was read all of his rights verbatim from my duty book. The following are his responses:

[Q:] You are charged with breach of probation

A: No answer, just yelling

[Q:] Do you understand the charges?

A: "shut the fuck up" repeated in excess of five times

[Q:] If you don't understand, tell me and I will explain it to you. Do you understand?

A: still yelling no answering

[Q:] 4a: You have the right to talk to a lawyer in private without delay. Do you understand?

A: "Shut the fuck up"

[Q:] You can get immediate legal advice from a free Legal Aid Lawyer by calling ... Do you understand?

A: Yes

[Q:] 4e: You also have the right to speak, without delay and in private, to a parent, or in the absence of a parent, an adult relative or in the absence of an adult relative another appropriate adult whom you feel may assist you

[Q:] Do you want to talk to a lawyer?

A: Yes

[Q:] Do you want to talk to one or both of your parents?

A: Yes

[Q:] Talk to relative?

A: Swearing again, won't answer

A: If I can't speak to my parents I want to speak to my lawyer that's it.

[Q:] You do not have to say anything about the charges unless you want to. Do you understand?

A: Switched to insulting me in French

[Q:] I also have to tell you that whatever you do say will be recorded in writing or on audio or video and may be given in evidence against you in court. Do you understand?

A: won't answer (OPA Non-EJS Case 16)

Foolishness can also capture cooperation and emotions. When confronted with allegations of mischief after starting a small fire at a park next to a play structure, the young person was “apologetic and cooperative, showing remorse for his actions, stating that he had made a stupid decision while he was high” (OPA EJS Case 10). Another youth, when confronted for theft of \$776.39 in shaving products including “a fusion four pack; two fusion cartridges; seven fusion power cartridges; two pro-glide cartridges; four fusion pro-glide power; 13 fusion pro-glide manual” the young person’s “voice began to crack and he began to cry” (OPA EJS Case 5).

While on the other hand, youth may find “the incident funny” after being confronted with lighting a fire (OPA EJS Case 3), and yet others may “seem to smile” when taken home for trying to shoplift “a bracelet and earring set values \$7.50, a deodorant to value \$3.49, lop nails value \$11.99, and kiss everlasting value \$12.99” (OPA EJS Case 16). Or, in an incident of accidentally lighting a couch on fire, the youth was “very embarrassed about incident and understands the severity of what could have happened if the fire was not contained” (OPA Non-EJS Case 25). And, in an instance of uttering threats, law can see how a young person was “apologetic and sincere” and she cordially undertook to “no longer communicate with or threaten or engage in violent behavior” (WPS EJS Case 27).

The observations of foolishness are also illustrated with the lack of sophistication in the conduct of young people. Law makes observations of conduct that it can define as illegal but in so doing, law seems to clarify the triviality of conduct, the lack of sophistication, insularity or selfishness in engaging in the conduct. This includes things like: concealing “merchandise valued at \$59.81 in his gym bag” (OPA EJS Case 18);

taking a “Pepsi drink valued at \$2.19 from the display” and going to “another part of the store and [drinking] it without making payment” (OPA EJS Case 16); selecting “a pair of Ralph Lauren polo gloves, valued at \$38 from a display rack” and exiting “the store passing all points of purchase, making no attempt pay” (OPA EJS Case 17); filling “a shopping cart with a variety of goods... a variety of cheeses, fish, chicken, and fruits... then exiting the store with a cart full of goods, making no attempt make payment” (OPA Case EJS 25); or making “several empty envelope deposits into his bank account” to withdraw a total of \$540 where “all envelopes the bank received were empty” (WPS EJS Case 27).

Finally, the program of fool is able capture the thick and rich detail of trauma, emotions, and irregularity. It is not just a fool, but crisis illuminates the circumstances of young people allowing law to threaten or actualize a sanction. Consider an incident where a mother had to call police because “her daughter was having a mental breakdown and assaulting her husband.” The case file goes on to describe how:

Upon my arrival, paramedics are already on scene and speaking with [the parents] on the front porch. They advised me that they could hear glass breaking in a physical altercation taking place inside the residence as well as a lot of screaming and swearing coming from [Serienna] as I exited my police cruiser and approached the door. [We] entered the residence and observed [Serienna] sitting on the floor in the front hall of the residence, screaming and crying and telling her father to go to hell.

At that time I helped [Serienna] to her feet and suggested she put some shoes on and a coat as she was only in a tank top and her socks, however, she screamed at her father to fuck off when he tried to hand them to her and threw them down. She then walked her outside to the ambulance in the pouring rain through the wet grass and her socks for assessment. Once inside the ambulance, [Serienna] was crying and saying she didn't care anymore. Her heart rate

was approximately 118- 125 beats per minute and she was extremely agitated. When asked straightforward questions in any other than a very purposely, quiet tone, she would response (sic) by screaming and swearing at whoever to fuck off.

She was assessed briefly[...] however, when given the option of choosing to go to [the hospital] by ambulance or police, she flew into a rage, ripped off all the monitors and said she would go with me. I then placed her in the back of my police cruiser without incident, and prior to leaving, spoke to [the parents] in their residence.

They advised me that she had come home last evening and spent the night, and that she had a mental breakdown last evening, showing her father the bruises all over her body and how horrible she looked. She expressed to her father that she feels like she is going crazy how miserable and sad she is. [Serienna] stated that she agreed to go to the hospital with him in the morning, and slept through the night.

I spoke to [the parents] and they informed me that [they] had received a text last night asking him to bring some food. He told her to come home and get a good nights sleep and some food as she has been on the run for 11 days. [Serienna] agreed to come home and met [Serienna] at a designated location. When they arrived home [Serienna] appeared to be on some kind of drug as she looked as if she was coming out of her skin and was crying uncontrollably at times during the night. She showed her father the emaciated state of her body and admitted that she was in bad shape and was going crazy. She did agree to go to the hospital with her dad the next day today and went to sleep.

The next day when [the parent] came home from work to take her to the hospital, [Serienna] refused.... Attempted to convince her to go but because [Serienna] was violent saying things “you only want to get rid of me!” and “nobody wants me!” When [the parent] tried to restrain her as she was smashing pictures of herself and punching the front bay window, [Serienna] scratched his forearms with her fingernails and punched him just under his right eye. [The parent] was bleeding from the scratches and is right cheekbone was a little sore. He did not wish to pursue the charges against XXX he just wants her to get some help.

[The parent] showed me an assessment done by a psychiatrist... It states that [Serienna] is diagnosed with O.D.D. (oppositional defiance disorder), persistent

depressive disorder, and ADHD. She suffers from seasonal asthma, sleep disturbance, eating problems, and acts of self-harm. She also has addictions to alcohol and drug (OPA Non-EJS Case 1).

Other parent-youth interactions illustrate a state of crisis that law observes. For instance, a young person was “furious he had to go to school” which was coupled by the parents’ assertion that “the Internet would not be going on that day if he did not go to school”. Consequently, the young person “spat on the wall of the living room, attempted to break a painting by smashing it with his hand... [and] started throwing things from the top floor to the main floor (dumping an entire bottle of water, throwing an axe [bodyspray] can, bottle of cough syrup, etc.)” (WPS EJS Case 14). Or, in the case of a young person being upset with his mother, there are ongoing behavioural concerns and the young person is going through drug treatment. In this instance, law observes how the young person:

...became extremely upset with his mother when she asked his friend to leave the residence for the evening. After the friend left a verbal argument ensued. [Frank] became extremely agitated at one point attempted to choke his mother by grabbing her around the neck. The other brothers were able to subdue [Frank] and remove him to another room.... [T]his is not the first time that [Frank] has assaulted her, however, at this point she does not wish to pursue criminal charges and wishes for police only stopped to speak to [Frank] at this point and warn him in regards to his actions.

Ultimately, Frank was diverted when he was threatened to be charged or threatening to actualize a sanction and advising “him of the consequences of assaulting his mother” (WPS EJS Case 16)

## The factors

Finally, law shapes punishment based on a variety of factors. When it comes to punishing youth in law, there is an approach that cranks up or turns down punishment based on what law calls aggravating and mitigating factors. Law is prompted to search for both “aggravating and mitigating circumstances related to the young person or the offence” (*YCJA* 2003) or law includes “mitigating or other factors” (*Education Act* 1990). These are factors which law “shall take into account” (*YCJA* 2003, s. 38(3); *Education Act* 1990, s. 306(4)) which implies obligatory observations.

Aggravating and mitigating factors are observed on a spectrum of penalty-informing considerations. For instance in cases of assault mitigation may be seen when there was “minor physical injury” (WPS EJS Case 16), or in cases of theft there may be mitigation when a wallet (WPS EJS Case 35), bicycle (OPA EJS Case 10), clothing (OPA EJS Case 22), or Smirnoff Ice bottle (OPA Non-EJS Case 28) was returned. The aggravating and mitigating factors are especially important after law guarantees that a sanction is needed as these are important when it comes to dosage/the extent of a sanction.

Law can consider many factors. Some factors may include: degree of participation in an offense; harm done to victims; reparation made by a young person; time spent in detention; and previous findings of guilt (*YCJA*, 2003, s. 38(3)). Other factors law describes include: the ability to control behaviour; the ability to understand foreseeable consequences; presence at school creating an unacceptable risk to the safety of any person; the pupil’s history; progressive discipline used with the pupil; the activity was related to harassment because of race, ethnic origin, religion, disability, gender or sexual

orientation; suspension or expulsion would affect the pupil's ongoing education; and the age of the pupil (*EA* 1990, Regulations 472/07, s. 2 – s. 3).

Using these factors, the search for mitigation may tone down the intensity of a sanction. For example, in reviewing an expulsion after a fight, law surveys “mitigating and other factors” of a physical assault. The law describes how there was no: “evidence to suggest the pupils did not have the ability to control their behaviour. However, during [the first pupil's] testimony, the Board – witnessed behaviour suggesting that [the first pupil] struggles with self-control and with authority” (at para 45); the “pupils’ continuing presence in the school did not create an unacceptable risk to the safety of any person”; the pupils committed the assault in the “context of a belief they were facing a threat to their safety” (para 47); and there was no use of progressive discipline methods which “mitigated the seriousness of the event as the pupils were not provided with an appropriate educational component which could have improved their response to the current events” (para 53). From surveying mitigating and other factors, law is able to “quash” the expulsion, allow pupils to return to any school in the Toronto District Board, and expunge the record of the expulsion (*Appellant v. Toronto District School Board*, 2014 CFSRB 28 at para 55). In other cases, the law sees that the factor of “travel time” to an “expulsion program is likely to have a negative impact on the Pupil's ongoing education and is, therefore, a relevant consideration”. While it was legal to expel, it is only from one school and not the entire board (*Appellant v. Respondent School Board* (Education Act s.311.7), 2016 CFSRB 56).

Mitigation creates opportunities for creativity, considering other “important factors” where a young person was responsible for the death of a police officer, who

ultimately is not sentenced to a term of custody and supervision. Age, health, history, and other factors can be mitigating (R. v. S.K., 2015 ONSC 7649 at pg. 16):

At the time of the offence S.K. was 15 years of age. Section 3(1)(b)(ii) holds that young people are entitled to a presumption of diminished moral blameworthiness and culpability which flows from the fact that because of their age they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. [...]

The mitigating factors to be considered pursuant to section 38(3)(f) are as follows:

- At the time of the offence S.K. was 15 years of age.
- S.K. has no previous record.
- As previously reviewed S.K. is a good student who has positive future prospects to continue his education and attend university.
- S.K. has the unqualified and unconditional support of his family to deal with his physical, emotional, and medical requirements.
- S.K. is a quadriplegic in a wheelchair paralyzed from the chest down. Those injuries have been described as catastrophic. He is at a low risk to reoffend.

Ultimately, law finds:

At the time of the offence S.K. had no previous record. He has had no bail breaches since being released from custody four years ago. He does not pose a future risk to the public. Despite the fact that he continues not to accept responsibility, I am satisfied that on the uncontradicted character evidence filed, he has expressed genuine and true remorse over the death of Constable Styles to a number of individuals on numerous occasions.

I am satisfied that even with his disability, S.K. is motivated to continue his education, attend university, and seek a future career, which hopefully will contribute to his well-being and to the well-being of the community at large.

I have considered the principles of rehabilitation and protection of the community. S.K.'s injuries speak for themselves. On all the evidence rehabilitation is not required, nor is protection of the public a factor.

Analytically, it is possible to describe how factors help paint the conditions for correct decision-making in law. Law, in its translation process of attributing meaning to factors, pegs the factors as those which mitigate or aggravate. These become important when selecting a sanction inasmuch as they set out requirements that law makes relevant to consider. When setting up these requirements, and showing that they have been observed by law, it can be asked what is alleviated or worsened by the factors.

### **Accountability**

In the final program, I illustrate how law's punishment mobilizes ideas of accountability, meaningful consequences, and responsibility. In setting up programs of punishment, programs establish either the requirements for selection (law's requirements for punishment) or the goals for selection (law's goals for punishment). In this final program, I want to illustrate how the law uses accountability not as a requirement for decision making or as a goal, but for both. This, if I can call it such, is a hybrid program of punishment that brings flexibility to youth punishment.

My hybrid program of youth punishment allows me to capture the dynamic and relational elements that are not adequately captured by, for instance, the concept of punitiveness. My empirical material shows that not all punishment is the same and not all punishment is coloured by being punitive in the sense of exclusion. I want to capture the diverse elements of power and force. The hybrid program is not totalizing but provides goals and requirements for decision-making and brings to light spatial and temporal dimensions for punishment. I show how this is flexibility inducing for law.

I want to begin with an odd realization: accountability, meaningful/appropriate consequences, and responsibility are deemed important but few tackle how they operate. Even introductory texts (Smandych and Winterdyk 2012) and advanced texts (Bala and Anand 2009) do not seem to move beyond the declaration that these ideas are important (Tustin and Lutes 2017). And, as Thorburn (2010) notes, accountability is the “watchword” under the *YCJA* (citing Trotter J. in *R. v. Lights*) and it is “concerned with both proportionality in the severity of sanction and with ensuring the rehabilitation and reintegration of the young person in the choice of sanction”. Consequently, youth law is communicating multiple requirements/goals.

This “watchword” is articulated in the preamble of the *YCJA*, in the declaration of principles, in principles of diversion (extrajudicial measures), and in principles of sentencing. In the *Preamble*, it is described how the youth criminal justice system in Canada “fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes.” And, in the declaration of principle, it further describes how the youth criminal justice system holds “young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person” and emphasizes “fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity”.

In the principles of extra-judicial measures, accountability explains how extra-judicial measures are “presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence

and has not previously been found guilty of an offence.” Finally, sentencing purposes and principles captures how “sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society” (*YCJA* 2003, s. 4, 38). In all of these instances, it is a goal or a priority for law.

Further exploration of accountability in law provides spatial and temporal differences that impact punishment. It is temporally and spatially distinguished in law to provide a path to flexibility and one that creates conditions of eligibility (see for instance Sylvestre 2016). Quite simply, I want to show how accountability may be observed in different spaces and at different times.

Law may observe accountability in the home where after some harassing text messages, there is accountability when the “cell phone has already been disconnected” and the parents have “enrolled her into programs to help” with her anger issues (OPA EJS Case 11) or when law observes efforts of parents to address accountability (OPA EJS Case 1). While the “mom is at a loss” when it comes to how to address the alleged harassment, law can divert when there is accountability at home. What transpires in the home may include concrete programming or, law may simply observe how “the parent/guardian and the young person are taking appropriate steps to address accountability” (OPA EJS Case 14) or “mom is trying to establish ground rules” (OPA EJS Case 19) opening up eligibility for diversion programming.

