

Cross-Over Youth and *Youth Criminal Justice Act* Evidence Law: Discourse Analysis and Reasons for Law Reform

R E B E C C A J A R E M K O B R O M W I C H *

ABSTRACT

Adolescents who are involved with child welfare systems, either in foster care or under child welfare supervision, across Canada, disproportionately “cross-over” to youth criminal justice proceedings. Virtually all have grown up in poverty; many are racialized or Indigenous; all are marginalized. As youths, and later as adults, they are proportionately more often charged, found guilty, and incarcerated relative to youth who are not or have not been “in care.”. This article critically considers disadvantages “cross-over” youths face under the YCJA. It provides a new, theoretically engaged understanding of how dangerousness and criminality are constructed in official discourses for cross-over youths. It argues that YCJA evidence law compounds the disadvantage of cross-over youth, who are already socially excluded, setting them up for disproportionate criminalization and incarceration. Both with respect to their statements and to documentary records about them, cross-over youth are vulnerable under Criminal Evidence law in ways that youths who reside in their families of origin are less likely to be. Systemic change to child welfare law and policy to focus on early interventions preventing apprehensions in the first place should be promoted. Further, as an interim and partial solutions, this “cross-over” should be addressed through changes to evidence law under the YCJA. We need to revisit the appropriateness and implications of explicit and implicit

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assumptions -running throughout youth criminal justice processes and protections - that a youth before the Court will be able to draw upon parental support.

Keywords: youth justice; evidence law; child protection; children's rights; discourse analysis; Indigenous people in the criminal justice system

I. INTRODUCTION

In Canadian prisons, we are locking up large numbers of marginalized people, and Indigenous people in particular. It is abundantly clear from Statistics Canada data that levels of adult incarceration in Canada remain high. There are massive increases, since the 1960s, in the proportional incarceration rate of Indigenous people, who make up roughly 25% of the prison population, but less than 5% of the Canadian population overall.¹ We also have overburdened criminal courts marred by delays, which can result in the dismissal of serious charges.² While there are well-documented problems with discrimination in the criminal justice system itself, ways in which formal legal discourses are contributing to the problem of over-incarceration of persons from Indigenous and other marginalized groups do not start and end in the criminal justice system.

A crucial entry point of marginalized individuals, and especially Indigenous children and youth, into the criminal justice system, is through the “protective” services provided by provincial and territorial child welfare systems where children are deemed at risk of harm. Relative to other countries, Canada takes proportionately higher numbers of children into protective care.³ It is especially salient for this law journal to consider the disadvantages faced by children and youth in state care, being as it is the *Manitoba Law Journal*, and Manitoba has the highest *per capita* rate of

¹ Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=NheG_hDv> [perma.cc/T3AC-U228].

² Problems with delays in the criminal justice system were made painfully obvious after *R v Jordan*, 2016 SCC 27.

³ Brownell, Marni et al, *The Educational Outcomes of Children in Care in Manitoba*, (Manitoba Centre for Health Policy: June 2015), generally and at 1, online (pdf): <mchp-appserv.cpe.umanitoba.ca/reference/CIC_report_web.pdf> [perma.cc/VD2E-GDE5].

children and youth in care in Canada.⁴ Research and attention should be paid to the glaring disproportion whereby 90% of children in state care in Manitoba are Indigenous.⁵

Statistical study of outcomes for children apprehended into Canada's provincial and territorial child welfare systems reveals that, too often, being taken into child "protection" in fact leads youth into abuse, criminalization, drug addiction, and early death. Indeed, what Indigenous Affairs Minister Jane Philpott has called a "humanitarian crisis" in the child welfare system, with a crushing disproportion of Indigenous children being taken into state care.⁶ Philpott, in November 2018, announced there would be pending changes to the state care of Indigenous children, promising to hand the management of that care over to Indigenous governments.⁷ However, at the time of writing, the precise nature of the coming changes, and any timeframe for their implementation, remain unclear.

Statistical research provides a damning indictment of the life chances of children taken into care. A recent BC study demonstrates that a child in the care of social services in that province is more likely to end up in jail than to finish high school.⁸ Sixty percent of homeless youth become homeless by leaving foster care.⁹ Worse still, a BC Coroners' Death Review Panel found that youths transitioning out of state care were five times as

⁴ According to the Manitoba Department of Families, *Annual Report, 2017-2018*, online (pdf): <www.gov.mb.ca/fs/about/pubs/fsar_2017-18.pdf> [perma.cc/7LD3-HSV8], there were 10, 328 kids in care in 2018, which was 3.6% less than the prior year, the first time the numbers of youth and children in care in Manitoba had dropped in 15 years.

⁵ Manitoba Legislative Review Committee, *Opportunities to Improve Outcomes for Children and Youth* (September 2018), online (pdf) <www.gov.mb.ca/fs/child_welfare_reform/pubs/final_report.pdf> [perma.cc/SMM6-6SQ3] at 1, 4.

⁶ Katie Hyslop, "How Canada Created a Crisis in Indigenous Child Welfare", *The Tyee* (9 May 2018), online: <www.thetyee.ca> [perma.cc/X5FN-7K5M].

⁷ See e.g. John Paul Tasker, "Ottawa to hand over child welfare services to Indigenous governments" *CBC News* (30 November 2018), online <www.cbc.ca/news/politics/tasker-ottawa-child-welfare-services-indigenous-1.4927104> [perma.cc/GVH8-L8F9].

⁸ British Columbia, Representative for Children and Youth & Office of the Provincial Health Officer, *Kids, Crime and Care: Health and Well-Being of Children in Care*, by Mary Ellen Turpel-Lafond & Perry Kendall (23 February 2009) at 7, 12 [Turpel-Lafond].

⁹ Stephen Gaetz et al, *Without A Home: The National Youth Homelessness Survey*, (Toronto: Canadian Observatory on Homelessness Press, 2016) at 47.

likely to suffer premature death, primarily from suicide and drug overdoses, than members of the general youth population.¹⁰

This paper critically considers ways in which the operating logics of child welfare law produce official documents that in turn construct system-involved youths as dangerous, criminal figures. It interrogates how those documentary records, and so those constructions, intersect with the rules of evidence in youth criminal justice, thereby crucially contributing to their criminalization. It looks at how governmentality, or the intersection of power and knowledge in discourse through the organized practices of ‘governmental rationality,’¹¹ or systems or ways of thinking about how conduct should be conducted, operates through the ways youths in care are defined and described in the official discourses of child welfare and criminal records and police charge synopses.

