

PREFACE

The Reddin Symposium is a forum for intellectual exchange about Canada that crosses disciplines and involves members of the community. The Canadian Studies Center promotes teaching and learning about Canada and sponsors a variety of lectures, readings, and films that help us better understand Canadian culture and society and its relations with the United States. The Canadian Studies Center is also a resource to Ohio and Canadian companies providing information and insights needed to do cross-border business. The relationship between Canada and the U.S. is extremely important, not just from an economic standpoint, but from a cultural and political perspective. The theme of this year's symposium, the Canadian criminal justice system, reveals myths commonly associated with criminality on both sides of the border and explores the nature of crime and punishment in Canada.

Rosemary Gartner opens the symposium with a comparative overview of crime in Canada and the U.S. She offers explanations for national differences in the perpetration of crime and the punishment responses of the two criminal justice systems. Rosemary Gartner received her Ph.D. in sociology from the University of Wisconsin. She is a professor at the University of Toronto Centre of Criminology, where she just completed a term as director. Her research has largely examined comparative and historical patterns of violence. In addition to numerous contributions to research and scholarship, Rosemary Gartner has consulted with the Federal Ministry of Health, the Canadian Centre for Justice Statistics, and has addressed the Senate of Canada.

Terrance Sweeney shifts the focus from street crime to white collar crime. He explores tax evasion investigations in relation to civil liberties. Recent high profile examples of white collar crime, cases like Enron, WorldCom, Tyco, Parmalat in Italy, and, a few years ago, the Bre-X scandal in Canada that reached all the way to Indonesia seem to be a worldwide phenomenon. Quite often the perpetrators of white collar crime are not convicted for the harm and massive financial losses they cause, but are convicted for income tax evasion. Terrance Sweeney is a partner in the Canadian law firm Borden Ladner Gervais, LLP, practicing exclusively in tax and trade law and heads the firm's tax litigation group. He has advised numerous clients regarding tax issues on purchase and sale of assets

and shares, reorganizations, take-over bids, and mutual fund securitizations. He has represented clients before the Canadian International Trade Tribunal, the Tax Court of Canada, the Federal Court of Canada, Trial and Appeal Divisions, and the Supreme Court of Canada. He has been a columnist for over ten years in *The Business Quarterly*. He is a graduate of University of Western Ontario [Ivey] School of Business Administration, and holds a law degree from Osgoode Hall Law School.

The final session features Canadian and American viewpoints on how the respective judicial systems would treat a similar criminal case. John McGarry, Superior Court Justice, London, Ontario, and Mark Reddin, Municipal Court Judge of Bowling Green, Ohio, compare courtroom proceedings. Differences are discovered through analysis of a single fact scenario involving search and seizure, arrest, admissibility of evidence, and sentencing.

Justice McGarry was awarded his B.A. and LL.B. from the University of Western Ontario. He is a Superior Court Justice in London, Ontario. Prior to this appointment, he was appointed to the District Court of Ontario. McGarry has been a lecturer at several programs including the Ontario Crown Attorneys' Summer Law Program, Aylmer Police College, and the Toronto Conference held by UNICEF with respect to Human Rights Conventions and their effect upon Canadian legislation. He was Co-Chair of the Social Context Initiative sponsored by the National Judicial Institute of Canada to assist the Canadian judiciary in better understanding issues of equality and impartiality with specific reference to gender, aboriginal issues, multiculturalism, and racism.

Judge Reddin is a native of Wood County, Ohio. He graduated from Bowling Green High School and Bowling Green State University. He received his law degree from the University of Dayton. He served in private practice before becoming a municipal prosecutor and then joined the bench as a Municipal Judge. Judge Reddin is a member of the Association of Municipal and County Judges of Ohio, as well as a presenter at Association seminars. Judge Reddin is a member of the Ohio Judicial College Criminal Law and Procedure committee, and also a member of the Toledo Woman's, Wood County, and Ohio Bar Associations.

Two generations of the Reddin family have generously sponsored this event. Judge Mark Reddin carries on the rich tradition established by his parents, Daniel and Evelyn Reddin. As this event has grown, so has the need for support. The many Friends of the Reddin (see Appendix B) have, through their generous contributions, helped to build the Reddin Endowment Fund. This event is also made possible with the support of the Government of Canada.

Mark Kasoff
Director
Canadian Studies Center

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**TRENDS IN CRIME AND CRIMINAL PUNISHMENT IN
CANADA AND THE UNITED STATES IN THE
POST-CHARTER PERIOD**
by Rosemary Gartner

Introduction

A long-standing belief of Canadians and Americans is that Canada is a more peaceful, law-abiding nation than the United States. This belief has been encouraged by Canadian and American scholars, such as S.D. Clark and Seymour Martin Lipset,¹ as well as by comparisons of the two countries' homicide rates, particularly their gun homicide rates, that are regularly made by both academics and popular commentators. Counter-revolutionary Canada, the argument goes, was established with a commitment to the communitarian ideals of "peace, order, and good government" whereas the United States, born from a revolution, dedicated itself to the individually-oriented ideals of "life, liberty, and the pursuit of happiness." These divergent ideals were reflected in the way in which each country's western frontier was settled. Canadian school children are taught that law, in the form of the North West Mounted Police, preceded the settlers, and a governmental presence was established early on the frontier to ensure that the state's authority was recognized. In the American west, rugged individualists—many of them men escaping the confines of state authority—frequently had (or chose) to make their own law on the frontier, and enforced it through popular justice. Owen Wister's *The Virginia* mythologized the frontiersman—a man of action rather than words who knows the limits of the law—and helped establish the cowboy as the archetypal symbol of the U.S. frontier. In Canada—"the only country in the world," said Margaret Atwood, "where a policeman is used as a national symbol"²—the cultural hero has traditionally been the disciplined, uniformed Mountie. One of the twentieth-century manifestations of these differences in the origins and development of the two nations was divergent approaches to criminal justice. To use the terms coined by Herbert Packer,³ a "crime control" model—one which gives priority to the maintenance of law and order—became predominant in Canada whereas a "due process" model—which emphasizes the protection of the rights of the accused—characterized criminal justice in the United States.

These differences in crime and criminal justice, according to a number of commentators, began to diminish in the last quarter of the 20th century. Whether because of the Americanization of Canadian (and indeed, global) culture and values (the view of those on the left), or because of the failure of Canada's "liberal social reforms" (the view of those on the right), Canadian crime rates began to rise in the late 1980s and were said to have approached if not exceeded U.S. levels in the 1990s.⁴ In addition, victims' rights movements and a due process revolution, ushered in by the Canadian Charter of Rights and Freedoms,⁵ Americanized the Canadian criminal justice system, claimed some analysts.⁶ Others have argued that Canadian sentencing practices became more like American practices because of a more general growth in "penal punitiveness" in most Western nations.⁷ Whatever the reason, changes in Canada's criminal justice system resulted in what some suggested was a significant growth in imprisonment rates in Canada—again, mirroring a trend that began in the United States in the early 1980s.⁸

In this paper, I will evaluate evidence about the extent to which crime and criminal justice in Canada became Americanized over the last two decades. That evidence suggests these fears—or hopes—about trends in Canadian crime and criminal justice are largely unfounded, although the evidence also suggests stereotypes about law-abiding Canadians are more than a little overdrawn. The paper concludes by speculating about the reasons for enduring differences between the two countries in their propensities for criminal violence and for punitive responses to crime.

Comparing Crime Rates in Canada and the United States

Among the major problems that plague efforts to use official statistics, such as those collected by the police, to compare countries on their levels of crime are cross-national differences in the definitions of criminal offenses, in the ways in which officials compile and report information on crime, and in the willingness of victims and witnesses to report crimes to legal authorities. As a consequence, most cross-national analyses of crime until recently tended to focus on homicide, because these definitional, recording, and reporting differences are minimized when dealing with lethal criminal violence. Until the 1990s, an assumption (often unstated) in many cross-national comparisons was that differences in homicide rates were probably a good barometer of differences in other types of crime, especially violent crime. So the United States, which had a homicide rate about four times that of Canada, Australia, and New

Zealand, and about eight times that of Great Britain, Norway, France, and Germany in the 1980s,⁹ was generally assumed to also have relatively high rates of other types of crime.

Victimization Survey Data. The development of victimization surveys that used the same methods to collect data on a standardly-defined set of criminal events in different countries has since shown this assumption to be inaccurate.¹⁰ For example, the International Crime Victimization Survey (ICVS) has now been conducted four times (in 1989, 1992, 1996, and 2000) in a number of countries. Canada and the United States are two of five countries that have participated in all four cycles of this survey. Data from the earlier cycles of the ICVS became widely available in the mid-1990s and were used by several analysts—including two American scholars, Franklin Zimring and Gordon Hawkins—to show that rates of many types of crime in the United States were not distinctly different from rates in other industrialized countries in the late 1980s and early 1990s.¹¹ The recently released results from the 2000 ICVS corroborate these earlier findings. In the thirteen industrialized countries participating in the survey the overall victimization rate—the percentage of the population which reported at least one victimization in the previous twelve months—ranged from a low of 15 percent in Japan and Northern Ireland to a high of 30 percent in Australia. Canada's rate of 24 percent put it on par with rates in Sweden, the Netherlands, Scotland, and Denmark, and slightly above the U.S. rate of 21 percent.¹² In other words, about one out of every four or five people in each country had been the victim in the previous year of at least one of the following eleven offenses: robbery, sexual assault, assault, burglary, attempted burglary, motor vehicle theft, motorcycle or motor scooter theft, theft of personal property, theft from a vehicle, bicycle theft, or vandalism of a motor vehicle. Based on this evidence, Canadians can hardly claim to be more law-abiding than their southern neighbors. Moreover, the victimization survey data from these countries, when compared to official statistics on homicides, show that there is very little relationship between homicide rates and rates of other types of crime, even violent crime. One cannot assume, then, that a country with high (or low) homicide rates also has high (or low) rates of, for example, assault or burglary.

One of the characteristics of—and, according to some analysts, one of the problems with—victimization surveys is that they capture many victimization experiences that might be considered relatively minor, even to the victims themselves. For example, in the ICVS the

crime victims who were most likely to consider their experience “serious” or “very serious” were victims of car theft; in contrast, victims of sexual assault—as defined in the ICVS—were much less likely to consider their experience “serious” or “very serious.”¹³ This is not surprising when one considers the ways in which these victimizations are defined. The developers of the ICVS wanted the survey questions to approximate as closely as possible the criminal code definitions of offenses in the different countries surveyed, while still maintaining a standard definition across countries. So, for example, the ICVS category of sexual assault includes unwanted sexual touching, grabbing, or fondling as well as forced or attempted sexual activity; and the ICVS assault category includes anything from the threat of physical harm to an attack causing injury. As a consequence, crime counts from victimization surveys are dominated by low level offenses, offenses that victims often consider too minor to report to police or to their insurance companies. For some analysts, this feature of victimization surveys renders their data less meaningful than police statistics for comparing countries on their levels of serious crime.