So accountability at home allows law to create eligibility for diversion. It is also possible to be accountable, and because this requirement is met, it becomes a

consideration at sentencing that can reduce the scope and scale of punishment. In the case of a young person that killed a police officer, he is already accountable which takes a period of custody off the table when determining punishment. As a result of a vehicle crash that killed a police officer, S.K. was left paralyzed, leaving law to note (R. v. S.K., 2015 ONSC 7649 at pg. 32):

That accountability has been impressed upon him every day since the crash over four years ago and will continue for the rest of his natural life. As tragic, unnecessary, and needless the death of Constable Styles was, imposing a custodial sentence will not make S.K. more accountable. S.K. is already serving a life sentence. He is a prisoner in his own body. That body is imprisoned in a wheelchair. Imposing a custodial sentence will merely transfer that wheelchair into an additional restrictive setting that will not provide further accountability for which S.K. is already paying

Accountability at home and accountability that has been already observed forges a path to diversion or non-custodial sanctions. This is distinguished from incidents where youth need to be accountable which creates a different path for punishing. In these instances, to make a young person accountable, law uses accountability to set “out the penalties for misconduct” and uses notions of “stricter accountability” to demand less tolerance for possessing drugs on school property (W.W. v. Lakefield College School, 2012 ONSC 577 at 20), or law uses accountability to help warrant imposing “meaningful consequences for the offender” (R. v. P.J., 2016 ONSC 3061 at para 54). So when accountability is not present or not historically observed, the “goal of accountability in that case could only be achieved by a term of incarceration, which she set at 12 months, consisting of eight months custody followed by four months community supervision” (R. v. A.M., 2015 ONCJ 507 at para 26) or having “considered all potential sanctions other than custody [...] none of them would hold these young persons accountable for their

offence nor would any of them provide meaningful consequences or truly promote the young persons' rehabilitation and reintegration" (R. v. J.D., 2015 ONCJ 550 at para 80).

The examples above illustrate how accountability oscillates between a goal and a requirement for punishment. When accountability is present, for instance with home-based sanctions, law transforms this into eligibility requirements. However, when there is not accountability, the requirement can lead to imposing some form of custody. In all instances, the program of accountability uniquely provides flexibility for law.

### **Discussion and conclusion from law's punishment**

Punishing youth in modern society may give the impression that it is all about applying principles and considering the nuances of each incident. From the perspective of systems theory, systems are able to organize and make sense of complexities with programs of punishment. Some of the considerations and goals established in programs may include the nature of the conduct, an individual's history of misconduct, the principles of punishing, or the impact of punishing young people. Certainly, if someone is to open relevant statutes or read legal judgments, it may seem that the expectations, decisions, and policies to punish are unstructured. My analysis here shows how there are *programs of punishment* in law.

The programs of punishment depend on a variety of important differences. When it comes to conduct, the difference between legal/illegal and inappropriate/appropriate become relevant. There are clear differences in the consequences; law mobilizes the differences such as consequences/ no consequences and consequences for others/consequences for youth. When it comes to the situation of the youth, differences between fool/fiend, and differences between aggravating and mitigating factors become

useful. Collectively, these differences help establish requirements and goals for punishing young people in law.

The programs of punishment allow law to select and organize relevant communications. These programs are able to offer considerations, attribute meanings, and show how law comes to select punishment. Of course, others studying the legal system have pointed out consistencies by focusing on courtroom interactions, leading to discoveries of normal crimes (Sudnow 1965) or case worth (Feeley 1979). Programs invite descriptions of legal communications and given that I explore programs in law and in education, it invites comparison and contrasting.

When I observe how law is operating to construct punishment, I have been able to gain better access to the internal operations of the system of law. My sociological approach has shown how I can observe and take into account the programs of youth punishment, the views that law itself takes when selecting or threatening punishment.

When I describe the character and possible consequences of youth conduct, guarantees of protection/intervention, the fool or the fiend, and the factors, and accountability, meaningful consequences and responsibility, the meanings of these programs are not self-evident. My illustrations above show how law uses these programs in a variety of different ways when selecting punishment. For example, the variability is seen when the protection program is used to insulate communities from youth while at the same time, the protection program can insulate youth from law. The variability is also clear when it comes to considering the mitigating and/or aggravating factors. Ultimately, observing these programs and their related meanings exposes the elements of punishing

youth in law. It shows that decisions incorporate both statutory declarations and have openness to substantive considerations when punishing.

## Chapter 7: Punishment in Education: Nets, Progressive Discipline, and School Climate

I now turn to document, analyse, and expose youth punishment in education. Just as my analysis of law began from the theoretical and empirical starting point that law is a separate system, so too is education. Education, as a separate system of communications and observations, has its own bank of considerations, operations, and goals *vis-à-vis* punishment. The central question I ask is: how are youth punished in education? A sub-question is: what are the educational considerations (or requirements and goals) for punishment in education?

I present *programs of punishment in education* to reveal requirements for punishment and the goals/objectives of punishment.<sup>46</sup> I confront and add to conversations touching the concerns of maintaining discipline and safety (Hill 2013), challenges with behaviour in schools (Trépanier 2008, [OHRC] 2004, Hill 2013, Milne and Aurini 2015), problems of severe punishment (Kupchik 2010), infiltrations of criminal justice logics (Simon 2007), or prioritizations of disciplinary logics with the norm, observation, and correction (Raby and Domitrek 2007, Raby 2009).

My contribution is markedly different from interpretive models suggesting that education is penetrated by criminal justice or disciplinary logics because I address more directly the intra-systemic elements of punishment in education. I show how punishment in education cannot be fully accounted for by external conditions, correspondence, and reproduction theses by offering a different interpretation which focuses on the goals and requirements for punishment.

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<sup>46</sup> I discussed in my methods chapter above the differences in data.

My empirical analysis leads me to argue that considerations related to behaviours, progressive discipline, and school climate set requirements and goals for punishment in education. Each of these selections, beginning with acceptable and unacceptable patterns of behaviour, allows education to select and create an educational penology. The educational penology that I present here shows how education creates behavioural expectations and punishes based on education's priority towards intra-education notions of environment, context, or territory. These intra-education elements provide the virtue of not making determinations based solely on excluding a student and show how education has immense flexibility in sanctioning. By documenting and understanding an educational punishment, I show more frontally how education defines, modulates, and operates punishment. And, this allows me to show the value in paying attention to the different meanings and contexts the system of education uses to craft punishment.

### **Nets of inappropriate behaviour, space, and problems of school climate**

To show the differentiation of behavioural expectations and punishments, I describe how behaviours can be caught in deep or wide nets. I am concerned with observing behavioural norms in education based on what can be sanctioned and the associated forms and intensities of punitive responses.<sup>47</sup> I showcase how different behaviours – those related to interpersonal, property, and possession/consumption – differentiate the scope and scale of (possible) punishment. After exposing the behavioural

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<sup>47</sup> For some, a starting point to discuss punishable conduct in education is seen with the distinction between major and minor, or big and convention rules (Raby 2012, Thornberg 2008). Thornberg (2008) has tried to capture the different types of rules by developing five non-mutually exclusive categories to organize observations in education. These categories are: relational rules (behaviours in relation to other people); structuring rules (behaviours aimed at structuring and maintaining school activities including the physical environment); protecting rules (those rules about health and safety); personal rules (rules that require self-reflection and/or taking personal responsibility for actions); and etiquette rules (rules about customs or traditions in schools). These categorizations open up an opportunity for theoretical development because there are not just issues of scale and intent/goal, and when the categories are non-mutually exclusive, it impedes making observations of rules/behaviours.

components of education's penology, I show how education is concerned about: 1) inappropriate behaviour across many different locales; and 2) the impact of behaviour on school climate and the goal of a positive school climate.

### Behaviours observed in education: Deep and wide nets

Education constantly qualifies behaviour. Focusing on the student's, pupil's, or child's (see for instance Bullying 2013) behaviour, behaviour may be: aggressive (Bullying Action Plan 2005); aggressive and repeated (Safe and Inclusive Schools 2016); disrespectful (Principal Handbook 2010); inappropriate or disrespectful; positive or appropriate or inclusive (Bullying Action Plan 2005); acceptable (Provincial Code of Conduct 2012), or respectful and responsible (Provincial Code of Conduct 2012). Inappropriate behaviour is observed when: "A 17-year-old student arrives at school dressed in army fatigues looking dishevelled. He refuses to communicate in a meaningful way with staff he encounters and appears to be mumbling to himself... [He] discloses that he has had enough and doesn't want to live anymore.... He leaves the office and the school" (ATIP: Case study six). Further, inappropriate behaviours may include: "intimidating another student" where the perpetrator has "a history of callousness and aggressive behaviour" (ATIP: Case study eight); sending "harassing messages on Facebook" some of which include threats (ATIP: Training materials); using an "inappropriate website" where a "student has entered the names of over 10 students and the different ways he would like each of them to die"; or "trafficking drugs on school property" (Hill 2013).

These behavioural expectations provide a gateway for education's power and force, where punishment follows acceptable/unacceptable behaviour. In education, in the

same way that a report card mark indicates the ability to do better or worse and by how much, observations of behaviour indicates the ability to behave differently and the “interventions, supports, or consequences”<sup>48</sup> needed to address behaviour. Education makes it “possible to handle educational problems in special ways” striving for an output that is judged based on school discipline (Luhmann 1995, 207), punishment is one of these “special ways”.

I am concerned about capturing the plurality, nature, reach, and spatial features of behavioural expectations. To account for the “special ways” of handling problems, I use Irby’s (2013) analytical distinction between wide nets and deep nets to capture behaviours and to simultaneously characterize school punishment.<sup>49</sup> I am able to organize behaviours in education based on the possibility of sanctioning and the intensity of sanctioning. Wide nets, and the net metaphor more generally, allows me to keep the analysis at the level of possibility so I can capture the difference between actualizing a sanction and threatening one. Quite simply, I use the notion of wide net to account for the huge swath of behaviours that can be defined as inappropriate.

I also use the notion of deep nets to capture the ability for education to punish severely for inappropriate behaviour. With deep nets, I am able to examine the intensity and temporal components (duration) of punishment. Deep nets allow me to capture “get tough” approaches without presupposing punishment is required or mandatory. And, I can assess educationally defined behaviours and the responses without being preoccupied

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<sup>48</sup> More will follow on these features below.

<sup>49</sup> I am building on notions of net-widening and net deepening (Irby 2013, Cohen 1985) which focuses on how youth may get into deeper trouble than in the past or there may be more behaviours that are targeted for punishment than in the past. These can capture historical change but the metaphor can be maintained to make sense of the present. I am not able to offer insight into the incremental or drastic (re)classification of behaviours in my study but my analytical classification of behaviours allows me to identify and characterize inappropriate behaviour in education.

with assessments related to punitiveness or counter-productivity (Kupchik 2010). Deep nets allow me to capture the duration, extent, and nature of trouble/punishment related to inappropriate behaviour and school. The wide and deep nets as analytical categories allow me to categorize the behaviours and penological possibilities.

### Deep nets and inappropriate behaviour in education

Education has the capacity to severely punish inappropriate behaviour. This is where deep nets are available and exclusion from education is possible. The two most severe sanctions involve exclusion and these differ in terms of their temporal and participation consequences. One type of exclusion is a suspension. A suspension is the removal of a student “from school temporarily for a specific period of time.” The time for suspensions ranges from one school day to 20 school days. Expulsion also involves the removal of a student but this is the removal “from school for an indefinite time period” (What Parents Need to Know 2009) either from the school or from the board. So both suspension and expulsion differ temporally. And, suspension and expulsion differ in terms of participation-based consequences in that suspension removes participation from a specific school while expulsion, in addition to its greater temporal impact, can remove participation from all schools in a particular board.

There are behaviours where a suspension or expulsion “must be considered”. The suspension must be considered for: uttering threats to inflict serious bodily harm on another person; possessing alcohol or illegal drugs; being under the influence of alcohol; swearing at a teacher or at another person in a position of authority; committing an act of vandalism that causes extensive damage to school property at the student’s school or to property located on the premises of the student’s school; bullying; being under the

influence of illegal drugs; or possession or sale of illegal or unauthorized tobacco products, prescription drugs and alcohol (OCDSB Policy 515; PPM 145 2012). And expulsion must be considered for: possessing a weapon, including possessing a firearm; using a weapon to cause or threaten to cause bodily harm to another person; committing physical assault that causes bodily harm requiring treatment by a medical practitioner; committing sexual assault; trafficking in weapons or illegal drugs; committing robbery; bullying (if the student has been previously suspended for engaging in bullying and the student's continuing presence in the school creates an unacceptable risk to the safety of another person); activities motivated by bias, prejudice, or hate; or giving alcohol to a minor (see for instance OCDSB Policy 515).

The deep nets of education are explicitly presented when suspension or expulsion are on the table. Suspension and expulsion are possible when interpersonal, property, and consumption/possession expectations are challenged. The interpersonal aspects may be seen when a student "has been receiving harassing messages on Facebook" which includes threats that have made the student "afraid to come to school" (Ontario Keeping Kids Safe at School 2009). Consumption/possession expectations are disappointed after "a student is holding a large amount of marijuana" and a principal finds a "couple empty baggies, which seem to contain residue of grass and \$50" and a knife" (OCDSB ATIP: An Inclusive, Safe and Caring Approach to Student Discipline 2016). And, interpersonal and consumption/possession expectations may be challenged at the same time when following an altercation in gym class, the next day the "students arrive at school, boy A draws a knife, approaches boy B in a threatening manner and attempts to stab him,

making contact, with the boys back” (OCDSB ATIP: An Inclusive, Safe and Caring Approach to Student Discipline 2016).

I want to foreground the temporal dynamics, the intensity of the sanctions, and co-presence of the behaviours with deep nets. First, deep nets set time-based requirements for exclusion. When suspension or expulsion is threatened or actualized, it is defined based on a quantification of school days. Second, when sanctions “must be considered” education has clearly set, to use my metaphor, the depth of the net. By setting something that must be considered, education has: identified the starting point; identified the deepest trouble that can stem from behaviour; and has shown what education can threaten to sanction. So, deep nets capture the intensity (with removal as most severe), duration, and impact of punishment on students. Interestingly, education has not set the punishment that must be selected therefore not operating with zero tolerance and automation in punishment.<sup>50</sup>

I also want to confront the apparent co-presence of behavioural norms between education and law. There are equivalents between criminal and educational statutes and the educational descriptions above. However, the connection remains at the level of behaviour not at the level of sanctions available for education. So, behaviours can coincide with the norms in law, but they do not need to. The coinciding may also be seen with major incidents which may include, shoving, slapping, punching, kicking, pinching, scratching with blood, biting, anything with bodily fluids, or threatening where these may constitute an assault in law (see also UCDSB ATIP: Guidelines for Safe Interventions

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<sup>50</sup> This leads to the discussion of progressive discipline described more fully below to illustrate the mechanics of punishing based on what is captured in the deep or wide net.

with Students 2010; OCDSB ATIP: School Board Student Discipline Policy 2015).<sup>51</sup> Notably, there is no evidence that education is working within a framework concerned about defining illegal/legal behaviour but it is working with ideas related to inclusion/exclusion of student's physical presence, and the duration of this possible exclusion. My discussion of progressive discipline and school climate below further substantiates this claim.

To make the point further, consider bullying, which is the quintessential behavioural problem in education (ON One Policy 2016; OCDSB ATIP: Safe Schools). Bullying may have the equivalent of harassment in criminal law but bullying remains a concern for education which is defined and addressed with education's penology. I want to take this opportunity to explore bullying as one of the possibilities that can be captured by education's deepest net and expose a target of punishment in education.

Bullying illustrates education's ability to define borders of the behaviour. For education, bullying is described as: "aggressive behaviour that is typically repeated over time. It is meant to cause harm, fear or distress or create a negative environment at school for another person. Bullying occurs in a situation where there is a real or perceived power imbalance" (Bullying 2013). This behaviour can take many forms but it is one of the interpersonal behaviours that make suspension or expulsion possible. Educational policy describes how:

It can be: physical – hitting, shoving, damaging or stealing property; verbal – name calling, mocking, or making sexist, racist or homophobic comments; social – excluding others from a group or spreading gossip or rumours about them; written – writing notes or signs that are hurtful or insulting;

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<sup>51</sup> The link between education and criminal law is explored more in the next chapter on structural coupling.

electronic (commonly known as cyber-bullying) – spreading rumours and hurtful comments through the use of e-mail, cell phones (e.g., text messaging) and on social media sites (Bullying 2013).

