CANADIAN SENTENCING PRACTICES IN RELATION TO OLDER ADULTS

Helene Love[*]

As Canada's population ages, judges will increasingly have to determine what sorts of sentences are appropriate for aged criminal offenders. This paper employs a quantitative approach to investigate whether old age a mitigating factor in sentencing by comparing the duration of sentences handed down to older adults (those aged older than 60 years) to those handed down to younger adults (those aged under 60 years). While overall there is no significant difference in the duration of sentences between older adults and younger adults, in many cases judges explicitly state that old age operates as a factor that commands leniency in sentencing.

En raison du vieillissement de la population canadienne, les juges auront à décider, de plus en plus, quel genre de peine est indiqué pour les auteurs de crime plus âgés. Au moyen d'une approche quantitative, l'auteure de l'article cherche à savoir si l'âge avancé d'un individu est un facteur pouvant atténuer la peine qui lui est infligée en comparant la longueur des peines d'adultes âgés (c'est-à-dire, de plus de 60 ans) à celle d'adultes plus jeunes (c'est-à-dire, de moins de 60 ans). Même si, en général, il n'y a pas de différence significative entre la durée des peines infligées aux adultes âgés et celles infligées aux jeunes adultes, dans de nombreux cas, les juges déclarent explicitement que l'âge avancé constitue un des facteurs qui doit les inciter à faire preuve de clémence au moment de la détermination de la peine.

1. Introduction

Canada's population is aging. Currently, one out of every seven Canadians is aged over 65, and by 2031, twenty-five percent of the population will be aged over 65.[1] As Canada's population ages, the criminal justice system will be presented with new challenges on how it will meet this demographic shift. Specifically, sentencing judges will increasingly have to determine what sorts of sentences are appropriate for aged offenders.

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[*]   LL M Candidate, UBC Faculty of Law

[1]   Statistics Canada, "Canada's population by age and sex" *The Daily* (15 January 2009), online: Statistics Canada <http://www.statcan.gc.ca/daily-quotidien/090115/dq090115c-eng.htm>.

Is old age considered to be a mitigating factor by sentencing judges? The purpose of this paper is to examine this important issue and determine if age is a mitigating factor in sentencing, in order to increase transparency and knowledge of current judicial practices in Canada. Looking at current trends in sentencing may promote consistency in sentencing and could inform the development of sentencing guidelines in the future. This paper investigates whether the current practice is to reduce a prison sentence when an older adult is an offender.

In this paper, I first situate the issue of age and sentencing in the Canadian statutory framework and in published commentary. While most secondary sources are silent on whether age is a factor to be considered in sentencing,[2] those that mention age suggest that advanced age is a mitigating factor in sentencing.[3] On the basis of this commentary, my hypothesis is that old age is a mitigating factor in sentencing and that older adults are more likely to be given shorter prison sentences.

The second part of this paper explains my research design. I conducted a basic quantitative study of Canadian sentencing decisions to see if penal sentences handed down to older adults were shorter than those handed down to younger adults (those aged younger than 60 years) for four different types of offences (sexual offences, drug-related offences, driving offences, and theft or fraud). After describing my research design, I explain the source of the data for this study and my data collection practices. This section concludes with a summary of the case law that makes up the sample relied on for this study.

The third part of this paper explains the results of this research and discusses the themes that emerged. I conclude by suggesting that more research is needed to determine when and how age can operate as a mitigating factor in sentencing, and suggest that a qualitative study could assist in interpreting some of the trends that emerged.

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[2]   See Gilles Renaud, *The Sentencing Code of Canada: Principles and Objectives* (Markham: LexisNexis Canada, 2009); Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001); Gary R Clewley and Paul G McDermott, *Sentencing: The Practitioner's Guide*, loose-leaf, (Toronto: Canada Law Book, 2010).

[3]   See e.g. R Paul Nadin-Davis and Clarey B Sproule, *Canadian Sentencing Digest*, loose-leaf, (Toronto: Carswell, 2010).

2. Statutory and Common Law Framework

Sentencing is "the judicial determination of a legal sanction to be imposed on a person found guilty of an offence."[4] After an accused person has been found guilty, or pleads guilty to a criminal offence, he or she is convicted of that offence and a sentencing hearing takes place where a judge determines what the punishment should be.

The purpose, principles, and objectives of sentencing are codified in sections 718 through 718.2 of the *Canadian Criminal Code*.[5] The Code is silent on what part, if any, the factor of the advanced age of an offender should play in the determination of a sentence. As a result, one must turn to the common law to determine whether age is a mitigating factor in sentencing.[6] In this part, the legislative history of the Code provisions for sentencing is described, followed by a review of commentary on the impact of age on sentencing.

A) Legislative History

Prior to 1996, there were no statutory guidelines regarding the purposes and principles of sentencing. The lack of codification of the fundamental principles, purposes, and objectives of sentencing led to a disparity in sentencing practices between judges, and even between regions of the country.[7] This disparity in sentencing practices prompted the federal government to establish an authoritative statement that could act as a primary source of guidance in this area for decision makers.[8]

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[4]   Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1986) at 153.

[5]   RSC 1985, c C-46.

[6]   Unlike the US, Canada does not have explicit sentencing guidelines that address advanced age. See United States Sentencing Commission, *2010 Federal Sentencing Guidelines Manual*, §5H1.1 (2010).

[7]   Allan Manson, Patrick Healy and Gary Trotter, *Sentencing and Penal Policy in Canada: Cases, Materials and Commentary* (Toronto: Emond Montgomery Publications, 2000) at 87.

[8]   See Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Government of Canada, 1969); Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions* (Ottawa: Government of Canada 1974); Law Reform Commission of Canada, *Dispositions and Sentences in the Criminal Process* (Ottawa: Government of Canada, 1976); Government of Canada, *Sentencing* (Ottawa: Government of Canada, 1984); Canadian Sentencing Commission, *supra* note 4; David Daubney, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General* (Ottawa: Government of Canada, 1988).

The federal government used reports created by the Canadian Sentencing Commission and a parliamentary commission called the Daubney Committee as the basis for further consultations with the provinces and interest groups in the late 1980s and early 1990s.[9] In 1996, their efforts resulted in Bill C-41, the *Sentencing Reform Act*. The objectives of Bill C-41 were: (1) to provide a consistent framework of policy and process in sentencing matters; (2) to implement a system of sentencing policy and process approved by parliament; and (3) to increase public accessibility to the law respecting sentencing.[10] Below, some of the Code amendments provided for by Bill C-41 are discussed, specifically, those that legislated the purpose of sentencing, the fundamental principle of sentencing, and other considerations in sentencing.

B) The Sentencing Provisions of the Code

Section 718 of the Code provides that the "fundamental purpose of sentencing is to contribute … to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions."[11] The objectives of sentencing include the denunciation of unlawful conduct; general and specific deterrence; the separation of offenders from society where necessary; to assistance with rehabilitation; to reparation to victims in the community; and finally promotion of a sense of responsibility in offenders for the harm done to victims and the community.[12]

Principles of sentencing, as distinguished from the purpose of sentencing, are "substantive rules that shape how judicial discretion is applied to assign priority to these objectives and to determine the relevant sentencing choices."[13] Section 718.1 of the Code sets out that the fundamental principle of sentencing is that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[14] Also known at common law as the "principle of proportionality," this section provides that the severity of any punishment should be directly proportional to the seriousness of the crime committed and the moral blameworthiness of the offender.[15]

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[9]   David Daubney and Gordon Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)" in Julian V Roberts and David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31.

[10]   *Ibid*.

[11]   *Supra* note 5.