I look critically at a pathway through which those incarcerated in Canada frequently first arrive there. As is discussed below, a disproportionate share of people incarcerated in Canada are under the care and custody of child welfare authorities when first taken into correctional custody, in the youth or adult system. The “Cradle-to-Prison Pipeline”¹² is a major problem precipitating a disproportion of vulnerable, poor, Indigenous and racialized youths from state care into the criminal justice system, and finally into prison.

This paper combines an analysis of evidence law under the *Youth Criminal Justice Act*¹³ with critical consideration of how child welfare systems, in their bureaucratic operating logics, construct “cross-over” youths as dangerous criminals in court records. This explores factors contributing to the over-representation of cross-over youth in the criminal justice and correctional systems, including fragmentation between systems, the construction in discourse of youths in care as a dangerous “type”¹⁴ as an

¹⁰ British Columbia, BC Coroner’s Death Review Panel, *Review of MCFD-Involved Youth Transitioning to Independence January 1, 2011 – December 31, 2016*, (Victoria: British Columbia Coroners Service, 28 May 2018) at 3, 11.

¹¹ Michel Foucault, “Governmentality” translated by Rosi Braidotti in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality*, (Chicago, IL: University of Chicago Press, 1991) 87.

¹² Mary Wright Edelman, “The Cradle to Prison Pipeline: An American Health Crisis” (2007) 4:3: A43 *Preventing Chronic Disease* 1 at 1.

¹³ *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

¹⁴ An especially salient discussion of how language and discourse are important elements of how people end up being labeled and otherwise understood as criminal is provided,

incident of particular forms of bureaucratic governance, and a disconnect between the needs of youths in care for procedural protections in criminal justice processes and their ability to access practical advocates with the potential to help them realize their rights. We need to change the way we interact with vulnerable youths across many systems.

From this analysis, I ultimately argue that change to child welfare systems should be combined with changes to evidence law to remedy this situation. Evidence law, under s.146 of the *YCJA* and elsewhere within the Act should neither explicitly nor implicitly assume the presence of benevolent, involved parents in the lives of the youths subject to it. To deal justly with youthful accuseds, the *YCJA* should open up possibilities for meaningful justice for those already disadvantaged by their inability to access the privilege and support generally provided by a family home.

This article focuses on youthful accused who are taken into the protective care of the state and looks at current developments in the law regarding how youth in care are impacted differently from others by the way evidentiary protections are offered under the *YCJA*. I critically inquire into whether evidence law, as it pertains to youth, specifically through *the YCJA*, the *Charter of Rights and Freedoms*, the *Criminal Code*, and the *Canada Evidence Act* and its protections specifically in relation to children and youth adequately address the situations of cross-over youth. As written, the *Youth Criminal Justice Act*, Canada's law governing criminal proceedings against youths aged 12-17, not only implicitly assumes the presence of parents in the lives of youths subject to its operations throughout, it makes the assumed involvement of these parents explicit in certain sections. This assumption is troubled by the disproportionate involvement of system-involved youths in *YCJA* proceedings: while some of these youth may have parents who participate, those parents are disadvantaged if they do try to become involved in any event. It suggests that law reform should be undertaken to remedy the disproportionate over-criminalization and over-incarceration of "cross-over" youth and that the appropriate reforms should not just be made to criminal law but also to child welfare law and policy.

When adolescents under the supervision of provincial and territorial child welfare authorities come before the youth criminal justice courts as

for example, by Heather Shore, in Heather Shore, "Reforming the Juvenile in Nineteenth and Early Twentieth Century England" (2011), 197 *Prison Service Journal* 4.

accused, they too often lack practical advocacy support to be able to realize their due process rights. At the same time, youths in care are, by virtue of bureaucratic systems of governance in operation in care settings, likely to be constructed in documentary records in ways that are highly prejudicial if admitted into court proceedings. This is especially true when the residential care setting is group care. This paper specifically considers a particular dimension of the ramifications of being “in care” to youth, and that is the absence of practical advocates.

This paper combines critical consideration of doctrinal law with critical discourse analysis to explore how available evidentiary protections set forth under the *YCJA*, *Youth Criminal Justice Act*, S.C. 2002, c.1 compound the disadvantage already faced by cross-over youth by relying upon the protective presence of a parent or adult in responsibility. I explore how cross-over youth frequently have no access to a parent or guardian willing to meaningfully step forward to protect their rights in a manner comparable to that of a parent. This absence, coupled with the ways they are understood, defined, and labeled, or, put another way, the presence of their construction in the discourses of official child protection and other official texts as a “type” that is dangerous and criminal, is a crucial intersecting point that produces their criminalization. In consequence, I argue that youth in care should either be afforded advocacy support through the child protective systems which have care of them or should be provided additional evidentiary protections under the *YCJA* to those afforded to others, such as an amplified right to counsel.

II. CROSS-OVER YOUTH

“Cross-over” youth are minors who are involved with child protection and the youth criminal justice systems. They are also commonly referred to as “dually involved” youth.¹⁵ Across Canada, under its Provincial and Territorial regimes for child protection, large numbers of children and youth are apprehended from their family homes and taken into “care” for a variety of purportedly protective reasons, on the bases of legal tests set forth under provincial and territorial laws. The “protection” they receive once

¹⁵ David Altschuler et al, *Supporting Youth in Transition to Adulthood: Lessons Learned from Child Welfare and Juvenile Justice*, (Centre for Juvenile Justice Reform, 2009) at 26.

apprehended has been cited by a great deal of research as problematic¹⁶. There are many issues with funding, appropriateness of placements, exploitation, neglect and abuse within the foster care and group care placements across the country. Problems with child welfare systems are underscored and compounded by the fact that youth in care are disproportionately of African-Canadian and Indigenous heritage. A 2015 study, for example, of kids in care in Toronto, found that nearly half of them were of Black heritage, while the Black population of Toronto was in the neighbourhood of 8%; while these numbers decreased to 37% in 2017, the disproportion is still staggering.¹⁷ According to Statistics Canada, Indigenous children and youth make up roughly half of the minors who are in state care across Canada, while they comprise less than 8% of the youth population.¹⁸

Young people (under age 18) living under the supervision or care of a child welfare system who are also entangled in the youth justice system due to allegations they have committed criminal acts are often referred to as “crossover youth.”¹⁹ Far too many of the children who are taken into state care across Canada’s provincial and territorial jurisdictions end up becoming criminalized and incarcerated, either as youths or, later in life, as adults. It is estimated that at least 40 - 50% of youth incarcerated across Canada “crossed-over” into youth custody from the child welfare systems.²⁰

¹⁶ See e.g. Mandell, D., Clouston Carlson, J., Fine, M., & Blackstock, C. (2003). “Aboriginal child welfare” (Rep., 1-64). Waterloo, ON: Wilfrid Laurier University, Partnerships for Children and Families Project; see also Sinha, V. , Kozlowski, A. (2013). The Structure of Aboriginal Child Welfare in Canada. *The International Indigenous Policy Journal*, 4(2). Retrieved from: <https://ir.lib.uwo.ca/iipj/vol4/iss2/2>

¹⁷ Laurie Monsebraaten & Sandra Contento “Drop in Black Children Placed in State Care Heralded as Good Start”, *Toronto Star* (30 June 2017), online: <www.thestar.com/news/gta/2017/06/30/drop-in-number-of-black-children-placed-in-care-heralded-as-good-start.html> [perma.cc/A28K-P5QE].