In addition to its form, it has consequences that may: effect learning; effect healthy relationships and school climate; and effect education objectives.

Education's ability to define inappropriate behaviour and keep it the property of education is seen when bullying is distinguished from conflict. Education describes how: "People may sometimes confuse conflict with bullying. Conflict occurs between "two or more people who have a disagreement, a difference of opinion or different views." Conflict between students does "not always mean it's bullying [...] Conflict becomes negative when an individual behaves aggressively by saying or doing hurtful things" (Bullying 2013). Conflict only becomes bullying when it is repeated over and over again and there is a power imbalance. My point is that bullying in education is not operating through legal/illegal, education is maintaining ownership of the behaviour, and education is making deep nets available with bullying.

I have shown when and where the most severe options for punishment in education are on the table. The deep nets make known the temporal consequences of the behaviour (exclusion for a period of time) and the nature/extent of punishment (exclusion by suspension or expulsion). When captured by deep nets, behaviour may be crime-like or it may be characterized by its frequency (bullying as repeated behaviour), and it is based on interpersonal, property, or possession/consumption behaviours.

## Wide nets and inappropriate behaviour in education

Wide nets are useful to categorize the boundaries of inappropriate behaviour and education's penal responses. The wide net captures a range of behaviour that is defined, problematized, and addressed in education. I use wide nets to move from the possibility of the most trouble and the most intense punishment (deep nets) to capture the overarching possibilities for punishment.

Education's punishment and its observations of behaviours can be characterised with a wide net, which frame behaviours prescriptively and prohibitively. The Provincial Code of Conduct (2012) describes standards of behaviour and identifies how education will maintain the standards of behaviour. It describes broad behavioural expectations when members of the school community must:

[...] respect and comply with all applicable federal, provincial, and municipal laws; demonstrate honesty and integrity; respect differences in people, their ideas, and their opinions; treat one another with dignity and respect at all times, and especially when there is disagreement; respect and treat others fairly, regardless of, for example, race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, gender, sexual orientation, age, or disability; respect the rights of others; show proper care and regard for school property and the property of others; take appropriate measures to help those in need; seek assistance from a member of the school staff, if necessary, to resolve conflict peacefully; respect all members of the school community, especially persons in positions of authority; respect the need of others to work in an environment that is conducive to learning and teaching; and not swear at a teacher or at another person in a position of authority.

In addition to what pupils must do, they must not bully, engage in interpersonal violence, or be under the influence of drugs or alcohol. Some of these overlap with the

interpersonal, property, and possession/consumption behavioural expectations noted above (Provincial Code of Conduct 2012).

Adding to this list, other inappropriate behaviours observed in education include: raising your voice; yelling at peers or staff; arguing with staff or peers; fighting; crying; running away; throwing objects; destroying property; self-injury; biting; pushes/grabs peers; pushes/scrapes staff; hitting/kicking peers; hitting/kicking staff; laying on floor; hiding; or, some “other behaviour” (UCDSB ATIP: Guidelines for Safe Interventions with Students 2010); smoking on school property or having a laser pen (School Code of Behaviour 2016); using “things that move” inside the school which includes using something that “bounces, can be thrown, kicked or passed” (School Code of Behaviour 2016), or behaviour that involves “sexist or homophobic comments, slurs and jokes or graffiti...” (ON Keeping Kids Safe at School 2009).

With my net metaphor I can capture the plurality and nature of punishment. Notably here, the behaviours are overwhelmingly interpersonal and describe both positive and negative expectations. And, based on where behaviour falls within this plurality, sanctions can be threatened. In summary, I have used wide nets to account for the swath of behaviours that can be observed as inappropriate. Wide nets, as the analytical tool, are able to capture a wide range of sanctions, but unlike deep nets, a starting point and exclusion are not necessarily on the table.

#### [Educational peculiarities and behaviour: Reach and spatial features](#)

In the context of describing the features of nets, I want to highlight the reach of the nets by describing a spatial dimension and a consequential dimension needed for behaviour to be caught by education’s nets. This allows me to show that education has

parameters of when, where, with what consequences, and with what goal it can become concerned about behaviours ranging from bullying, to giving alcohol to a minor, to having a laser pen.

#### Education's reach: Locale and school climate

Illustrating the boundaries of education's observations of behaviour, the Provincial Code of Conduct describes how behavioural requirements apply to pupils "whether they are on school property, on school buses, or at school-related events or activities, or in other circumstances where engaging in the activity will have an impact on the school climate" (Provincial Code of Conduct 2012, 2). This "includes school buildings, grounds and facilities" and "during field trips or at school sponsored events off school premises" (PPM 128 2012). This is clarified to include "[school board] property, school buses and school related activities including field trips and sporting events" (OCDSB ATIP: Code of Conduct 2016).

The territorial context clarifies how the wide net and deep net can work. At the same time, there are other opportunities for education to observe behaviour. This is where education becomes concerned with the consequences of behaviour.

Punishment is also available based on events off school property if "it could have an impact on the school climate" which is defined as "the learning environment and relationships found within the school and the school community" (PPM 145 2012). To further illustrate, the ability to threaten or actualize a sanction by way of suspension or expulsion is possible when "[...] the student's behaviour has a negative impact on the school climate." This may occur with cyberbullying which is "bullying that happens through technology, like email or a cell phone." Here, technological reach, the nature of

conduct and the (possible) impact opens up student interactions to scrutiny by education. Education is not only able to define spatial boundaries where behaviour can be observed but, it can create opportunities to threaten or actualize sanctions based on the consequences of behaviours.

Education is not only concerned with the type of behaviour, whether it is behaviour that is “courteous and good” on the school bus or “rowdy or improper language” in the hallway. Education can open up opportunities for punishment by observing consequences of behaviour based on the impact on school climate. When education defines its reach, it is based on locale and based on consequences. In both instances, education has a rubric for its own assessment of what is inappropriate, where this behaviour takes place, and how it may impact school climate.

#### Education’s goal: School climate

Hoy (1990, 152) explains how: “School climate is the relatively enduring quality of the school environment that is experienced by participants, affects their behavior, and is based on their collective perceptions of behavior in schools.” It provides a slogan for school as: personality; relationship; health; excellence; and expectations. These slogans can be seen concretely with three dimensions: a physical dimension (e.g., school appearance); a social dimension; (e.g., interpersonal relationships, fairness); and an academic dimension (e.g., quality instruction (Kutsyuruba, Klinger, and Hussain 2015). Overall, school climate provides a slogan or a “handy term to describe all the features of school organizations that have been related to achievement” (Hoy 1990, 163). Beyond a slogan, there is another dimension, school climate informs punishment and provides a goal for education when punishing.

School climate may be defined as “the learning environment and relationships found within the school and the school community” (PPM 145 2012). When it is positive “all members of the school community feel safe, included, and accepted, and actively promote positive behaviours and interactions” (PPM 145 2012) or “members of the [school] community feel safe, comfortable, accepted, and valued”. Education goes on to describe how “[c]reating and maintaining a safe environment requires the active involvement and vigilance of students, parents/guardians, and staff” (Safe Schools, Student Suspension and Expulsion 2016). School climate is to be safe, inclusive, and accepting. Additional qualifications include a “positive”, “respectful”, “safe and accepting”, “supportive”, “inclusive”, “welcoming” (Provincial Code of Conduct 2012), “equitable”, “affirmative”, “inspiring”, “free from assumptions”, “dignifying”, “respectful”, and “empathetic” (ATIP: Module three: Fostering positive school climate 2016).

Education pairs its conception of positive school climate with a series of substantive indicators based on affect, safety, behaviour, and inclusion. The Provincial Policy on student behaviour (2012) reveals these elements when it describes how: “A school should be a place that promotes responsibility, respect, civility, and academic excellence in a safe learning and teaching environment. A positive school climate exists when all members of the school community feel safe, included, and accepted.” And, further illustrating the affective elements, policy describes how “inclusive social climate based on caring and respectful relationships among and between students, teachers, other school staff, parents and administrators is generally accepted as a necessary supporting condition for learning.” As an outcome “A positive school climate, with a safe learning

and teaching environment, is essential for students to succeed in school” (ATIP: Keep Kids Safe at School 2016; see also What Parents Need to Know 2009).

Training material uses graphics to describe school climate. In a series of word bubbles, positive school climate is described as: accessible, liberating, caring, safe, healthy relationships, welcoming, supportive, inclusive, accepting, free from discriminatory biases and barriers, equitable, affirmative, inspiring, free from assumptions, diverse, non-judgmental, trusting, dignifying, respectful, and empathetic (ATIP: Module III: Fostering positive school climate 2016). There are other observations that indicate a positive school climate. In a bulleted list with checkmarks, education answers the question “how do we know?” there is positive school climate (ATIP: Safe, Inclusive, and Accepting Schools 2016). The list describes how there is positive school climate when:

- ✓ students, staff members and parents feel-and are-safe, included and accepted
- ✓ all members of the school community demonstrate respect, fairness and kindness in their interactions, and build healthy relationships that are free from discrimination and harassment
- ✓ students are encouraged and give support to be positive leaders and role models in their school community; for example by speaking out about issues such as bullying
- ✓ Strategies for bullying prevention and intervention and awareness-reasoning are reinforced for students and staff
- ✓ every student is inspired and given support to succeed in an environment of high expectations

Having described the affective, behavioural, safety-related goals and indicators, school climate paints an outcome for education. School climate provides a goal that education purports to achieve and expects to see. Now I want to show the connection to punishment. The Provincial Code of Conduct clarifies the link to punishment and

education's progressive discipline when it explains how: "The promotion of strategies and initiatives such as Student Success and character development, along with the employment of prevention and intervention strategies to address inappropriate behaviour, fosters a positive school climate that supports student achievement and the well-being of all students" (Provincial Code of Conduct 2012). So, when punishment can maintain school climate with "intervention strategies to address inappropriate behaviour" school climate is not just physical, social, and academic but also, penological.

The penological feature of school climate is seen concretely when education distinguishes between reporting and responding to behaviour. The concrete strategies/options are captured with my discussion of progressive discipline (PD) below, but for there to be PD, there must first be the selection of responding or reporting. In education, there is a requirement to curb behaviour and protect school climate. Policy describes how: the "purpose of responding to incidents that have a negative impact on school climate (i.e., inappropriate and disrespectful behaviour) is to stop and correct it immediately so that the students involved can learn that it is unacceptable" (see PPM 145 2012).

The behaviours that "have a negative impact on the school climate" may include things like "all inappropriate and disrespectful behaviour (e.g. swearing, homophobic or racial slurs, sexist comments or jokes, graffiti), as well as those incidents that must be considered for suspension or expulsion." To protect and pursue school climate, responding includes: "asking a student to stop the inappropriate behaviour; naming the type of behaviour and explaining why it is inappropriate and/or disrespectful; and asking the student correct the behaviour (e.g., to apologize for hurtful, it and/or to rephrase the

comment). By responding in this way, board employees immediately address inappropriate student behaviour that may have a negative impact on school climate” (see PPM 145 2012). In creating opportunities to respond to behaviour, education is not reporting behaviour. Reporting behaviour means to refer to a principal where a progressive discipline approach, up to and including suspension or expulsion can be used. So, by distinguishing responding and reporting, responding can be seen as “threatening” to report which creates an opportunity for education’s power.

In summary, I have shown the educational observation and categorization of behaviours. Education’s observations of behaviours are linked with clear instances of power and force. Focusing on the peculiarities of education’s punishment, I have established how education can consider inappropriate behaviour and its wide boundaries. Education is not only concerned about where inappropriate behaviour occurs but the consequences of that behaviour on school climate. Seemingly, the *where* behaviour occurs is as important as *how* the behaviour has impacted education.

### **Progressive Discipline**

I now want to explore progressive discipline (PD). Progressive discipline is described as a whole-school approach to address misbehaviour that uses interventions, supports, and consequences. I will illustrate how progressive discipline is differentiated and catalogue the suite of options it makes available to punish. In the same way that law uses sentencing/diversion as selections of power and force, progressive discipline is used by education and its selection has requirements for education’s power and force. I then illustrate the elements proper to punishment in education by showing how education’s requirements for punishment include considering what I call the ABCs and the factors.

PD provides the gateway to study the considerations and goals of punishment in education.

I expose how the ABCs and the factors are part of intra-system dynamics of punishment. These elements show how education foregrounds a concern for the contextual or experiential or environmental elements when punishing. These considerations provide education with a virtue of not making determinations of merely excluding and allow education to sanction according to the context of behaviour. This follows that education can only fluctuate among sanctions based on things education is dialled into and this allows me to show what matters to education when it comes to punishing.

### Progressive discipline

Education can threaten or actualize sanctions beyond suspension and expulsion, this is what education calls progressive discipline (PD). PD emerged out of efforts to address concerns about the differential impact and application of suspensions on the black community in Toronto, culminating in an Ontario Human Rights Tribunal Report. Historically, school discipline was “zero tolerance” based, removing options that could be selected for inappropriate behaviour and making punishment automatic and standardized. Historically, analysts have described how there was a “deterrence based model” of student discipline (Milne and Aurini 2017) that relied on strict rules, rigid/mandatory consequences, and little variability in selecting sanctions. Milne (2015, 52) describes how policies would: “not allow teachers to vary the punishment according to extenuating circumstances (e.g., recent loss of a grandparent) or the severity of the act (e.g., a push compared to a punch).”

PD is education's punishment strategy that offers more than suspension or expulsion for a distinctly educational penology. PD involves "corrective and supportive" processes to promote positive student behaviours. Inasmuch, the goal of PD is clear but the strategies and how it is distinguished needs to be disentangled.

Progressive discipline neutralizes zero tolerance and is seen as less punitive with an emphasis on prevention and early intervention (Hill 2013, 6) or "non-punitive" where punitive selections are substituted for prevention, intervention, and consequences (ATIP Policy Package 2016; UCDSB ATIP: Supporting Students with Challenging Behaviour, 2015; UCDSB ATIP School Discipline 2016). Policy documents describe how education "has shifted away from an approach that is solely punitive towards progressive discipline, a new approach that corrects inappropriate behaviour and offers multiple supports" (Safer Schools 2009). Or, when inappropriate behaviour is caught by the deep or wide nets of education "disciplinary measures should be applied within a framework that shifts the focus from one that is solely punitive to one that is both corrective and supportive" (ON Caring and Safe Schools 2010, 5; PPM 145 2012).

When contrasts with punitiveness are the difference invoking feature of PD, education is able to neutralize punitive characteristics and observations by focusing on prevention, intervention, and consequences. Curiously, PD shows what it is not without exposing what is wrong with punitiveness, what it may offer, the risks it brings, or the challenges it presents. But, when PD is not punitive it means that students will have more "opportunities to learn from their choices", it means that "Parents will be made aware sooner and will have more opportunities to be involved" and it means that professionals ranging from social workers to psychologists will work with schools to "offer support

and counselling to students” (Safer Schools 2009). So, being not punitive opens the door to learning, parents, and professionals.

When PD is not punitive, the wide scales and options of education’s punishment are foregrounded. Or, to draw on the idea above, there are wide nets. Education explains how it uses corrective, supportive, and preventative notions to distinguish from punitive pursuits. When selected, progressive discipline: “utilizes a continuum of preventative, interventions, supports, and consequences to address inappropriate student behaviour and to build upon strategies that promote positive behaviours” (OCDSB Policy 124 2008, 1). PD accordingly works with a goal in mind and purports to offer a suite of options. Let me explain this further.