[12]   *Ibid.*

[13]   Manson, *supra* note 7 at 66.

[14]   *Supra* note 5.

[15]   Julian V Roberts and David P Cole, "Introduction to Sentencing and Parole" in Roberts and Cole, *supra* note 9 at 10.

The individual circumstances of the offender are weighed in the application of subsection 718.2(b) of the Code, which provides: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."[16] While both sections 718.1 and 718.2 require that the circumstances of the offender are taken into consideration when crafting an appropriate sentence, neither explicitly sets out how advanced age can impact a sentence.

The Code also sets out factors that could be considered aggravating and mitigating circumstances in section 718.2.[17] Aggravating circumstances include where the offender abuses a spouse or common law partner or a person under eighteen years of age; if an accused abuses a position of trust or authority; evidence that an offence is tied to organized crime or terrorism; or evidence that the offence was motivated by bias, prejudice or hate based on race, sex, age, mental or physical disability or other similar factor.[18] Interestingly, the advanced age of an offender is not a personal characteristic that is listed as an aggravating or a mitigating factor in section 718.2 of the Code. Accordingly, the common law is relied upon for guiding principles relating to how the individual characteristics of an offender, such as an offender's advanced age, are considered by the courts.

C) The Common Law With Respect to Age and Sentencing

Whether age is a factor that commands a more lenient sentence is up for debate. Many of the secondary sources on the topic of sentencing do not include a discussion of old age as a mitigating factor.[19] There is some commentary and case law on the topic that suggests that age is a mitigating factor for a variety of reasons: (1) because a sentence would disproportionately impact an offender considering the remaining lifespan of that offender; (2) because older offenders have associated health issues; or (3) that old age can be a mitigating factor where it is accompanied by evidence of good character, but will not be a mitigating factor if an accused is found guilty of a lengthy period of wrongdoing or of a violent or serious crime. Each of these themes relating to age and sentencing is described in the paragraphs that follow.

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16   *Supra* note 5.
17   *Ibid.*
18   *Ibid,* s 718.2(a).
19   See Renaud, *supra* note 2; Manson, *supra* note 2; Clewley and McDermott, *supra* note 2.

1) Disproportionate Impact of a Sentence on Older Offenders

The Supreme Court of Canada has suggested that the utilitarian and normative goals of sentencing effectively exhaust themselves once a sentence outlasts the anticipated lifespan of an offender. In *R v M(CA)*,[20] the leading case on the principle of totality, the accused pleaded guilty to numerous counts of sexual assault, incest and assault with a weapon against children. In upholding the trial judge's sentence of 25 years, Lamer J provided some direction on the issue of sentencing of older adults:[21]

> However, in the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the Code, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value.

While the Supreme Court did not rule in favour of the accused in *R v M(CA)*, Lamer J's passage from that case suggests that where appropriate, the totality principle can be triggered to reduce a global sentence if the combined total sentence handed down to the accused exceeded his or her likely remaining lifespan.[22]

The Supreme Court's premise that the remaining life span of an accused is a factor to be considered by sentencing judges has been picked up in subsequent cases. In *R v AR*, Twaddle JA of the Manitoba Court of Appeal found: "Advanced age is usually a mitigating feature. There are two reasons for this. The older a person is the harder it is to serve a prison term and the less is that person's life expectancy after prison." [23]

R v EC[24] provides another example where the Manitoba Court of Appeal thought to consider the remaining life span of the accused as a means of mitigating the totality of a sentence. In that case, the 61-year-old offender had committed child abuse and sexual abuse for close to 20 years,

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20   [1996] 1 SCR 500.
21   *Ibid* at para 74.
22   *Ibid* at para 42.
23   (1994), 92 Man R (2d) 183 (CA) at para 35.
24   (1996), 113 Man R (2d) 33 (CA).

resulting in the sentence of 25 years at trial. On appeal, the Court of Appeal reduced his global sentence to 20 years imprisonment, finding that:[25]

> A sentence of 25 years surpasses by large measure the "expected remaining life span" of the accused. In that sense, and only in that sense, can it be said that "traditional goals of sentencing have all but depleted their functional value," and that, therefore, the sentence in its totality was demonstrably unfit.

A final example of this principle in the case law can be found in *R v Monette*,[26] where the Ontario Court of Appeal dealt with an appeal by a 90-year-old offender who was sentenced to five years' imprisonment for a number of sexual and other assaults. The Court of Appeal reduced the prison term to a reformatory term to be served within the community without any special conditions, holding "… en pratique, une sentence de cinq ans au pénitencier serait pour lui une sentence à perpétuité."[27] That is, practically speaking, a five-year sentence for this man amounts to a life sentence.

With the exception of the accused in *R v M (CA)* (who did not have his sentence reduced), all of the offenders in the cases in this section suffered from some sort of illness, which weakens the proposition that old age alone could act as a mitigating factor in a sentencing decision. Indeed, Kevin Boyle and Michael Allen suggest that "age may be relevant in relation to an older offender where the court out of mercy may reduce the sentence, especially if the offender has a limited life expectancy or ill health."[28]

2) Age and Poor Health

In the *Canadian Sentencing Digest*, Paul Nadin-Davis suggests, "Only rarely are the Courts called upon to consider old age as a mitigating factor in isolation. More frequently, it is discussed in connection with illnesses or age-related degeneration of the brain."[29] Renaud J has made the echoing comment that "sentencing courts appear to approach the question of age by asking for information about the offender's wellbeing...[A]dvanced age is merely an incident to the question of the offender's state of health."[30] In

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[25]   *Ibid* at para 53.

[26]   [1999] OJ No 4750 (CA) (QL).

[27]   *Ibid* at para 15.

[28]   C Kevin Boyle and Michael Allen, *Sentencing Law and Practice* (London: Sweet & Maxwell, 1985) at 273.

[29]   Nadin-Davis and Sproule, *supra* note 3.

[30]   Gilles Renaud, "Sentencing Elder Offenders: A Thematic Review of the Principles" (4 February 2000) Alan D Gold *Collection of Criminal Law Articles* (QL) at paras 6, 11.

his article, Renaud J comments that "if there are no health problems or if these are not significant, the simple fact of being an elderly offender may not weigh heavily in the balance."[31] In support of this proposition, these sources collectively rely on cases that illustrate how old age, when combined with ill health, can operate to reduce the prison term for an offender.[32]

3) Age and Good Character

A final theme put forth in the literature is that age is more likely to be a mitigating factor when it is combined with good character.[33] Clayton Ruby suggests, "The age of an offender, particularly past 60 years, is a serious factor to be considered in mitigation, especially where it is combined with evidence of good character."[34]

A corollary is that old age will not operate as a mitigating factor where it is accompanied by a lengthy period of wrongdoing or in cases involving violent or serious crimes. In his article on the themes that emerge from sentencing older offenders, Renaud J suggests that serious offences do not command leniency, regardless of the health or age of the offender.[35] However, one source suggests old age combined with ill health may mitigate a sentence, even in serious cases like sexual assault.[36]

The scarcity of Canadian commentary on the topic points to the need for further research in this area. The commentary and cases reviewed herein suggest that in some circumstances age is a mitigating factor in sentencing. On the basis of this literature, my hypothesis is that age operates as a mitigating factor in sentencing. In the next section I describe the research design that I have used to investigate this hypothesis.

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[31]   *Ibid* at para 14.

[32]   *R v Dinn* (1993), 104 Nfld & PEIR 263 (Nfld CA) at para 12; *R v Lysack* (1988), 26 OAC 338 at para 8; *R v V* (1994), 156 NBR (2d) 161 (QB) at para 5; *R v McCrystal* (1992), 55 OAC 167.