¹⁸ Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under*, by Annie Turner, Catalogue No 75-006-X (Ottawa: Statistics Canada, 13 April 2016).

¹⁹ Nicholas Bala, Rebecca De Filippis & Katie Hunter, *Crossover Youth: Improving Ontario’s Responses* (Association of Family and Conciliation Courts, 2013) at 2.

²⁰ See Scully & Finlay, “Cross-Over Youth: Care to Custody” (2015), online (pdf): <www.CrossOverYouth.ca/wp-content/uploads/2016/03/Cross-Over-Youth_Care-to-Custody_march2015.pdf>.

Their odds of becoming criminalized and incarcerated have been found, in some studies, to be higher than their odds of graduating high school.²¹

It is well documented that youth who have in care, especially when placed in group care, have a strong chance of ending up facing charges in the youth justice system, and also of serving sentences in youth corrections. This “cross-over” is well-known amongst justice system practitioners. For example, the small number of youths in care in Ontario make up 40-50% of the accuseds in the youth system.²² I am involved with the Cross-over Youth Evaluation Project, a multidisciplinary team of researchers, funded by the Law Foundation of Ontario. It is a pilot project which takes measures to address the criminal charging of youths in care through provision of “two-hatter” judges and lawyers (professionals who work in criminal and child welfare systems alike) in the youth justice court. The Cross-Over Youth Project is an exciting initiative bringing together professionals from the child protection and justice systems.

Taking a trauma-informed approach to youth justice means appreciating that a number of social and psychological factors affect the behaviours, perceptions, and life chances of cross-over youth. These extralegal factors compound and reinforce any impact that the operation of doctrinal law may have on them. Youth generally come to the attention of child welfare authorities as a result of their direct victimization through violence, exposure to parental neglect, or violence between parents, and often, all three, as well as experiences of poverty. The reasons youth are taken into care in themselves put youths at risk of involvement with the criminal justice system.²³ It is well established that mental health problems sourced genetically or through nurture, or in some combination of both, substance abuse, childhood maltreatment, experiencing or witnessing abuse, living through family breakdown, and experiencing attachment disruptions put youths at risk for offending behaviour.²⁴

²¹ Turpel-Lafond, *supra* note 8.

²² Scully & Finlay, *supra* note 20.

²³ David E Barrett et al, “Delinquency and recidivism: A Multicohort, Matched-Control Study of the Role of Early Adverse Experiences, Mental Health Problems, and Disabilities” (2013) *Journal of Emotional and Behavioral Disorders* (2013) 22:1 *J Emotional Behavioral Disorders* 3.

²⁴ For discussion, see Ray Corrado, Lauren F Freedman & Catherine Blatier, “The Over-Representation of Children in Care in the Youth Criminal Justice System in British Columbia: Theory and Policy Issues” (2011) 2:1/2 *Intl J Child Youth & Family Studies* 99.

Flaws in the operation of the child welfare systems in which youths are enmeshed also contribute to the likelihood that youths in care will become involved with the criminal justice system. Systemic factors in the delivery of care also combine to increase the likelihood of youths in care having contact with the justice system. Multiple placements within the child welfare system are associated with increased risk of contact with the justice system.²⁵ Instability or change in placements can increase feelings of anger, insecurity, and mistrust on the part of a youth.²⁶

There are many factors that contribute to the disproportionate likelihood of youth in care “crossing over” to criminalization. Overwhelmingly, they have experienced marginality, and trauma, which is why they were apprehended in the first place. Systemic issues within the youth care system also contribute to their vulnerability to criminal offending behaviour and criminalization: youth in care face frequent moves, and have to settle in to different routines in different settings. They can lack a sense of “attachment” or “place,” which can produce alienation and an impetus to rebel against rules. They may have diagnoses that contribute to difficulties with their capacity to comply with rules in a care setting.

While “cross-over” youth themselves present challenges, the ways in which our systems respond to them are too often not adequate to address them.²⁷ In addition to, and intersecting with, social and systemic factors, dimensions of the legal framework in which youth criminal justice decisions are made may detrimentally affect the chances of “cross-over” youth to receive treatment comparable to that received by adolescents with parental or other family support.

There are many points of intersection that have been identified by Scully and Finlay, as well as Bala and others,²⁸ at which decisions are made by relevant justice personnel that affect cross-over youth. Not only judges but also Crown Prosecutors, police officers, defense counsel, probation officers, and, not least child protection workers, make decisions in the criminal process that can either initiate involvement of youth into the formal criminal justice system or re-direct them into a less punitive pathways

²⁵ Office of Juvenile Justice and Delinquency Prevention, *Family disruption and delinquency*, Juvenile Justice Bulletin (Washington, DC: U.S. Department of Justice, September 1999).

²⁶ Turpel-Lafond, *supra* note 8 at 11.

²⁷ Nicholas Bala et al, “Child Welfare Adolescents & Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2014) 19:1 Can Crim L Rev 129 at 142-143.

²⁸ *Ibid*; Scully & Finlay, *supra* note 20.

that might respond meaningfully to the youth's context and circumstances in the child welfare system

For example, while placed in care, particularly group care, a youth may be criminally charged, for instance with assault or being unlawfully at large, if they harm or threaten to harm a group home worker, or if they run away from the facility. Assault charges are often laid even when the harm is instigated by a physical restraint imposed on the youth by the worker. Both these experiences themselves and the formalized criminal system response, are typical, mundane events for youth living in group care, and events that would be highly unusual for a youth not in care.²⁹ Further, these youth are often charged with offences that are based on behaviour that would not have resulted in court involvement if they lived with parents or relatives, but rather reflects an institutional response to adolescent misbehaviour.