The continuum of “interventions, supports, and consequences” consists of: preventative practices; early and ongoing intervention strategies; and a range of supports and consequences. For this suite of selections to operate, education needs to distinguish prevention from interventions and supports, and yet further from consequences. Which of these are selected depends upon the behaviour that has occurred and a host of other considerations. When inappropriate behaviour occurs, the “interventions and supports, and consequences” are triggered and this makes possible education’s power and force. When inappropriate behaviour has not occurred, education lands on preventative efforts which are not education’s power and force but are be pre-emptive efforts to help behavioural outcomes. For example, some of the preventative practices may include: student leadership; character education, staff training; antiracism programs; and

classroom management strategies<sup>52</sup> (ATIP: Inclusive, Safe and Caring Approach to Student Discipline 2016).

Progressive discipline has a suite of options where it can opt for threatening or actualizing a sanction. Education's interventions are said to meet the needs and skills of individual students by providing accommodations, doing testing and assessments, providing counselling or mediation, or referring to a specialized agency. For instance, the pre-behaviour or preventative approaches may involve: mentorship; peer counselling; modification or accommodation of the school setting; or support programs (UCDSB ATIP: Discipline appendices 2012). Other interventions may include: planned ignoring, supportive statements, setting limits, redirecting, changing and activity or changing a setting, using a visual cue, providing an alternative work spot, giving a choice, addressing the concern one-on-one, or intervening physically (UCDSB ATIP: Guidelines for Safe Interventions with Students 2016). So, graffiti in the bathroom which scribbles: "This school sucks. It should be destroyed [...] Evryone hear (sic) is stupid [...]" "Its (sic) almost tyme (sic). Tomorrow (sic) is D-day (ATIP: Module IV 2016) may lead to something intervention-based that may also be informed by a one-on-one strategy.

Some early and ongoing intervention strategies to address inappropriate behaviour may include: Oral reminders; contact with parents; review of expectations; peer mentoring; or referral to counselling. It may also involve: a written work assignment with a learning component; volunteer service to the school; restitution for damages; or

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<sup>52</sup> My goal is not to engage with each one of these options. There are a couple of reasons for this. First, my data is limited inasmuch as it does not provide specific illustrations or cases and the content of the situations where one of these options is selected. Second, engaging with these options is a different project which fits best with future attempts to build upon the work I present here. To build on my work here, another study could explore and expose how "redirecting" or "addressing the concern one-on-one" is communicated, is threatened/actualized, and how it is differentiated by education.

withdrawal of privileges (UCDSB ATIP: Student Handbook 2016). There is value in pointing out these instances/selections of power and force. First, these make clear the suite of options that are available. From education's perspective, what is available is not always exclusionary. Rather, the suite of interventions and supports/progressive discipline makes it clear that punishment can be threatened or actualized inside (or in a way that continues having the student in school) the school and punishment can be threatened/or actualized in a way that consequence leads to someone being removed from school (in the case of suspension/expulsion when it is threatened or actualized).

Finally, supports and consequences may include: meeting with students/parents/principal; referral to anger management or substance abuse counselling/intervention; detention; withdrawal of privileges; restitution; restorative justice and practice; transfer; short/long-term suspension; and recommendation for expulsion (ATIP: Handbook on Progressive Discipline 2015). Some additional efforts may include: a reprimand; community service; removal of privileges; or in school or out of school suspension.

The suite of options shows that all behaviour is not the same for education and education sees the complexity arising from behavioural concerns. I have described how PD offers a suite of possible selections with various intensities and forms. Education begins by showing that punishment is not just punitive, opting for a range of responses which may include a verbal reprimand, the brokering of services, or physical exclusion. My description of these selections shows that punishment in education, specifically what can be threatened and what can be actualized, is much more than suspension and expulsion. However, remaining unexplored are the elements that make PD distinctly part

of education. So, I can ask: what are the requirements/considerations for selections related to discipline? I will now illustrate how punishment needs to be tailored according to the ABCs and the factors.

### ABCs and the factors

Education is able to foreground the experiences and environment of a pupil (not something moral, or based on a need to deter, or rooted in condemning the behaviour). I expose how the ABCs and the factors are part of intra-system dynamics of punishment in education. This allows me to show how education's punishment is narrative based, personable, contextual, and in search of causes/conflicts. These elements provide education with a virtue of not selecting punishment based on excluding and show how education has the ability to select among multiple sanctions.

I want to start with a few examples. Consider destroying the property of others and pushing/grabbing peers as inappropriate behaviours. Education is prompted to ask "what happened" and ask "what happened just before the behaviour?" Affirming the importance of the context, there may have been a setting change, name-calling, work assigned, or fatigue that can explain the behaviour. This importantly provides context for education to select punishment as it is part of the context it "must consider" (Safe Schools 2016).

Education constantly describes how it is sensitive to nuanced understandings of behaviour. Training material and policy documents show how there is a need to consider the root causes of behaviours when selecting PD. Specifically, education sees how behaviour occurs in a context, it is learned, and it can serve a function for the individual. And, behaviour can be changed over time. Education describes behaviour as part of a

story, whereby inappropriate behaviour is “a student’s way of responding to something in the environment.” Next, education’s considerations of root causes means recognizing that inappropriate behaviour may be a pupil’s attempt to communicate the need, not necessarily a “deliberately aggressive or purposefully negative act.” Finally, education describes the fluidity of behaviour and behavioural assessments when it describes how it “can be understood differently when viewed from different perspectives and when the context in which it occurs is taken into account (ATIP: Principal incident checklist 2016, 706).

Another way that education packages context and causes is through the ABC’s. The ABC’s continue to clarify that education does not want behaviour considered in isolation. Instead, when it comes to behaviour it has an antecedent(s) and a consequence(s) – hence ABC Antecedent, Behaviour, Consequence (UCDSB ATIP: Supporting Students with Challenging Behaviour 2015). Considering the ABC’s, education captures not only student behaviour but events related to it (leading to the behaviour or following the behaviour) and these are important for education when considering punishment (ON Caring School 2010).

So far, I have been describing the different considerations/requirements for punishing. I have established how there are peculiarities related to behaviour and education and I have started to establish how progressive discipline can focus on the contextual, experiential or environmental elements of behaviour. Building on the ABC’s, training and policy documents describe how a: “Principal must: consider mitigating and other factors when determining interventions, supports and consequences for

inappropriate student behaviour along a continuum of progressive discipline.” This leads me to rapidly present some of these factors.

With PD comes increased attention to: mitigating factors; alternative programs for expelled/suspended students; retaining student status when expelled; and conflict resolution as part of the curriculum (Roher 2007). In education, mitigation factors focus on current and future conduct and other factors focuses on the status, consequences, historicity, and identity of a young person.

The first mitigating factor involves considering the ability for a student to control his or her behaviour. Another mitigating factor captures the ability of a student to “understand consequences of his or her behaviour”. Finally, a mitigating factor assesses “whether the pupil’s presence at the school does or does not create an unacceptable risk to the safety of any other individual at the school.” These are the factors that can lessen the force of education’s punishment. There are other factors that are important, some of these “other factors” include:

- Academic, discipline and personal history or “student’s history”
- Progressive discipline use in the past and success with progressive discipline
- If the infraction (or activity) was related to any harassment of the pupil because of race, colour, ethnic origin, place of origin, religion, creed, disability, gender or gender identity, sexual orientation or harassment
- The impact of discipline on the pupil’s prospects for further education
- The pupil’s age
- In instances where an individual educational plan has been developed: behaviour part of a disability related; if appropriate individualized accommodation has been provided? If a suspension is a likely result in aggravating

or worsening the pupil's behaviour or conduct or whether suspension is likely to result in greater likelihood of further inappropriate conduct

- Whether the pupil's continuing presence at school create an unacceptable risk to the safety of anyone at school (UCDSB Student Discipline 2016)

The "other factors" make it clear that education can move beyond a narrow view of assessing the present and the future (with mitigating factors) and open up its reflection to the past, present, and future. In so doing, status (age), consequences (unacceptable risk to the safety of others), historicity (academic and personal history; past success with PD...), and identity (disability related) of a young person are considered by education.

I have shown how there are multiple opportunities, modulations, and techniques for punishment in education and how punishment in education is not necessarily exclusionary, although it can be. And, I have demonstrated the value in looking at punishment from the systems perspective to move beyond examining suspension and expulsion. Just like how analysts of punishment in law tend to over-indulge in the role of the prison as a site of punishment, scholars of education may similarly focus on the suspension and expulsion as indicators of punishment. The consequence of such an approach is that many other features are overlooked.

I am mindful of scholarly critiques that have troubled the inability of education to consider personal, emotional, or other problems that students may have, instead opting to respond to behavioural issues with punishment in criminal justice-centric logics (Simon 2007, Kupchik 2010) or with general rigidity (Lyons and Drew 2006, Kupchik, Green, and Mowen 2014). Adding to the conversation about the form and intensity of punishment in education, my discussion above has shown how PD punishes educationally and produces a distinctly educational penology. Quite simply, PD stems from a desire to

punish in a way that seems to avoid the most punitive. Or, to use my metaphor from above, punish in a way that avoids deepest of the nets by foregrounding the experiences and environment of a pupil.

In summary, PD is a program of punishment in education that helps set out requirements for punishing. The requirement is established with what I call the ABCs and the factors. So the elements of education's penology concretely include contextual or experiential or environmental elements of behaviour. Having shown the use of ABCs and the factors, I am able to track how education can provide contextualized assessments of behaviour, how education privileges intra-system elements, and how education is not ignorant to context. As such, concerns in the literature about the depersonalization of decision-making have been challenged. When selecting progressive discipline, there are clear and convincing requirements for education to assess. In demonstrating efforts to avoid punitiveness and foregrounding experiences/environments, I have shown how this does not automatically facilitate connections between education and the law, does not automatically facilitate exclusion, and it brings a suite of considerations to the decision to punish.

## **Discussion and conclusion on education's punishment**

I see educational selections as “almost automatically [producing] a situation in which particular patterns of behaviour are acceptable, while others are not” (Vanderstraeten 2004, 264).<sup>53</sup> I identified patterns of behaviour and argued that

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<sup>53</sup> I want to begin with reminder about the consequences of working with systems theory. Systems theory points us to the idea that we cannot enter the head or mind of another human, a teacher, or a student. In fact, teachers cannot “gain direct access to the results of educational interventions” be it rule setting, giving detention, or removing privileges (Vanderstraeten 2004, 264). However, it is possible for education to “observe and record the patterns of visible behaviour of their students,” and the selections that follow certain behaviours. Observers can then ask: “What is the effect of this condition? How can education create

behavioural classification based on wide and deep nets, locality of behaviour, school climate, and progressive discipline create a program of punishment in education. I have exposed three empirical themes in my discussion above.

First, I have shown how inappropriate behaviour is captured by deep and wide nets. Second, behaviour alone is not what makes punishment in education possible, which I have shown by describing the importance of the territory of behaviour and the school climate. I have also illustrated how positive school climate serves as a goal for education. Third, I have shown how there are various selections that are possible under the framework of progressive discipline (PD). PD is principally concerned with differentiating punishment as a non-punitive characterization. And, the use of the ABC's and the factors allowed me to illustrate that education is dialled observing personal, environmental, and contextual considerations. Cumulatively, my discussion allows me to expose, clarify, and show the importance of intra-system considerations for punishment in education.

The theme of the ABC's and the factors illustrate how education is dialled into observing personal, environmental, and contextual considerations. These considerations in education are in stark contrast to zero tolerance, increasingly punitive, and general exclusionary tactics that have been identified in existing research on education's punishment. Certainly education can still exclude or rely on "harsh" penalties but, my analysis of the requirements to punish shows how education has a set of considerations that can change the simple connection between an educationally observed behavioural problem and exclusion. The ABC's and the factors make it clear that education is open to

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an orderly structure, which is comparable to the forms of self-organization of the major function systems of society?" (Vanderstraeten 2004, 264).

creating educationally relevant considerations to inform the selection of a sanction in education. And, such considerations transform the current uni-directional understanding.

Current research on punishment in education generally focuses on efforts to maintain behavioural expectations with “school discipline”, exposes exclusionary processes, and presents the infiltration of criminal justice logics in education (see for instance Adams 2000, Brickmore 2004, Kupchik 2010, Raby 2012, Thornberg 2007). Kupchik (2010) is particularly concerned about punitive and exclusionary school punishment that is coloured by: overreactions to misbehaviour; a narrow focus on rules and not reasons for misbehaviour; neutralizing learning opportunities from misbehaviour; and worsening behaviour with education’s punishment. Consequently, youth (mis)behaviour is heavily problematized, defined up (Simon 2007, 224), and matched with hardened attitudes that aligns education and the criminal law.

These are all serious concerns but I am able to interject and add to these debates by showing some additional features and considerations of education’s punishment. Like Raby’s (2012, 248) study of school rules in Ontario, my goal has been to use a diverse collection of data to expose and theorize complexities related to punishment and behavioural standards in education. From my perspective, behaviours and punishment need to be considered through a new perspective. In my discussion of behaviour, progressive discipline, and school climate, I have been demonstrating how there is a distinct set of penological considerations for education. These are education’s own selections vis-à-vis punishment, and by observing educational communications and selections, punishment in education is irreducible to law and it is not just the virtue of exclusion. So, I have shown how there is not a totalization of punishment across social

systems and there are more intra-systemic features to punishment worth exploring. If only to show, after the fact, that there are many features of punishment that would be lost without my perspective.

I have been able to empirically present a theoretically informed and empirically grounded observation of penological considerations in education. These *programs of punishment* allow for punishment in education. Programs do not make punishment better or worse, but I have shown how it all works in education by focusing on how education creates its own operations about punishment.

## **Chapter 8: Education's Engagement with Law and Law's Engagement with Education**

In this final chapter, I put to use the concept of structural coupling to expose relations between systems in the context of punishment. I begin by quickly outlining what is gained with this analysis. Then, I engage with my empirical material showing how law and education are linked in the context of punishment.

This chapter allows me to: assess how law and education observe each other; paint the value/role of punishment across systems; clarify an alternative thesis to steering; and document how mutual influences<sup>54</sup> between law and education can work. When assessing the inter-systemic capacity of punishment, I am adding to conversations and debates about what impacts punishment and how it operates. In this chapter, I ask: how does punishment link systems (law and education), with their own perspective on punishment? How does this take shape in the framework of social systems theory? And, what explanatory, analytical, and empirical value is there in such a framing?

I argue that punishment can be used to theorize and explore the influence or the inter-systemic connections between law and education. Punishment allows each system to refer to its environment to capture elements of the environment (which for law means elements of education and for education means elements of law) that are useful for each system.<sup>55</sup> Exposing the relationship between law and education allows me to demonstrate how punishment influences across systems.

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<sup>54</sup> I use the concept of influence synonymously with structural coupling.

<sup>55</sup> There are other links with its environment, for instance science. This can be seen in concerns for the labelling effects of youth punishment. When the Supreme Court discusses youth criminal law and protecting identities, it notes how “the stigma and labelling that may arise from release of the young

My analysis shows how law and education make productive use of each other as different systems. To paraphrase Teubner (1991, 135-136) I demonstrate how the “circle is complete”: education nonchalantly makes educational value from legal norms and accomplishments created for law’s own purpose, and the law, undisturbed by the educational value, creams off the value of education’s operations that create work. This shows how systems are not colonized or colonizing in the context of punishment, but punishment provides a *filter, or a bridge* for inter-systemic points of contact. This filter positions punishment to be a hypertext (Febbrajo and Harste 2013), making punishment available in different interpretations where law can make use of education and education can make use of law.

### **Law in Education: Partnerships, and the arsenal of maintaining school safety**

Law appears in education as part of what I call education’s arsenal of maintaining school safety. This does not mean that law is dictating decisions or operations, but law influences education, meaning that education creates value from legal norms and accomplishments. I demonstrate how education uses law as part of the safe school community and as a response to (mis)behaviour.

Education can count on law as a partner and a resource. I show not only that education is sensitive to law, but how such sensitivity is created and maintained through education’s own parameters. While law in schools is traditionally observed through the prism of law being mobilized negatively, that means to criminalize students (e.g., Simon,

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offender’s identity result from the actions of the media and broader society. The harm is a product of media coverage and society’s reaction to young offenders and to the crimes they commit” (R. v. D.B., 2008 2 SCR 3 at para 178).

