

Tough on crime, big on prisons

CRIME RATES ARE FALLING

In order to win support for the “tough on crime” agenda, the Conservatives have to ensure that fear of crime does not wane. However, the rate of violent and non-violent crime has been falling in Canada since the early 1990s.

Stockwell Day, the Minister of Public Safety, announced that unreported crime was rising; however, he could not explain how he had discovered the numbers on unreported crimes.

A Conservative party supporter, who had worked as an adviser to Stockwell Day, recently produced a study that questioned the validity of Statistics Canada’s findings that crime rates were falling. Leading criminologists immediately denounced the methodology of this study.

THE US MODEL

Harper has followed the example of the United States. He has learned that if you wish to pretend to be tough on crime, it is not necessary to have the facts or do proper studies. It is only necessary to keep promoting the idea that there is a terrible crime problem and that people should be scared. This is the soil in which the United States managed to grow a prison population of over two million and achieve first place in the “world highest rate of incarceration” contest. This achievement seems to impress Stephen Harper, who follows all the latest ideas developed by the “tough on crime” leaders south of the border.

The fact is that states such as California are facing bankruptcy. They are realizing that they cannot afford to imprison so many of their citizens and are finding ways to release prisoners and abandon some “tough on crime” poli-

BY ROBERT KELLERMAN

Robert Kellerman practised criminal law in Toronto. He is a co-founder of the Law Union of Ontario and is well known for his work as a social justice lawyer.

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cies. By contrast, Harper plans to produce more prisons and more prisoners to fill them.

SENTENCING REFORM BEFORE THE CONSERVATIVES

In Canada, the federal government writes criminal law. The former Liberal government had made major changes to the criminal law aimed at both adults and youth. These changes placed a great emphasis on reducing the use of incarceration and the use of incarceration reflected more enlightened views about what works and what doesn’t work in terms of deterring crime and reforming behaviour.

IMPLEMENTING THE “TOUGH ON CRIME” AGENDA

The Conservatives have passed many pieces of “tough on crime” legislation. Some of this legislation will have a serious impact on the number of people that will be imprisoned and on the length of sentences that will be served. Some of the changes in the law are clearly cos-

metic, intended to allow the Conservatives to look tough.

However, slowly but surely the law is being changed to undo what the Liberals had tried to do in terms of reducing the use of imprisonment. The result will be thousands of people unnecessarily imprisoned and subjected to the cruelty of the so-called correctional facilities, or penitentiaries.

Here are some examples of “tough on crime” legislation.

Conditional Sentences

The conditional sentence was introduced by the Liberal government in 1992 in order to provide a sentence that was more severe than probation, but less severe than imprisonment. An offender sentenced to a conditional sentence serves the sentence in the community unless he or she breaches one of the conditions imposed by the court. The conditions can be very strict and usually contain a period of house arrest as well as a community service order, curfews, treatment, etc. A breach of any condition can lead to the judge ordering that the offender serve the remainder of the sentence in custody.

The Harper government has moved to restrict the availability of this type of sentence by creating a long list of offences where the conditional sentences are not an option for the sentencing judge.

What Is Accomplished by These Amendments?

The clear motive behind the changes was to cut off the possibility of people avoiding imprisonment. Another motive, though, was to tie the hands of the judges. The Harper government does not trust most of them. In their view, the judges are “soft on crime.” The simple solution is to remove the discretion of the judges so that they are forced to sentence people to imprisonment even when they feel it is inappropriate to do so.

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The explanation provided by the government for severely restricting the availability of the conditional sentence is that these offences “deserve jail”—end of story. The effect of this change is that more people will be sentenced to imprisonment and the prisons will be more crowded.

Mandatory Minimum Sentences

More than 40 offences now carry a minimum penalty, and minimum penalties mean more people go to jail. They remove the discretion of judges to determine the appropriate penalties.

The rationale for mandatory minimum sentences has usually been that the minimum sentence is necessary to deter those who might contemplate committing the offence. Criminologists have done a great deal of work investigating the question of when deterrence works, when it does not, and whether increasing penalties for particular types of offences will make any difference in terms of deterrence. In general, mandatory sentences do not deter.

It is clear that the results of these studies are not of interest to the Harper government. In the parliamentary hearings concerning minimum sentences, they heard submissions from numerous experts that questioned the wisdom of such measures, and they ignored them. The Conservatives have either increased minimum sentences or created new ones with respect to 19 different offences.

The “Truth in Sentencing” Act —The Removal of “Two for One” in Sentencing

It has been standard practice for judges to grant two days’ credit for each day of pre-trial custody served by an offender. Borrowing language from the “tough on crime” movement in the United States, the Conservatives moved to eliminate this long-standing sentencing practice.

There was no lack of transparency in this sentencing practice. The judges were not doing this in secret and case law clearly articulated the rationale. The

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Supreme Court of Canada had endorsed the practice as a way of achieving fairness in sentencing. The practice was developed to avoid unfairness caused by the laws governing parole and the oppressive conditions faced by those detained in lock-ups awaiting trial.

The government chose not to understand this rationale, and the Conservatives once again passed legislation that removed the discretion of judges to sentence properly. A more honest title for this act would have been the “Eliminating Fairness in Sentencing Act.”