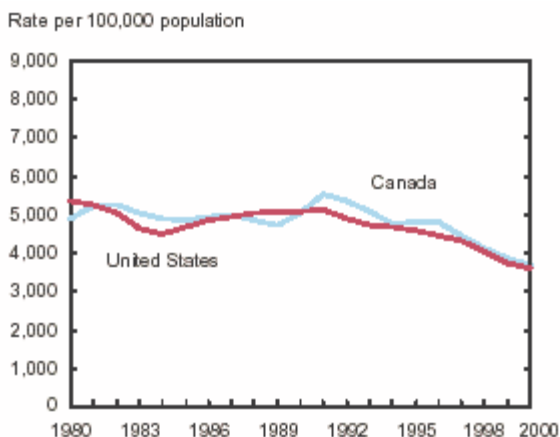
The ICVS, like many other victimization surveys, has other characteristics that may limit the usefulness of its data for cross-national comparisons. For example, the survey is conducted in most countries over the telephone and therefore excludes people who do not have telephones or who have no fixed address, many of whom may have relatively high risks of victimization. Sample sizes in each country ranged from 1,000 to just over 5,000, meaning that one respondent might represent as many as 200,000 people in a country, depending on its size. Response rates, or the willingness of the people contacted to participate in the survey, ranged widely across countries. Smaller sample sizes and response rates increase what is known as the “sampling error” or the accuracy of the estimates of victimization rates.

For these reasons, relying on data from both victimization surveys and official statistics collected by the police provides a more comprehensive picture of cross-national differences in the extent and nature of crime. Fortunately, data from the ICVS and other victimization surveys suggest that differences between Canada and the U.S. in the proportion of crimes that are reported to the police are relatively minor, which means official statistics on crime from the two countries are more comparable than previously assumed.¹⁴

Official Statistics. In 2001 the Canadian Centre for Justice Statistics (CCJS) issued a report indicating that official statistics from Canada and the U.S. on seven types of crime could be reliably compared if some minor modifications and cautions were attended to.¹⁵ After undertaking the recommended modifications, the CCJS released a comparative analysis of crime in Canada and the U.S. for the years 1980 through 2000.¹⁶ The findings from this analysis offer probably the best available evidence for evaluating claims that the crime rates of the two countries have been converging in recent years. What does this analysis show?

By combining break and enter, motor vehicle theft, and theft, a comparable property crime rate can be calculated for the two countries. Trends in this rate between 1980 and 2000 are shown in Figure 1.

Figure 1: Property Crime Rates in Canada and the United States



Source: Gannon, Maire. Crime Comparisons between Canada and the U.S. *Juristat*, 2001, 21 (11).

Clearly, there is essentially no difference between the two countries in their rates of property crime throughout this twenty-one year period. However, there is also no evidence that Canadian and American rates converged in the post-Charter period (i.e. after 1982), precisely because these rates were no different at the beginning of the 1980s. Decomposing this aggregated property crime rate into its constituent parts tells essentially the same story. Rates of motor vehicle theft were slightly higher in the U.S. for most of the period, but Canadian rates surpassed them slightly in the mid-1990s.¹⁷ Rates

of break and enter, on the other hand, were slightly higher in Canada in the early 1980s, but dropped below rates in the U.S. in the early 1990s and remained there.¹⁸ Similar to the picture portrayed by ICVS data, Canadians appear to have been as likely as Americans to be victims of property crime throughout the last two decades of the twentieth century. Residents of some Canadian cities were at much higher risk of property crime than residents of some U.S. cities, however. Indeed, Vancouver's rates of property crime rank it second in North America behind Miami and are about twice the rates in such U.S. cities as Los Angeles, New York, Washington D.C., and even (with regard to break and enter, and theft) Detroit (see Table 1).

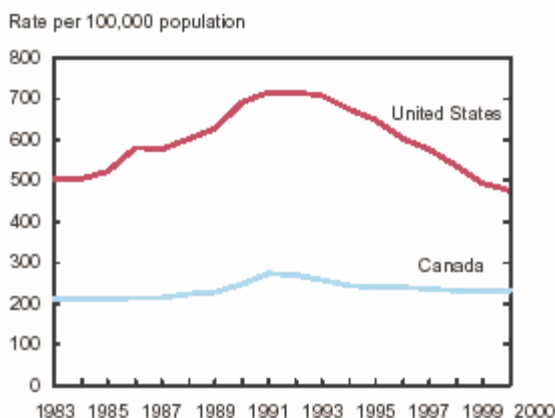
Table 1: Property Crime Rates (per 100,000 population) for Five Major Canadian and U.S. Metropolitan Areas, 2000

	<u>Population</u>	<u>Break & Enter</u>	<u>Motor Vehicle Theft</u>	<u>Theft</u>
<i>Canadian Metropolitan Areas</i>				
Toronto	4,751,408	553	365	1,692
Montreal	3,480,342	1,195	800	2,068
Vancouver	2,048,823	1,430	1,058	4,415
Calgary	952,960	814	580	2,616
<u>Edmonton</u>	<u>944,194</u>	<u>986</u>	<u>539</u>	<u>2,559</u>
CANADA	30,750,087	954	521	2,224
<i>U.S. Metropolitan Areas</i>				
Los Angeles	9,534,500	636	674	1,726
New York	9,111,706	453	428	1,785
Philadelphia	5,079,925	507	492	2,199
Wash., DC	4,904,313	452	484	2,223
<u>Detroit</u>	<u>4,510,292</u>	<u>735</u>	<u>919</u>	<u>2,280</u>
U.S.A.	281,421,906	728	414	2,475

Source: Gannon, Maire. Crime Comparisons between Canada and the U.S. Juristat, 2001, 21 (11).

By combining homicide, aggravated assault, and robbery, a comparable violent crime rate can also be calculated for the two countries. Trends in this violent crime rate between 1983¹⁹ and 2000 are shown in Figure 2.

Figure 2: Violent Crime Rates in Canada and the United States

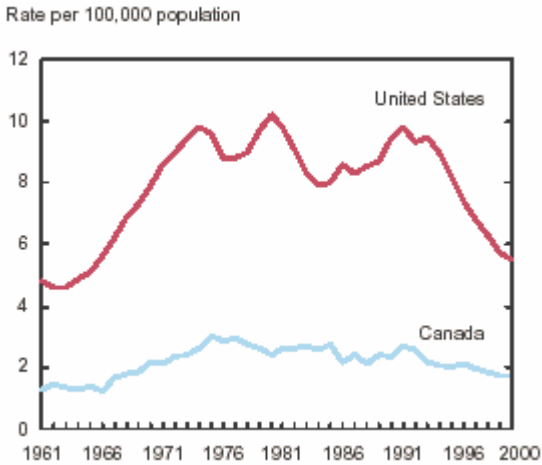


Source: Gannon, Maire. *Crime Comparisons between Canada and the U.S.* Juristat, 2001, 21 (11).

The picture here is notably different from that portrayed in Figure 1. Throughout this eighteen year period, the U.S. violent crime rate was between two and three times higher than the Canadian violent crime rate. There is a convergence of sorts in the rates in the latter part of the period, but that is because the U.S. rate, which, like the Canadian rate, peaked in 1991, declined more sharply than the Canadian rate in the 1990s. But, again, we see no evidence that violent crime rates in Canada became “Americanized” over time. Decomposing this aggregated rate into its constituent parts leads to the same conclusion. The gap between the aggravated assault rates of the two countries was greater at the end than at the beginning of the 18-year period.²⁰ In contrast, the two countries’ robbery rates converged, but not as a result of an increase in the Canadian rate. Rather, the Canadian rate varied little over time whereas the U.S. rate rose and then declined dramatically.²¹

Because definitions and reporting practices related to criminal homicide are comparable over a longer period, trends in homicide rates in the two countries can be compared for the last forty years of the twentieth century. The common perception that the U.S. has more lethal violence than Canada has been accurate for this entire period, according to the data in Figure 3.

Figure 3: Homicide Rates in Canada and the United States



Source: Gannon, Maire. *Crime Comparisons between Canada and the U.S.* Juristat, 2001, 21 (11).

The gap in homicide rates in the two countries was greatest from the mid-1970s until the early 1990s, when the U.S. rate was as much as five times the Canadian rate. The two countries ended the twentieth century, however, with essentially the same difference in homicide rates that existed in 1961. Again, we see no evidence that rates of lethal violence in Canada rose toward U.S. rates during this period.

What these data on trends in property and violent crime indicate is that Canada and the U.S. differ not in the propensities of their citizens to steal and burgle, but in the propensities of their citizens to physically—and especially lethally—attack or use force against each other. This conclusion has been drawn by others, in particular Franklin Zimring and Gordon Hawkins who aptly titled their book, *Crime is Not the Problem: Lethal Violence in America*. They draw comparisons between the U.S. and a number of other industrialized nations to show that what distinguishes crime in the U.S. from crime in these other nations is not its volume, nor even its violent nature. In their view, “(w)hat sets the United States apart from other developed nations is a thin layer of life-threatening violence that probably accounts for less than 1 percent of American crime and less than 10 percent of American violence.”²² As this statement implies, it is the character of violence in the U.S. that differentiates it from other industrialized democracies, including Canada. For Zimring and Hawkins, what marks the character of homicide in the U.S. is the use

of firearms: “The use of firearms in assault and robbery is the single environmental feature of American society that is most clearly linked to the extraordinary death rate from interpersonal violence in the United States.”²³

This raises a question that newspaper, television, and radio reporters have asked me every year for the past decade on the day after the Canadian Centre for Justice Statistics releases its annual homicide report. That report has shown the Canadian homicide rate dropping fairly steadily since the early 1990s. But because a decline in homicide is deemed relatively not newsworthy—or at least less newsworthy than an increase would be—those reporters’ bosses send them in search of something more dramatic or eye-catching to develop their stories around; as the saying goes “If it bleeds, it leads.” And so the question I am typically asked goes something like this: “Although our homicide rate isn’t going up, is it possible that our homicides are starting to look more like homicides in the United States?” What they mean by this—beyond a question about gun-related homicides—is typically unclear (even to themselves, I suspect). But the question does direct our attention to differences in the character rather than simply the level of lethal violence in the two countries.