Hirschfield...), law in schools can also be observed through the selections that education makes based on law.

The central distinction in education is marked by the difference between conveyable and non-conveyable. To compare with law, the central distinction is between legal and illegal. In exploring what is conveyable, law becomes important for education (Baraldi and Corsi 2017) to take into consideration. These links, as Baghai (2012, 125) describes, allow systems (which in my case are law and education) to “take certain features of one another into account and rely on them for their own operations”. So here, the conveyable shows how certain features of law and youth punishment are taken into account and relied upon not for law itself, but for the operations of conveyance in education.

Education observes law based on its own terms. This challenges the way that this relationship is theorized and the meanings attributed to this relationship. When education takes certain features of law into account and relies of them for education’s own operations, a new vantage point is given when studying punishment. First, it begins to untangle the hierarchy granted to law and the perceived dominance of criminal justice/criminal law logics. Second, it shows the value, from education’s perspective, of law’s norms. Finally, there are new substantive selections for education which assumes the existence of law, gets content, creams off the work of law that is possible, without becoming law.

### **Law in education: Problems, partnerships, and part of education’s force**

Punishment provides a link between law and education when education addresses problems. I refer to this link as education’s arsenal of maintaining school safety.

Education is able to produce value from legal norms when it is faced with certain problems. Taking advantage of the theoretical insights offered by systems theory and the concept of structural coupling/influence allows me to demonstrate empirically where and how education can be influenced by its environment. I will argue that this common punishment platform does two things: it creates a partner, and it provides a substantial selection for education by providing something that education can threaten and (possibly) actualize. It shows how and with what consequences education can see law, and with what implications punishment links the two systems. Creating problems, finding solutions and threatening and actualizing sanctions is all part of illustrating how punishment provides a “common platform” to structure communications to and from systems.

#### The threats/problems facing education

I want to begin by highlighting what is going on in education to make law’s influence possible. Law’s influence is possible when there are problems. These problems, which are observed and defined by education, act as precursors to education’s connection with law. Not all of these problems are new as some have been echoed above.

Problems for education can be characterized by threats to the ability to convey knowledge and skills in schools. These problems, which remain the property of education, allow education to observe law as a way out of the problem. Education’s vision for law allows me to show how law can influence parts of education, without putting education in the business of ‘doing law’. Ultimately, education assumes the existence of law, counts on law, and can be meaningfully influenced by law on its own

terms. By creating partnerships and threatening law's force, education is able to make *educational value from legal norms and accomplishments*.

First, law's influence can be seen with a general awareness for law in education. For instance, consider the provincial code of conduct which describes/ascribes how: "All members of the school community must: respect and comply with all applicable federal, provincial, and municipal laws..." (Provincial Code of Conduct 2012). Similarly, school handbooks describe the needs: "to be law-abiding citizens and to be accountable for actions that put the physical and emotional safety of others and oneself at risk (ATIP UDSCB: School Handbook) or for "Respect and comply with all applicable federal, provincial, and municipal laws" (ATIP UDSCB: School Handbook). This shows an awareness of law, but it is not clearly linked to law's or education's capacity or vision for punishing youth.

In educational communications, there are descriptions of occurrences/incidents/circumstances linking law and education. Specifically, policy outlines the interaction between school boards and police, policy creates awareness of specific incidents (substance abuse, weapons, access), or general policy describes the need for safe schools (ex OCDSB ATIP: An Inclusive, Safe and Caring Approach to Student Discipline). I offer a synthesis of these occurrences/incidents/circumstances in education.

There is a problem for education. The problem may challenge the ability for education to convey skills and knowledge. Practically, a bomb threat is one of such threats that can trouble the ability to convey skills and knowledge. When faced with such a problem, selections need to follow. One of these selections is engaging or threatening to

engage the police/law. This is to say that these are problems for the system of education that warrant, from the system's own perspective, something to be done. I want to illustrate how there are certain types of problems that emerge in education that become precursors for law's influence.

Handbooks, policies, and protocols describe an assortment of threats that can be observed by education. These threats include: bullying; "bullying [that] involves criminal behaviour, such as sexual assault or use of a weapon" (ON Bullying 2013); bullying where "threat to your child's safety is in the community rather than the school" (ON Bully 2013); criminal behaviour; a bomb threat (Local Protocol 2015); exigent circumstances;<sup>56</sup> criminal harassment; occurrences such as hate- and/or bias-motivated occurrences<sup>57</sup> and gang-related occurrences<sup>58</sup> (Local Protocol 2015); non-consensual sharing of intimate images; possession of drugs; relationship based violence; robbery; sexual assault; threats; trafficking in weapons or drugs (Local Protocol 2015), weapon that are "dangerous or a threat to the safety of others" (OCDSB Policy 525 2008).

Having presented some of the threats, a question needs to be addressed: threats to what? I want to suggest that threats jeopardize or challenge the main function of education in conveying skills and knowledge. Practically, a bomb threat or critical incident can quickly transform conveying material, skills, and knowledge to something

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<sup>56</sup> The police/school board protocol in ON defines this as: Urgent, pressing, and/or emergency circumstances. Exigent circumstances usually exist when immediate action is required for the safety of the police or others. Such circumstances may include a bomb threat, a person possessing or using a weapon, or a fire on school property.

<sup>57</sup> The police/school board protocol in ON defines this as: Incidents (e.g., involving statements, words, gestures) motivated by hatred or bias towards an identifiable group (i.e., a group distinguished by colour, race, religion, gender, sexual orientation, or ethnic origin) that are publicly communicated and that are wilfully intended to promote or incite bias or hatred against such a group.

<sup>58</sup> The police/school board protocol in ON defines this as: Incidents involving a group that consists of three or more persons, however organized, and has as one of its main purposes the commission or facilitation of a criminal offence in which any or all of the members engage.

else. Or, “aggressive behaviour that is typically repeated over time” may similarly obstruct the capacity to convey skills when it is “meant to cause harm, fear or distress or create a negative environment at school.” These threats illustrate how (potential) problems for education are seen by education.

Education acknowledges many other threats. Education also goes beyond listing sources of threats to identify a larger semantic that textures the threats to education and creates opportunities for linking law to education. In outlining these dynamics of threats for education, a richer story is told about why and how education comes to trouble some of the above-listed occurrences. Moreover, it brings an internal coherence to the threats and why the threats must be addressed. This internal coherence and context is rooted in safety. There can be threats to safety in education, challenging the ability for schools “be safe, and feel safe” (OCDSB ATIP: School 1 Handbook), troubling the “the overall responsibility for the training, safety, and well-being of students” (Local Protocol 2015), or the “overall safety of staff and students” (Local Protocol 2015). These threats also challenge what it is that schools and codes of conduct aim to promote, maintain, encourage, discourage and prevent. Education, as described in the Provincial Code of Conduct (2012, 4) aims:

To promote responsible citizenship by encouraging appropriate participation in the civic life of the school community. To maintain an environment where conflict and difference can be addressed in a manner characterized by respect and civility. To encourage the use of non-violent means to resolve conflict. To *promote the safety* of people in the schools....

Presenting the threats for education and showing the link to safety, I have catalogued some of the context for education’s observations of law. The identification of

a problem and the link to safety has been the precursor for linking education and law. This captures how there are problems for education and law *can be a part* of what is referenced to define these problems. I will now offer more explicit touching points between law and education when it comes to punishment. I show how the selections are made possible in the face of these problems. The connection with law is made with education's view of partnerships and education's view of law as part of its own power and force.

### Education's creation of law as a partner

As a partner, education positions law as a mechanism to better attain, maintain, and protect education's ability to convey skills and knowledge, and promote school safety. This allows education to keep its social relevance. Law/the police are education's partner when faced with issues/threats. The crafting of law as a partner does two things: it assumes the existence of something in education's environment; and the environment/law makes a difference in the selections available for education because the structure of education demands it.

The partnership that education creates is clear when law/police: are seen as "essential partners in the prevention of crime and violence in the school environment" (OCDSB Protocol 2016; Ministry of Education, ON); or when police and education work in "a supportive, cooperative and equal partnership aimed at creating school environments that promote respect, responsibility, and civility" (OCDSB Protocol 2016, 4). The partnership is further illustrated when education sees law as "essential partners in the prevention of crime and violence" (ATIP UCDSB: Protocol 2016); or as a

“partnership to create safe school environments, and to prepare plans to be used in the event of a major incident of school violence” (ATIP UCDSB: Protocol 2016, 36).

The Provincial Code of Conduct further illustrates the selections available for education by creating a partnership. This assumes the existence of law/police in the environment. The Code of Conduct explains how: “The police play an essential role in making our schools and communities safer. The police investigate incidents in accordance with the protocol developed with the local school board....” And, this feature is echoed by a school board when it is described how: “the police play an essential role in making our schools and communities safe. The police investigate incidents in accordance with the protocol developed with the Upper Canada District School Board” (UCDSB ATIP: Protocol 2016). But the partnership is not just something that can help or play a role, as more obligatory language contextualizes education’s vision of law. It seems that as part of best practices, the partnership should be created and maintained. The envisioning of a partnership and the role of the police describes how:

School boards and principals should develop, promote, and maintain strong partnerships with police and seek to benefit from their support in implementing the school’s violence-prevention policies, particularly where those policies pertain to addressing risk factors associated with antisocial, gang-related, or criminal behaviour. In a closely cooperative relationship, police may also offer support in a consulting role, to assist school personnel in determining appropriate action when dealing with violent behaviour and to explain the procedures for police investigations (Local Protocol 2015, 10).

The provincial policy (ON One Policy 2016) further describes how: “Police play a vital role in supporting and enhancing the efforts of schools and their communities to make schools safe places in which to learn and work. In addition to responding to and

investigating school-related incidents, police are essential partners in the prevention of crime and violence in schools.”

Partnerships allow education to observe its environment and in so doing, they can create partners in law and specify the (possible) involvement of police. In prescriptive fashion, education observes how “School boards and principals should develop, promote, and maintain strong partnerships with police and seek to benefit from their support in implementing the school’s violence-prevention policies...” (Local Protocol 2015, 10). This role, and making the link to the list of threats presented above, is seen to be important when: “addressing risk factors associated with antisocial, gang-related, or criminal behaviour.”

By creating a partner, education crafts a solution to the problems of safety and violence. Education counts on law’s force or threats to “assist” in delivering appropriate action. This assistance, or influence, is the gateway education to make a place for law. Further illustrating the link between education and law, education discusses partnerships and sees police/law as a partner that is capable of being a source of expertise. In the case of the education-police partnership, police seem to be positioned with expertise related to violence, violence prevention, and violent behaviour. When education sees this expertise, and seemingly when police are apprised, “police may also offer support in a consulting role, to assist school personnel in determining appropriate action when dealing with violent behaviour and to explain the procedures for police investigations” (Local Protocol 2015, 10). I have explained above how the determination of “appropriate action” is the gateway for punishment. So, by creating a partner, education is able to be influenced by law.

In addition to expertise, the partnership shows just where education sees value in law. Specifically, law provides an essential role. When law is seen with such importance, its ranking for education must be viewed alongside what law has to offer for education. For me, the question must be posed: what can education do/what can education select in seeing law as this vital/essential ingredient? Let's explore this further.

Education sees police as a partner in: “maintaining safe and orderly environments in the schools and facilities of the boards and at all board-sponsored activities”; “responding to and investigating school-related incidents”; “supportive, cooperative and equal partnership aimed at creating school environments that promote respect, responsibility, and civility”; “measures to provide and ensure the safest possible learning/work environments for students, staff and others lawfully on school property” (OCDSB Protocol 2016). All of these examples illustrate how law is crafted as a partner for education.

#### Law as part of education's force

Finally, law is part of a solution to education's problems when it is something education can threaten. Across educational communications, education's reference to law invokes statute and police. In this dual reference, education can threaten or actuate sanctions. In this instance, engaging the police/the law is the sanction. Hence, it is education's threat to call police or rely on a provision of statute, but education cannot guarantee how police or how law will come to observe the puzzle that education creates for law.

Education's link to law rests on education threatening to use law or actualizing a legal course of action. This is not education doing legal operations, in the same way that

someone calling 911 is not a legal operation, but this is illustrative of how punishment links law and education by providing a path for education to expose, threaten, and actualize its own power and force. I will develop the following argument: Education's power and force are exposed by threatening to engage the police, threatening to engage parts of the *Education Act*, actualizing education's sanction by calling police, or actualizing education's sanction by relying on suspension or expulsion provisions under the *Education Act*.

I want to begin by painting the possibility of threatening and actualizing law. Maintaining the boundaries of law and education, it is helpful to think of law as a resource for education. As a resource, it can be threatened, it can be actualized, but education cannot guarantee what will happen from law's perspective when/if law makes its own observations. This is seen concretely in the empirical material when education references the *Education Act* to legitimize its ability to suspend or expel.

Law becomes a resource for education in the context of clarifying the relationship between education and police. The law as part of education's force is also seen when law is threatened (and sometimes actualized) in the context of the ability to call police when dealing with the above-described circumstances/incidents/problems. In the empirical materials, these illustrations show how education is able to productively make use of law, and it does so on its own terms.

Recall, force is the actualization of a sanction. A non-exhaustive list of sanctions for education can consist of warning, any of the 'progressive discipline' pursuits, suspending, or expelling. These are part of education's selections but when it comes to suspension and expulsion, law too has something to offer. Law influences education by

providing a reference for education's selection of suspending or expelling. It is with reference to law that education is able to say that, we can suspend or expel.

Expanding on the above notions, when I observe educational communications, the law is referenced to capture where "suspension must be considered" or where "expulsion must be considered" (e.g., OCDSB Policy 515: Form 515). Or, it may be noted that "the *Education Act* allows a principal to suspend a student out of school for up to 20 school days for very serious incidents" (OCDSB ATIP: An Inclusive, Safe and Caring Approach to Student Discipline). The "very serious incidents" as a distinct concept is not explicitly defined but, the reference to the *Education Act* go on to list the reasons why there would be a suspension.

It is the *Education Act* that makes a suspension possible if there is: a threat to inflict serious bodily harm on another person; possessing alcohol or illegal drugs; being under the influence of alcohol; swearing at a teacher or another person in a position of authority; committing an act of vandalism that causes extensive damage to school property or to property located on the premises of the school; bullying; other reasons specified by the School Board policy. Similarly, reasons for expulsion are listed. While it remains a decision of education whether or not to suspend but, it is possible to see law's influence by documenting references to statute.

But, law's influence is not just seen with the reference to the *Education Act* and the threatening or the actualization of the sanctions of suspending or expelling. This means that law is not just a resource for education in the sense of providing a reference to statute. Law is also seen as a resource for education by providing a substantive selection, the selection is education calling the police. Engaging the police from the point of view

of education may be important because: “Police play a vital role in supporting and enhancing the efforts of schools and their communities to be safe places in which to learn and to work. In addition to responding to and investigating school-related incidents, police are essential partners in the prevention of crime and violence” (ON One Policy 2016; OCDSB Protocol 2016). The possibility of the police, as a proxy of law, provides a substantive selection for education’s force. It is education’s force because, it is education’s sanction or threat to call or otherwise engage the police. Education cannot guarantee what law will do but the possibility of law empirically illustrates the influence of law on education.

For education, creating a relationship with the police shows how education may threaten or may actualize that relationship. Law is not colonizing education, but it works in the other direction. Education may (or may not) engage law/police based on circumstances that arise in education. Ultimately education cannot guarantee the course of action taken by law, education cannot guarantee how law will observe what education points out, but education can create a point of contact with the law. I will now explore some of these points of contact more explicitly.

