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Criminal Justice Law Reform: Stealing A Page From The American Playbook

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CRIMINAL JUSTICE LAW REFORM:

STEALING A PAGE FROM THE AMERICAN PLAYBOOK

Criminal justice law reform is a major component of the Federal Government's current legislative agenda. Unfortunately, instead of basing reforms on criminological research or the advice of experts, our current Government, by its own admission, is far more interested in what ordinary Canadians think about the criminal justice system.

Canadians increasingly fear crime. They see the criminal justice system as broken. For the majority, the mollycoddling of criminals is to blame; placing too much emphasis on protecting the rights of suspects and accused persons and not enough on safeguarding victims and empowering police. The judiciary invariably features in this narrative, attracting strong criticism for taking a kid-glove approach, especially on questions of bail and sentencing. Widespread anxiety about crime and criminals explains why being tough-on-crime is such a powerful political tool.

Our current Government understands this. It has taken a page from the playbook of American politicians who, for over a generation, ever since Barry Goldwater first announced a "War on Crime" in his 1964 campaign for the presidency, have carefully exploited criminal justice for political ends. The results of the American experiment are well known; the United States now incarcerates more people, per capita, than any other country in the world. At the same time, its homicide rate remains the highest of any G7 country. Remarkably, just as the tide has begun to shift in the U.S., with many states beginning to repeal the mandatory minimum sentences that fed the growth in incarceration, our current Government remains committed to bringing these same failed policies to Canada.

Prior to the prorogation of Parliament, the Government had introduced a torrent of headline-grabbing legislation that fosters its tough-on-crime image. The various amendments that mark this punitive turn in Canadian criminal justice policy fall into four general categories:

- expanding police powers;
- creating more crimes;
- tightening the rules governing bail;
- increasing the chances that those convicted of crimes will go to jail and that those who do will serve longer sentences.

The net result will undoubtedly be a further rise in Canada's already burgeoning prison population. Recognizing this, the Government recently doubled the budget for prison construction and maintenance.

Reviewing all the details of the Government's tough-on-crime policies is not possible in this short article. Nevertheless, a few of these reforms deserve special mention because they raise significant civil liberties concerns.

When it comes to the expansion of police powers, the privacy of Canadians is threatened by legislation that the Government claims necessary for police to combat cybercrime, in particular child pornography. To that end, the Government had introduced legislation (Bills C-46 & C-47) that would substantially erode the privacy Canadians enjoy when they go online. In particular, Bill C-47, as it was presented, required that Internet Service Providers and cell phone companies, in response to a demand by specially designated police officers, furnish information to police regarding their customers, including an individual's name, address, telephone number, email address, Internet Protocol (IP) address, etc. Not only does this specially designated police officer not require a warrant, he or she does not even have to reasonably suspect that access to the information is necessary to investigate a crime. If a bill similarly drafted was reintroduced and became law, constitutional challenges under s. 8 of the *Charter* are likely.

The Government's efforts to tighten access to bail are similarly troubling. Recent amendments to the *Criminal Code* have served to reverse the burden in bail hearings where an accused person is alleged to have perpetrated a violent crime with a firearm, is charged with importing or trafficking a firearm or is charged with a firearms offence while subject to a weapons prohibition. Placing

the burden on the person charged with a crime to establish why they should be released pending trial is not our usual approach to bail.

Ordinarily, the Crown bears the burden of showing why bail should be denied. This is in keeping with s. 11(e) of the *Charter,* which guarantees the right "not to be denied bail without just cause." The Supreme Court of Canada has instructed that "just cause" will exist where two preconditions are met: 1) bail is denied only in a narrow set of circumstances; and 2) the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. In light of these considerations, the Supreme Court previously upheld a reversal of the burden for those charged with drug trafficking. The Court reasoned that such accused are more likely to have a profit incentive for continuing to offend if released and are more likely to have the resources and criminal connections to abscond. In other words, reversing the burden in cases of accused drug traffickers is directly connected to valid bail considerations.

One is hard pressed to see the parallel for those charged with firearms offences. Frankly, these amendments appear to be driven by punitive considerations, a desire to get those charged with serious gun crimes off the street sooner rather than later. Reversing the burden in bail hearings based on that sort of reasoning turns the presumption of innocence on its head. Given this, constitutional challenges are no doubt on the horizon.