Do homicides in Canada have different characteristics than homicide in the U.S.? In a number of respects, they do. As is widely believed, homicides in Canada are much less likely to be committed with firearms. Table 2 reports data on total and firearm homicides for Canada and the U.S. in 2002.

Table 2: Total and Firearm Homicides in Canada and the U.S., 2002

	<u>Canada</u>	<u>U.S.</u>
Number of homicides	582	16,204
Homicide rate (per 100,000 population)	1.85	5.6
% of homicides committed with firearms	26%	67%
Firearm homicide rate	.48	3.8
% of homicides committed with handguns	17%	51%
Handgun homicide rate	.30	2.9
% of homicides w/out firearms	74%	33%
Non-firearm homicide rate	1.37	1.9

Source: Savoie, Josee. Homicide in Canada, 2002. Juristat, 2003 23 (8); and U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States, 2002. Washington D.C. Department of Justice, 2003.

In 2002 there were nearly thirty times more homicides committed in the U.S. than in Canada. When corrected for the difference in populations of the two countries—that is, when calculated as homicides per 100,000 population—the difference is, of course, much smaller. Even so, the U.S. homicide rate was three times as great as the Canadian rate in 2002. In Canada, only about one in four homicides is committed with a firearm, and only about one in six with a handgun. In contrast, two out of three homicides are committed with firearms in the U.S., and fully half are committed with handguns. The greatest difference between the two countries, then, is in their rate of handgun homicides; the U.S. rate is about ten times greater than the Canadian rate. Rates of homicides committed with other weapons are much less dissimilar: the U.S. rate is only about 40 percent greater than the Canadian rate. Consistent with Zimring and Hawkins conclusion, which they based on data from the 1980s and 1990s, the use of firearms clearly still distinguishes homicides in Canada and the U.S. But even when firearms are not used, Americans are more willing than Canadians to lethally attack each other.

There are other important differences in the character of Canadian and U.S. homicides. Homicide is much more likely to be an urban phenomenon in the U.S. than it is in Canada. Put differently, large cities are much more dangerous than small cities and rural areas in the U.S. whereas in Canada this is not the case. Consider homicide rates for five major urban areas in the two countries, compared to each country's total homicide rate (see Table 3).

Table 3: Homicide Rates for Five Canadian and Five U.S. Metropolitan Areas, 2000

	Population	Homicide Rate
<i>Canadian Metropolitan Areas</i>		
Toronto	4,751,408	1.7
Montreal	3,480,342	2.1
Vancouver	2,048,823	2.0
Calgary	952,960	1.7
<u>Edmonton</u>	<u>944,194</u>	<u>2.0</u>
CANADA	30,750,087	1.8

Continued on next page.

Table 3 continued: Homicide Rates

	Population	Homicide Rate
<i>U.S. Metropolitan Areas</i>		
Los Angeles	9,534,500	10.6
New York	9,111,706	7.8
Philadelphia	5,079,925	8.1
Wash., DC	4,904,313	7.4
<u>Detroit</u>	<u>4,510,292</u>	<u>10.6</u>
U.S.A.	281,421,906	5.5

Source: Gannon, Maire. Crime Comparisons between Canada and the U.S. Juristat, 2001, 21 (11).

The homicide rates in Canada's largest metropolitan areas were very similar to the national rate, whereas homicide rates in major U.S. metropolitan areas tend to be as much as double the national rate. Canadians, like Americans, typically believe that their urban centers are more dangerous places than the rest of the country, but, at least with regard to homicide, this is not the case. The two nations also differ in the nature of the relationships between homicide victims and their killers, as is shown in Table 4.

Table 4: Victim-Offender Relationships in Homicides in Canada and the U.S., 2002

	Canada	U.S.
% of homicides unsolved	23%	36%
Unsolved homicide rate	.43	2.02
<i>Of solved homicides:</i>		
% of homicides by strangers	15%	24%
Stranger homicide rate	.21	.86
% of homicides by acquaintances	44%	53%
Acquaintance homicide rate	.63	1.9
% of homicides by family members (incl. spouses)	40%	22%
Family homicide rate	.57	.79
% of solved homicides by spouses	20%	9%
Spousal homicide rate	.28	.32

Source: Savoie, Josee. Homicide in Canada, 2002. Juristat, 2003 23 (8); and U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States, 2002. Washington D.C. Department of Justice, 2003.

In a not insubstantial proportion of homicides in both countries, the relationship between the victim and offender is unknown because the homicide is unsolved; but the proportion of unsolved cases is much greater in the U.S. than in Canada. Of those homicides that are solved, over three-quarters of these are committed by strangers or acquaintances of their victims in the U.S., compared to only about 60 percent of solved homicides in Canada. Conversely, a larger proportion of homicides in Canada are committed by family members, especially spouses, compared to homicides in the U.S. So homicide in Canada is a more intimate affair than it is in the U.S. It follows from this that the largest gap in homicide rates in the two countries is for stranger homicides: the U.S. stranger homicide rate is more than four times the Canadian rate.²⁴ The gap in homicide rates declines as the victim-offender relationship becomes more intimate, such that spousal homicide rates in the two countries are very similar. Since the distribution of victim-offender relationships in homicides in Canada is similar to that in other industrialized democracies (except the U.S.), what these data suggest is that homicide in the U.S. is also distinctive for the extent to which it occurs between people who do not know each other well or at all.

What the data in the preceding three tables indicate is that lethal violence in Canada and the U.S. differs not only in its level but also in its character. These differences—in the use of firearms, in urban/rural distribution, and in victim-offender relationship—have distinguished homicides in the two countries for at least the last forty years and, along with data on trends in violent crimes, provide no support for the conclusion that the level or nature of criminal violence in Canada became ‘Americanized’ in the late twentieth century.²⁵ Property crime rates in Canada and the U.S., by contrast, are essentially indistinguishable. However, because they have been similar for over twenty years there is no basis for claiming that Canadian rates converged with U.S. rates in the post-Charter period.

Comparing Criminal Punishment in Canada and the United States

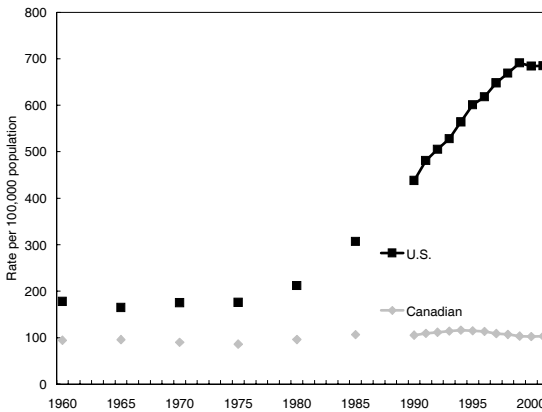
Our ability to compare criminal justice responses to crime in Canada and the U.S. is much more limited than is our ability to compare crime rates in the two countries. This is largely due to the lack of comparable national-level data on the operations of the two countries’ criminal justice systems. The one measure of criminal justice responses to crime we can compare is the rate at which each country incarcerates people charged with or convicted of crimes. If the academic and popular commentators cited earlier are correct,

Canada became caught up in a wider trend toward greater punitiveness, a trend that began first in the U.S. and then was taken up in many other industrialized democracies. What do the data show?

In the figure below, the rate at which Canada and the U.S. incarcerated people in their respective prisons and jails is shown for the period 1960 to 2002.²⁶ The Canadian rate appears relatively flat over this forty-some year period, because of the scale of the increase in imprisonment in the U.S. beginning in the late 1970s. The U.S. rate increased from just under 200 per 100,000 population at its low point in the late 1960s to just over 700 per 100,000 by 2002—a level many times greater than that in any other western industrialized democracy.²⁷ Canada's incarceration rate was just over half of the U.S. rate in the 1960s; but by the end of the twentieth century its rate was one-seventh of the U.S. rate. Clearly, in the realm of criminal punishment, Canada and the U.S. experienced an extraordinary divergence in the post-Charter period, not a convergence.

This should not be interpreted as undermining claims of some legal scholars that Canada became more punitive in the post-Charter period. In fact, the Canadian incarceration rate increased from a rate of about 86 per 100,000 in the mid-1970s to a peak of 116 per 100,000 in 1994—a 35 percent increase. But since 1994 Canada's incarceration rate has decreased and currently stands at about 103 per 100,000. Canada did not, then, follow the trend of rising imprisonment rates in the last years of the twentieth century that characterized many industrialized democracies.

Figure 4: Incarceration Rates in Canada and the United States, 1960-2002



Sources: Canadian Centre for Justice Statistics. Adult Correctional Services in Canada. Ottawa: Statistics Canada, various years; and Bureau of Justice Statistics. Sourcebook of Criminal Justice Statistics. Washington D.C.: U.S. Department of Justice, various years.

Explaining the Enduring Differences in Crime and Criminal Punishment in Canada and the United States

What might explain the enduring differences between Canada and the United States in their levels of serious criminal violence, especially lethal violence, and in their rates of criminal punishment? While a number of potentially contributory factors have been identified, no general theory exists that has gained wide acceptance and been rigorously tested. The following, then, is speculation informed by a smattering of research findings and the selected observations of some scholars of crime and law.