It is possible to begin by listing the incidents where the notification of police/law is mandatory. This listing of incidents has two consequences, first it assumes that there are police to contact therefore assuming the existence of part of its environment. And second, it pinpoints what in the environment (may) be contacted. Some of the incidents that (may) require contact of police include: death; physical assault causing bodily harm requiring treatment by a medical practitioner; sexual assault; robbery; criminal harassment; relationship-based violence; possession of a weapon (including a firearm);

using a weapon to cause or threaten bodily harm; trafficking in weapons or illegal drugs; possessing illegal drugs; hate and/or biased-motivated occurrences; gang-related occurrences; extortion; non-consensual sharing of intimate images; and bomb threats. Discretionary notice includes incidents such as: giving alcohol to a minor; being under the influence of illegal drugs or alcohol; threats of serious physical injury (include those made on social networking sites or through instant messaging, text messaging, email...); incidents of vandalism; and trespassing.

To further illustrate how education's force is influenced by law, it is possible to observe how education sees law as a resource. For example, looking at Ontario's One Policy on Schools (2016, 15), education is able to see how: "Police play a vital role in supporting and enhancing the efforts of schools and their communities to make schools safe places in which to learn and work. In addition to responding to and investigating school-related incidents, police are essential partners in the prevention of crime and violence in schools." Police do not automatically occupy this role, but it is one that is created and opened up by education. It is education's selection to see law as a support, a tool for safety, a partner, and an agent of crime and violence prevention. It is possible that the issues faced in school are simply too complex to handle by education alone. So, if education contacts police, it provides a pathway to deal with this complexity. As a new selection, the police as a partner is transformed. Hence, when police/law is seen as education's resource, it moves law beyond the simple partner that co-tackles problems.

Further illustrating how education uses law as part of its own force, education has come to define a specific "role and mandate" for police (as the proxy for law) (see Police and School Board Protocols). A formalized relationship, that being how education sees

law/law enforcement is “used by the School Boards and Police Services to assess, respond to and prevent violent incidents from occurring and to ensure our students’ safety” (OCDSB Protocol 2016) or is used in “maintaining safe and orderly environments in the schools and facilities of the boards and at all board-sponsored activities” (OCDSB Protocol 2016). These protocols have various goals. These include:

... assisting in the greater safety and protection of students, teachers, principals, staff, and volunteers in schools; encouraging constructive, ongoing, adaptive, and responsive partnerships between police and the school community in areas such as violence prevention; reinforcing the importance of a coordinated and multifaceted approach on the part of schools and police in their interactions with parents and the community, in an effort to promote the well-being of students; ensuring that the obligations and requirements of both the education and police systems are met; and ensuring an equitable and consistent approach across a school board’s jurisdiction in the way police and schools respond to a school-related occurrence (ON Police Local Board Protocol 2015, 7-8).

The creation of the protocol illustrates how education is influenced by law. Again, when faced with an incident, such as those related to violence, safety, or protection, education is able to create a role for law. It is influenced in the sense that it provides a selection for education, but it also creates the capacity for education to see a role for law. While it is impossible to determine exactly what law will do when faced with one of the incidents, these are observed by education and education sees something from law.

Education has a mandate for law. This is a mandate that education ascribes for police but at the same time, reaffirms education’s own responsibility in dealing with issues at school. From education’s perspective, there is a need for a “clear understanding of police and school responsibilities” (Local Protocol 2017, 7). The characteristics are discussed above with the partnership theme and education’s selections are clarified and

police/law can be part of a sanction mobilized by education. Concretely, the mandate that education sees for police includes things such as:

...engaging and working proactively in partnership with school officials to ensure the effectiveness of this protocol; protecting public safety and preventing crime; enforcing the *Youth Criminal Justice Act*, the *Criminal Code*, other federal and provincial legislation and regulations, and municipal by-laws; upholding the duties legislated under section 42 of the *Police Services Act*; assisting victims of crime; conducting police and criminal investigations; assisting in the development of young people's understanding of good citizenship; promoting and fostering the prevention and reduction of crime, both against and committed by young people; providing information on community safety issues; diverting young people away from crime and antisocial behaviour; and working in partnership with other government and community-based service providers to support positive youth development (ON Police Local Board Protocol 2015, 8).

This illustrates how there are proactive and reactive responsibilities for law, responsibilities of enforcement, responsibilities of safety, and responsibilities of cooperation/partnership (Local Protocol 2015). These occurrences lay the foundation for education being influenced by law. The influence of law that I focus on touches youth punishment. This is to say that when education references law, in the context of education's punishment, it is when education is faced with one of these challenges/problems/incidents.

My discussion above provides a glimpse into how education sees its environment. Having outlined the problems, what the problems challenge, and having sketched the discretionary and mandatory needs to contact the police, I have shown how education creates a partner and sees law as part of education's power/force. The problem-partner dimension exposes new dynamics of the relationship between education and law.

### Summary: Education observing law

I have demonstrated how education can make observations of law and I have explored when and where law and education are connected. The picture that I have tried to portray shows that education filters parts of law for its own use in the context of punishment. When faced with a problem, education is able to create a partner in law and rely on law as part of its (potential) punishment. The connections based on policy and codes of conduct show how law is not impacting education in a way that can be seen as law colonizing education. Instead, education connects to law on its own terms, as responses to threats by creating partners and creating a resource.

Law influences parts of education and this does not make education law nor does it put education in the business of distinguishing legal from illegal. So, there is influence all while the differences between the two systems remain intact. Exposing these facets adds a new understanding to the mutual influence (or couplings) that are able to occur between law and education.

### **Education in law: The sentence tweaker, law's work, and conditions of force**

I will now chronicle the other direction of influence: how law makes use of education on law's own terms. This continues to illustrate the coupling ability of punishment where there can be selective links between two different systems. And just like with education, law is able to make new selections based on its observations of education. Practically speaking, this shows links and relationships between systems, which may occur in new and meaningful ways. For example, the first thing that comes to mind from current punishment literature is how education is taken over by criminalizing

tendencies. The empirical blind spot is that there is little discussion of how law may be impacted by education, or how education is observed in law.

I demonstrate how law productively uses education to maintain its own operations. Law makes use of education in the sentencing process, as a source of work or a site of (possible) criminalizable conduct, and as coercion-based education. I also illustrate how education provides substantive selections for law.

### Education as legal sentence tweaker: Observing success, failure, or transformations

In legal communications, there are stories about past success or failures in education, and transformations in scholarly achievement. This acts as a possible sentence tweaker/modifier, or at least a consideration as part of the legally relevant story of a young person in the legal system. I will argue that law is able to observe education, make legally relevant a young person's past success/failure in education or make legally relevant the future of education for a young person. Law and education's contact is one where law observes education, making observations legally communicable and legally relevant in the operations of punishment in law. This clarifies boundaries between law and education, empirically illustrates where and how law can observe education, and theoretically transforms ideas about one system steering another. Instead of steering, this can be referred to as influence.

Law's observations of education can be seen in statute. In statute, the *YCJA* describes that when considering a youth sentence, there must be contemplation of recommendations from a conference, a pre-sentence report, representations made by counsel, and "any other relevant information before the court" (*YCJA* 2003, s. 42(1)). To illustrate education's standing for law, legal reports for sentencing (that is a pre-sentence

report) are to interview and assess a young person's "school attendance and performance record and the employment record of the young person" (s. 42(2)(vii)). Education is positioned in law as a (potential) tailor of sentencing/law's force. This illustrates education's special influence on law, at the sentencing stage.

As part of the "other relevant information before the court", the successes and failures, past records, and future aspirations of young people in education can be legally relevant. For instance, the law can: observe how "In regard to the subject's education, [she] has stated that she dislikes school" (R. v. Z.W., 2016 ONCJ 490 at para 91); see how "J.D. is described as capable intellectually, with vastly unrealized potential. Previous attempts to have him complete his secondary school diploma with alternative educational opportunities have not been successful as he has failed and/or refused to attend" (R. v. J.D., 2015 ONCJ 550 at para 24); or describe how a young person is "somewhat of a troublemaker, at times, while in school" (R. v. R.W., 2016 ONCJ 325 at pg. 6). Other illustrations pronounce how: the accused "struggled significantly in high school and ultimately dropped out in grade 10" (R. v. R.S., 2015 ONSC 3607 para 12), or the accused "does not like school and skips to hang out with his older peers" (R. v. N.E., 2015 OJ. NO 7086 at para 64). These examples illustrate law's observation of conflict or failure in an educational environment, which becomes legally communicated as one of many factors worth discussing at sentencing.

To further illustrate, the depth and detail of the link with education may paint a portrait of the past. For example, it can be legally observed how:

J.D. was suspended from school for sending threatening messages over Facebook. His vice principal found a hammer in his backpack at school. J.D. has been diagnosed

with Attention Deficit Hyperactivity Disorder (A.D.H.D.) and is currently taking medications to treat his symptoms (R. v. J.D., 2015 ONSC 550 at para 26).

Or in another case, the young person:

... did not do well in school. He was suspended in 2005, at age 10, for “conduct injurious to others.” .... P.J.'s performance at school deteriorated further. He did not like high school and he stopped attending for several months in grade 10. This pattern continued in grade 11. He would get up in the morning and leave home, as if he were going to school, but he was in fact skipping school with his friends. He was suspended in 2012 for “illegal drugs.” He completed only one course in grade 11 and two courses in grade 12. He stopped attending school altogether in 2012 (R. v. P.J., 2016 ONSC 3061 at para 19).

These instances of law’s observations of education point out past failures with education or tenuous achievements, making it legally relevant for law to observe such failures. Education becomes one of the considerations worth chronicling when sentencing.

Law’s observations of education are not always about failure. Some young people can be seen to have transformed. For example, one young person was legally observed to have: “over the past eight months Mr. S.C. has applied himself at school and in the community where he has demonstrated leadership qualities” (R. v. S.C., 2015 ONCJ 584 at para 15). And, illustrating the possibility of doing well in school law chronicles how:

Before his arrest, and over the course of the last year while on bail, J. attended [Named] Secondary School where he earned relatively decent grades. Ms. N. B., a child and youth worker at the school, describes J. in very positive terms. She reports that he was a good student who was well regarded by other students and teachers. J. never had any difficulties with attendance nor did he ever have any disciplinary issues at the school (R. v. J.L., 2016 ONCJ 594 at para 35).

This same young person received an award at graduation for overcoming “difficult personal circumstances in the process” (R. v. J.L., 2016 ONCJ 594 at para 36). These connections with education pinpoint education as an indicator of past success or failure.

Interestingly, the lack of failure in education may move beyond historicizing conduct to capture culpability. For example, in a case of sexual assault and sexual interference of a paternal cousin it was described how: “during this period he grew from a young boy of thirteen to a mature youth of seventeen. He was an intelligent and capable student, and he knew what he was doing was wrong, yet he persisted” (R. v. H.(D.), 2014 ONCJ 254 at para 15). So, success in education not only describes legally relevant considerations, because it is legal to legally consider “school attendance and performance” but also nuances legal conversations.

These illustrations show how law makes use of educational information. This reflection not only illustrates how law can observe its environment (observing education in the context of sentencing) but at the same time it shows how law paints a picture about a young person’s past. This historicizing accomplishment looks to the past to help with the current task. This surveying of the past is also present in the final observations of education made by law: education as a canvas to observe transitions/changes.

Finally, law can also observe transitions/changes in education. This adds to the success or failure narrative. So legally, this is an observation of law, which makes educational influence possible. In some instances, custody may be a changing point in the life of a young person. It may be that the contact of a young person with education is a litmus test for the future.

Descriptions of change are explained legally when the court observes how there was a transition from deteriorated school performance where: “He did not like high school and he stopped attending for several months in grade 10. This pattern continued in grade 11. He would get up in the morning and leave home, as if he were going to school, but he was in fact skipping school with his friends.” (R. v. P.J., 2016 ONSC 3061 at para 19). But then, when in custody, there is a tide change. The court goes on to describe how:

All the youths who are in custody at RMYC are expected to attend school each day, although it is not compulsory. P.J. did attend school at RMYC and he completed all of his grade 12 credits, receiving consistently good marks of between 78% and 92%. His teachers at RMYC rated his learning skills and work habits as either excellent or good.... P.J. was clearly proud of his success in completing high school at RMYC (at para 21).

The transition to educational success is also described as one of many possible mitigating factors. For example, legal communications note how there was: “some success while incarcerated, including his high school education.” Law goes on to describe how: “his academic achievement was strong across most domains of academic functioning (reading and writing), with some weakness in math.... C.S. has received a number of certificates of positive behaviour which speak glowingly of his commitment to education and his respect for staff and other students” (R. v. C.S., 2014 ONSC 4362 at para 28). Law’s observations of transition and the importance of education are also noted when “prior to this offence W.R. had not shown much interest in school, with the assistance of a [social] worker he enrolled in a co-op program at D. Secondary. He has completed 14 credits” and “W.R. advised that he would like to complete secondary school and attend college” (R. v. W.R., 2015, ONCJ 441 at para 18). Or, in the case of R. v. T.C.J., (2015 O.J. No.

3731 at para 97), changes in educational success are captured when it is described how the young person:

began grade nine at [named] High School, but his attendance there was brief because he was suspended for assaulting another student. After that, he transferred to another [named] high school to complete his first semester of grade nine.... His educational records [...] indicate that he was pleasant and respectful in class and participated well. He showed a positive attitude, demonstrated mutual respect for his peers and followed classroom expectations.

And, another tide change is described when:

Most importantly J.D.S. utilized his time at the [correctional] Centre in order to get high school credits. He had absolutely no credits when he walked in, in September of 2010. He now has 22 or 23 credits. The worker at the centre indicates that J.D.S.'s work at school is incredible, the math that he is doing is second to none, he excels in school, he likes the routine. All reports indicate that he completed this high school diploma in December of 2013 (R. v. J.D.S., 2014 ONSC 228 at para 11).

In yet another instance, a young person is recognized for having “participated in some programming and did complete his high school education”. On the other hand, his attitude while in custody is noted as being both positive and negative. He has been described by staff as a “skilled behind the scenes manipulator” who tries to run the unit in which he is housed” (R v. S.B, T.F., and M.W., 2014 ONSC 3436 at para 21). Similar transitions, or change moments are legally noted, for instance where one youth:

[...] was suspended from school on three or four occasions. On one occasion, he was suspended for talking back to a teacher; and, more recently, he was suspended for fighting. That incident led to a 20 day suspension, which he was in the midst of serving when he was arrested and incarcerated. Since his incarceration, T.C.J. has taken his studies more seriously, apparently recognizing the importance of educational achievement to the realization of his life

goals.... [H]e has continued to attend school and apparently excelled in his studies.

T.C.J. has now completed 14 high school credits, and is presently working on completing his 15th. His grades in the courses he has completed are rather good [....] [H]is teacher indicates that he is, “a polite, independent student who shows initiative by starting his work promptly when he gets to class” and she indicates that he “will complete work back in the unit in preparation for unit tests or exams” (R. v. T.C.J., 2015 O.J. No. 3731 at para 61-63).

The transition towards excelling in education comes to be legally observed in the sentencing process. The law is able to canvas the past and use attendance and performance at school to tell a story about transformation. Interestingly, law observes transformations not just in formal assessments and scores, but educational performance in a broad sense of respect, interactions in school, work ethic, and future aspirations.

In addition to legal observations of success, failure, and transitions in education, law can observe impressive accomplishments in education. These accomplishments are legally articulated as part of sentencing (that is a consideration of force) and part of what can be seen as mitigating. There may be transformation and success when: “W.R. has worked hard toward rehabilitation since this offence. He has acquired more school credits, and *achieved an impressive work record, a record of the type I have not seen in the sentencing of other young people*” (R. v. W.R., 2015 ONCJ 441 at para 26, my emphasis). In a different case, a young person who was rendered paraplegic as a result of the offence for which he is being sentenced, is excelling in school. Law observes how the young person is: “close to earning his high school diploma and has achieved excellent marks in his courses. S.K. has expressed an interest in pursuing post-secondary studies in either computer engineering, mechanical engineering, or automotive engineering, either at Waterloo or UOIT in Oshawa” (R. v. S.K., 2015 ONSC 7649 at para 17). And more so,

the achievements are noted that: “despite S.K.’s physical challenges, he has applied himself diligently to his studies, obtaining the following grades in Grade 11 courses: University Computer Science (98%); Information and Communications Technology Business 93%; Geography 80%; Grade 12 University Function Mathematics 86%; Grade 12 University Computer Science 96%.”