[33]   Eugene Ewaschuk, *Criminal Pleadings and Practice in Canada* (Aurora: Canada Law Book, 1983) at 464.

[34]   Clayton C Ruby et al, *Sentencing*, 7th ed (Markham: LexisNexis Canada, 2008) at 250. See also Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook* (Ottawa: Canadian Association of Provincial Court Judges, 1982) at 48.

[35]   Renaud, *supra* note 30 at para 15. For this proposition, Renaud J relies on three cases that support his theory: *R v Lehoux* (1997), 100 BCAC 10; *R v OJ* (1990), 94 Nfld & PEIR 31 (Nfld Prov Ct); *R v Harris (No 2)* (1989), 8 WCB (2d) 630 (Ont Dist Ct).

[36]   Ruby, *supra* note 34 at 250, relying on *R v AR*, *supra* note 23 at para 2.

3. Research Design

Sentencing is a highly discretionary exercise. A sentence depends on a number of factors including whether an offender pleaded guilty, the circumstances surrounding the commission of the offence, the gravity of the offence, evidence of good character, psychological profile, victim impact statements, expressions of remorse, existing criminal record, the prevalence of a particular type of the offence in the community (for example, if breaking and entering is on the rise, a stiffer penalty may be warranted), eligibility for parole, and the underlying philosophy subscribed to by the sentencing judge.[37] The presence, absence, or weight given to any of these factors impacts a sentence and may cause a sentence to be reduced or lengthened. In the present study, relying on existing sentencing decisions makes it virtually impossible to measure or control for all of these factors and establish with certainty that advanced age alone caused a reduction in a sentence.[38] Accordingly, the objective of the present study is to investigate whether there is a correlation between advanced age and the duration of a prison sentence.

The relationship between advanced age and penal sentences was investigated using a quantitative analysis with simple coding rules. A quantitative analysis allows me to uncover tendencies that emerge from a large number of cases, which reveals general trends in sentencing practices over a number of years, jurisdictions, and offence categories. Given the degree of variability in sentencing decisions, this research design will allow me to make generalizations over a large population of data to determine if there is a relationship between age and the length of a prison sentence.

In order to see if penal sentences were reduced for older adults, the sentences handed down to older adults are compared to those handed down to younger adults (those aged younger than 60 years) for four different

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[37]   Kenneth WF Fiske, "Sentencing Powers and Principles" in Joel E Pink and David C Perrier, eds, *From Crime to Punishment: An Introduction to the Criminal Law System*, 5th ed (Toronto: Carswell, 2004) at 297.

[38]   Wing Hong Chui, "Quantitative Legal Research" in Mike McConville and Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) at 50, citing Thomas D Cook and Donald T Campbell, *Quasi-experimentation: Design and Analysis Issues for Field Settings* (Boston: Houghton Mifflin, 1979) for the proposition that in order to establish causation one must be able to show that: (1) the cause (the independent variable) precedes the effect (the dependent variable) in time; (2) there is an empirical association between the two variables; and (3) there is no plausible alternative or explanation for the co-variation of the independent and dependent variables. Using real life sentencing decisions, I could not establish that there is no plausible alternative or explanation for the co-variation between age and the duration of a penal sentence.

classes of offences (sexual offences, drug related offences, driving offences, and theft or fraud). The average prison sentence handed down for each group is then compared to identify whether older adults are given shorter prison sentences than younger adults for the same type of crime. In the paragraphs that follow, I describe the source of the data and the selection process. I will then set out the information that was collected from the judgments that allowed me to investigate if age is a mitigating factor in sentencing.

A) Data Source

The texts that I analyzed are written judgments available on the commercial database QuickLaw. For the present study, QuickLaw provided the quickest and most economical way to access a large amount of case law spanning a number of years. While a more thorough collection practice would be to combine a QuickLaw search with a records search of each courthouse for unreported decisions, this practice would be time consuming, expensive, and beyond the scope of the current research.[39] Using QuickLaw as the source of my case law allowed me to conduct a search of cases spanning decades in an accessible, fast, and relatively low cost manner.

Using QuickLaw for case law analysis is an essential methodology for analyzing trends in judicial interpretation. Susan McDonald and Andrea Wobick explain:[40]

> The decisions reviewed from QuickLaw do not equal total decisions in Canada … These decisions, however, are those that are reported and because they are available through the QuickLaw database, they become precedents for future caselaw. Lawyers and judges would look to the decisions reported on QuickLaw for their precedents and would rarely have other information on cases available to them.

Decisions reported on QuickLaw are chosen as precedents for future judicial decisions and will influence the evolution of the common law. Judges look to other case law as precedent to determine what is appropriate for a given offender, and they turn to QuickLaw to find those cases.

Despite these advantages, there are some known limitations of using case analysis, and specifically QuickLaw, in a research design. One

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[39] Furthermore, even this data collection practice would be incomplete as it would omit cases that were not recorded.

[40] Susan McDonald and Andrea Wobick, "Bill C-46 Caselaw Review" *JustResearch* (2004), online: Department of Justice <http://www.justice.gc.ca/eng/pi/rs /rep-rap/jr/jr11/p5b.html>.

weakness of research based on case analysis is that focusing on judicial decisions alone fails to take into account those crimes that do not enter into the realm of judicial decision-making.[41] In the present study, this concern is magnified due to the fact that the decisions being relied upon are sentencing decisions. Not only do sentencing cases have to enter the realm of judicial decision-making, but they represent only those cases where an accused was found guilty. Minor offences are not likely to make it through all of these stages of prosecution. This will impact my data because those cases that will be included in the sample are those that were serious enough to be prosecuted, tried, and the evidence was strong enough to result in a conviction, thus resulting in a bias towards more serious offences being represented in the underlying sample.[42] This limitation is especially true in the case of historical offences, which, due to challenges relating to the collection and reliability of evidence, present a "formidable challenge" for prosecutors and are unlikely to be pursued unless the underlying charge is sufficiently serious.[43]

Another weakness of relying on reported decisions was mentioned by Karen Busby, who notes that decisions reported on QuickLaw may not constitute an accurate sampling of the range of situations where any judicial decision was made because decisions are more likely to be written down or recorded where a judge finds an issue to be in the public interest.[44] Similarly, Susan MacDonald and Andrea Wobick write, "Decisions are usually provided orally. Unless a particular request is made, oral reasons are not usually transcribed and published."[45] Those cases that were not transcribed and sent to QuickLaw will not be included in the sample for this study. The risk is that my sample may fail to take into account a potentially large number of cases that represent routine dispositions and may not be truly representative of sentencing practices for older adults.

The implication of these limitations on my research is that they limit the range and nature of the information that is gathered for the present study. The range of information is limited to those cases that have been

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[41]   Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the *Criminal Code*" (2008) 20:1 CJWL 111 at 120.

[42]   An American study by Craig Forsyth and Robert Gramling suggests that nearly eighty percent of the crimes the elderly commit are property crimes, such as shoplifting. See Craig Forsyth and Robert Gramling, "Elderly Crime: Fact and Artifact" in Belinda McCarthy and Robert Langworthy, eds, *Older Offenders: Perspectives in Criminology and Criminal Justice* (New York: Praeger, 1988) at 11.

[43]   *R v Home*, 2008 NUCJ 6, 78 WCB (2d) 277.

[44]   Karen Busby, "Third Party Records Cases since R v O'Connor" (2000) 27:3 Man LJ 355 at 356.

