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Ottawa's harsh new penal proposals won't make us safer, just poorer — and less humane.

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How do you create effective public policy in a field that sparks high emotion? Homelessness, the gun registry, Afghanistan, euthanasia, interest rates — in volatile and unstable times almost anything can be turned into an irrational bogeyman that all the research and studies in the world cannot combat. In March, a collection of academics gathered at the annual Walter Gordon Massey Symposium in Toronto to consider this highly charged question under the rubric "Private Emotion, Public Policy." After many hours, the best that could be gleaned from the discussion was that reason and emotion coexist in all of us, cannot be separated and must each play their part in the creation and acceptance of worthwhile policy.

This essay deals with just such a public policy conundrum: whether to respect the constitutional rights of citizens, even when imprisoned, versus the need many people feel to punish prisoners by depriving them of most of their rights. In a country with an aging demographic such as ours, politicians are fully aware that older citizens (who are also prime voters) are afraid of crime and criminals and are generally convinced that life is getting more dangerous, despite Statistics Canada data from 2009 showing the fifth consecutive annual decline in police-reported crime and crime rates overall that we have not seen in Canada since the 1970s. The "lock 'em up and throw away the key" mentality, to be expected among Conservatives, is spreading to traditional Liberal and NDP supporters as well, and the Harper minority government knows this. It has proven to be an ideal time, therefore, for Stephen Harper to fundamentally change the philosophy and direction of our correctional services, confident that such change will be a non-starter for the opposition. So it has proven thus far, but public discussion of this issue is urgently required. Without it, recommendations with draconian implications for the protection of human rights, public safety and the public purse are being presented as the future of federal corrections in Canada.

In 2007, Stockwell Day, then minister of public safety, struck a five-person panel and charged it with reviewing the operations of the Correctional Service of Canada. The panel was composed of Rob Sampson, former minister of corrections for the Ontario government under Mike Harris, and four other individuals with little overall experience in correctional policy. Six months later, they produced a 170-page report titled *A Roadmap to Strengthening Public Safety,* an extraordinary document largely devoid of historical context, constitutional analysis or research-based evidence.

Both the panel's observations and recommendations are indelibly flawed.

The Harper government officially responded to the report in its 2008 budget, investing $478.8 million over five years to begin the implementation of a new vision. With a speed unprecedented in the history of Canadian corrections, a blueprint for the "transformation" of Canada's federal system has been endorsed and adopted by CSC as the correctional

equivalent of the Holy Grail. All of this with very little discussion or critical commentary, either in the public domain or among the criminal justice non-governmental community. Our analysis reveals such fundamental misunderstandings and misinterpretations of the Canadian correctional context that both the panel's observations and recommendations are indelibly flawed.

Before we examine the panel's five key subject areas, a little history is in order. Canadian corrections officially date back 175 years to the opening of Kingston Penitentiary in 1835. Throughout the intervening decades there have been abuses, scandals, riots, cover-ups and a well-documented succession of royal commissions, commissions of inquiry, government task forces and academic literature attempting to fix the problems. But it is fair to say that nothing has affected corrections more profoundly in this country than the adoption of the Corrections and Conditional Release Act in 1992, designed to bring correctional legislation into conformity with the Charter of Rights and Freedoms. From that point forward, correctional authority was to be exercised within a culture of respect for rights and not according to the dictates of administrative convenience.

Why should we care about the human rights of prisoners? These people have broken the law and are being punished for it. Beyond the basic rights the panel agrees they have — rights to food, shelter, medical treatment and a lawyer — why should they be entitled to anything more? It is our contention — and both academic analysis and Canadian case law back this up — that the discipline and control necessary in the correctional system can be effective in promoting positive change in the individual and avoid being self-defeating only if it is inherently moral and justifiable. Promoting and respecting human rights is not about being soft; it is about being decent. It is also the most effective way of doing corrections.