These illustrations clarify how law can be influenced by education and how education can be one of law’s many reflections/considerations. The legal observations of education illustrate law’s concern with painting a picture of the past for youth to select the appropriate amount of force for law. These modifiers show where there is success, failure, transition or an impressive accomplishment, and showcase the influence that can be observed by looking at the links between social systems.

#### Education as law’s work: Education as a site of crime, complainant, investigation

Education also provides a space for law’s work, thereby connecting law and education in a way that is different from successes/failures/transitions. The connection is observed in case files and common law where, education is the space where law observes and potentially applies its distinctions. Concretely, law is influenced by education to address criminalize(able) conduct in schools. Returning to one of my opening assertions, this is where Teubner’s (1991, 135-136) *contention about systems doing more because they are linked becomes crystal clear and to paraphrase: “law, undisturbed by the educational value, creams off the value of education’s operations that create work”* (my emphasis).

There may be incidents where police are contacted which initiate legal observations. But, education cannot guarantee how law will observe education, it can

only provoke/influence it. Legal cases illustrate how law can be influenced by education by making work for law. For example, law can describe how the Vice Principal observed:

Two males by name [Charlie and Luke] with a gun that at first glance [she] thought was real. [The] VP ran out and yelled at the accused, continuing to think that it was real. As she got closer, she observed [Charlie] and she was yelling at him. He stated “its fake, its fake” the continued to walk with Luke bringing the imitation firearm up to eye level, pointing it across the street at the houses and then turned around and waved it at the school back and forth. As fellow students were out in front of the school, they were scattering, as they also believed that the gun was real. As the VP got closer, [she] saw that it was fake and instructed [Charlie] to give it to her, with him laughing, putting it down in front belt/ front part of his pants, into his belt area, and then pulled it out again... (WPS Non-EJS Case 5).

This legal observation of an incident initiated at school resulted in 12 months’ probation, 4 day suspended custody sentence for pre-trial detention, a \$100 victim fine surcharge, and a three year prohibition from firearms. Other legal incidents observed in education may result in nine months’ probation after an assault causing bodily harm, and a breach of sentence conditions, probation, and an undertaking. In this instance, two students engaged in an “exchange of words over a comment that was made toward a mutual female friend” and later over the lunch hour, a “pushing match ensued” where both:

...punched each other until [Charles] tripped and took [Sonny] to the ground with him. [Sonny] began biting the left pinky finger, at one point, indicated that he was chewing on it. The teacher pulled the two boys apart, [they were] brought down to the office. [Charles] left school property and was later treated at the Hospital emergency department, having pieces of hanging flesh trimmed from his bite wound (OPA Non-EJS Case 7).

In another instance, threats shared via text messages were reported to police, where law saw education as a source of work. This incident was reported by a vice principal after a student came to him saying that she was threatened. Police observe

education's observations of messages which uttered: "you're not just fucked your dead (sic)" and "I'm going to be be the shit of of you tomorrow (sic)" (WPS EJS Case 9). In this instance, police spoke with a young person and his mother, ultimately warning them about the criminal offence of uttering threats. So, no criminal charges are laid, but the threat of law's force in the future and engaging a parent on a young person's conduct is part of how education influences law. Similarly, a principal contacted police because of "two females fighting over a boy". While the female was formally warned about criminal harassment, law's force was threatened after law observed texts stating "if I ever see you again, I swear I will beat the fuck out of you and also I'm fucking in love with him and if you do anything again, you'll be dead" as "a criminal offense of utter threats and reasonable probable grounds exist to arrest and charge her for the said offense" (OPA EJS Case 30).

In a different instance, police may observe the criminal offence of causing a disturbance after a teacher was "drawn out of the class by loud yelling" and "attempted to stop the accused from doing [running down hallway] so as it was dangerous to others, then the accused repeatedly ignored her request stop, became aggressive, [and] the accused shouted loud obscenities in her face." The accused "continued to yell and scream as she left the area" leaving the teacher "deeply affected by what transpired" (OPA EJS Case 4). Or, diversion may be selected by law after school reports to law how a student "attempted to steal money from a teacher's coat" when a student was "caught by another teacher to be going through the coat pockets of the teacher's jacket which had been left hanging, unattended, in the classroom" (OPA EJS Case 26).

These illustrations show how education provides a site for law's work where law may or may not be influenced to also observe. Law makes observations based on observations made by education. By pointing out that not all people are charged and not all are diverted, I show how not all observations are subject to law's punishment. The possibility for different observations allows me to reveal how there are legal selections that are made based these law's and education's simultaneous observations. So education cannot guarantee how law will observe. What education provides law, in some instances, is a diet for actualizing law's capacity to observe and define incidents (that just happened to take place in school) as criminal. To say it differently, education offers incidents for law, which may or may not be seen as the legal/illegal. At one moment in time, both education and law may see the incident in similar terms – for instance there's a problem that there's a gun at school or there's a problem that someone has been harmed and needs to seek medical attention – but it is impossible for education to actualize the illegality of such conduct (see also Nobles and Schiff 2013b).

### Education as legally coerced

Finally, law makes observations of education when law sets education as a condition of force. Concretely, conditions of a sentence can require or coerce participation in education. As a condition of force, there is a link between law and education in the sense that education's existence makes legal selections possible. That is to say, without education, law would not have the option to have education as a requirement of force.

In law, making education part of force can be actualized in the requirement to: “attend school or any other place of learning, training or recreation that is appropriate”

(*YCJA* 2003, s.55(2)(e) and s. 105(3)(c)). This legal condition may be selected for a term of probation or a term of conditional supervision. In these instances, the influence of education on law is nuanced from those outlined above. Law is still observing the environment to translate educational issues into legal ones and in so doing, law is making selections by crafting the legal requirement to attend school, which rests on the assumption that education exists. This is also different from the links between law and education above as legally coerced is inherently forward-looking.

Using education as a condition of force may be seen when youth are legally required to: “Make reasonable efforts to attend school or seek and maintain employment” (R. v. W.R., 2015 ONCJ 441 para 36); “... either attend school full-time or take training full-time, or seek and maintain gainful employment on a fulltime basis” (R. v. J.L., 2016 ONCJ 594); “Attend an education program approved by his probation officer” (R. v. K.E., 2015 ONCJ 68 at para 48); “attend school or work as required” (R. v. D.P.M., 2015 OJ No 4448 at para 41); “either attend an educational program or to seek employment” (R. v. C.(J.), 2014 ONCJ 705 at para 37); or “attend school or an educational program” (R. v. D.A., 2016 ONCJ 637 at para 27). As such, education not only impacts law when it comes to pointing to what can be legally considered (see legal tailor/tweaker theme), but in the context of selecting scope, scale, and character of force.

Education is also a check on law’s force. This check applies in two different contexts. First, after six months, a youth sentence can be reviewed (*YCJA* 2003, s. 59(1)). If a youth sentence is “adversely affecting the opportunities available to the young person to obtain services, education or employment” law can observe the hindrance or the help that its force creates in educational opportunities. This offers a reflection of educational

barriers or gateways created by law's force. At the same time, education influences force when community service, personal service, or a non-residential program is the sanction, the sanction cannot "interfere with the normal hours of work or education of the young person" (*YCJA* 2003, s. 54(7)(b)). Just like above, this legal condition for force is capable of being aware of the consequences force may have on accessing/engaging education.

#### Summary: Law observing education

Looking at how law observes education provides a nuanced addition to the sociology of youth punishment and to sociological inquiry curious about operations between and within different social systems. While others assess how law impacts education (or how criminalization logics impact education), the field is silent on how education can influence law. My discussion above addresses this silence by documenting education's influence, which is concretely evidenced with education as a sentence tweaker by illuminating success, failure, and transformation, with education as a site for law's work, and with education as a condition of force. My empirical description offers new insight, adds to my theoretical explanation of social systems being able to observe each other, and illustrates the influencing capabilities of punishment. The discussion also adds to the literature on punishment by showing how education can influence the quantity and quality of punishment.

#### **Discussion and conclusion from education's engagement with law and law's engagement with education**

In social systems theory, the environment can irritate the system. This irritation process is an important inter-systemic feature at work when it comes to youth punishment. The intra-systemic features of youth punishment in the chapters above shows how punishment plays a role as an internally crafted resource for education and

law with legal and educational programs of punishment. But at the same time, systems can point at each other or, make use of the norms of another system on their own terms.

Law and education can select certain features, or be influenced, based on what it sees to be relevant in their respective environments. In a sense, punishment provides an internal structure to facilitate the influence of education on law and law on education – my illustrations show how systems are influencing and influenced by their environment. Having explored education as part of law’s environment and law as part of education’s environment, exposing these inter-systemic features clearly open up paths for future analyses of other situations that can influence or other systems that can influence law or education in the context of punishment.

This chapter allows me to highlight how punishment creates opportunities for links between systems. My analysis of law in education illustrates how education uses law (and punishment) as part of education’s promise of safety/partnerships. And, my observations of law illustrate how law uses education (and punishment) as part of crafting legal sentences, making work, and as a condition of coercion. As such, punishment contributes to the coupling of education with law and law with education. Or, punishment provides a selective coordination of law and education with its environment, allowing systems to consider its environment’s possibilities/promises/objectives.

By observing each other, law and education are able to do more in their respective social systems. My empirical material shows how education is able to diagnose/identify problems, create a partner, and have a sanction to threaten or actualize with the linking of law to education. And, when education is linked to law, law is able to consider success, failure or transformation, discover a source of work, or create conditions for coercion. In

both instances, law and education can increase their own complexity and increase selections in their own spheres.

When law and education can influence each other, it rethinks the colonizing of one system over the other and rethinks intersystemic points of contact. It also provides an empirical and theoretical alternative to understand punishment, it is able to “separate and link system[s] at the same time” (Febbrajo 2013, 5). The linking of systems with punishment shows how it can be a “common platform” to structure communications to and from systems. These links, as Baghai (2015, 125) describes, allow systems to “take certain features of one another into account and rely on them for their own operations”. This is my empirical and theoretical contribution. Punishment has this linking/coupling capacity with law and education.

For the sake of illustration, think about the multiple systems that can offer communications about punishment: law can talk about punishment in terms of illegal/legal sentence of a fine; economics can talk about punishment as payment/non-payment of a fine, or media can talk about punishment in terms of newsworthy/not newsworthy. From the perspective of social systems theory, punishment for law and for education does not limit them from looking at their surroundings (that is, their environment) to see what else it perceives to be relevant. In all of these instances, systems communicate about and observe punishment in their own terms. Both law and education operate undisturbed by the value the systems see in each other. This enables me to present a new lens to see not only punishment within systems, but also between systems in new and theoretically meaningful way.

My discussion also adds to systems theory. Existing examples of structural coupling/influence have shown how something like the contract can link the economy and law, or the event of a wrongful conviction can link law and the mass media (Nobles and Schiff 2013c). When punishment is seen as an illustration of structural coupling, a new empirical area is revealed to assess links between law and education. When punishment becomes and is used as this point of reference for inter-systemic communications/connections, punishment can be seen as a hypertext (Febbrajo and Harste 2013) that makes available different interpretations and different selections in different social systems. It could be said that this analysis points out new forms of the legal observations of education and new forms of the educational observations of law, and these new forms are made possible without an a priori positioning of which one prevails (see Febbrajo 2013, 9).

In summary, I am arguing that punishment provides an intersystemic link between law and education. This not only serves to distinguish them, but it also links them. This is not, a point-to-point connection between law and education. Rather, the couplings of intersystemic structures use a common platform of punishment for mutual exchanges of communications between the systems.

In closing, my discussion liberates steering theses from its problems (of perspectives), shows the inter-system importance of punishment, and illustrates the gap and directional problem between punishment in law and in education (law does not just impact education but education impacts law). I have shown a complementary narrative: punishment provides a diet across systems, education provides the diet of success, failure,

transitions, work, and conditions for law in the context of punishment and law provides a diet of partnerships and safety for education in the context of punishment.

## **Chapter 9: A Sociological Account of Youth Punishment**

In this dissertation I examined punishment in law and in education. I began my study disappointed by the state of understanding youth punishment and I used this as an opportunity to forge a path to foreground punishment in law and education. My research asked: 1) how are youth punished in the systems of law and education, and 2) in the context of youth punishment in social systems, are the social systems of law and education linked, influenced or coupled, and if so, how?

Answering these questions moves me beyond a disappointing state of understanding youth punishment. I have been arguing that youth punishment is both something that is distinctly educational or distinctly legal, but at the same time punishment in law and in education can influence each other. I have demonstrated how there are peculiarities of youth punishment in law and education and I have shown unique paths linking law and education. This has allowed me to make additions to the existing narratives about how youth are punished, in what ways youth are punished, and how law and education are sites of youth punishment. My observations allowed me to detail the norms of youth punishment and the norms of youth behaviour in law and education.

To capture and review my key findings and contributions, I will list and describe seven key insights coming from my study. My goal is to engage both the substantive findings and the theoretical contributions. I am particularly keen to clarify the insights from this research when it comes to observing sites of punishment, considering both the intra-systemic and the inter-systemic features of punishment, showing what is observed

when studying punishment, and offering theoretical variety. After reviewing my core insights, I will end with a discussion of limitations and paths for future research.

**Insight one: Windows to observe punishment:**

I would like to reiterate the value of using law and education as windows to observe youth punishment; I have been able to reveal and clarify spaces for punishment. This reaffirms pursuits to study punishment beyond the criminal law (e.g., Tonry 2011) and shows how different social systems can be sites of inquiry on punishment.

By focusing on the systems of law and education, I have been able to engage with the distinct penological features of these systems. When I expose the elements of youth punishment, I engaged with norms of punishment and the norms of behaviour in law and education. By using law and education as windows to observe manifestations of punishment, my research exposed the range of behaviours and punishments created in law and education. For example, when it comes to the norms of behaviour, I have shown how law observes “offending behaviour” (*Youth Criminal Justice Act* 2003) or “inappropriate behaviour” (*Education Act* 1990). This opens up a suite of disappointed expectations ranging from threatening to inflict harm (Appellant v. Toronto Catholic District School Board (Education Act s.311.7), 2013 CFSRB 23; WPS EJS CASE 9; WPS EJS Case 8), vandalizing or stealing property (OPA EJS Case 12; OPA Non-EJS Case 23; WPS EJS Case 10; WPS EJS Case 21) or causing serious injury or death with some form of violence (R. v. A.S., 2016 ONSC 3940; R. v. C.N., 2016 ONCJ 582). These norms of behaviour do not operate on their own as they provide a path for law to communicate programs of punishment.

Education observes behaviour that is aggressive, aggressive and repeated, disrespectful, or inappropriate. And unlike law, education also specifies behaviours that are positive, appropriate or inclusive, acceptable or respectful, and responsible. Education's norms of behaviour capture interpersonal, property, and possession/consumption issues ranging from not meaningfully communicating with staff (ATIP: Case study six), to bullying, to shoving, slapping, punching, kicking, pinching, scratching with blood, biting, and anything with bodily fluids, to smoking on school property, to having a laser pen, and using "things that move" inside the school. As such, I have been able to clarify the creation of behavioural norms in education and in law to address questions of where youth punishment unfolds and in relation to what norms.

I also have been able to show the peculiarities of punishing in law and education with *programs of punishment*.<sup>59</sup> These programs set a variety of considerations and goals for the system's selection of punishment. The programs in law showed how law uses: the character and possible consequences of youth conduct; guarantees of protection/intervention; the fool or the fiend, and the factors; and accountability. These features are law's own selections. My chapter on punishment in education showed a different set of programs. Education relies on patterns of behaviour where behavioural classifications are based on wide and deep nets, locality of behaviour, school climate, and progressive discipline. These features are education's own selections. In both instances, I have shown the distinct penological considerations in education and in law.

When I detail the windows to observe punishment, my research not only reveals how systems can be observed, but how punishment can be studied communicationally.