[45]   McDonald and Wobick, *supra* note 40.

pursued through the criminal justice system until its latest stage. The nature of my data is limited to those sentencing situations that a trial judge, or other decision maker, has deemed significant enough to record and publish. The consequence is that my research will study only those offences that were egregious enough to pursue and important enough to record.

B) Selection Process

In this study, the potential sample group (all sentencing decisions) was divided into two groups based on the age of the offenders involved: offenders aged between 19 and 59 years old (younger offenders) and offenders aged 60 and over (older offenders). These two groups were further subdivided according to predetermined categories of crime. Time limits and limits as to the level of court were placed on the selection of case law for this research.

1) Age 60 as the Boundary between Old and Young

The range for when old age starts is somewhere between the ages of 50 and 65. At the early end of the spectrum are those who consider old age to begin at age 50, including Erdman Palmore, a gerontologist who specializes in the field of ageism. Palmore believes that age 50 is when society perceives older adults to deviate from the younger norm, and begins to treat individuals of this age group differently.[46] Correctional Service Canada (CSC) also considers "older offenders" to be those aged 50 and older.[47] Gilles Renaud suggests that courts have begun to consider old age to begin as early as 55, with courts in the UK starting "old age" at age 60.[48] Mainstream society considers "older" to begin at about 60 or 65, because this is the age of retirement (and in jurisdictions where it is still permitted, mandatory retirement) from the workforce, when the effects of aging become more apparent, and because it represents the age for eligibility for national income security programs.[49] For the purposes of this research, I set old age at a mid-point of the ages suggested in the literature reviewed above, age 60.

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[46]   Erdman B Palmore, "Ageism in Canada and the United States" (2004) 19:1 Journal of Cross-Cultural Gerontology 41.

[47]   Julius HE Uzoaba, *Managing Older Offenders: Where Do We Stand?* (Ottawa: Correctional Service of Canada, Research Branch, 1998), online: <http://www.csc-scc.gc.ca/text/rsrch/reports/r70/r70_e.pdf>.

[48]   Renaud, *supra* note 30 at paras 23-24.

[49]   Special Senate Committee on Aging, *Embracing the Challenge of Aging* (Ottawa: The Special Senate Committee on Aging, 2007), online: Parliament of Canada <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/agei-e/rep-e/repintfeb 07-e.pdf> at 7-10.

A shortcoming of this aspect of my research design is that, in manipulating the data in the selection process on the basis of age, I compromise the ability to establish causality in these research findings.[50] The results of this study will not establish that age causes a sentence to be reduced; they will only be able to suggest if there is co-variation between these variables.

2) Categories of Offences

In this study, I compare older adults and younger adults who have committed similar crimes. I chose to group offences into categories for the purpose of making sentencing comparisons because there are hundreds of offences in the *Criminal Code* and a direct comparison on an offence by offence basis would likely result in individual sample sizes that are too small to illuminate general trends.

The categories of offences that are compared are: (1) sexual offences; (2) drug-related offences; (3) driving offences; and (4) theft or fraud. "Sexual Offences" are offences that have a sexual basis and include inappropriate touching, child pornography, incest and the other offences found in Part V of the Code in sections 150 – 182. "Sexual Offences" also include sexual assault, which is found in sections 266 – 269 of the Code. The category "Drug-related Offences" includes contraventions of sections 4 – 7 of the *Controlled Drugs and Substances Act*.[51] The "Driving Offences" category includes sentencing decisions where an offender contravened sections 249 – 250 of the Code. And finally, the category "Theft or Fraud" includes cases where the offender has contravened the offences found in part IX of the Code, sections 321 – 380. Cases where an offender has been charged with crimes that do not fall within these categories were classified as "Other." In this category, no comparison is made between older and younger adults because the offences were too diverse to allow for an effective comparison to be made.

These categories were chosen because they were cited as some of the most common offences that resulted in the incarceration of older adults as reported in a 1997 Corrections Canada report on older offenders.[52] While this approach is not as comprehensive as a comparison of all crimes, it

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[50]   Joseph E McGrath, "Methodology Matters: Doing Research in the Behavioral and Social Sciences" in Ronald M Baecker et al, eds, *Readings in Human-Computer Interaction: Toward the Year 2000*, 2d ed (San Francisco: Morgan Kaufmann Publishers Inc, 1995) at 167.

[51]   RSC 1996, c 19.

[52]   Uzoaba, *supra* note 47 at 18. Homicide was not included in this study because its mandatory life sentence means there is little judicial discretion to investigate.

allows for easier interpretation of the findings. Furthermore, offenders are often charged with more than one particular crime and grouping offences into categories allowed me to capture where offenders committed different, but similar offences. The limitation is that by restricting my sample to these four categories of crimes, it limits the applicability of my results to those subsets instead of all crimes.

While many of the cases involved multiple offences, I assigned only one type of offence for each case in the sample – the "primary offence."[53] The primary offence is defined as the type of offence where the offender was found guilty of the greatest number of counts.[54] Only cases where the primary offence was a sexual offence, drug related offence, theft/fraud, or driving offence were included in the sample.[55]

The implication of tracking only the primary offence for each case is that it provides limited insight into multiple-offence cases because the non-principal offences were not recorded in the database, although their associated sentences were included.[56] This will inevitably lead to bias in my sample by overstating sentences attached to primary offences. For example, a case involving two counts of sexual assault and one count of armed robbery would be coded as a sexual assault case, even though the sentence that was associated with the armed robbery might have been greater than the sentence for the two sexual assaults.

Originally, 206 cases involving older offenders were classified as sexual offences. This was subsequently reduced to 200 as I chose to exclude the six cases that did not involve sexual offences against a child. As indicated earlier, the Code provides that it is an aggravating factor when an offence involves a victim who is less than 18 years of age.[57] Because the overwhelming majority of the sexual cases with older offenders involved children, I controlled for this aggravating circumstance by

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53   The coding manual did provide for offenders having an equal number of counts between types of offence, but this only occurred once, and this case was excluded from the sample.

54   An alternative way to have coded for the primary offence is to define the primary offence as the offence with the highest sentence, as was done by Mandeep K Dhami and Karen A Souza, *Study of sentencing and its outcomes: pilot report* (London: Ministry of Justice, 2009), online: Ministry of Justice <www.justice.gov.uk/publications /docs/study-sentencing-outcomes-pilot.pdf>.

55   Cases where there were equal counts or where "other" was the primary offence were excluded from the sample.

56   Elizabeth LC Merrall, Mandeep K Dhami and Sheila M Bird, "Exploring Methods to Investigate Sentencing Decisions" (2010) 34:3 Evaluation Review 185 at 189.

57   *Supra* note 5, s 718.2.

excluding those cases that did not involve a child and by comparing this sample with sexual offences for younger adults that involved a child.

3) Time Limits

By tracking decisions available on QuickLaw between January 1, 1981 and February 28, 2011, I trace trends in the sentencing of older adults for fifteen years before and after the sentencing provisions of the Code came into force in 1996. I chose this time period so that there are an equal number of years where the common law principles of sentencing alone were being applied by judges and the number of years where the principles of sentencing were, in part, codified in sections 718 – 718.2 of the Code.

This time limit did not result in an equal number of cases included in the sample from before and after the codification of the sentencing provisions. In fact, there was a greater number of sentencing decisions available from the most recent fifteen years, likely because QuickLaw only started including unreported decisions in its database in the mid-1990s.[58] Before then, QuickLaw only contained reported decisions, which were decisions the publisher of the report regarded to be of some significance.