In addition to creating a number of unnecessary new crimes (street racing being one of many such examples; given that such conduct has long been prosecutable as dangerous driving), the Government has also been busy making a number of troubling changes to Canada's sentencing laws.

It has moved to expand the list of mandatory minimum sentences for a wide assortment of crimes. Most recently, for example, it proposed a mandatory minimum sentence of 2 years imprisonment for those convicted of fraud where the amount involved exceeds $1 million (Bill C-52). In addition, in 2008, the Government amended the *Criminal Code,* providing for escalating mandatory minimum sentences for a number of firearms offences. For example, if the Crown proceeds by indictment, an individual caught with a loaded unregistered firearm now faces a minimum 3 year sentence for a first offence, and a minimum 5 year sentence for subsequent offences.

In addition, the Government has proposed further restrictions on the use of conditional sentences (i.e. house arrest), foreclosing the availability of such sentences for a number of offences, including theft over $5,000 and drug trafficking. In other words, conditional sentences will be off the table even for certain non-violent offenders.

Finally, the Government recently amended the *Criminal Code,* restricting the ability of judges when passing sentence to credit offenders for time spent in pre-trial custody. The practice was developed by judges, who cited two reasons for it: 1) the deplorable conditions that exist in many of our provincial remand facilities; and 2) unlike with sentences served post conviction, the period spent in pre-trial custody is not subject to remission through parole. The recent amendments foreclose judges from giving enhanced credit for time spent in pre-trial custody except if the circumstances justify it. Even then, however, the law imposes a strict limit on the amount of credit that can be given (1.5 days for every 1 day in pre-trial custody).

An impossibly burdensome standard for invoking the prohibition found in s. 12 of the *Charter* on cruel and unusual punishment probably means that each of these changes to Canada's sentencing laws is likely to survive constitutional challenge.

It is important to remember, however, that just because a law is constitutional doesn't mean that it is sound from a public policy standpoint. Going forward, civil libertarians must recognize that the fight against tough-on-crime measures will often be lost if we only become engaged with these issues in the courts.

There are two ways to win the struggle against the War on Crime. First, we can simply wait; the experience in the United States demonstrates that at a certain point the politicians and the electorate will tire of a costly war that never delivers a decisive victory. Of course, for civil libertarians, this simply isn't a realistic option. The human cost of allowing misguided policies to come to full fruition is simply too great.

The second option is education. Widespread misconceptions that make tough-on-crime policies so popular must be met head-on. The impact on public perceptions of our criminal justice system from American crime dramas, sensationalistic crime reporting, and political rhetoric must be countered with

facts. Unfortunately, too many believe that what they see on Law and Order fairly reflects what happens in Canadian courtrooms.

When it comes to criminal justice issues, many see the *Charter* as a source of technicalities that criminal defence lawyers exploit and that liberal judges are all too happy to seize upon in order to slam the police, exclude evidence and allow the guilty to escape justice. Anyone close to the Canadian criminal justice system knows that such an account is pure fiction.

In reality, relative to their colleagues on television, the judiciary in Canada is rather conservative. They are understandably reluctant to grant bail to individuals who are shown to pose a substantial risk to public safety if released. In addition, under our discretionary approach to the exclusion of unconstitutional evidence, minor or technical violations of the *Charter* rarely lead to the exclusion of evidence. Canadian judges are sympathetic to the difficult job performed by our police officers and are rarely enthusiastic about excluding evidence against a factually guilty accused. Canadians need to know all of this.

In addition, Canadians should be continually reminded that crime is actually down. For example, in 2006, the latest year for which we have statistics, the crime rate was the lowest it has been in 25 years. This decline is across the board, with Statistics Canada reporting a downward trend even for violent crimes. For example, the rate of violent victimization, including sexual assault, robbery, and simple assaults reduced slightly over the five-year period from 1999 to 2004. In other words, the perception that crime is out of control is simply fiction.

Finally, Canadians need to become more informed about the long-term implications of pursuing tough-on-crime policies. In that respect, the experience in the United States provides a great deal of teaching material on the economic and human costs of this misguided approach.

With education, Canadians will be equipped to see through the empty symbolism of these punitive policies. It is only when tough-on-crime polices no longer garner votes that the War on Crime in Canada will come to a decisive end. Hopefully, then, we can finally begin the process of recognizing and redressing the true causes of crime. In the meantime, civil libertarians in Canada have their work cut out for them.

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