Abolition of the Faint Hope Clause

In February of this year, the Conservatives passed legislation designed to abolish the “faint hope clause.” The aptly named clause provided only a very faint hope to a person convicted of murder that his or her parole eligibility date might be moved forward.

Offenders convicted of first-degree murder are sentenced to life and cannot apply for parole until they have served 25 years. Offenders convicted of second-degree murder also are sentenced to life and may have their parole eligibility date set at any number between 10 and 25 years. The law allowed prisoners to apply only after they had already served 15 years.

The application for parole is first screened by a judge who decides whether there is some reasonable prospect that a jury would look favourably on

the application. If the judge allows the application to go forward, a jury then has to be satisfied that the prisoner deserves an opportunity to apply to the parole board. It should be clear that prisoners like Paul Bernardo or Clifford Olson could never dream of using this section, as no judge or jury would possibly look favourably on their application.

The government has removed the hope of all prisoners. This is an example of the Conservatives trying to look tough but accomplishing nothing except to deny the possibility that a few individuals, having already served 15 years, might get the opportunity to persuade a judge, then a jury, and then the parole board that they were a changed individual. Even if granted parole, they would be supervised for the rest of their lives.

WHY THE OPPOSITION PARTIES HAVE FAILED

The Liberal Party, when last in power, had begun to reform the law in order to rely less on imprisonment. Unfortunately, they and the other parties have been running scared from the Conservative Party’s attacks, which paint them as “soft on crime.”

The problem for the opposition has been their refusal to unite in opposition to the Conservatives’ “crime story.” They have not dared to unite in a vote against the crime bills for fear of triggering an election. They have thus taken turns supporting the “tough on crime” bills, while allowing the other opposition par-

ties to oppose the bills and somehow satisfy their more enlightened followers that they still have a few principles.

The Conservative “tough on crime” agenda has run into trouble with the provinces that have already spent billions building more correctional facilities to imprison the growing numbers of prisoners. In the federal–provincial division of powers, the provinces are obliged to imprison all those who are sentenced to less than two years. The provinces are pushing the federal government to pick up some of the tab for the growing prison population produced by the “tough on crime” legislation.

CRIME IS A SOCIAL PROBLEM

Alternative strategies for dealing with the roots of crime, such as poverty reduction, education, job opportunities, treatment for mental health problems, treatment for alcohol and drug addictions, early childhood education, and after-school programs, are dismissed by the Conserva-


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tives as “bleeding-heart-liberal, soft on crime” solutions. However, it is telling that Conservative senator Hugh Segal wrote an opinion piece in the *Toronto Star* (February 20, 2011) in which he argued “to be tough on crime we must be tough on the causes of crime.” He identified poverty as the key cause of

crime and advocated a guaranteed annual income as a solution to poverty. It may be a sign that some red Tories are prepared to break ranks with Harper and to speak out against Harper’s agenda.

MORE PRISONS, MORE INMATES

Still, the federal Conservatives seem determined to build more prisons regardless of the cost, even when faced with a massive debt. They refuse to reveal the projected costs to the opposition, but the Parliamentary Budget Officer estimates a price tag of \$10 to \$13 billion.

Recently, there have been encouraging signs that the Liberals will be prepared to fight against the “tough on crime” agenda in the next election. Should the opposition parties join hands in this effort, they may discover that they can all benefit by helping the Canadian public to see the destructive nature of the “tough on crime” agenda. Perhaps then a discussion about real solutions to criminal behaviour can begin. 

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so rarely in the past five years that it is news when it does happen. This failure to initiate negotiations with the opposition can be explained, perhaps, by the longer-term goal of changing the political culture, which would be diluted by compromise and confidence in the government’s capacity to control public discourse.

The government has relied on its capacity to set the agenda for public discussion and to influence the terms in which even media criticism has been framed. Only time will tell whether or not the goals of supplanting the Liberals as the natural governing party and recalibrating Canadian political culture to a more right-wing value system will succeed. A Focus Canada poll, reported by Jeffrey Simpson in the *Globe and Mail* on February 4, 2011, found the welfare state consensus holding across a wide range of specific values and policies, though a slight majority were satisfied with the general direction of government policy.

The unravelling of some key elements of Canadian parliamentary democracy may require more than a change of heart or a change of government to fix.

Since the hostile takeover of the Progressive Conservative Party, Canadian political discourse has been marked by a notable disrespect not only for opponents and the long-standing welfare state consensus, but also for the very institu-

tions of democratic government in Canada. The past chicanery of the Liberal Party notwithstanding, the Harper revolution threatens more than political discourse.

A DEMOCRATIC AUDIT

The unravelling of some key elements of Canadian parliamentary democracy may require more than a change of heart or a change of government to fix. When a convention is violated and the public acquiesces, the convention itself may well have changed. Where there is a strong public backlash, a subsequent government may be motivated to enshrine the rule in law or regulation. Once abrogated, it is unlikely that a convention will be complied with in the absence of a legal sanction. The developments briefly outlined here make the case for a democratic audit to review the entire range of Canadian institutions and practices and to consider formalizing key elements of the system. 