Thirty years is a long time to be tracking judgments. Such a long time frame is required, however, because sentencing decisions involving older offenders are relatively rare. Accordingly, it takes a long period of time to accumulate cases involving older adults from which to draw generalizations. The larger the sample of sentencing decisions, the more the distribution of length of sentences and other extraneous factors in that group approaches the "idealized" random sample.[59]

While a large sample size is not required in simple research with strict controls,[60] a large sample size is especially crucial in sentencing decisions because it increases the even distribution of factors other than age that are taken into account in any given judgment. This increases the probability that differences in the two groups can be attributed to age and not competing factors.[61] For example, if a sample were to include ten sentencing decisions, where nine of them involved sentences of one or two months and one of them involved a declaration that an accused was a dangerous offender

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[58]   458 of the 590 decisions were reported in 1996 or more recently.

[59]   McGrath, *supra* note 50 at 162 states, "The larger the number of things to be allocated by some random procedure, the more the distribution of those cases will approach the idealized random distribution."

[60]   Mark Balnaves and Peter Caputi, *Introduction to Quantitative Research Methods: An Investigative Approach* (London: Sage, 2001) at 94.

[61]   McGrath, *supra* note 50 at 163.

(which is recorded as a sentence of 300 months),[62] this would have a larger impact on the counts and length of sentence than if a dangerous offender was one of 100 cases included in a sample. Given the complexities of sentencing and the variation of the factors that judges take into account, it was important to collect as many cases as possible so that the distribution of these extraneous circumstances across the data could be as normal as possible.

While the advantage of collecting judgments over such a long time frame is that it allows for the even distribution of extraneous factors, the disadvantage is that cases that are outdated will be included in the data sample. With the common law in a constant state of development, it is questionable whether sentencing principles developed thirty years ago and inferences drawn on these cases will remain relevant in the present day.

4) Jurisdiction

Because I was interested in quantifying prison sentences, I limited the case law relied on to decisions that involved criminal law and penal sentences. I limited the courts and tribunals that were involved in my search to provincial courts of first instance (provincial courts and provincial superior courts).

All of the provinces and territories of Canada were included in my search. However, given my search was conducted only in English, I will miss decisions that were written in French. This means that Quebec and New Brunswick will be under-represented in the data sample.

5) Summary of Data Sample

In total, my data sample included 295 sentencing decisions for each age group (590 total), broken down as follows: 200 sentencing decisions for each age group in the sexual offence category; 22 sentencing decisions for each age group relating to drug-related crimes; 51 cases for each age group for theft or fraud; and 22 cases for each age group where individuals were sentenced for driving-related offences. Excluded from the analyzed data were 67 sentencing decisions that fell into the "other" category, involving a range of offences from operating a hunting operation without a licence to armed robbery.[63]

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62   Dangerous offenders are sentenced to serve an indeterminate term in a penitentiary. 300 months is the number that I selected to represent an indeterminate penal term because 25 years is the minimum non parole period for first degree murder, the most serious crime in the Code.

63   Lee Epstein and Andrew Martin, "Coding Variables" in Kimberly Kempf-Leonard, ed, *Encyclopedia of Social Measurement* (San Diego: Academic Press, 2005),

C) Information Tracked in the Judgments

Because of the inherent limitations of the data relied on and the variability in the factors and weight to be attributed to them in any sentencing decision, I was limited in the range of variables I was able to study. I recorded only those factors that were capable of being discerned from a written judgment, so latent information that potentially had a significant impact on a sentencing decision was not accounted for. For example, I could not record the relative seriousness of the offence or the impact of a particular witness statement on a decision. This limits my results because, arguably, these factors could have a more significant impact on any given sentence than the factors that I did record.[64]

I tracked the following variables in the judgments: (1) level of court; (2) type of offence; (3) age of offender; (4) gender of offender; (5) whether the judge explicitly comments on the effect of age as a mitigating factor; (6) duration of penal sentence; (7) whether the offender was Aboriginal; and (8) whether the judge explicitly comments on the health of the accused. These factors were chosen because they were directly relevant to the phenomenon being studied (the duration of the sentence and where the judge explicitly states that age operated as a mitigating factor) and they were factors that emerged from s. 718.2 of the Code and relevant case law as being important in determining if age is a mitigating factor in sentencing (the health and Aboriginal status of an accused).[65] In the paragraphs that follow, I will identify the specific choices I made in each of these respects, as well as the limitations of these choices on the generalizability of my findings.

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online: <http://epstein.law.northwestern.edu/research/codingvariables.pdf> at 3, suggest that any more than 10 percent of your data falling into the "other" category indicates that the categories should be reconsidered. In the current study, these cases were excluded from the sample.

64   Alfred Blumstein *et al*, eds, *Research on Sentencing: The Search for Reform*, vol 2 (Washington DC: National Academy Press, 1983) at 69-125 suggest that the seriousness of the offence and the prior record of the accused are the most important factors considered in sentencing; however, this is a somewhat dated American source, so these results may not be transferable to the Canadian system.

65   The effect of Aboriginal status is relevant after 1996 when section 718.2(e) of the Code came into force, and is particularly important after the leading case on conditional sentencing for Aboriginal offenders was decided: *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

1) Sentence

The duration of the prison sentence was chosen as a means of measuring whether age was a mitigating factor in sentencing because it was quantifiable and allows for inferences to be drawn about the impact of advanced age on a sentencing decision. Sentences for each offender were recorded as the total penitentiary term in months. This reveals trends in the award of prison sentences and the duration of those sentences, but does not provide any information about the types of sentences being handed down. For instance, in cases where multiple counts were being sentenced to the same offender, recording the total penal term takes into account consecutive sentences, but fails to take into account the sentences that have been ordered concurrently. Another limitation of recording the data in this way is that it does not distinguish between the types of sentences that do not involve a prison term, as fines, suspended sentences, conditional sentences, and house arrest are all recorded in the same manner (as serving 0 months of prison time), limiting the scope of my results accordingly.

2) Mitigation

If a judge explicitly mentioned the impact of age on sentencing, it was recorded. The advantage of including only explicit statements about age as a mitigating factor is that it leaves less room for interpretation on the part of a researcher and associated bias, thus increasing reliability. The disadvantage is that it results in an underrepresentation of the phenomenon in the data because in many circumstances, the impact of age is implied. For example, it was common that a sentencing decision would mention the age of an accused along with other characteristics that are generally considered to mitigate a sentence (evidence of good character or a steady record of employment, for example). These cases would not be coded as age operating as a mitigating factor because the judge did not explicitly say it was a mitigating factor. In practice, age may operate as a mitigating factor in sentencing much more than is revealed in the present study.

3) Other Personal Characteristics of the Accused

Apart from an accused's age, I recorded the state of health of the accused, whether or not an accused was Aboriginal, and the gender of an accused. I recorded the health of the accused because the secondary sources and case law I reviewed suggested that age was a mitigating factor especially when combined with illness. Because of the common co-occurrence of illness and advanced age, in order to isolate age as a mitigating factor – as distinguished from ill health – it was necessary to keep track of cases

where the health of the accused was explicitly mentioned in the judgment. I recorded the gender of the offenders in the cases for the purpose of seeing if there was any gender bias in the sample that could have had an impact on my results.

Finally, the Aboriginal status of the accused was recorded because subsection 718.2(e) of the Code provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[66] Recording the representation of Aboriginal offenders in the sample allowed for the application of subsection 718.2(e) of the Code to be taken into account when analyzing the results.