But there are other, deeper reasons we should care about prisoners' rights. There is no other government activity in a democratic society that entails as much power over individual citizens' freedom as prison. And accountability inside those walls is exceptionally hard to monitor. Prison management is largely invisible to the public, in contrast with other powerful systems such as the courts, which operate in a publicly accessible forum. And there is the "don't want to know" factor: prisons hold people who have little claim over the attention or compassion of the general community. For all these reasons, prison is the acid test of our commitment to human rights. If we can maintain that commitment in our prisons, we can do it anywhere. If not, then respect for human dignity becomes conditional, based on the decisions of faceless officials operating with the broadest authority in the darkest places of society.

Unlike most previous reports and commissions, there is not a single mention of prisoners' human rights in *A Roadmap to Strengthening Public Safety.*

The first area the *Roadmap* deals with is offender accountability. The panel finds that the 1992 legislation, the CCRA, with its insistence on the principle of using "least restrictive measures" to control prisoners' behaviour, constricts CSC in its ability to act. The panel prefers "'appropriate measures' to support correctional plan implementation." What that

means is that prisoners would have to "earn" their rights and privileges (beyond the basic rights mentioned above). You behave well, you get to play football and have visitors. You don't, you don't.

This recommendation, if enacted, would subvert the key Supreme Court judgements in this area: Solosky v. The Queen (1980), which dealt with the privacy of mail, and Sauvé v. Canada (2003), which had to do with prisoners' voting rights. In Sauvé, Chief Justice Beverley McLachlin uses the evocative phrase "citizen law-breakers" to describe prisoners and their relationship to Charter rights. Throughout the history of incarceration, it has been the pervasive tendency of prisons to make prisoners more dangerous and more antisocial. In recent decades, though, it has been increasingly recognized that two indispensible components in reconciling the goals of public safety and justice have been promoting a culture of respect for the rule of law and human rights and holding correctional authorities accountable for abuses of power. But the panel seems to think that correctional officials can pick and choose which constitutionally derived human rights they will respect.

Eliminating drugs from prison is the panel's second point of focus: "The Panel believes the presence of illicit drugs in a federal penitentiary is not only unacceptable but results in a dangerous environment for staff and offenders." Fair enough comment, but then the *Roadmap* recommends "more stringent control measures (*i.e.,* elimination of contact visits)" and a requirement that all visits be behind glass. More drug dogs and a greater use of ion scan equipment (which can detect trace particles of illegal drugs on surfaces such as clothes, money, cell phones, *etc*.) and "enhanced perimeter control" are called for, as well as more "intelligence gathering and sharing."

Their recommendations are breathtaking in their scope, complexity and cost.

There is no research to support the view that ending contact visits will have a major impact on reducing the flow of drugs into prisons. CSC's own internal audit of drug interdiction reveals that from 2001 to 2006 drug seizures in the visits areas accounted for less than 20 percent of drug seizures in penitentiaries. While that figure may not tell the whole story (since some drugs coming in through the visits area may not have been caught on the spot), this still represents a relatively small percentage of the drugs coming in. Blocking the visits area to any physical contact would have a crippling effect on inmates and their families, while at the same time ensuring that more drugs would enter through other well-established channels.

Permitting a humane visiting regime while ensuring a drug-free penitentiary is impossible if either the visits or the drug interdiction must be absolute. Both outcomes are desirable but reflect the competing interests at stake, a recognition that is entirely absent from the panel's analysis.

As for the ion scanners the panel is so enthusiastic about, they are recommending them without any cost-benefit analysis or review of CSC's experience with these machines. In fact, CSC has never been able to produce evidence of studies conducted by them or

anyone else that establishes the reliability of this technology in the field. There is no doubt that the technology is highly sensitive to certain substances and can identify extremely small amounts in the laboratory. What is in dispute is whether the machines can reliably differentiate between illegal drugs and many other perfectly legal substances. They can never determine whether minute contaminations occurred completely innocently or not. A 1998 study of several ion scanners in the United Kingdom revealed that the only illegal drug the machines detected reliably was cocaine and that for other drugs the machines were not currently reliable. A 2006 CSC audit indicated ion scan policies and procedures were not being followed properly at Canadian penitentiaries. The panel does not seem to have been aware of the existence of this audit.