Accounting for Differences in Criminal Punishment. Why did Canada not follow the pattern in the U.S. of rising imprisonment rates throughout the 1990s? One reason may well be the extent to which criminal justice issues are politicized and influenced by popular opinion in the U.S., in contrast to Canada. A number of analysts have argued that in the late twentieth century crime and criminal justice issues in the U.S. took on, in David Garland's words, "a new and strategic significance in the political culture." As a consequence, Garland continues, "crime . . . came to function as a rhetorical legitimation for social and economic policies that effectively punished the poor and as a justification for the

development of a strong disciplinary state.”²⁸ U.S. politicians—as well as judges and prosecutors, where they were elected—learned that being seen as ‘soft’ on crime was an electoral death warrant. In some states, such as California, grass roots citizens’ groups fueled by a distrust of government and judges, were successful in getting initiatives passed that toughened criminal penalties and limited the discretion of judges to work around these tougher laws.²⁹

In Canada, while some of the political rhetoric around crime became more punitive, corresponding changes to the criminal justice system did not generally follow from this rhetoric. Criminal justice policies are much slower to change in Canada than they are in the United States in part because, while the administration of criminal justice is a provincial responsibility, criminal law is a federal responsibility. Making changes to the criminal law therefore requires extensive consultation with provincial and territorial governments. Moreover, those most likely to be in charge of criminal justice reforms in Canada are non-elected bureaucrats and civil servants, not politicians; and Canadian judges and prosecutors are appointed, not elected. This tends to buffer the criminal justice system from swings in public opinion over crime and criminal punishment.³⁰

A good example of the difference between the two countries in criminal justice policymaking can be seen in Kent Roach’s description of the effects of the victims’ rights movements of the 1980s and 1990s.³¹ Both countries established national task forces on crime victims in the 1980s. The U.S. task force was composed of victims’ rights advocates and members of what Roach calls “the ideological right,” such as Pat Robertson. The task force’s final report strongly recommended a punitive approach to victims’ rights, and argued for increased spending on imprisonment and for restricting the due process rights of the accused. The Canadian task force, in contrast, was composed of civil servants representing federal and provincial government agencies and ministries. Its final report stressed interventions such as victim compensation and restitution, not punishment; and it did not call for limiting the due process rights that had recently been expanded by the Charter. Roach argues that since that time, Canadian victims’ rights initiatives have moved closer to the punitive, litigious American model. Nevertheless, they continue to have limited impact because of the way in which criminal justice reforms are carried out in Canada.

The Canadian government did not, then, act on what others have called a general turn toward the sort of popular punitiveness that

characterized many western industrial democracies in the 1990s. Another reason for this, as Anthony Doob and Cheryl Webster have argued, is the strong skepticism over the effectiveness of criminal punishment that exists in Canadian policymaking circles. In a comparison of Canadian and U.S. sentencing policies, Doob and Webster observe that U.S. policies reflect “the belief that sentencing is an effective means of solving the problem of crime in society.” In contrast, they continue, Canada lacks “any clear political and public belief that the sentencing system can reduce crime” and this “has been important in limiting enthusiasm for harsher sanctions” in Canada.³² More generally, there is what Doob and Webster term an “official culture of restraint in the use of imprisonment which has characterized Canadian criminal law for decades.” Indeed, in 1996 this “culture of restraint” was formally and explicitly made a legislative principle of sentencing when the Criminal Code of Canada (CCC) was amended. Currently, Section 718.2 of the CCC states that:

An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstance; and 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.

Much more could be said about differences between Canada and the U.S. in policies and reforms related to criminal punishment. For example, the desire on the part of many Canadian policymakers to shun an Americanized approach to criminal justice is almost certainly another factor contributing to these differences. A 1993 House of Commons Standing Committee—which was dominated by conservative politicians—expressed this view in their report:

If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.³³

Certainly this is an issue that invites further examination, if for no other reason than the scale of the difference between the two countries in their incarceration rates, a difference that cannot be explained, as we have seen, simply by differences in their crime rates.

Accounting for Differences in Violent Crime. What might account for the differences between Canadians and Americans in their rates of serious, violent crime? We have already seen that Canadians are not more law-abiding than Americans when it comes to property crimes, so the difference in violent crime cannot be attributed to a general propensity toward crime in the U.S., or the lack of one in Canada. Any account needs to be focused on the lesser propensity for violence in Canada compared to the U.S. For present purposes, the role that differences in the availability of firearms plays will not be considered for two reasons. First, many scholars have examined this controversial issue and yet considerable disagreement remains over the extent to which this national difference in serious violent crime is primarily due to the greater availability of firearms in the U.S.³⁴ Summarizing this research literature and the various critiques of it in a meaningful way is beyond the scope of this paper.³⁵ Second, it seems to me that attributing the difference in violent crime rates to firearms begs the questions why are Americans more willing to tolerate high levels of gun ownership and why are they more willing to use firearms against each other?³⁶

There are at least two other important differences between the two countries that are likely to be implicated in their different rates of violent crime. First is the difference between the two countries in their levels of income inequality. Study after study has shown that in cities, states, and countries where income or wealth is more unequally distributed, the risk of violent crime is greater. Conversely, where the gap between the rich and poor is smaller, violent crime rates are lower.³⁷ Although both Canada and the U.S. have relatively high levels of economic inequality compared to many European countries, the U.S. outpaces Canada on this economic indicator. In the late 1990s, the richest 1 percent of the U.S. population held about 40 percent of the country's total wealth; whereas in Canada, the richest 1 percent of the total population held 'only' 25 percent of the country's wealth. In an analysis of recent Canadian and U.S. data on inequality and homicide rates, Daly and his colleagues replicated the finding that the degree to which resources are unequally distributed, as opposed to the average level of material welfare, is a major determinant of homicide rates; and went as far as to conclude that "local levels of income inequality appear to be sufficient to account for the two countries' radically different national homicide rates."³⁸

A second difference between Canada and the U.S. is in the attitudes of their citizens toward the use of violence. A Canadian public opinion polling company, Environics, conducted a survey of over 100 social values in Canada and the United States in 2000, and among the values they examined was “acceptance of violence.” The statements designed to measure acceptance of violence and the proportion of respondents agreeing with them are shown in Table 5.³⁹

Table 5: Canadians’ and Americans’ Views on Violence, Environics Poll, 2000

	Canadians	Americans
<i>% agreeing with the following statements</i>		
Violence is a normal part of life, and is nothing to be concerned about.	9%	18%
A little violence can offer relief when one is tense; it’s no big deal.	14%	31%
It is acceptable to use violence to get what you want.	13%	23%

Source: Adams, Michael. 2003. *Fire and Ice: The United States, Canada, and the Myth of Converging Values*. Toronto: Penguin Books.

As the table shows, about twice as many Americans as Canadians agreed with statements indicating tolerance or acceptance of violence, according to this poll. Moreover, the gap between Canadians’ and Americans’ views on violence increased over the 1990s and is among the greatest of the value differences between the two countries. As Michael Adams, who heads Environics, writes “Attitudes toward violence are, in fact, among the features that most markedly differentiate Canadians from Americans.”⁴⁰ These poll results may not be surprising, given the longstanding popular belief that Americans are more accepting of violence. Nevertheless, the different levels of support for these statements verify this belief and show that Canadians’ views on this value dimension, like most of the others tapped in the Environics poll, show no sign of converging with those of Americans.

Conclusion

Whether rooted in long-standing cultural and historical differences, or in more contemporary differences in economic and social policies—or, most likely, both—Canadian and American

differences in violent crime and in criminal justice responses to crime are substantial and show no evidence of converging at the beginning of the twenty-first century. However, Canadians have not been any less willing than Americans to steal from or defraud each other, at least since the early 1980s. The stereotype of Canadians as law abiding, then, appears to be overstated. The traditional (if romantic) portrayal of Canada as a peaceable kingdom, however, retains considerable validity, at least in comparison to the U.S. It has become a popular pastime for scholars and pundits in Canada to disparage and deride what they see as fatuous bromides claiming Canada is a more tolerant, egalitarian, civil, and communitarian country than the U.S.—and certainly such claims do greatly oversimplify a very complex reality. But as someone who was born in the U.S. and who has lived in Canada for just over fifteen years, I find these claims compelling and resonant with my experiences. So you will perhaps forgive me for concluding with what some commentators have taken to be a particularly apt illustration of the disparate cultural orientations of Canada and the U.S. As you probably know, each year, *Time* magazine chooses a “Newsmaker of the Year” who serves as the subject for its cover story for the year’s last issue. In 2003, *Time* chose the American soldier as the “Newsmaker of the Year.” The Canadian version of *Time* magazine also chooses the Canadian “Newsmaker of the Year.” The 2003 Canadian Newsmaker of the Year was, like the American version, not a single person. Rather it was a couple: Michael Leshner and Michael Stark, who were married in June 2003 six hours after the Ontario Court of Appeal upheld a lower court decision to legally allow same-sex marriages.

Endnotes

- ¹ S. D. Clark, *Canadian Society in Historical Perspective* (Toronto: McGraw-Hill, 1976); Seymour Martin Lipset, *Continental Divide: The Values and Institutions in the United States and Canada* (New York: Routledge, 1990). See also John Hagan and Jeffrey Leon, "Philosophy and Sociology of Crime Control," in *Social System and Legal Process*, edited by H. M. Johnson (San Francisco: Jossey Bass, 1978); and John Hagan, *The Disreputable Pleasures: Crime and Deviance in Canada* (Toronto: McGraw-Hill, 1991).
- ² Margaret Atwood, *Survival: A Thematic Guide to Canadian Literature* (Boston: Beacon Press, 1972), p. 171.
- ³ Herbert Packer, "Two Models of the Criminal Process," *University of Pennsylvania Law Review* 1964, 113: 1-68.
- ⁴ The phrase in quotation marks is from David Frum, "How Cool is Canada?," *The National Review OnLine*, Oct. 1, 2003. See also: Jeffrey Simpson, *Star-Spangled Canadians: Canadians Living the American Dream* (Toronto: Harper Collins, 2000); Eli Lehrer, "Crime Without Punishment: As American Streets Get Safer, Crime in Europe Soars," *The Weekly Standard*, May 27, 2002 (v. 6, #36); Rhonda Lenton, "Homicide in Canada: A Critique of the Hagan Thesis," *Canadian Review of Sociology and Anthropology* 1989, 14: 163-178.
- ⁵ The Canadian Charter of Rights and Freedoms, which came into effect in 1982, provides protection for a range of individual rights that, until the Charter, had been recognized in the common law but did not have constitutional guarantee. Among these rights are freedom of speech, conscience, and religion; protection against unreasonable search and seizure; and rights to due legal process.
- ⁶ See, for example, Kent Roach, *Due Process and Victims' Rights: The New Law and Order Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).
- ⁷ Julian V. Roberts, Loretta J. Stalans, David Indemaur, and Mike Hough. *Penal Populism and Public Opinion: Lessons from Five Countries* (New York: Oxford University Press, 2003).
- ⁸ See, for example, John Pratt, *Punishment and Civilization* (London: Sage, 2002), p. 177; and Roach, in *Due Process and Victims' Rights*.