4. Results and Discussion

Old age can operate as a mitigating factor in sentencing. In over one third of the cases involving older adults, the sentencing judge explicitly stated that old age mitigated the sentence handed down to an offender. However, when the sentences of older adults and younger adults are compared, in some categories of offences older adults are sentenced to longer prison terms than younger adults. The paragraphs that follow will discuss the underlying sample and these sentencing trends.

A) Offences

The sample contained 295 cases for each group of offenders – younger adults and older adults (n=590 total). These cases were divided between the offence categories as follows: 200 cases dealing with sexual offences; 22 cases with dealing drug offences; 51 theft/fraud cases; and 22 cases involving driving offences.

Older adults were generally guilty of more counts of an offence than younger adults. As the table below demonstrates, a greater proportion of older adults were found guilty of more than three counts of an offence than younger adults. In the older adult sample, 64 cases involved offenders charged with five or more counts whereas in the younger adult group only 36 offenders were found guilty of more than 5 counts.

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66   *Supra* note 5.

Table 1: Distribution of counts		
Number of Counts	**Older Adults**	**Younger Adults**
1	40%	45%
2	19%	28%
3	9%	12%
4	9%	4%
5 or more	23%	11%

The number of counts does not necessarily reflect the severity of offence committed. For example, there are offenders included in the sample that committed serious fraud[67] or repeated rape and incest over a period of years, but were only charged with one count of an offence.[68]

B) Gender and Aboriginal Status

There were more women in the older adult sample than in the younger adult sample. Both the older adult and the younger adult groups contained comparable numbers of Aboriginal offenders. Only one case involved an Aboriginal woman – it was in the older offender data.[69]

Table 2: Gender of offenders in sample		
Type of offence	**Number of Women Offenders (old)**	**Number of Women Offenders (young)**
Sexual offences	0.5%	2%
Drug offences	0.5%	0
Theft or Fraud	27%	14%
Driving Offences	14%	0
Total	6%	4%

The fact that the older and younger groups contain a comparable number of Aboriginal offenders is significant because subsection 718.2(e) of the Code requires particular consideration to the circumstances of Aboriginal offenders when considering whether sanctions other than imprisonment are reasonable in the circumstances. Four of the cases involving older Aboriginal offenders and two of the cases involving younger Aboriginal offenders were decided before this section came into force in 1996.[70] In all of these cases, the Aboriginal offenders were handed down sentences that involved incarceration. The use of alternatives to

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[67]   *R v Li*, 1995 OJ 4219 (SC).

[68]   See *R v DPG*, 2006 OJ 160 (SC); *R v CRP*, [1994] BCJ 3340 (SC).

[69]   *R v Fedorak*, 2010 ONSC 40.

[70]   *R v Ittigaitok*, [1984] NWTR 21 (Terr Ct) (36 months); *R v Maracle*, [1996] OJ No 4442 (Ct J (Gen Div)) (15 months); *R v JT*, [1992] YJ No 69 (SC) (4 months); *R v III*

prison for Aboriginal offenders increased after 718.2(e) was introduced and *Gladue* was decided.[71]

Table 3: Aboriginal status of offenders in sample		
Type of offence	Number of Aboriginal Offenders (old)	Number of Aboriginal Offenders (young)
Sexual offences	4%	6%
Drug offences	4%	0
Theft or Fraud	0	2%
Driving Offences	9%	0
Total	4%	4%

C) Co-occurrence of Old Age and Illness

In most of the sentencing judgments in this study, the state of the accused's health was not mentioned. Of the 295 cases in the older adult sample, 225 did not mention the health of the offender or indicated that the offender was in good health. For younger adults, the state of the accused's health was not mentioned or the accused was in good health in 262 of the 295 cases.

Table 4: Health of the offender				
Age	Offender's health not mentioned	Offender's illness is a mitigating factor	Offender is in good health	Offender's illness is not a mitigating factor
Older Adults	75%	22%	1%	2%
Younger Adults	84%	9%	5%	2%

70 cases in the older offender group involved an accused that suffered from some sort of mental or physical illness. In 64 of those 70 cases, the illness was explicitly stated to operate as a mitigating factor in the sentencing decision and in six of the cases, the accused's illness did not operate as a mitigating factor in the sentencing decision (either because the judge expressly stated that it would not be a mitigating factor or because it was not expressly listed with other mitigating factors in the judgment). Of

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(1996), 151 NSR (2d) 216 (SC) (3 months); *R v GM*, [1994] OJ No 976 (Ct J (Gen Div)) (24 months); *R v Henderson* (1989), 100 NBR (2d) 308 (QB (TD)) (30 months).

[71]   In the older offender sample, four of the offenders were given sentences that did not involve a custodial term: *R v Tedjuk*, [1998] NWTJ No 162 (SC); *R v Weisgerber*, 2009 SKPC 107, 340 Sask R 298; *R v MM,* [1999] OJ No 5372 (Sup Ct J); *R v CRP* (2001), 49 WCB (2d) 577 (Ont Sup Ct J). In the younger adult sample, three of the offenders were given sentences that did not involve a custodial term: *R v VBM*, [1999] BCJ No 1982 (Prov Ct); *R v Taylor*, 2010 YKTC 2; *R v Kakepetum*, [2001] OJ No 1511 (Ct J).

the 33 cases where the accused was ill in the younger offender category, ill health was said to be a mitigating factor in the sentencing decision in 27 of those cases.

Illness was less likely to operate as a mitigating factor for younger adults: even though there were less than half as many total cases involving ill younger adults, both groups contained six instances where the judge found that the accused's ill health would not operate to mitigate a sentence. One possible reason for this result could be that older adults in the sample had more serious illnesses than the younger adults.

D) Old Age Explicitly a Mitigating Factor

Judges explicitly stated that age was a mitigating factor in 108 of the 295 sentencing decisions involving older adults. In 48 of those cases the illness of the offender coincided with age as a mitigating factor. In 60 of the cases, the ill health of the accused was not mentioned or was explicitly said not to operate as a mitigating factor.

Table 5: Percentage of cases where old age was explicitly mentioned to be a mitigating factor			
Category of Offence	Age explicitly referred to as a mitigating factor	Age explicitly denied to be a mitigating factor	Impact of age on a sentence not mentioned
Sexual Offences	36%	9%	55%
Drug Offences	22%	0%	78%
Theft or Fraud	41%	2%	57%
Driving Offences	36%	4%	60%

While these results show that there are many cases where sentencing judges explicitly state that the old age of an offender operated to reduce the sentence, in the majority of cases, the impact of old age on a sentence was not explicitly set out by the judge. In some cases, the judge explicitly found that age did not operate to reduce a sentence.

E) Sentencing Data

The average total sentence for older adults was longer in the sexual offence and driving categories, but was shorter for drug offences and in the theft/fraud category.

Table 6: Average total sentence		
Offence Category	**Older Adults Total Sentence (in months)**	**Younger Adults Total Sentence (in months)**
Sexual Offences	37.16	27.52
Drug Offences	30.68	32.36
Theft or Fraud	18.98	21.85
Driving Offences	9	7.05

The longer duration of average penal sentences is not surprising given that older adults were found guilty of more counts (on average) in each category of offence.