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<sup>59</sup> I have decided to engage more exhaustively with the norms of punishment below when I elaborate on the intra-systemic features of punishment.

My approach is distinguished from those research programs which focus on the affirmative or expressive qualities of punishment as I prefer to see how punishment does not exist outside of the systemic communications that constitute it. So, to study punishment communicationally is not to prioritize one system over the other, as communicative features of punishment are system specific. I have privileged and exposed the different communicative elements of punishment in law and education. To serve as a reminder, when I refer to communication, Luhmann (2002, 106) explains how: “We can think of society as the all-encompassing system of communication with clear, self-drawn boundaries that includes all connectable communication and excludes everything else.” I have been showing what is included and excluded in the systems of law and education when it comes to punishing youth.

#### [Insight two: Intra-systemic features of punishment and moving beyond what over-determines punishment](#)

Perhaps the most important achievement from my study is unearthing the peculiarities of punishment in law and education. My sociology of youth punishment worked to show and better understand “the reflection work carried out by” (Luhmann 1994,56 as cited in Garcia 2015, at para 3) the legal and educational systems themselves. When I observe this reflection work, I can reconcile the short-sightedness of punishment being impacted/over-determined by a host of other forces.

When thinking about the programs of punishment in education and the programs of punishment in law that I outlined above, it is helpful to have an overarching rationale for what these offer. I find it productive to describe these as part of the interpretive project of understanding youth punishment. In this way, and like Garland (1991, 157), I am not aiming for a grand synthesis or overarching model of punishment, but I am trying

to “investigate how we might most usefully utilize the range of perspectives and vocabularies through which punishment can be variously understood and to develop a conception of punishment that can ground this multiplicity of interpretations and show how they interrelate.” My analysis shows how the “multiplicity” and the “interrelations” involve displaying and deepening the understanding of the inter- and intra-systemic elements of punishment.

Through the *programs of punishment* I have illustrated how law and education are building their own reality (Dubé 2017) and this informs my analysis of the intra-systemic features of punishment. Specifically, I have been able to show the content needed for punishment to be legal or for punishment to be educational (King and Thornhill 2005). These programs are revealing of some of the most “hard core” (as cited in Valois 2013, Chapter 4, para 21) of the system by offering up the considerations and goals for punishment.

For example, I have shown how punishment in law and education can both threaten and actualize sanctions, they are able to mobilize their own communications based on what is legally important and what is educationally important to create and maintain norms of punishment. This is seen when law is concerned about protecting not only the public or students, but also the young person. The internal constitution of punishment is also seen in the educational program of punishment which foregrounds what I referred to as the ABC’s (ABC: Antecedent, Behaviour, Consequence), the territoriality of the behaviour, and progressive discipline.

In education, what I described as the ABCs are part of intra-system dynamics of punishment in education. The ABC’s serve to show how education captures not only

student behaviour but events related to it (leading to the behaviour or following the behaviour) and these are important for education when considering punishment. The ABC's illustrate how education is dialled into observing personal, environmental, and contextual considerations. These considerations in education are in stark contrast to zero tolerance, increasingly punitive, and general exclusionary penological tactics that have been identified in existing research on education's punishment.

In education, the territorialisation of behaviour is another peculiarity of education's punishment. This allowed me to clarify how education can punish for behaviour "whether they are on school property, on school buses, or at school-related events or activities" or if the behaviour "will have an impact on the school climate". Education is not only able to define spatial boundaries where behaviour can be observed but, it can create opportunities to threaten or actualize sanctions based on the consequences of behaviours.

Another peculiarity of punishment in education is seen with progressive discipline. Progressive discipline (PD) provides a whole-school approach to address misbehaviour that uses interventions, supports, and consequences. PD provides the gateway to study the forms and intensities of punishment in education notably because progressive discipline gives something to education to threaten or actualize beyond a suspension or expulsion. It does this by claiming to be non-punitive and meeting the needs and skills for individual students by providing accommodations, referring to anger management or substance abuse, referring to counselling, assigning detention, withdrawing privileges, doing testing and assessments, providing counselling or mediation, or referring to a specialized agency. These elements provide education with a

virtue of not selecting punishment based on excluding and show how education has the ability to select among multiple sanctions.

I also exposed the intra-systemic features of punishment in law when I documented how programs of punishment in law operate in and through: the character and consequences of conduct; the promise of protection; the fool or the fiend, and the factors; and accountability. For example, I have empirically demonstrated how law observes the consequences emanating from breaching behavioural norms and at the same time, law is capable of seeing the consequences from law's potential. So, when it comes to punishing, law can consider how a community and a family are "shattered and devastated" by the permanent loss of a professional, a husband, a father, and a brother (R. v. S.K., 2015 ONSC 7649 at pg. 15). At the same time, law can see the consequences coming from its potential in the context of publishing identity, having a criminal record, and imposing custody.

### [Insight three: Punishment connecting law and education](#)

When I showcase the peculiarities of punishment, I am not preoccupied with presenting silo-like descriptions of punishment in law and education. Indeed, my approach began with a concern and a promise to engage the intra-systemic and the inter-systemic features of punishment in law and education. My work has been able to show how law uses education on law's own terms and vice versa. This account provides a radically different analysis of punishment by highlighting influences or the points of connection between law and education.

My final substantive chapter showed how education makes use of legal norms and law makes use of education. This allowed me to show how punishment provides

important inter-systemic connections. I described how education was able to address problems of safety by seeing law as part of its arsenal of maintaining school safety. I also showed how education was able to confront educational concerns by seeing law as a partner. When it comes to law, law is able to make use of education's observations by using educational success or failures to *tweak* sentences, by using education as a space for law's work, or by using education as part of law's coercion.

These inter-systemic features address an important empirical issue related to the direction of influence. My review of the literature clearly illustrated how law/criminal justice logics are impacting education with the criminalization of school discipline theses. However, what remains unknown and underdeveloped is how education can impact law. Unthinkable and unexposed in current empirical analysis are instances where law is impacted. To say it with systems theory, influences on law are unthinkable.

As I have demonstrated empirically how law productively uses education and vice versa. This confronts the direction problem, asks important questions about connections, enriches our understanding of punishment, and puts more frontally the role of social systems. I am therefore able to debunk the uni-directional focus on the elements that over-determine punishment to the benefit of emphasizing complexity, contingency, and multi-directionality. This not only interjects in conversations about steering but it paves a path to ask important questions about other sources of influence in the inter-systemic analysis of punishment. Answering these questions is obviously for another project.

#### [Insight four: Observing punishment and clarifying a concept](#)

Another key insight pertains to the analytical strategy I used to observe punishment across systems. By using power, force, and influence as a set of distinctions

to guide observations, I have offered a strategy to observe punishment, I have moved the analysis of punishment beyond focusing on examples of exclusion (e.g., suspension in education or a custodial disposition in law), and I have addressed theoretical redundancies that left the current state of punishment underdeveloped and undertheorized. This is most clearly evidenced with the difficult inclusion of ideas such as diversion and its options (in the case of law) or progressive discipline and its features (in the case of education). So, I have been able to identify more of the possibilities of punishment and what may be selected in the social systems.

#### *Insight five: Offering interpretive variety*

My dissertation challenges the dominant interpretive frameworks used to study punishment and moves beyond the gloomy state of theorizing youth punishment. Consequently, I have deepened the current understanding of youth punishment, through what I have called the programs of punishment and coupling abilities of youth punishment in law and education. As my research demonstrates, there are peculiarities of punishment in two social systems and punishment can connect social systems.

I have shown how punishment may not just be something that reflects and is over-determined by social, economic, cultural, and political processes. Rather, punishment is multi-faceted and multi-system. It is multi-faceted in the sense that it can be observed as something that is threatened or actualized, or something that influences. It is multi-system, which in this study was law and education, in the sense that different systems have different takes, processes, or considerations and goals when it comes to punishment. This has allowed me to show how different systemic contexts can be seen as distinct and important sites where punishment unfolds.

### Insight six: Researching law and researching with law

Another insight from my research touches on some of the practical strategies for getting access to data. I described how I was able to do research with law (ATIP and legal application for case files) and do open-sourced data collection to gather an enormous assemblage of documents, training materials, cases, PowerPoint decks, and case files on the punishment of youth. This allowed me to add to the body of work on doing access to information requests. And, doing research with law allowed me to engage the legal system and its functionaries as audiences of criminological and sociological research (Piché 2016). When I engage these functionaries – maybe I can call it “public sociology lite” – I am starting a conversation about the legal system as an audience of sociological research that is ghostly silent in current public-oriented conversations.

My descriptions and strategies for translating the need for sociological research into legal rights to access data are important take-away messages. I have provided some practical strategies for researching with the audience in mind. And, using access to information in a way that strategically gets list of records is another important take-away for doing research with the audience and process in mind.

### Insight seven: On the usefulness of social systems theory

There remains an elephant in the room – what is the use of the complex machinery of systems theory in understanding punishment? While I do not want to restate my critical reflections from above, I would reiterate how systems theory provided a language and a theoretical apparatus to mount the critique of current studies of youth punishment. So, I have gone beyond saying that it is theoretically flat (as in Phoenix’s work) and this is what makes systems theory useful.

Part of my project explores the intra-systemic features of punishment where I am trying to put law and education back into the sociological study of punishment. I am reminded of where Cotterrell (1998, 175) decried the silencing of law in sociological studies because law disappeared and the object was reduced to sociological terms. Indeed, the very notion of intra-systemic features of punishment provides a solution to this concern. By foregrounding law and education, I have been able to highlight a legal point of view and educational point of view in a sociological study of youth punishment. And at the same time, I have been able to illustrate how education is not colonized by law and law is not colonized by education. So, systems theory is useful because of what it helps me observe.

Systems theory has productively allowed me to show how punishment exists in law and education but not as something that is predefined, in terms of form, content, and substance. Rather, punishment stimulates decision-making/selections by way of goals and requirements. This brings me to programs. The programs have allowed me to empirically demonstrate and understand how law and education play a role in shaping punishment. This is the value from my perspective. This is an empirical achievement and this makes systems theory inherently useful.

Luhmann described how: “There are few bases for being able to radically change whatever society one is living in. There are many bases for making better use of its possibilities” (Luhmann 1992, 182). In this sense, there are opportunities for creativity and thinking differently about punishment by realizing that the goals and requirements that I identified are not the only ones. The puzzle then becomes one of asking: how can education and law draw on different notions to punish differently? This can allow me to

expose how communication provides a gateway to observe “structural patterns that might otherwise be overlooked” (Hendry and King 2015, 399) by simply asking about the internal routines/considerations/goals of systems (Dube 2010). This also makes systems theory useful but would have to be more fully explored in future research.

Above, I have used theoretical and topical outputs from my study to show how it is useful. However, the very idea of useful is a little tricky to define. Mostly, this is because I do not have an easily exposable and externally valid definition of useful. To address usefulness, I can, in systems theory fashion, highlight how the very question of usefulness depends on the observer. So, I can see my work as useful because I have instigated debate, overcome problems in observing punishment, and described inter-systemic and intra-systemic features of punishment. However, I remain humble about these achievements and insights.

While I am left tackling questions of usefulness with the dismissal of interventionist techniques with systems theory, it does not close off the ability to continue to observe systems and interpret what is taking place and this makes my work useful. And, although disconnected from interventionist strategies, I am not closing off possibilities for change. Rather, I can rest on the premise that there is no difference between interpreting the world and changing it (Moeller 2012). As I close this paragraph, the world is different. As I finish this sentence and summarize my contributions to the study of punishment, the world is different. How to analyse and evaluate this difference does not go away.

Finally, one way of describing usefulness is to answer a policy question. Research would be unquestionably accepted as useful if I show where punishment can be scaled

down, where it may not be necessary or more harmful to punish, or where the mechanics of punishment can address concrete problems related to gangs, Indigenous overrepresentation, the over-use of custody, the inaccessibility of diversionary measures in the north, or violence. However, with this narrow conception of usefulness I want to show how I have two options: transform findings so it is useful and provides solutions; or stay detached and analyse from the perspective that it is not a bad or wrong thing to interpret social events in multiple ways (King 2006). In either case, there is nothing in systems theory that stops the sociologist from trying to irritate or influence systems (Dubé 2017).

Perhaps the most obvious point of translation coming from this research would be to investigate how, under what conditions, and with what effects law and education can more carefully observe the role of history/biography in the programs to punish. Both law and education, in their own ways, touched on how there are a suite of factors to consider that tell a biographical narrative. In education this was apparent in the program of the ABCs and the factors and in law, this was apparent in program of the fool and the fiends. And, in addition to transforming findings, systems theory provides a platform to ask important questions of social systems. For example, when it comes to what has been revealed by structural coupling, it can be asked: Is only law seen as a partner and what other social systems influence education? Or in the case of law, is only success in education seen as a *sentence tweaker* or are there other social system achievements that are valuable for law?

## **Limitations**

There are some analytical limitations to my study. The first analytical limit concerns the scope of my study. I have limited my analysis of punishment to two jurisdictions over a three year period. So, I focus on the present to the detriment of a historical, but equally important, account of youth punishment.

Another limitation in this study is the absence of directly comparable data between law and education. While I exposed and explored this concern above and argued that this is partly explained by the differences in the systems, where the differences help justify the need for an approach that captures systemic differences in the operations of punishment, I cannot overlook the challenge at hand. I do not have the stories of violence, bullying, and other disappointments of education's behavioural expectations to include in my analysis. Consequently, the lack of countless examples of "real" incidents in education keeps my analysis closer to the level of "punishment on the books" in education.

However, my approach shows how decision-making/selections in education are formed and facilitated in a way that keeps it within the boundaries of the respective systems. Confronting this analytical challenge could lead to research that uses the lived experiences of decision-makers with interviews, focus groups, ethnographic approaches, or archival strategies. This promises to enrich the narratives and decisions of punishment in education.

## **Future research**

If there are going to be challenges and debates about youth punishment, there is a continued need to study the locations, forms, and consequences of punishment. Future

research can expand spatially, temporally, and topically. So, exploring intra-systemic and inter-systemic features of punishment across different jurisdictions, with a historical component, and with different systemic referents would be a logical expansion of this project.

Future research may pose questions about how youth are punished in other social systems and how these other systems are linked. This continues the pursuit of inter-system and intra-system investigations. Specifically, I have in mind studies of youth punishment in the home, in sport, in politics, in science, and in mass media. These sites may not only be accessed with secondary data as opportunities remain to engage these systems with interviews, field observations, and/or focus groups. And, studying links between systems provides a novel path to explore system change.

I also remain curious about behavioural expectations. For instance, I am curious about asking how the same event can be observed differently by different social systems. For example, how can a hockey fight be seen as both assault in law or roughing in the game of hockey? Or, how can having a knife at school be seen as a code of conduct violation and a criminal incident? These questions would need more direct access to events/narratives.

I am also left thinking about punishment and its temporal dynamics. By this I mean where punishment begins and where it ends. While my study has been concerned with observing the selection of punishment, I have left unexplored questions about what happens once it is selected, what happens once it is threatened or actualized, when it stops, and what features it takes on between being selected and ceasing. Posing these

questions and unearthing more of the temporal dynamics of punishment, its continuity, or its change could be another path for future work.

My work carves out a space and shows the value in observing the legally and educationally constituted processes of punishing youth. In so doing, I am tackling more directly the problems and possibilities of youth punishment and making more visible punishment that can unfold in both law and education. My study of punishment in law and education calls into question and exposes the different instances of power and force. In exposing these different instances, I am engaging a “framework for the systematic detection, exploration, and mapping of the interfaces, interactions, and interplays of the function systems of society” (Roth and Schütz 2015, 27).

In this context, important questions remain to be asked about how punishment can operate and be observed communicationally in other social systems. And, if I am to mobilize the formula I used here, questions remain about the inter-systemic and intra-systemic features of punishment for youth, for adults, and for specific sub-populations. I have set the table to ask new questions in this area and build upon some of my empirical, conceptual, and theoretical scaffolding in future research.

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