- ⁹ See, for example, Franklin Zimring and Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (New York: Oxford University Press, 1997).
- ¹⁰ Victimization surveys typically ask respondents about whether they have been the victim of various crimes over the previous twelve months; and ask them details about their victimizations, including whether they reported them to the police. In this way, what criminologists call “the dark figure of crime”—that portion of crime which does not appear in police statistics because of under-reporting—can be measured.
- ¹¹ Zimring and Hawkins, *Crime is Not the Problem*. See also Jan van Dijk and Pat Mayhew, *Criminal Victimization in the Industrial World* (The Hague: Ministry of Justice, 1992); Anna Alvazzi del Frate, Ugljesa Zvekic, and Jan van Dijk, *Understanding Crime: Experience of Crime and Crime Control* (Rome: United Nations Interregional Crime and Justice Research Institute, 1993); and John van Kesteren, Pay Mayhew, and Paul Nieuwbeerta, *Criminal Victimization in Seventeen Industrialised Countries* (The Hague: Wetenschappelijk Onderzoek-en Documentatiecentrum, 2000).
- ¹² See Sandra Besserer, “Criminal Victimization: An International Perspective,” *Juristat*, 2002, 22 (4). The ICVS allows comparisons between Canada and the U.S. on other crime-related behaviors and attitudes, and these comparisons also reveal negligible differences between the two countries. For example, equal percentages (83%) of survey respondents in both countries reported feeling safe when walking alone in their neighborhood at night; similar percentages (80% in Canada, 75% in the U.S.) reported using at least one household security measure; and similar percentages (87% in Canada, 89% in the U.S.) felt that the police in their area were doing a good job of controlling crime.
- ¹³ 84% of victims of car theft considered their experiences “serious” or “very serious” compared to 65% of sexual assault victims, according to the 2000 ICVS (Besserer, 2002).
- ¹⁴ See, for example, Marc Ouimet, “Crime in Canada and the United States: A Comparative Analysis,” *Canadian Review of Sociology and Anthropology*, 1999, 36: 389-408.

- ¹⁵ Maire Gannon, "Feasibility Study on Crime Comparisons Between Canada and the United States," catalogue no. 85-F0035XIE (Ottawa: Canadian Centre for Justice Statistics, 2001).
- ¹⁶ Maire Gannon, "Crime Comparisons Between Canada and the United States," *Juristat*, 2001, 21 (11).
- ¹⁷ Rates of motor vehicle theft were fairly stable in both countries over this period, ranging from about 350 to 590 per 100,000 in Canada, and about 400 to 620 in the U.S.
- ¹⁸ Rates of break and enter dropped from about 1,600 (in the early 1980s) to about 750 per 100,000 in 2000 in Canada. In the U.S. this rate peaked in the late 1980s at just under 1,600 and declined to just under 1,000 per 100,000 in 2000.
- ¹⁹ The CCJS note to this figure states that "For comparison purposes, the Canadian category of aggravated assault includes attempted murder, assault with a weapon, and aggravated assault. Trend analysis starts in 1983 due to the reclassification of Canadian assault categories in 1983."
- ²⁰ The Canadian aggravated assault rate hovered between about 110 and 140 per 100,000 during these years; the American rate rose from about 275 per 100,000 in 1983 to a peak of about 440 in 1992, before declining to about 325 in 2000.
- ²¹ The Canadian robbery rate fluctuated between about 90 and 115 per 100,000 over these years; the U.S. rate was slightly over 250 per 100,000 in the early 1980s and again in the early 1990s before declining to about 150 per 100,000 at the end of the period.
- ²² Zimring and Hawkins, *Crime is Not the Problem*, p. 50.
- ²³ *Ibid.*, p. 122.
- ²⁴ Some criminologists would argue that unsolved cases are more likely to involve offenders who are strangers than offenders who know their victims. If this is so, the difference in the stranger homicide rate between Canada and the U.S. is even greater.
- ²⁵ See Rosemary Gartner, "Homicide in Canada," in *Violence in Canada: Sociopolitical Perspectives*, edited by J.I. Ross (Toronto: Oxford University Press, 1995).
- ²⁶ The data for Canada are only available through 2001.
- ²⁷ In 2002, incarceration rates in Norway, Denmark, Finland, Sweden, Ireland, Belgium, Germany, France, Italy, Canada, and the Netherlands all ranged between about 50 and 100 per 100,000

population. Rates in Australia, Spain, Portugal, England & Wales, and New Zealand all ranged between about 110 and 150 per 100,000. Russia's incarceration rate was approximately 600, still well below the rate in the U.S.

²⁸ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), pp. 101-102. See also Pratt, *Punishment and Civilization*, pp. 185-188.

²⁹ See, for example, Franklin Zimring and Gordon Hawkins, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, 2001).

³⁰ As Pratt, in *Punishment and Civilization* (p.187), notes: "The less the bureaucratic organizations of punishment have been pushed to one side in the new axis of penal power, the less the influence of populist punitiveness is likely to be and the more likely that there will still be significant voices that worry about prison levels and insist on 'civilized' conditions within prison." For a comparison of criminal justice policy change in Canada and the U.S. that illustrates this point, see Michael Petrunik, "The Hare and the Tortoise: Dangerous and Sex Offender Policy in the United States and Canada," *Canadian Journal of Criminology and Criminal Justice* 2003, 45: 43-72.

³¹ Roach, *Due Process and Victims' Rights*.

³² Anthony N. Doob and Cheryl Marie Webster, "Looking at the Model Penal Code Sentencing Provisions through Canadian Lenses," *Buffalo Criminal Law Review*, 2003, 7: in press.

³³ Standing Committee on Justice and the Solicitor General (Ottawa: House of Commons, 1993), p. 2. I thank Tony Doob for making me aware of this and other material relevant to the Canadian government's views on criminal punishment.

³⁴ What is not in dispute is that firearms are more widely available in the U.S. compared to Canada. An estimated 49% of American households and 22% of Canadian households owned firearms in the late 1990s. (Richard Block, "Firearms in Canada and Eight Other Western Countries: Selected Findings of the 1996 International Crime (Victim) Survey," Ottawa: Department of Justice, Canadian Firearms Centre, 1997).

³⁵ Like Zimring and Hawkins, I have no doubt that the availability of firearms does make violence in the U.S. more lethal. But whether and what types of gun control policies that have been

proposed in the U.S. would lower rates of homicide is a separate issue. There is considerable literature on this, including recent work by Philip J. Cook and Jens Ludwig, *Gun Violence: The Real Costs* (New York: Oxford University Press, 2002); Gary Kleck and Don B. Kates, *Armed: New Perspectives on Gun Control* (Amherst: Prometheus Books, 2001), James B. Jacobs, *Can Gun Control Work?* (New York: Oxford University Press, 2002); and Jens Ludwig and Philip J. Cook (editors), *Evaluating Gun Policy: Effects on Crime* (Washington DC: Brookings Institute, 2003). John Lott Jr. also has a recent book on the topic (*More Guns, Less Crime*, Chicago: University of Chicago Press, 2000), but readers should be aware that there is considerable controversy over some of the data Lott has relied on in his research as well as over some of the analytic techniques he has used. For critiques of his methods and different interpretations of his findings, see, for example, John Donohue, "The Impact of Concealed-Carry Laws," pp. 287-339 in Ludwig and Cook (eds.), *Evaluating Gun Policy*; and John Donohue, "Shooting Down the More Guns, Less Crime Hypothesis," *Stanford Law Review* 2003 (55); Otis Dudley Duncan, "Gun Use Surveys: In Numbers We Trust?," *The Criminologist* 2000 (25): 1, 3-7. Websites that contain information on this controversy include: <http://www.tsra.com/LottPage.htm>; <http://johnlott.com>; <http://www.cse.unsw.edu.au/~lambert/guns/lott98update.html>; <http://www.cse.unsw.edu.au/~lambert/guns/lott98update.html>; <http://www.johnlott.org>.

³⁶ Here the phrase frequently used by the gun lobby is apt: "guns don't kill people, people kill people." The implication I would draw from this is somewhat different from the gun lobby's preferred interpretation, however. Obviously, guns do not have to be used by people against each other just because they are available. In rural Canadian Aboriginal communities, guns are widely available; and Aboriginal Canadians have high rates of homicide. However, firearms do not account for a particularly high proportion of Aboriginal homicides. One explanation that has been offered for this is that in Aboriginal communities, firearms are defined as tools for hunting animals, not tools for dealing with interpersonal conflicts. The question thus becomes why have so many Americans come to define firearms as tools for dealing with interpersonal conflicts?

- ³⁷ See, for example, Rosemary Gartner, “The Victims of Homicide: A Temporal and Cross-National Comparison,” *American Sociological Review* 1990, 55: 92-106; Judith Blau and Peter Blau, “The Cost of Inequality,” *American Sociological Review* 1982, 47: 114-129; Harvey Krahn et al., “Income Inequality and Homicide Rates: Cross-National Data and Criminological Theories,” *Criminology* 1986, 24: 269-295; John Hagan and Ruth D. Peterson (eds.), *Crime and Inequality* (Stanford: Stanford University Press, 1995).
- ³⁸ Martin Daly, Margo Wilson, and Shawn Vasdev, “Income Inequality and Homicide Rates in Canada and the United States,” *Canadian Journal of Criminology* 2001, April, p. 220.
- ³⁹ These data are taken from Michael Adams, *Fire and Ice: The United States, Canada, and the Myth of Converging Values* (Toronto: Penguin Books, 2003).
- ⁴⁰ Adams, *Fire and Ice*, p. 52.

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Question and Answer Session for Rosemary Gartner

Tom Blaha, Wood County Economic Development Commission: One of the things that you touched on was that the criminal justice system in Canada is federal rather than provincial whereas the U.S. system is fragmented into states. Does that mean also that whatever policy there is regarding capital punishment would also be federal rather than provincial? What is the Canadian policy on capital punishment? Finally, does this mean that the prison system is federal rather than provincial?

Rosemary Gartner: Capital punishment would fall under federal rules, but it was abolished in 1976. There is a federal prison system and there is a provincial prison system. If convicted of crimes where the sentence is two years or less people would go to a provincial facility. If it is a crime where the sentence is two years or longer they would go to a federal facility. Provinces administer the provincial facilities and the federal government administers the federal facilities.

George Baty, Cresset Chemical Company: It seems that the record of solving crimes and catching perpetrators is better in Canada than the U.S. Could that possibly be due to the situation where if, when looking for a needle in a haystack, the smaller the haystack the easier it is to find somebody?

Rosemary Gartner: What I showed you were the ‘solved rates’ for homicide. Homicides in Canada are much more likely to occur among people who know each other such as intimate partners or family members. It is easier to solve crimes like that, the person is often there at the scene. It is probably the case that the reason the unsolved rate of homicides in the U.S. is so much greater is that homicides in the U.S. are much more likely to occur among strangers. Those are just much tougher homicides to solve.