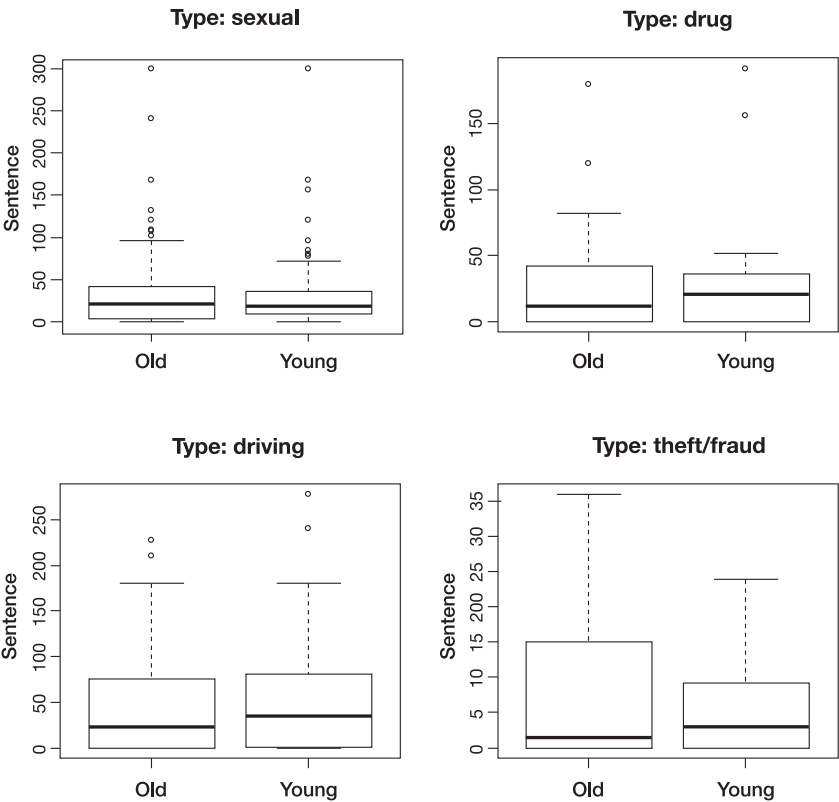| Table 7: Average number of counts per offence category		
Offence Category	**Average # of Counts (Old)**	**Average # of Counts (Young)**
Sexual Offences	4.15	2.72
Drug Offences	1.59	1.59
Theft or Fraud	6.08	5.86
Driving Offences	1.64	1.27

An interesting pattern that emerges in all categories of offences is that older adults are on average found guilty of more counts per offender than younger adults. A potential reason for this result is that older adults have had a longer period of time in which to commit crimes before being discovered.

However, when the duration of sentences are analyzed using a standard t-test, there is no statistically significant difference between the two groups.[72] The table and box plot graphs below show that, in general, the range of sentences for older adults and younger adults were similar, and that the differences between the mean sentence for each group was so small that any difference could not reliably be attributable to the age of the offender.

Table 8: T-test results for sentences awarded to older adults and younger adults		
Type	**T-test p-value**	**Significance**
Sexual	0.2621	Not significant
Drug	0.9074	Not significant
Driving	0.5616	Not significant
Theft/fraud	0.5501	Not significant

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[72]   The t-test was run by Hong Yeng Zhang, a graduate student in statistics at the University of British Columbia.

Type: sexual

Type: drug

Type: driving

Type: theft/fraud

Figure 1: Box plot results of sentences for older and younger adults for different types of crimes

Older adults were awarded non-penal sentences more frequently than younger adults. Of the 82 older adults that did not serve penal sentences, 25 suffered from some sort of mental or physical illness. For younger adults, the impact of health on the type of sentence awarded was less dramatic, with only 8 of the 55 non penal sentences handed down to individuals who were described to be of ill health.

Table 9: Distribution of Sentences over sample		
Sentence	**Older Adults**	**Younger Adults**
No Penal Sentence	28%	19%
12 months or less	20%	26%
13 – 36 months	30%	34%
37 – 60 months	12%	13%
More than 5 years	10%	8%

F) *The Impact of Ill Health on a Sentence*

Because many of the secondary sources relied on cases where old age and ill health were both present in an accused, the issue of whether it was age, illness, or both that operated to reduce a sentence may have been confounded. To isolate the impact of poor health on a sentence, I compared the average sentences of older adults in good health with the average sentences of older adults in poor health:

Table 10: Older offenders' health, average counts per offender, and average sentences				
Offence	Average total sentence, older adults with poor health	Average number of counts, older adults poor health	Average total sentence, older adults in good health or health not mentioned	Average number of counts, older adults in good health or not mentioned
Sexual Offences	22.15 months	4.09 counts	37.93 months	4.19 counts
Drug Offences	14.80 months	1.80 counts	40.62 months	1.38 counts
Theft/Fraud	23.06 months	5.23 counts	16.94 months	6.50 counts
Driving	20.00 months	2.00 counts	8.48 months	1.62 counts
Total	20.00 months	3.28 counts	25.99 months	3.42 counts

On average, older adults in poor health served shorter total prison sentences than older adults in good health. However when the comparison is made within individual categories of offences, older adults in poor health were sentenced to longer prison terms in the theft/fraud and driving categories.[73]

To isolate the impact of age on the duration of the sentence, I compared the sentences handed down to older adults and younger adults who were either said to be in good health or their health was not mentioned: [74]

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[73]   There was only one offender in the driving category that was in poor health, which compromises the generalizability of the finding for this type of offence.

[74]   Drawing the comparison between older adults and younger adults in poor health was ineffective because the underlying sample wasn't heavily populated in several categories: it only contained one case that involved an older adult in poor health (driving offence); one younger adult with poor health (driving offence); and it did not contain any data for younger offenders with poor health (drug offences).

Offence	Average total sentence, older adults with good health or health not mentioned	Average number of counts, older adults good health	Average total sentence, younger adults in good health or health not mentioned	Average number of counts, younger adults in good health or not mentioned
Table 11: Older adults and younger adults with good health (or health not mentioned)				
Sexual Offences	37.93 months	4.19 counts	26.83 months	2.75 counts
Drug Offences	40.62 months	1.38 counts	32.36 months	1.59 counts
Theft/Fraud	16.94 months	6.50 counts	23. 14 months	6.50 counts
Driving	8.48 months	1.62 counts	7.53 months	1.21 counts
Total	25.99 months	3.42 counts	22.46 months	3.02 counts

With the exception of the theft/fraud category, older adults in good health were sentenced to longer average prison sentences than younger adults in good health.

G) Sexual Offences

The sexual offence category presented the largest discrepancies between older offenders and younger offenders. The table below outlines the results as well as some of the characteristics of the offenders in the underlying data:

Table 12: Comparison of older offenders and younger offenders in the sexual offence category		
	Older Offenders	Younger Offenders
Average number of counts	4.15	2.72
Average total penal sentence (in months)	37.16	27.52
Average age (in years)	63	35
Gender	0 women	3 women
Aboriginal	8	11
Age as a mitigating factor (number of cases explicitly mentioned)	Yes: 73 No: 17 Not mentioned: 110	Yes: 3 No: 0 Not mentioned: 197

On average, older adults were found guilty of more counts of sexual offences than younger adults. Only seven of the 200 younger adults had been found guilty of more than ten counts, whereas eighteen older adults were charged in excess of ten counts. This discrepancy in the number of counts charged per offender is reflected in the average total penal sentence, which is significantly greater for older adults than younger adults.