While police have, in many instances, a discretion to impose "extrajudicial measures" pursuant to s. 4 of the YCJA where a young person engages in minor offending behaviour, they are under pressure not to do so, and to pursue a formalized process, when social workers and community members demand a charge be laid. When criminal charges are laid, proceedings ensue in which a youth in care must navigate two separate and discrete systems between which there is often little or no coordination, communication, or cooperation.³⁰ As a result, compared to youths not involved in the child welfare system, US studies have shown that cross-over youth are less likely to receive probation and more likely to receive punitive sentences, including custody.³¹

III. CRITICAL DISCOURSE ANALYSIS – CONFIGURING THE CRIMINAL YOUTH

On a social constructivist, Foucauldian understanding of governmentality, selves and identities are constructed in and through

²⁹ Turpel-Lafond, *supra* note 8 at 36-37, 51.

³⁰ Gene Siegel & Rachael Lord, "When Systems Collide: Improving Court Practices and Programs in Dual Jurisdiction Cases" (2004) Technical assistance to the Juvenile Court: Special project bulletin, (Pittsburgh: National Center for Juvenile Justice), online: <www.ncjj.org/Publication/When-Systems-Collide-Improving-Court-Practices-and-Programs-in-Dual-Jurisdiction-Cases.aspx> [perma.cc/S9X5-RM9V] at 1.

³¹ Denise C Herz & Anika M Fontaine, *Final report for The Crossover Youth Practice Model in King County, Washington*, (Georgetown University: Center for Juvenile Justice Reform, 2012).

governmental processes;³² the removal of a child from his or her family home destabilizes, and threatens erasure of, their identity while it makes children and youth into subjects who are constructed in the discourses of official texts as having identities of riskiness and criminality. Rather than being defined, as children and youth often are, relationally, with respect to networks of family members, or even with reference to socioeconomic status or neighbourhood, youth in care are labeled and described in official discourses with reference to conduct and risk. To quote Joe Norris, a hereditary chief with the Halalt First Nation in the Cowichan Valley of British Columbia, “even if they manage to graduate high school and avoid jail and the streets, Indigenous kids lose something when they’re removed from family, community and culture and placed – most often – with a white foster family...They lose their identity.”³³ Critical discourse analysis³⁴ of official texts produced in relation to cross-over youth is a productive tool for social research. Close scrutiny of how youth are identified, labeled, and described in these texts, and how those definitions have governmental effects, is a way to examine the political and ideological content of texts, and how power and knowledge are deployed in those texts in ways that support or refute particular narratives. As discussed below, critical discourse analysis of official records about youths in group care, and the criminal records of cross-over youth, reveal the way they are labeled and constructed in texts that code and classifies them as dangerous in ways that do not match with the underlying situations for which their conduct was noted up.

In youth criminal justice proceedings, Courts are involved in an exercise of public sense-making. That exercise takes place on the basis of discursive records that precede the presence of the actual youth in the courtroom in many respects. In this exercise, it is clear that youth in the custody and care of the Crown, face disadvantages linked to their age and family status. These decisions are routinely made on the basis of criminal records and police charge synopses alone, in the absence of contextual information about the youth’s involvement with child welfare.³⁵

³² See Michel Foucault, *Technologies of the Self: A Seminar with Michel Foucault*, (Amherst: University of Massachusetts Press, 1988) 16–49.

³³ Katie Hyslop, “One Woman’s Campaign to End Indigenous Child Apprehensions” *The Tye* (27 November 2018), online: <www.thetyee.ca> [perma.cc/X5FN-7K5M].

³⁴ See Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

³⁵ Since child welfare and the YCJA systems operate separately, there is no automatic transfer of information between the systems, and, it is inconsistent and even arbitrary

It is an understatement to say that most youth court charges are resolved by guilty plea. In fact, a high percentage of youth charges (41%) are stayed or withdrawn, and fewer than 1% of youth charges are resolved by means of an acquittal.³⁶ In turn, most guilty plea resolutions are negotiated on the basis of formal criminal records and the police synopses of charges. In this resolution process, the Crown's discretion engages with the way these youths are described and defined in official texts before the Court well before other contextual factors in the life circumstances of the young person, or the young person's views, are considered. If a young person's situation, including being a "cross-over" youth comes to the attention of the Court at all, this will be in the context of a Pre-Sentence report, ordered after a guilty plea is entered. The facts alleged against a youth to constitute an offence that are reported in a police synopsis will not reliably or predictably make reference to the youth's placement in social services care or supervision.

Two examples of cross-over youth that I have studied using the methodology of Critical Discourse Analysis are the case of Ashley Smith, and that of Abdoul Abdi. In both Smith's case and that of Abdi, it was clear they, as youths in care, became constructed in formal legal texts as far more dangerous than they actually were.

Through the bureaucratic governance model dominant in child welfare settings, particularly in group care, youths are readily discursively constructed as dangerous criminals in ways that submerge and obfuscate the detailed facts and context through which they acquire labels of dangerous and risky. A record of multiple disciplinary infractions and consequent police interventions configures them in discourse as dangerous offenders

whether police notes or a police synopsis of an offence will mention whether a young person was in care at the time a charge was laid. Where the facts of the allegation involve an assault in group care, the fact that the complainant and accused were in a child welfare setting together, or knew each other from the context of child welfare care, is not necessarily or mandatorily mentioned. Consider the murder of Reena Virk, for example, where, in *R v Ellard*, 2009 SCC 27, the fact that the victim and the group of teens involved in beating and killing her, were almost all in the care of British Columbia's child and family services when the offence transpired, is a little known side-note to the case that is largely unmentioned.

³⁶ Statistics Canada reports that acquittals are infrequent in youth court cases, accounting for slightly more than 1% of cases in 2014/2015 and this proportion has remained stable since data collection began in 1991/1992. Statistics Canada, *Youth crime in Canada, 2014*, by Mary K Allen & Tamy Superle, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 17 February 2016).

when they come before criminal courts, and when decisions are made about the conditions under which they are to be held in custody. As is discussed below, this discursive transformation of youth in care into criminals took place in the Ashley Smith case; it happened in the Abdoul Abdi case: it happens routinely every day.

In my PhD thesis, 2015 book,³⁷ and 2017 article,³⁸ I looked critically at the Ashley Smith case as an instance of public sense-making about a vulnerable, system-involved youth. I critically analyzed governmental work done by discursive figures of Smith produced in that case in official texts. This critical discourse analysis (CDA) of public texts, which revealed how sense was made of Ashley Smith in the official record, demonstrated how completely she was discursively configured in legal proceedings as a carceral subject: an inmate. Smith accumulated over 75 youth charges and hundreds of disciplinary infractions while in group care, and then in custody. Through bureaucratic processes of exclusion, she was deemed a risk to others and an impediment to the efficiency of the system. Because she was unruly and resistant, logics of risk and security intersected to code and label her, as “high risk” or high needs, and therefore, dangerous, and ultimately, a “maximum security” prisoner notwithstanding the fact she had never seriously harmed anyone but herself and her index offence, for which she entered custody, was throwing apples.