The third area the *Roadmap* focuses on is employability and employment. The panel notes that employment as a priority program "has been eclipsed over the past decades" by programs dealing with concerns such as substance abuse and violence. It then goes on to recommend that prisons have "a more structured work day … to … allow for the proper allocation between work, education and correctional programs." The panel makes it clear that it only supports basic education where it is directly tied to employment. The panel claims to have seen examples out in the working world "that demonstrate that basic education and specific skills can guarantee immediate employment and can offer a solid base that an employer can use to build increasing expertise through on-the-job experience and training." Based on their discovery of these magical unidentified programs, the panel then places great expectations on CSC to make employment during and after release a priority, apparently unfazed by the fact that their recommendations are breathtaking in their scope, complexity and cost.

Recent legislation will, by itself, increase the prison population by 10 percent.
The history of corrections is filled with work or work-training initiatives that in their day were thought would reduce recidivism, ranging from breaking rocks to trades training. Unfortunately, ideas that seem to make sense intuitively often are very difficult and expensive to implement in the unusual world of the prison. While training can benefit some prisoners, there is little reason to believe or evidence to support the idea that massive employment programs directed at the entire population, where so many have other serious problems unrelated to employment, should be the primary focus of corrections. Over the years, instead, CSC has increasingly embraced a "what works" philosophy, which accounts for the shift from a historically popular focus on employment skills to a focus on cognitive skills, mental health, addictions, anger management, literacy and education in a broad sense. The panel makes no attempt to trace the reasons for that shift and, indeed, so certain are the panelists of their conclusions about employment being the be-all and end-all of prisoner success that they actually propose that CSC researchers go out and prove what the panel is convinced must be out there … somewhere. It is remarkable that the panel would propose far-reaching changes first and then ask the CSC Research Branch to find the evidence to justify those changes. Policy-based evidence instead of evidence-based policy, it seems.

The recommendations relating to work, training and placement would inevitably have enormous cost implications if implemented. But the panel makes no attempt to estimate

what those costs might be. The substantial influx of new money to implement the proposals is highly unlikely in current economic conditions. Nor is the employment of ex-prisoners likely to become a priority for government spending or the private sector in the face of increasing unemployment in the general population. Moreover, the lack of space in training programs, already a barrier for many prisoners, can only become much worse as the prison population grows. In fact, the panel does not take into account the anticipated prison population increase to be created by planned and new legislation that introduces long mandatory minimum sentences for a whole range of offences. For instance, the Correctional Service of Canada has estimated that recent legislation that changes how credits are given for time served prior to trial will, by itself, increase the prison population by 10 percent.

We should all be concerned that the new focus on employment will take resources from other areas that have greater potential to reduce recidivism and that the panel's initiatives will mark another chapter in the history of costly if well-intentioned correctional failures.

Any plan must be open to serious public review in the planning stages if we are to avoid having many future generations saddled with expensive, obsolete structures.
Fourth on the *Roadmap's* list of concerns is physical infrastructure. The panel is keen on building "regional complexes" across the country and says that "with four or five penitentiaries within one perimeter, CSC could invest in relatively sophisticated equipment to screen not only people but also vehicles entering the compound." This whole discussion is about the economies of scale in building super-prisons, with no consideration either for human rights concerns or for burgeoning prison populations. This is the one section of the *Roadmap* where experts were called in: Deloitte & Touche were contracted to independently estimate the costs of constructing and operating new regional prison complexes to replace existing prisons. The feasibility of replacing existing prisons while the prison population would be growing dramatically was never addressed, even though the panel's recommendations and government sentencing bills make dramatic growth inevitable. Also not addressed in the study was the questionable assumption by the panel that the "prison complex" would be able to serve and manage diverse needs and security levels effectively.

Even the report's conclusions about costs were cautious and equivocal. "The assumptions that underlie the analysis may be considered reasonable only to the extent that CSC baseline data and standards (such as resource indicators) are reasonable." Any plan, especially such a massive one as this, must be open to serious public review in the planning stages if we are to avoid having many future generations saddled with expensive, obsolete structures.