40 of the 200 older adults in the underlying sample for this category served their sentences in the community, whereas only 27 of the younger adults did, even though the underlying sample for younger adults contained nearly twice as many Aboriginal offenders.[75]

Another striking trend that emerges from the data on older offenders is the number of cases that explicitly state that age will not operate to mitigate a sentence. In the sexual offence category, in nine percent of the cases the judge explicitly rejected the proposition that age should operate as a mitigating factor (other categories show less than half of this rate of rejection). In the case law, there are various reasons for rejecting age as a mitigating factor. Some judges refused to mitigate a sentence because the crimes were recently committed,[76] or where the crimes were simply too serious to allow for the personal characteristics or condition of the offender to be given any weight.[77] In other cases, age was linked to health and if an accused was still in good health, the trial judge refused to consider age alone as a factor to mitigate a sentence.[78] Other judges simply did not give any reasons for rejecting that the age of an accused should reduce a sentence.[79]

H) Drug Offences

In contrast to sexual offences, the least amount of difference between older adults and younger adults' sentences were found for drug-related crimes. Older adults and younger adults were, on average, charged with the same number of counts. The samples had similar characteristics (no Aboriginal offenders, only one woman in the older offender group), which makes it easier to draw the comparison that isolates the impact of older age on the sentencing of an adult. When the average total sentences are compared,

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[75]   This is counter intuitive given the directions provided in section 718(2)(e) of the *Criminal Code*, along with the leading case on conditional sentencing: *Gladue*, *supra* note 65.

[76]   *R v Ruby* (1991), 94 Nfld & PEIR 47 (SC (TD)); *R v DD*, [2002] OJ No 2070 (Sup Ct J) at para 23 the judge finds, "his age and innumerable health issues didn't stop him from committing the offence against his granddaughter."

[77]   *R v FJS*, 2005 ABQB 992, 421 AR 384; *R v HM*, 2001 ABPC 51, 294 AR 294; *R v Sauriol*, [2005] OJ No 2590 (Sup Ct J); *R v Cloutier* (2004), 29 CR (6th) 365 (CQ) at para 121; *R v Taqtaq*, [1990] NWTJ No 100 (SC).

[78]   *R v DTG* (2007), 76 WCB (2d) 151 (Ont Sup Ct J); *R v PL*, [1997] OJ No 4694 (Ct J (Gen Div)); *R v Plint*, [1995] BCJ No 3060 (SC); *R v SP* (2004), 62 WCB (2d) 38 (NL Prov Ct); *R v EJW* (1993), 120 NSR (2d) 66 (SC).

[79]   *R v AN*, 2009 NSSC 186, 279 NSR (2d) 201 at para 39; *R v Estabrooks (KB)* (1999), 222 NBR (2d) 55 (QB); *R v Lasik (RJ)* (1999), 180 Nfld & PEIR 125 (SC (TD)); *R v RBL*, 2005 ABPC 63.

older adults served sentences that were generally over a month shorter than younger adults as outlined in the table below:

Table 13: Comparison of older offenders and younger offenders in the drug offence category		
	Older Offenders	**Younger Offenders**
Average number of counts	1.59	1.59
Average total penal sentence (in months)	30.68	32.36
Average Age (in years)	60	30
Gender	1 woman	0 women
Aboriginal	0	0
Age as a mitigating factor (number of cases explicitly mentioned)	Yes: 5 No: 0 Not mentioned: 17	Yes: 0 No: 0 Not mentioned: 22

Age was explicitly mentioned to be a mitigating factor in the reasons provided by the sentencing judge in five of the 22 cases where older adults were sentenced for drug related crimes.

I) Theft/Fraud

Offences dealing with theft and fraud also resulted in similar characteristics of the offenders and an average total sentence per count charged within a couple of weeks between the two groups:

Table 14: Comparison of older offenders and younger offenders in the theft/fraud category		
	Older Offenders	**Younger Offenders**
Average number of counts	6.08	5.86
Average total penal sentence (in months)	18.98	21.85
Average Age (in years)	63	35
Gender	13 women	7 women
Aboriginal	0	1
Age as a mitigating factor (number of cases explicitly mentioned)	Yes: 21 No: 1 Not mentioned: 28	Yes: 3 No: 0 Not mentioned: 48

What is striking about the results that emerged from the theft and fraud category is the proportion of cases where the judges explicitly stated that the age of the older offender would operate to mitigate the sentence. In 21 of the 51 cases, the judges explicitly stated that old age was a mitigating factor in sentencing compared to younger offenders, where age operated to

reduce the sentence in three of the 51 cases (two of those cases involved individuals in their twenties, one involved an individual in his fifties). The proportion of cases where age was explicitly found to be a mitigating factor in sentencing is higher for theft and fraud than any of the other offence categories.

Another interesting trend that emerged in the data is that theft and fraud were the crimes committed by the greatest proportion of women. This category of offence included more than twice the number of women in the sample than any other offence category.

J) Driving Offences

On average, older adults committed more driving offences and were given average total penal sentences that were greater than those handed down to younger adults:

Table 15: Comparison of older offenders and younger offenders in driving offences		
	Older Offenders	**Younger Offenders**
Average number of counts	1.64	1.27
Average total penal sentence (in months)	9	7.05
Average Age (in years)	63	35
Gender	0 women	3 women
Aboriginal	2	0
Age as a mitigating factor (number of cases explicitly mentioned)	Yes: 8 No: 1 Not mentioned: 13	Yes: 0 No: 0 Not mentioned: 22

In 36% of the driving cases old age was mentioned by the sentencing judge to be a mitigating factor in the sentencing decision.

5. Conclusion

Some aspects of this study point to the conclusion that old age is a mitigating factor in sentencing. In over a third of the cases involving older adults, the sentencing judge explicitly said that old age operated as a mitigating factor in the sentence. When older adults and younger adults were found guilty of the same average number of counts for the same category of crime (drug-related offences), older adults served shorter average prison terms. There is also data that suggests age operates as a mitigating factor, independent from illness (for theft/fraud offences). Furthermore, the data suggests that older adults are more likely to be

awarded a non-penal sentence than younger adults, and that this tendency is not tied to illness.

However, there are other parts of this research that suggest old age is not a mitigating factor in sentencing. Older adults were sentenced to longer prison terms than younger adults for sex offences and driving offences. Further, when the duration of sentences between older adults and younger adults are compared, they are not significantly different.

These inconclusive results highlight the benefits of further qualitative study on the content of the judicial decisions. There are certain limitations associated with this quantitative research that may have impeded conclusive results on this question. First, in order to ensure reliability, I only counted age to be a mitigating factor where a judge expressly said that age was a mitigating factor. Cases where the impact of old age was implied (that is, it was listed along with other characteristics that are generally considered to be mitigating factors) or where the judge was silent on the impact of age were included as cases where the impact of age was not mentioned, did not get counted in favour of mitigation. This limit was necessary for the purpose of ensuring consistency in my data collection processes, but it certainly resulted in an under-reporting of cases where age operated to reduce a prison term.

A second limitation of this quantitative study is that, despite the efforts here to account for factors that are known to have a significant impact on the duration of a sentence and type of sentence awarded (such as the type of offence committed, gender, Aboriginal status, and illness), there is clearly more going on in the judicial decision making process that cannot be tracked quantitatively. I could only count those characteristics that were capable of being measured or tracked, but I acknowledge that there are other significant factors that play a role in a sentencing decision that have impeded my ability to isolate the factor of age in these results.

A third limitation of this study is that "mitigation" is assumed to be represented by a shorter prison term. For the purposes of this basic quantitative analysis, I assumed that the number of months in prison reflected the severity of a sentence, so that a shorter prison term amounted to a sentence being mitigated. This assumption oversimplifies the notion of mitigation, and fails to take into account factors beyond a prison sentence that reflect leniency by a trial judge.

These three limitations highlight some shortfalls of this quantitative analysis, however, quantification necessarily involves an over-simplification of the complex judicial decision making involved in sentencing. Further

qualitative studies on the topic could address these shortfalls, by examining the content of sentencing decisions to uncover information about the judicial reasoning that can highlight factors, including or apart from old age, that could operate to mitigate a sentence.