The widely publicized inquest into Smith’s death at age 19 in Federal Corrections custody at Grand Valley prison, which ultimately ended in the shocking verdict of homicide, focused for jurisdictional reasons, on her time in adult prison only. The four to five years she had spent crossing over between group homes and correctional custody in New Brunswick’s child welfare and youth justice systems through the machinations of hundreds of charges for disciplinary infractions was not part of the conversation at the inquest. However, as I argue in my book, it was not just the 11 months she spent in adult corrections, but at least as much those years and the hundreds of youth charges, that were crucial factors contributing to her death.

³⁷ Rebecca Bromwich, *Looking for Ashley: ReReading What the Smith Case Reveals About the Governance of Girls, Mothers and Families in Canada* (Bradford: Demeter Press, 2015).

³⁸ Rebecca M Bromwich, “Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies” (2017) 40:3 *Man LJ* 193, (last accessed 28 May 2019) online: 2017 CanLIIDocs 370, <www.canlii.org/t/2c50> [perma.cc/N76E-ZUFD].

I argued in my prior work, and reiterate now, that Smith's is a case fundamentally like those of many system-involved youth, and, but for its spectacular and tragic end in her 2007 death, captured on video, and later ruled in a 2013 inquest to be a homicide,³⁹ was representative of routine processes that affect “cross-over” youth. While Ashley Smith’s case has been understood to be an instance of the abuse of solitary confinement, it is also an example of the criminalization of cross-over youth.

Similarly, I looked at the governmental work done by discursive figures of Abdoul Abdi, produced in criminal and immigration law discourses in my expert affidavit that was tendered as evidence by counsel for Mr. Abdi in that 2018 case.⁴⁰ Abdoul Abdi was a system involved or “cross-over” youth in Nova Scotia who had family ties to Somalia but had never lived there, having been taken to Canada as a child by refugee relatives. Early in his life, he became the subject of a child welfare apprehension. More specifically, Abdi was born in Saudi Arabia to a Somali mother, then spent four years in a refugee camp in Djibouti. He landed in Canada at the age of six with his sister and two aunts. A year later, at the age of seven, Abdi had been taken into child-protective services custody. He became a permanent ward of the state shortly thereafter. Although a Crown ward, Abdi was never adopted. Instead, he was shuffled between 31 placements while “in care,” most of which were group homes. As is typical of the consequences to youths of living under the bureaucratic and formalized governance models prevalent in group care, it was in those group care settings that Abdi accumulated a youth criminal record. In consequence to this record, and to the child welfare authorities’ egregious inaction with respect to regularizing Abdi’s immigration status, the Canadian government sought to deport Abdi to Somalia, a country where he had lived only briefly as an infant.

However, these two youths had much in common. These two youths – Ashley Smith and Abdoul Abdi – had in common their child welfare system involvement. They were “cross-over” youth who became vulnerable to criminalization in different child welfare systems (New Brunswick and Nova Scotia) and faced different kinds of marginality by virtue of their different gender and race. Their stories did not end the same way: Ashley Smith died

³⁹ Ontario, Office of the Chief Coroner, *Coroner’s Inquest Touching the Death of Ashley Smith*, by John Carlisle, (Toronto: OCC, December 13, 2013).

⁴⁰ *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 733, [2018] FCJ No 774.

in prison while Abdoul Abdi's appeal of the decision to deport him was ultimately successful. They were both vulnerable, precarious, system-involved youths who acquired criminal youth records the same YCJA context and faced, fundamentally, the same problem: a youth criminal record preceded their arrival at criminal and other legal proceedings, a discursive representation of them that produced dangerousness from a series of incidents that would have, but for their correctional and child welfare system involvement, not have been characterized the same way. Like Smith's death, and the threat to deport Abdi, the disproportionate over incarceration of system-involved youth is a predictable outcome of the intersection of logics of risk and security: it will recur unless interrupted. It will continue. In the governing logics in operation in child welfare-run settings, particularly group care, governing logics subject system involved youths to different, and often higher, levels of official scrutiny than other young people.

The formalized, bureaucratic models of governance prevalent in group care settings, whereby adolescents in care receive a series of warnings, and, often, are criminally sanctioned as a consequence of any physical violence or theft, results in the police involvement with youth in group care in ways they would not likely be involved in a family setting. It results in the production of records, coding, and classification of youths in ways that discursively construct them as dangerous. To a large extent, the form of bureaucratic surveillance to which youths in care, particularly group care, are subject, produces their criminalization.

Questions of admissibility of records, criminal, disciplinary, and otherwise, are important when the issue of how youths are labeled and constructed through the way they are talked about in the discourses of official child welfare and criminal records is considered. Records and other information about youths before the Court are difficult to obtain prior to a guilty verdict. The child welfare system and criminal justice system are, to a large extent, opaque to one another, at least until a finding of guilt has been made.

IV. PARENTS, EVIDENCE LAW, AND THE *YCJA*

The *YCJA* supplements the *Criminal Code of Canada*,⁴¹ the *Canada Evidence Act*,⁴² and *Charter of Rights and Freedoms*.⁴³ Accordingly, under the *YCJA*, youths are entitled to the presumption of innocence and various protections afforded any criminal accused under evidence law. Like any adult accused, they are entitled to the right to remain silent, the right to know the reason for their detention or arrest. They have the right to retain legal counsel and to be secure against unreasonable search and seizure, as well as against arbitrary detention.⁴⁴

In addition to the legal rights of adults, youths are provided additional procedural protections under the *YCJA*. Many of these protections centre on the access a youth is entitled to have to a parent or responsible adult, as guide, mentor, and practical advocate, through the criminal justice process. As an evidentiary protection, youths have the right to have an adult or parent present when being questioned by the police, as will be discussed below. In the following discussion, I argue that, to remedy problems with the over-criminalization and over-incarceration of cross-over youth, the *YCJA* should be reframed with this reality in mind. More specifically, I would suggest that a helpful place for this intervention to take place would be to amend the evidentiary protections provided under s. 146 of the *YCJA*.

Consultation with, and involvement of, parents is woven through the *YCJA* as a foundational idea. The Preamble to the *YCJA* recommends that the justice system should partner with the youths' families and communities to prevent youth crime by addressing its underlying causes, responding to the needs of young persons, and providing guidance and support. It is articulated in the Declaration of Principle of the *YCJA* that "measures taken against young persons who commit offences should...where appropriate, involve parents, [and] the extended family."⁴⁵ Notice to a parent is provided for under s. 26 of the *YCJA*. This section requires police to provide a Notice to the parent about a young person's first court appearance. Section 26(4) allows for another adult to be served with the notice if no parent is locatable.