Tom Silvia, Indian Law Section of the State Bar of Michigan: Regarding enforcing personal protection orders, what happens when somebody goes to Canada?

Rosemary Gartner: Judge McGarry is probably the more appropriate person to speak to that.

Justice McGarry: Peace bonds would be the obvious mechanism. We have a very similar system to that of the U.S. with respect to protection in an abuse situation. A peace bond is a criminal remedy that is Canada-wide. Often what happens is, in many situations, the abused spouse decides not to pursue the matter. We then try to facilitate a peace bond scenario to at least offer some protection out of the situation. So it goes through a criminal court and the police are there and entitled to enforce the peace bond.

Clifton Boutelle, Bowling Green State University: Your statistics were very interesting. I was curious as to if there is any reason advanced for the really high property crime rate in the city of Vancouver? Secondly, why are there so many more spousal homicides in Canada than in the U.S.?

Rosemary Gartner: As far as Vancouver, I have not heard any explanations for that. We do have a regional trend in crime as in the United States. Crime rates are higher on the west coast of Canada than on the east coast. Nobody has been able to come up with a very good explanation.

As far as spousal homicide rates, the spousal homicide rate in Canada is not higher than that in the U.S. It is the proportion of all homicides that are between spouses that is higher in Canada than in the U.S. The rate is actually higher in the U.S., it is just that the proportion occurring between spouses is higher in Canada.

Justice McGarry: One word I did not hear throughout the presentation was the word drugs. It seems to me that is the key to an awful lot of those statistics that you have produced.

Rosemary Gartner: I would agree. Arrests for drug offenses over the past quarter century show that twenty-five years ago Canada and the U.S. were exactly the same. Since the U.S. war on drugs the gap has increased exponentially. The vast growth in U.S. state and federal imprisonment has been for drug-related convictions.

Arnold Oliver, Heidelberg College: In the U.S. we are able to pretend that corporate crime is not a huge problem because we do not collect statistics on it in terms of both physical damage and money lost. Is Canada the same way? The corporate crime reporter wants the FBI to begin at least collecting statistics, but they have not so far. Is the Canadian approach different?

Rosemary Gartner: I think the approach is basically the same. In part, it is very difficult to gather statistics on corporate crime or corporate misconduct because it involves civil law as well as criminal law. It is just a more complicated project. I do not think it is simply because people do not care. You are right that in Canada, as in the U.S., we know much less about it, even though presumably the costs are much greater.

Shirley Ferguson, Medical College of Ohio: I am a psychiatrist. Has there been any interest in seeing the impact of changes in the treatment of mental illness to crimes of violence. I do not know what is happening in Canada but we have had a huge advance in deinstitutionalization—sending out many people with mental illness into the community. I am wondering what is happening in Canada and whether or not they are noted to be responsible for any percentage of crime.

Rosemary Gartner: There certainly has been a similar move to deinstitutionalization, but the data I have collected on homicides

suggest that if that has contributed to an increase in violent crime rates, it may be, in part, because these people are out in the street and available for victimization, not so much for committing crime. There is not a whole lot of evidence with which I am familiar. There is a debate going on about the extent to which people with mental illness are more likely to be violent. There is almost no debate over the question of whether people with mental illness are more likely to be victimized.

WHITE COLLAR CRIME: TAX EVASION AND CIVIL RIGHTS

by Terrance Sweeney

Introduction

Canada was formed as an independent nation in 1867. Our Constitution from that date was the British North America Act (BNA Act), a statute of the British Parliament, which could only be amended by it. The convention developed over the years, however, whereby the Canadian Parliament would request amendments to the BNA Act and the parliament in Great Britain would oblige.

There was no protection for civil rights embedded in the BNA Act. Nevertheless, Canada was a flourishing democracy which respected human rights. This can be illustrated by the case of *Roncarelli v. Duplessis*. Frank Roncarelli owned a restaurant in Montréal which had a license to sell liquor. He was a member of the Witnesses of Jehovah and had acted as a bailman for a large number of members of this sect charged with violation of various municipal bylaws in connection with the distribution of literature. He sued the defendant, who was the Premier and Attorney General of the Province of Québec, personally for damages arising out of the cancellation of his license by the Québec Liquor Commission.

The evidence was clear that Duplessis had ordered the Québec Liquor Commission to cancel Roncarelli's license to punish him for his support of the Jehovah Witnesses, which apparently had become an annoyance to the Roman Catholic population of Québec and its Premier. In these circumstances, the Supreme Court of Canada reversed the Québec Court of Appeal and upheld the trial judge's finding against Duplessis and increased the damages awarded at trial by \$25,000.

In the course of his judgment, Justice Rand said:

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the Appellant to obtain one: it was to be "forever." This purports to divest his

citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry

And later when it was argued that the Attorney General, as long as he acted “in good faith,” was free effectively to do as he pleased, Justice Rand said:

“Good faith” in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally to divest a citizen of an incident of his civil status.

It should also be noted, however, that evidence illegally obtained was nevertheless admissible in Canada. As stated by Justice Martland in *R. v. Wray*

I am not aware of any judicial authority in this country or in England which supports the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute. . . .

. . . The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.

Evidence, even if obtained through an involuntary and inadmissible confession, was still deemed relevant and admissible in criminal trials. In *Hogan v. The Queen*, all the judges of the

Supreme Court of Canada agreed that the police had denied Hogan's right to counsel under the Canadian Bill of Rights (a non-constitutional federal statute). His lawyer was in the police station when Hogan asked to speak to him. The majority of the judges held, however, that this rule that evidence, even if illegally obtained, was admissible if relevant was not a rule that should be set aside in order to enforce the right to counsel under the Bill of Rights. The Bill, after all, did not provide a remedy for its enforcement.

Over the years, Canadians gradually came to resent that we had to ask the British Parliament to amend the BNA Act. Furthermore, continuing pressure was exerted to embed a bill of rights in any constitution that was created. Finally, on April 17, 1982 under the leadership of Pierre Elliott Trudeau, our then Prime Minister, Canada succeeded in patriating its Constitution. This is the Constitution Act, 1982, which has as schedules the BNA Act (now known as the Constitution Act, 1867) and its various amendments.

Part I of the Constitution Act is the Canadian Charter of Rights and Freedoms which includes, among other things, guarantees of liberty, security of the person, fair trial, minority language rights, and equality. Thus, since April 17, 1982, Canada has had a constitutionally-entrenched bill of rights applying equally to all legislatures. There was a Canadian Bill of Rights enacted in 1960 but it was confined to the federal (national) sphere of legislative jurisdiction.

Unlike the Canadian Bill of Rights and certain provincial bills of rights, the Charter is constitutionally entrenched. As such, it is among the basic constitutional instruments, now referred to as the Constitution Acts, 1867-1982. Furthermore, it is entrenched in the sense that it cannot be amended by the ordinary legislative process, but only by the special procedures set out in Section 38 of the Constitution Act, 1982. Finally, as a constitutionally-entrenched Charter, its paramouncy over other legislation is provided for in Section 52. You may well imagine the flood of constitutional jurisprudence that has been created since 1982.

For purposes of this paper, I will focus on Sections 7, 8, and 24 of the Charter to illustrate how the Charter has been applied by the Courts to the actions of officials of the Canada Revenue Agency (CRA) under the Income Tax Act (Tax Act). I will also draw some parallels between the Canadian system and that of the United States.

S.7: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

S.8: Everyone has the right to be secure against unreasonable search or seizure.

S.24(1): Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

These provisions will be familiar to constitutional experts in the United States. The influence of the U.S. Constitution on the framers of ours is readily apparent. Sections 7, 8, and 24 deal primarily with the rights of a defendant in criminal proceedings and is similar to U.S. due process clauses found in your Fifth and Fourteenth Amendments. There is, however, one striking difference. the Canadian Charter does not explicitly protect property rights to the extent found in the U.S. Constitution. U.S. due process clauses, for example, apply to “deprivations of life, liberty, or property,” whereas the corresponding language in the Charter covers deprivations of life, liberty, and security of the person. The U.S. Fifth Amendment, moreover, provides that “private property” shall not “be taken for public use, without just compensation” and the original Constitution provides further that “states shall not enact laws impairing the obligation of contracts.” The Canadian Charter contains no directly equivalent provisions.

Section 8, which contains protection against arbitrary or unreasonable searches and arrests, finds its counterpart in the Fourth Amendment. Note, however, that the Charter omits explicit warrant and probable cause requirements from the text of the Charter in favor of general proscriptions of “unreasonableness” and “arbitrariness.” This should be contrasted with the detailed rules that have been developed by American judges on warrants—such

warrants have to be specific in nature and based on “probable cause.” Section 24 is a direct response to the *Hogan* case noted above.

Revenue agents are entitled to obtain information in respect of the taxing statute purely as an administrative function, but sometimes they cross over the line and begin to conduct a criminal investigation under the guise of a civil one. Once a criminal investigation is instituted, then Charter rights are engaged (e.g. requirement to obtain a search warrant).

The Tax Act includes provisions empowering CRA officials to obtain information in connection with a civil audit to monitor taxpayers’ reporting of income. The Tax Act is also “quintessential criminal law” under which taxpayers can be prosecuted, fined, and incarcerated. The evidence in both civil and criminal proceedings is normally obtained, however, by officials of the same agency, the CRA.

Norway Insulation Inc. (Norway) was one of the first cases to consider the hybrid role of a CRA auditor. During a routine audit by CRA in April and May of 1991, the auditor believed that Norway Insulation may have had some unreported sales. On May 22, 1991, he discussed this with the supervisor and the file was referred to the CRA Special Investigations Division, which, among other things, was charged with conducting investigations into, and prosecuting, tax evasion. In July 1991, a Special Investigator was put in charge of the file and he too believed there might be unreported income. He sent the file back to audit and requested that other specific matters be investigated which was done on October 1991 through using the warrantless inspection and audit procedures authorized by the Tax Act.

The matter was subsequently referred back to Special Investigations in early March 1992 and on the information obtained, search warrants were issued and executed in June 1992 and tax evasion charges followed. The trial judge had excluded the evidence on the grounds that the taxpayer’s Section 8 rights had been violated and that it would bring the administration of justice into disrepute to allow the evidence to be received (S. 24).

The Crown appealed to the Ontario Court of Justice General Division. In that court, Justice Laforme, agreed with the conclusions of the trial judge and referred to the relevant section of the Tax Act which was designed as a regular audit tool to ensure compliance with the Act. He held that:

It is not designed to gather evidence for the purpose of a criminal prosecution. It should not be used to boot strap ministry investigators into a position where they can obtain a warrant which would otherwise be unobtainable.