Finally the panel turns to its most controversial and expensive proposal: eliminating statutory release and moving to earned parole. Some history is required here as well. Up to 1969 in Canada, a prisoner released on parole would be under community supervision until the end of the sentence. But a prisoner who did not qualify for parole — by definition a higher-risk offender — would serve out two thirds of the sentence and then be released directly onto the street with neither supervision nor assistance. In 1970, in the

interests of public safety, "mandatory supervision," now known as "statutory release," came into effect: prisoners not granted parole were still entitled to be released at the two thirds point in their sentence, but instead of being free they were now subject to mandatory supervision by a parole officer. With some highly selective statistics, the *Roadmap* "demonstrates" that statutory release prisoners are out there in the community committing high levels of violent crime. Better to keep them behind bars longer, says the panel, believing that the need to earn parole will "motivate" large numbers of prisoners to do better.

One particularly disturbing consequence of the panel's proposal to abolish statutory release is the impact it will have on aboriginal offenders.

In fact, the overall rates of both violent and non-violent reoffending by those on statutory release have been dropping steadily from an already low rate for many years. The panel is unable to show any evidence that abolishing gradual supervised release for these higher-risk prisoners, on average only 6.6 months, is a reasonable balance against the competing risk of direct unsupervised release to the community.

Second, there is the cost, which the Canadian Criminal Justice Association and the John Howard Society have worked out to show that the price for this change could approach $1 billion in capital costs alone. Operating costs would increase by about $156 million annually. While costs should not outweigh community safety, proposing enormous expenditures of this nature without any evidence of increased community safety is irresponsible public policy. With just a fraction of this amount we could better address the issues of mental illness in prison, for example.

Third, the abolition of statutory release will have a huge impact on the federal prison population. Those so affected will serve 50 percent more time in prison than is the case now. And when this proposal is combined with the other criminal justice legislation such as new mandatory minimum sentencing provisions that the Harper government has already passed, or plans to pass, into law, we are probably looking at a substantial increase in Canada's prison population both federal and provincial. Citing Cabinet confidentiality, the federal government has refused to make public its estimates for costs and prison population increases.

One particularly disturbing consequence of the panel's proposal to abolish statutory release is the impact it will have on aboriginal offenders. The numbers are horrifying and getting worse: in 1997, aboriginal people represented close to 3 percent of the population and 12 percent of all federal inmates; in 2007, they had increased to 19.6 percent of federal prisoners, with experts predicting the figure could reach 25 percent in under ten years. Fewer aboriginal people get parole, so more find themselves on statutory release. If the panel's recommendation to abolish goes through, many more aboriginal people will serve their complete sentences in prison.

Nowhere in the *Roadmap* does the panel give this implication any consideration. In fact, nowhere in the *Roadmap* are aboriginal people mentioned as a group requiring special

attention at all. By contrast, the Supreme Court, taking note of those 1997 figures quoted above (3 percent of the population, 12 percent of the prison population), issued this call to action: “These findings cry out for recognition of the magnitude and gravity of the problem and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system.” By ignoring the impact of their key recommendations to make gradual release more difficult to obtain, the panel’s recommendations have provided an unintended roadmap for incarcerating even more aboriginal offenders for even longer periods of time.

In our view, the panel was too easily captured by those who promote deprivation as a means to achieve compliance in a system where compliance often trumps all other considerations, such as the desperate circumstances or the mental health of an individual. The document the panel has created is a vision that offers a false promise of public safety, obscuring its great detrimental impact on the protection of human rights and on effective corrections. The *Roadmap* speaks to the dangers inherent in the creation of major “transformational” policy virtually overnight by a largely unqualified group under a heavy cloud of political expediency.

As for the indifference or distaste or fear in the population that cynical politicians may be counting on to push through many of these egregious changes in our correctional system, here is what the American writer Pearl S. Buck had to say: “You cannot make yourself feel something you do not feel. But you can make yourself do right in spite of your feelings.”

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