⁴¹ *Criminal Code*, RSC 1985, c C-46.

⁴² *Canada Evidence Act*, RSC 1985, c C-5.

⁴³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁴⁴ For general discussion, see e.g. Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin, 2009).

⁴⁵ *YCJA*, *supra* note 13, s 3(1)(c)(iii).

Provisions for consultation with parents are especially salient under the YCJA because acquittals are so rare, guilty pleas so frequent, and concerns have been raised about the extent to which the right to counsel afforded in the YCJA is meaningful, as it is infrequently exercised.⁴⁶ Section 146 of the YCJA is the provision dealing specifically with evidence under the Act. It expressly states that the rules of evidence as generally applicable in adult prosecutions apply in youth criminal justice court. It provides an “enhanced” protection for youths.⁴⁷ Section 146(2) provides additional protections to youths, specifically enumerating at sub (2)(c) that the young person must be given an opportunity to communicate with counsel and a parent. Evidentiary protections set forth under the YCJA specifically contemplate that a parent is an important practical advocate whose role is supplementary and additional to a lawyer: affording a young accused access to legal counsel does not suffice to address the role a parent provides in evidentiary protection.

The relevant portion of s. 146(2) of the YCJA sets out as follows:

(c) The young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel; and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) If the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

Evidence law under the YCJA therefore contemplates and provides for the protective and supportive role of an “appropriate adult” of the young

⁴⁶ See Michele Peterson-Badali et al, “Young People’s Experience of the Canadian Youth Justice System: Interacting with Police and Legal Counsel” (1999) 17:4, *Behav Sci & L* 455–465. See also Michele Peterson-Badali et al, “Young People’s Perceptions and Experiences of the Lawyer-Client Relationship” (2007) 49:3 *Can J Corr* 375–401.

⁴⁷ Larry C Wilson, “Enhancing the Enhancements? Section 146 of the Youth Criminal Justice Act and the Supreme Court of Canada: A Comment on *R. v. L. T.H.*” (2009) 40:2 *Ottawa L Rev* 267, (last accessed 28 May 2019) online: 2009 CanLIIDocs 59, <www.canlii.org/t/28fq> [perma.cc/WQD7-A8HH].

person's choosing, or, preferentially, a parent as a practical advocate in helping ensure rights protection.

Justice Rothstein, writing in *R v L.T.H.*, made clear that the protections afforded young persons in relation to their statements are significantly broader than those provided to adults under the *Charter*. He wrote:

Unlike an adult, a young person must be advised of the right to silence. A young person must also be warned of the potential use of any statement made to a person in authority. He or she must be advised of the right to consult with counsel and a parent, and to have those persons present while a statement is made. If any of these requirements are not satisfied, the statement will automatically be inadmissible... In contrast, an adult only has to be informed of the reason for arrest and the right to retain counsel.⁴⁸

In fairness, it is not clear from court records that parents in fact play active roles in youth criminal justice proceedings, nor is there good data available on what the outcomes of this involvement might be.⁴⁹ In the context of a strong emphasis (placed in s. 4 of the Act) on using less formal extrajudicial measures where possible, it may be that the impact of parental involvement is felt more often at the stage of police contact or arrest, and never becomes visible in Court. More research is warranted into how parental involvement factors in to YCJA processing.

In any event, the focus on parental involvement is obviously problematic for cross-over youth. Coupled with their vulnerability to being labeled as dangerous in ways disproportionate to their actual offending behaviour, cross-over youth are disadvantaged by operation of the YCJA because the legislation specifically contemplates, throughout, the involvement of parents. The ways in which parents are to be involved in the youth criminal justice process are not always clearly articulated, and may not be effectively realized even when youths are living in their families of origin.⁵⁰ Nonetheless, it is a basic assumption woven throughout the logic of the YCJA that parents will be involved as supportive guides and practical advocates for a youthful accused. This assumes that parental support is available. Such an assumption is not tenable in the context of the reality,

⁴⁸ *Ibid* at 277.

⁴⁹ See Michele Peterson-Badali & Julia Broeking "Parents' involvement in youth justice proceedings: perspectives of youth and parents" (2004) *Report to the Department of Justice Canada*, online (pdf): <www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/pdf/sum-som.pdf> [perma.cc/S53T-7HJB].

⁵⁰ See, generally: Michele Peterson-Badali & Julia Broeking, "Parents' Involvement in the Youth Justice System: Rhetoric and Reality" (2010) 52:1 Can J Corr 1.

discussed earlier in this paper, that for a very significant portion of the population of youthful accuseds, the disadvantages of life in child welfare care are compounded by a lack of access to meaningful parental involvement

Federal funding and legislative amendment providing for practical advocates to be made available to youth not able to access parental support might go some distance to alleviating the disproportionate criminalization of cross-over youth. It may be, as Bala et al recommended as one of a series of recommendation as to how to address the needs of cross-over youths, (including reducing the reliance on group care and increasing collaboration between systems) that the most effective remedy for evidentiary issues disadvantaging youths in care, because of their lack of a parent who can meaningfully engage in proceedings, would be to increase the advocacy role of child welfare workers.⁵¹ This could involve a reframing of the role of child welfare workers in youth criminal justice proceedings and would likely necessitate new funding streams and jobs for care workers. I would argue that it would simultaneously make sense for the YCJA itself to contemplate provision for youths to access a practical advocate in addition to a lawyer, and for Federal funding to be deployed to make this possible.

A key issue for youth is to have their rights properly explained; providing access to a parent or person in authority is supposed to assist in that but where youth are “in care” this is often not meaningfully accessible. A greater obligation should be imposed on the provincial child welfare authorities to ensure an “appropriate adult” is made available. It may be that the budgetary capacity of child welfare needs to be increased in order to facilitate this. Additionally or alternatively, s. 146 should be amended to level the playing field between cross-over youth and youth situated in families. Directly concerning the Federal legislation, amendment to s. 146 to provide for court appointment of an “appropriate adult” that is analogous to the provision allowing for appointment of counsel under ss. 25(4) and (5), might be a beneficial change.

The presence of a parent as a practical advocate, assured under s. 146 of the YCJA, provides an opportunity for an adult to explain the processes of the court. A practical advocate can support the youth not just legally but emotionally and developmentally. Most significantly, a practical advocate can potentially interrupt the harsh, exclusionary operating logic of the way the youths are defined and described in discourse as carceral subjects.