Justice Laforme adopted earlier Supreme Court of Canada decisions which made it clear that in quasi criminal matters two elements are necessary to satisfy the requirements of Section 8 of the Charter:

1. That as a fundamental aspect, and as an indispensable requirement, there should be a scheme of prior authorization through the exercise of a judicial discretion in the decision to grant or withhold authorization for a warrant of search.
2. That the decision to grant or withhold the authorization requires the balancing of the interests of the individual to be free of intrusions of the state and the interest of the state to intrude on the privacy of the individual for the purpose of law enforcement.”

Justice Laforme agreed with the trial judge that once the matter was turned over to the Special Investigations, it was an investigation for the purposes of laying charges and was no longer merely an audit.

The search was unreasonable . . . no standard applied so as to assess the competing interests of the individual and those of the state nor was there any proper scheme or authority applied so as to assess the request and grant prior authority to conduct the search.

Justice Laforme upheld the trial judge and excluded the evidence obtained by Special Investigations under Section 24(2) of the Charter. Furthermore, the search warrants, having been obtained as a consequence of the excluded evidence, were quashed. The trial judge and Justice Laforme were particularly critical of the actions of the officials of CRA who knew, or ought to have known, that they required proper prior authority based upon a proper review of the relevant competing interests before obtaining the evidence they did. Section 24(2) was properly applied to exclude the evidence because the conduct undertaken by the officials of the CRA was “oppressive to the rights of individuals.”

The Supreme Court of Canada (SCC), in November 2002, issued judgments in *Jarvis* and *Ling*, and clarified and amended the apparent rule laid down by the Ontario Court of Justice in *Norway Insulation*.

Jarvis

The taxpayer's wife was an artist who had earned income from her art. After she died, the taxpayer continued to sell her art. In 1994, however, the CRA received an anonymous tip that the taxpayer had failed to report a substantial amount of income from the sale of the art in the 1990-1991 taxation years.

In February 1994, a tax auditor contacted the taxpayer and his accountant and notified them that the taxpayer was under audit. She had formed an initial impression that the taxpayer had received significant amounts in 1990 and 1991 from sales of his late wife's art. The tax auditor met with the taxpayer's accountant and spoke with the taxpayer on March 16, 1994. She reviewed the taxpayer's books and records on April 11, 1994. The taxpayer was not cautioned as to his rights and answered all the auditor's questions and authorized the auditor to obtain information from his bank. The auditor subsequently determined that there was a gross unreporting of income by the taxpayer in 1990 and 1991 and on May 4, 1994, she referred the file to the Special Investigations Division of the CRA. In June of 1994 an investigator from that Division determined that there were reasonable and probable grounds to obtain a search warrant.

Meanwhile, the taxpayer's accountant had attempted to contact the CRA auditor regarding the status of the audit. He was put off, however, as the auditor was advised to "stall" the matter, and in November 1994, the tax auditor prevaricated and advised the accountant that no progress had been made in the file.

On November 23, 1994, the information was filed with the Provincial Court and warrants were issued authorizing searches of the taxpayer's residence, the accountant's office, and the local office of the CRA. In early 1995, the investigator assigned to the file issued requirement letters, using the civil powers in the Tax Act, to various banking institutions which complied and provided the requested documentation. The taxpayer was charged with three counts of tax fraud and two counts of willfully evading or attempting to evade payment of taxes. The taxpayer succeeded at trial in excluding the evidence obtained from and after March 16, 1994. The Crown,

however, appealed and was successful and the Alberta Court of Appeal dismissed a further appeal.

Ling

In November 1994, CRA was auditing Mr. Ling in respect to his claim for farm losses. In the course of this audit, the CRA auditors obtained various documents and information and met with the taxpayer several times before the file was referred to Special Investigations. At the final meeting, before the referral in December 18, 1995, the taxpayer was questioned about certain bank deposits and unreported income and admitted that he had mistakenly failed to report certain amounts. After the matter was referred to Special Investigations, officials interviewed two witnesses who had previously been interviewed by the auditors and served requirement letters on four banks and the taxpayer's accountant. Shortly thereafter, the Special Investigations people met with the taxpayer and cautioned him regarding his rights. He was charged with six counts of filing false returns under the Act. The taxpayer brought a motion to exclude from the criminal trial materials provided to the CRA.

Decision of Supreme Court of Canada

In *Jarvis*, the Supreme Court of Canada recognized that the Tax Act is "essentially a regulatory statute that relies on self-assessment and self-reporting obligations." The Court recognized the hybrid nature of the Tax Act, being in part regulatory but also a quasi-criminal statute that should afford taxpayers Charter protections. It noted that Section 7 is relevant as the taxpayer's liberty is at stake. Section 8 deals with privacy but taxpayers can have only a diminished privacy right with respect to books and records produced during the ordinary course of regulated activities. The Court ultimately decided upon a "predominant purpose test," under which statutory audit and inspection powers are no longer available to the CRA once the predominant purpose of an inquiry is the determination of a criminal liability.

The Court found that all relevant factors must be considered when determining the predominant purpose of an inquiry and noted that no one factor is determinative in and of itself. Once the predominant purpose of an inquiry is the determination of penal liability, the "full panoply" of protection under the Act applies.

In applying the predominant purpose test in *Jarvis*, the Court found that there was no investigation into the taxpayer's penal

liability before May 4, 1994. The banking information obtained, however, pursuant to requirement letters issued after the criminal investigation had begun, was obtained in violation of the taxpayer's Charter rights and this information was excluded from use in evidence.

In *Ling*, the Supreme Court of Canada found that the audit was properly conducted as an audit and not as an investigation up to and including the December 18, 1995, meeting between the auditors and the taxpayer. After that date, however, the inquiry changed to an investigatory one into the taxpayer's penal liability and any information gathered by requirement letters issued after that date was in violation of the taxpayer's Sections 7 and 8 Charter rights and had to be excluded.

One should not assume that evidence prejudicial to an accused is always excluded, even in the context of a violation of a taxpayer's Charter rights. In *Chusid*, the appellant was charged with income tax evasion. The Crown alleged that he had neglected to report \$1 million in commission income in 1987. The CRA tax auditor, however, as late as January, 1994, was issuing requirements to banks to obtain more information about Chusid even though the auditor admitted at trial that at that point he was investigating a serious offence. In these circumstances, Justice Beaulieu of the Ontario Superior Court held that Chusid's Charter rights were seriously breached and the issuing of the requirements violated his rights under Section 8 of the Charter. Notwithstanding this finding, however, Justice Beaulieu went on to hold that to exclude the evidence would bring the administration of justice into disrepute as Chusid was not deliberately misled or deprived of information about the inquiries that were going on in connection with him. Moreover, he was an accountant who was concerned about the ongoing investigation from the outset and was hardly a naive citizen being duped or overwhelmed by a government official for the purposes of surreptitiously obtaining self-incriminating information.

While an offence under the Income Tax Act is, in the words of Justice Cory, "quintessential criminal law," it differs in some respects from "typical" criminal offences. Tax evasion is an offence that is not easily detected, that may be committed with minimal planning and effort, and that does not have an individual victim. Given the nature of the offence, I am sure that many are tempted to report less income than required under the Act.

However, our tax system depends on the honesty and integrity of the public, and those who evade taxes erode the moral and economic fabric of society. . . . In the case at bar, the potential injury to the public interest is further magnified given the amount of taxable income that Mr. Chusid allegedly evaded reporting. . . . The administration of justice demands enforcement of the Canadian income tax regime, so that citizens will honour their responsibilities to society as a whole. . . . In my view, investigations and prosecutions under the Income Tax Act take on a particular significance when those of considerably higher relative means are alleged to have failed to Honour their obligations to society, and thereby deprive the Government of the ability to respond to the needs of their fellow citizens. . . .

The exclusion of Mr. Chusid's banking records would bring the administration of justice into greater disrepute than their inclusion. Consequently, despite the fact that the records were obtained in violation of Mr. Chusid's Section 8 rights, I find that they are admissible pursuant to Section 24(2).

The American Experience

Perhaps we should not be surprised that remarkably similar American jurisprudence was developing in the United States at roughly the same time. It does surprise me that the Canadian courts were apparently not aware of this. I could find no reference in the Canadian cases to the American ones discussed hereunder.

The Internal Revenue Manual (the "Manual") provides:

If after consultation with the district fraud co-ordinator, it is determined a potential fraud case has firm indications of fraud and meets criminal criteria, the compliance employee will suspend all activities without disclosing to the taxpayer or representative the reason for the suspension. A referral to Criminal Investigations will be prepared. . . .

The problem comes from the fact that in order to determine if fraud is present, a comprehensive civil examination is mandated by the Manual because a taxpayer's mere understatement of tax on a return does not qualify for fraud and will not qualify for criminal referral. Instead, the Revenue Service must establish that the taxpayer

had an intent to defraud. This raises the question to what extent does an American taxpayer have any substantive rights or remedies against the IRS, on presentation of the evidence in a criminal trial?

In *Tweel*, during the course of an audit at the behest of the Racketeering Section of the Department of Justice, the taxpayer's accountant asked the revenue agent whether a "special agent" was involved in the current examination. The revenue agent informed the accountant that no special agent was involved, but did not disclose the involvement of the Department of Justice. In these circumstances, the Fifth Circuit Court overturned the trial court's ruling and ordered the taxpayer's documents (obtained by the IRS) to be suppressed. The Court in *Tweel* found the revenue agent's response to the accountant's question to have been a "sneaky deliberate deception" and a "flagrant disregard" for the taxpayer's rights. Moreover, "his silent misrepresentation was both intentionally misleading and material." His response was technically true but was so misleading that it vitiated the taxpayer's consent to produce documents. Thus the microfilming of his documents constituted an unreasonable search in violation of the Fourth Amendment.

Two years later in *Caceres*, the Supreme Court of the United States resiled from the rule developed in *Tweel*. The Court distinguished conduct mandated by the IRS Manual from conduct mandated by federal law or the Constitution, finding that a court's duty in the former was most evident only when the conduct was mandated by the latter. In *Caceres*, the defendant was taped when he offered a bribe to an IRS agent during the course of a civil audit. The agent had, however, failed to obtain the proper authorization under internal IRS rules for the wiretap. The Court held that there was no federal law or constitutional provision requiring the enforcement of the IRS rule requiring authorization prior to the recording of conversations. The Court found that although rules governing the conduct of criminal investigations were desirable, the rules themselves provided more benefit to the public than any deterrence that would result from the application of the exclusionary rule to violations that were not constitutional in nature. The Court found in *Caceres* "there is simply no reason" why a court should exclude evidence that was acquired in violation of mere regulatory rules and admitted the tapes acquired were in violation of the IRS manual.