⁵¹ Bala, de Filippis & Hunter, *supra* note 19 at 38.

Parents can, potentially, mobilize different constructions of their adolescent child in the conversation taking place in courtrooms and public debate about their children.

The issue of admissibility and evidence law generally are particularly salient when youths in care are considered especially because there are likely to be significant records about those youths, because their identities outside of those official discursive constructions are made unstable by their precarious status: at a minimum, they are more likely than youths living with their families of origin to have potentially prejudicial documentary evidence available about their pasts. Cross-over youths are thus especially vulnerable and in need of the protections of evidence law at the same time that those protections are not as meaningfully available to them.

V. ANALYSIS AND RECOMMENDATIONS

This paper has suggested a theoretical lens, through the method of critical discourse analysis, to inform discussion of the well-established problem that youths in the care or under the supervision of the child welfare systems of Canada's provinces and territories disproportionately become involved with the criminal justice system, and, in appallingly large numbers, ultimately become incarcerated adults. It is clear that cross-over youth present distinctive and different needs that are clearly not yet well addressed by either the child welfare or youth criminal justice systems. The personal, social, and financial costs to be saved by changing the ways in which the system works with cross-over youth would be difficult to overestimate. Given that these youths make up about half, and perhaps more, of our youth corrections populations, and then comprise far more than their share of the adult correctional inmate population, the potential benefit of early interventions in the process of their criminalization is immense.

There is no single quick fix for the problem of over-criminalization of "cross-over youth" in the youth criminal justice and youth corrections system. The paper has explored how Canada's criminal justice and correctional systems are complex. It is a truly federal system, with the Federal criminal law doctrine interacting with thirteen provincial and territorial systems addressing procedural aspects of setting up courts, as well as providing their own youth criminal justice systems. Further, the provincial and territorial child and family services systems are not unified internally. Manitoba, for example, has 4 child and family service

‘Authorities’ which oversee 27 ‘agencies.’ In Ontario, there are over 50 ‘Children’s Aid Societies.’ Provinces and territories also provide uneven funding for community supports to criminal justice. The system is complex indeed. Because they are complicated, these systems cannot be easily fixed with one quick solution. Further, because the social and psychological circumstances of system-involved youths are also complex, doctrinal law itself cannot be looked to as a single solution to the problem of over incarceration of cross-over youth.

Collaboration amongst systems and approaches that start in a position informed by the contribution of trauma to youths’ lives and behaviours, are certainly part of the solution, as Bala and colleagues have contended:

the challenges faced by cross-over youth are multi-faceted and dependent on the social and familial context of individual youth. However, there is a theme that emerges and affects all youth in navigating the two different systems: that is there is a problem of fragmentation and lack of integration.⁵²

Certainly, we need systemic child welfare law reform in principle to support families in lieu of removing kids where possible, particularly where the protection concerns are directly linked to poverty or parental experiences of victimization. At a more local level, it could be useful to go upstream from the courts to where the charges come from. Legislative and regulatory change could be made to provincial and territorial child care regimes to provide alternative mechanisms and supports for dealing with adolescents’ misbehaviour while in state care in lieu of quicker recourse to police involvement than would be present in a family home. Legislative provisions could be matched and mirrored with new supports and procedures within the child welfare systems to discourage and reduce the reliance of group homes and child welfare authorities on resorting to charging youths.⁵³

To remedy delays in the criminal justice system, overburdened courts, and over-filled prisons, change should be made not only to the criminal law but to our provincial and territorial regimes for child protection. Under our

⁵² *Ibid* at 2.

⁵³ Section 6(1) of the YCJA requires police, before starting judicial proceedings, to consider whether it would be sufficient to take no further action, to administer a caution, or to refer a youth to an appropriate community agency or program. This means that, in the YCJA, as already written, Court should already be a last resort. Since warnings, cautions, and referrals are not formally tracked by most police services, it is largely unknown how often police do or do not use them, and in what circumstances.

Constitutional division of powers, these regimes are fragmented and subject to the will of varying and changing governments. Especially as consistent change to provincial and territorial child protection laws is neither forthcoming nor reasonably to be expected imminently, more coherent change could potentially, at least on an interim basis, be ushered in through new Federally-crafted and funded support in the YCJA for kids in care.

Collaborative solutions involving multiple systems across jurisdictions would be helpful towards remedying the problem of the over incarceration of cross-over youth, but Federal action is warranted and necessary to ensure meaningful action is consistently taken. A key difficulty with seeking to remedy the situation through provincial and territorial action is that this depends upon the will of a variety of governments across the country. Governments at the provincial and territorial level across the country are not necessarily *ad idem* in their views about child protection, or justice, and they are not invariably supportive of youth in care. Prevailing political agendas across the provinces often diverge. Systemic movements towards better supporting youths in, and aging out of, care, as well as a shift away from a focus on apprehensions in the first place do not seem to be reliably or consistently forthcoming.

Attempts towards systemic changes to child welfare are being made in several jurisdictions. In 2018, British Columbia introduced Bill 26, crafted to allow Indigenous communities a more meaningful role in ensuring children remain within their societies, and to recognize the importance of enabling Indigenous children to access, practice, and learn about, their culture.⁵⁴ In 2017, Ontario's then-government enacted a new *Child Youth and Family Services Act*⁵⁵ a statute that amended the province's child welfare regime to ensure better support for youths aging out of care, and to encourage and facilitate kinship placements in more circumstances, seeking to keep children out of foster care where possible. Similarly, in a positive Manitoba development, that province's child protection legislation was amended in 2018 in an effort seeking to ensure that children and youth could not be apprehended into state care on the basis of their family's poverty alone.⁵⁶ However, the same week that Manitoba amended its law,

⁵⁴ Bill 26, *Child, Family, and Community Service Amendment Act, 2018*, 3rd Sess, 41st Parl, BC, 2018 (assented to 31 May 2018), SBC 2018, c27.

⁵⁵ *Child, Youth and Family Services Act*, SO 2017, c 14.

⁵⁶ After the 2018 amendments to Manitoba's *The Child and Family Services Act*, SM 1985-86, c 8, direct consequences of poverty such as a child not having a coat or sufficient

and one year into the operation of Ontario's CYFSA a newly-elected and differently oriented Conservative Ontario Government signaled a radically different direction by announcing its intention to discontinue funding the Province's Office of the Provincial Advocate for Children and Youth. This Ontario office was intended to ensure young people have a voice about things that affect their lives. Subsequently, in spring 2019, the Ontario Provincial government reduced funding for child protection by \$84.5 million dollars per year.⁵⁷ While the Ontario government has committed to transfer some of the functions of the Office of the Provincial Advocate to the Ombudsman of Ontario, that government's actions illustrate the vulnerability and complexity in seeking to address the needs of youth coming before the federally constituted youth criminal justice courts by relying on the changing whims of provincial governments.

In this article, I have contended that there are multiple strategies that, together, can be employed to improve the situation. More specifically, we need to facilitate collaboration across systems (health, child welfare, education, and justice, as well as others), as is sought to be done by the Cross-over Youth Project. We need to look beyond, and more specifically upstream from, evidentiary protections and trials to understand, deal with, reform, and improve, the functioning of the youth criminal justice system in Canada. If law reform is to be used to remedy the disproportionately high numbers of "cross-over" youth sentenced and held in custody in Canada.

The unique contribution of this paper, and therefore my specific addition to offer conversations about cross-over youth, is a theoretical postulation based on an analysis of the intersection of discourse with evidence law is a part of the problem presented by the "cradle-to-incarceration pipeline," and therefore can be part of the solution. This paper has argued that evidentiary protections available to adolescents under s. 146 of the YCJA and through the Act in general, are far less meaningfully available to youth "in care" than to youth situated in families because they

food will not themselves be considered "neglect" as a basis for apprehension of a child. Interventions in circumstances where poverty is clearly the major concern for the family are now intended to be supportive of the family unit.

⁵⁷ See Contenta, Sandro, "Ontario Government Slashes Funding to Children's Aid Societies" (22 May 2019) *The Toronto Star*. See also Marv Bernstein & Birgitte Granofsky, "Eliminating the Ontario Child Advocate's Office a mistake" *The Toronto Star* (19 November 2018), online: <www.thestar.com/opinion/contributors/2018/11/19/eliminating-the-ontario-child-advocates-office-a-mistake.html> [perma.cc/LX4K-3H29].

focus on affording parental and family support to adolescents, supports that youths who are wards of the relevant provincial or territorial child welfare authorities cannot access. At the same time, evidentiary protections are especially relevant to the circumstances of cross-over youth, in light of the ways that they are constructed in the official discourses of criminal youth records. Consequently, it has suggested that the YCJA could be reformed to provide alternatives should to the YCJA default to “parent.”

In addition to specifically suggesting a re-evaluation and amendment of s. 146, my general recommendation is that, in much the same way as consultation with, and involvement of, parents, is woven through the YCJA as a foundational idea, the reality is that for a very significant portion of the population of youthful accuseds, disadvantaged social position is compounded by a lack of access to meaningful parental involvement. So, the Act should be reframed with this reality in mind. More specifically, I would suggest that a helpful place for this intervention to take place would be with reference to evidence law under s. 146 of the YCJA. The YCJA should not assume the presence of benevolent, involved parents in the lives of the youths subject to it. Rather, the Act should be reformed to take an approach to evidence that opens up possibilities for meaningful justice for those already disadvantaged by their removal from, or inability to access, or lack of experience with, the privilege of a family home.

VI. CONCLUSION AND SUGGESTIONS FOR FURTHER RESEARCH

This paper has critically explored the disproportionate criminalization and incarceration rates of “cross-over” youth. It has looked at how adolescents who are “system involved” through the child welfare systems, either in foster care or under child welfare supervision across Canada’s provincial and territorial jurisdictions, are facing dire life chances, in terms of health, education, and career prospects, and are disproportionately also enmeshed in youth criminal justice proceedings. It has looked at how virtually all have grown up in poverty; many are racialized or Indigenous; all are marginalized.

This article critically considers trauma-informed perspectives on why cross-over youth are so often criminalized, taking into account their psychological and social challenges in child welfare settings, honing in on the particular disadvantages system-involved or “cross-over” youths face

when dealt with under the YCJA. I have argued that a significant portion of this over criminalization can be explained through a new, theoretically engaged understanding of the intersection of how dangerousness and criminality are constructed in official discourses for cross-over youths with YCJA evidence law. I have argued that YCJA evidence law compounds the disadvantages of cross-over youth, who are already socially excluded, setting them up for disproportionate criminalization and incarceration. Both with respect to their statements and to documentary records about them, cross-over youth are vulnerable under Criminal Evidence law in ways that youths who reside in their families of origin are less likely to be.

This article has contended that early interventions preventing apprehensions in the first place should be promoted. It also suggests ways in which this “cross-over” or “cradle-to-incarceration pipeline” can be addressed through criminal law. I specifically suggest changes to evidence law under the YCJA that should be combined with shifts to provincial and territorial child welfare law and policy. We need to counter explicit and implicit assumptions -running throughout youth criminal justice processes and protections - that a youth before the Court will be able to draw upon parental support.

Certainly, further research should be conducted into how the over-incarceration of cross-over youth relates with doctrinal evidence law. Research should be conducted into to what extent the disadvantage cross-over youth face under s. 146 of the YCJA might render the provision unconstitutional under s. 15(1) of the *Charter* as family status discrimination. Further, critical discourse analysis of a larger number of cases relating to cross-over youth that unpacks ways in which their criminal records and child welfare records are dealt with by Courts would be useful to test the theoretical position I have taken about how they are routinely configured in discourse. Finally, especially since Ontario’s Cross-over Youth Evaluation Project⁵⁸ is a quantitative, mixed-methods study, and since it is

⁵⁸ I am involved with a team of researchers in conducting a formative and summative evaluation of the Cross-Over Youth Project (COYP). Brian Scully & Judy Finlay, *Cross-over youth: Care to custody*, Report completed on behalf of the Cross-over Youth Committee (Toronto, 2015), online (pdf): <docplayer.net/64549375-Cross-over-youth-care-to-custody.html> [perma.cc/8TXK-E68A]. The COYP an innovative, four-year, community-based demonstration program in Ontario. (Toronto, Belleville, Thunder Bay and Chatham) The COYP aims to address the systemic factors that contribute both to the high rate of youth transitioning from one system into the other and to the poor outcomes they experience, compared to their non-child welfare

struggling to gain access to the youths who participated, the situation calls for new research using grassroots, qualitative, applied research methods that involve collaboration with youths to support the inclusion of their own views and voices in policy conversations about what should be done to address their circumstances.

counterparts. Addressing systemic factors is expected to reduce the number of youth in the child welfare system who cross-over into the youth justice system and to improve their outcomes by enhancing justice and child welfare system responses. The COYP seeks to facilitate the communication and co-ordination between the two parts of the justice system and allow youth involved in the two systems to have representation that is more effective than current practice. Working with Principal Investigator Dr. David Day, a Ryerson University psychologist, and funded by the Law Foundation of Ontario, we are assessing the Toronto site's effectiveness.