The case of the *United States v. McKee* attempted to reconcile *Tweel* and *Caceres* by fashioning a rule that bridged the analyses of

both. In *McKee*, the IRS received two tips that a taxpayer and her husband were using corporate funds of a wholly owned corporation for personal purposes without disclosing such moneys as income in their personal income tax returns. The tax auditor met with the taxpayer numerous times and obtained documents, after which she referred the case to Criminal Investigations. The taxpayer was charged with fraud and pled guilty, reserving the right to appeal.

On appeal, the Sixth Court engaged in a detailed analysis of the duties and obligations of revenue agents engaged in civil investigations that uncover potential criminal situations and went a long way towards, at least obliquely, overturning *Caceres*. It determined:

. . . [It] would be a flagrant disregard to individuals' rights to deliberately deceive, or even lull, taxpayers into incriminating themselves during an audit when activities of an obviously criminal nature are under investigation.

In *McKee*, the Court formulated a two-part test to determine when the IRS is engaged in a constitutional violation by means of conducting a criminal investigation through a civil audit. In order to establish such a constitutional violation, the taxpayer must show, by clear and convincing evidence, that:

. . . an IRS agent made affirmative misrepresentations in the course of an investigation, and because of those misrepresentations, the taxpayer disclosed incriminating evidence to the prejudice of her constitutional rights.

Note that the Court specifically stated that a taxpayer:

. . . can satisfy the burden as a practical matter, by showing that the IRS agent knowingly failed to comply with the Manual's suspension-of-investigation rules.

Courts subsequent to *McKee* have not followed it. For example, in *Kontny*, the defendants paid their employees regular wages for overtime work, rather than time and a half, but did not report any of the overtime wages to the IRS thereby allowing their employees a greater net paycheck. This was reported to an IRS special agent and was later turned over to another agent to conduct a civil investigation. He interviewed the defendants and told them that his investigation was a civil one. He then determined there was evidence of fraud and referred the case for criminal prosecution. The defendants were later convicted of tax evasion. On appeal, the

defendants argued that the evidence against them should have been suppressed because the IRS engaged in a criminal investigation under the guise of a civil audit in violation of the Manual's provision.

The Seventh Circuit, however, refused to give the Manual provision as much credence as had the Sixth Circuit in *McKee*. The Seventh Circuit relied more on *Caceres* and that the Supreme Court had forbidden the admission of evidence acquired in violation of the Constitution but had refused to extend that prohibition to violations of statute or regulations, noting that *Caceres* specifically involved a Treasury Regulation. The Seventh Circuit, therefore, rejected *McKee* and distinguished *Tweel* and imposed a markedly higher standard and said that "proof of deceit must be linked to the Constitutional standard of threat nor promise." Simple deceit, without more, is neither a threat nor a promise, although it may qualify as a basis of either. The Seventh Circuit gave two examples of what it meant by deceit combined with threats or promises:

... if the revenue agent had pretended to be a member of the mob and threatened to kill the defendants if they did not produce their business records, or if the revenue agent had pretended to be an assistant U.S. attorney and promised not to prosecute the defendants if they cooperated.

The facts in *Kontny* did not rise to that level and the Court refused to suppress the evidence. The U.S. Supreme Court refused to hear an appeal in *Kontny*.

Conclusion

I was interested to learn that courts on both sides of the border were dealing with a similar problem at roughly the same time. It is sad, however, and perhaps symptomatic of the "two solitudes"—Canada and the United States—that Canadian judges were not apprised of developments in the United States. This seems to me all the more remarkable since the resolution of the problem by Canadian and American judges is so similar. Canada has opted for a "predominant purpose" test. The United States is not prepared to extend civil liberties protection if the IRS breaches its own rules (*McKee* case excepted). We see, therefore, the traditional role of courts in our two countries to balance the interests of the individual to be free of state interference and the interest of the state to intrude on the privacy of the individual to enforce tax laws. A theme I found from the law in both our countries is that courts are not going to be

fastidious about excluding evidence if the result is that a tax cheat goes free.

The author wishes to acknowledge his appreciation and indebtedness to both Mr. Nemeth and Mr. Bernhardt for their work “The Internal Revenue Manual as Protector of Constitutional Rights” from which a great deal of the analysis relating to the American jurisprudence is borrowed.

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Question and Answer Session for Terrance Sweeney

Mark Kasoff, Bowling Green State University: With respect to Mr. Chusid, who neglected to report \$1 million, after he was declared to have non-criminal intent did he still have to pay some taxes?

Terrance Sweeney: Yes. He would have had to pay the tax and penalties escalating to as high as 100 percent of the tax. He did not get off the hook but he did not go to jail. One can be convicted of civil liability in the tax situation by not reporting income which undoubtedly leads to penalties ranging from 50 to 100 percent of the tax avoided, but that does not prevent the Crown from prosecuting for criminal fraud and double jeopardy in the sense that one could be fined again.

Tom Silvia, Indian Law Section of the State Bar of Michigan: The U.S. seems to be all over the place on whether there is a knowing and willful intent not to engage in the duty to pay taxes or the duty to pay child support. I wonder if there is a similar trend in Canada where they are taking what was a civil liability and criminalizing it?

Terrance Sweeney: I am not able to answer that. Maybe Justice McGarry with his experience as a judge could help us?

Justice McGarry: I would say basically not. The police would give you a very practical answer—not the one that you would appreciate—if it is a civil matter we do not prosecute. So if it is done on a civil basis the police just basically are not interested. They have other fish to fry.

Mark Kasoff, Bowling Green State University: Have there been any Al Capone type cases in Canada where people have been successfully charged in tax evasion?

Terrance Sweeney: Yes. There is a famous case of Harold Ballard and Stafford Smythe, the owners of Maple Leaf Gardens. Maple Leaf Gardens was a public company but Ballard and Smythe treated it like their own pocketbook. Some of the shareholders raised a fuss about it and one thing led to another and it was discovered that none of these monies that they had been taking had been reported on their tax returns. Smythe committed suicide and Ballard went to jail.

Justice McGarry: One further point regarding corporate fraud and prosecutions in Canada, we do not see many of them. They are usually civil settlements. If there is any criticism of the court system it is that people convicted of corporate fraud in Canada receive insignificant sentences compared to the U.S. The deterrence factor is not very great. To a sixty-year-old man who is going to go away to jail for two or three years he may think it is very significant, but that is usually the range; two or three years for very significant amounts of money.

Terrance Sweeney: You will recall Alan Eagleson, the promoter of the Canadian National Hockey Team and the Director of the NHL Players Association, was charged in Boston and in Toronto. Allegations were made against him by Bobby Orr and other players who established that Eagleson had feathered his own nest with the pension plan of the hockey players. Eagleson plead guilty in Toronto and received a sentence of six or eight months. Had he been prosecuted in Massachusetts he may well have gone to jail for fifteen or twenty years.

Mark Kasoff, Bowling Green State University: Did anybody lose big on the Bre-X scandal?

Terrance Sweeney: Yes. People made and lost fortunes on the stock. In terms of criminal convictions, John Felderhof, the former vice-chairman and chief geologist of Bre-X Minerals Ltd., has been in an incredibly long series of hearings before the Ontario Securities Commission. I do not think they can get to first base because one of the tactics of the defense was to just make the hearings so miserable for everyone that he would goad the judge appointed to the case into making mistakes. The Securities Commission appealed to the

Provincial Court to remove Justice Peter Hryn, who was assigned to the case, on the grounds of jurisdictional error. The Appeals Court rejected this bid and sent the parties back to the Securities Commission room. That was at least three years ago. Today there is still no beginning of a resolution—it is not even at the trial stage, it is still just the Securities Commission hearing.

Ron Randall, University of Toledo: With regard to the IRS in the United States, I think the big story is that we have starved the IRS for funds, reduced its staffing to the point that very few people are ever audited. The consequence is that large amounts of money, both legal and illegal, go untaxed. I wonder if there is a similar situation in Canada or a different attitude toward the IRS.

Terrance Sweeney: That is a very interesting point. The statistics in Canada show that for each Revenue Canada auditor hired they collect three times their salary every year. Yet, when governments want to cut expenditures they cut the department that is guaranteed to raise the money. It is perhaps part of the public perception of tax auditors as being pariahs, going all the way back to biblical days.

Frank Laatsch, Bowling Green State University: Are there provincial differences in civil rights; in particular, Québec?

Terrance Sweeney: The Charter is federal and applies to all aspects of life in Canada.

Justice McGarry: The human rights are provincial matters, so each province has their own human rights code.

**IN THE COURTROOM:
CROSS-BORDER COMPARISONS**
by Justice John F. McGarry and Judge Mark Reddin

Introduction

We will take two courtroom perspectives, one from the Canadian viewpoint and one from the American. To do this we will present a “fact scenario” as a device to compare and contrast the Canadian and American criminal justice systems.

An Outline of the Canadian Judicial System

—John F. McGarry

Before presenting the fact scenario, I will try to briefly sketch the Canadian system which is perhaps a little simpler than the American. At the top we have the Supreme Court of Canada with nine judges. They are the ultimate authority in Canada. They represent Canada geographically so that Québec has certain representatives on the court as do the various other provinces. The process in which they are placed on that court is through the selection of the Prime Minister. That is under current review by our new Prime Minister and rightly so. The feeling is that they do not wish to go through the same process as happens to the Supreme Court in the United States, but there will be a vetting process to at least give the perception that somebody else other than the Prime Minister is selecting the judges for the top court in Canada. Then each of the provinces has a Court of Appeal. In Ontario, there are twenty-seven members on that court. They are selected mostly from the trial court although some come from private practice. Most of them that do come from the trial court would come from my court, the Superior Court in Ontario. This is a very large court of 300 members. Each province has a Superior trial division, some are called Queen’s Bench. I sit in the Southwestern Ontario region, and there are twenty-seven judges in that area.

After the Superior Court, there is the Provincial Court which deals with the bulk of the criminal matters in the province. They are given full jurisdiction under the criminal code, except murder, which is a federal statute. For practical purposes, the jurisdiction has been recently enlarged so they deal with the bulk of crime. To some degree, the Provincial Court also has civil matters and family law matters. My job as a judge is to be available to take on almost any trial. I have no idea what I am doing Monday. It could be a criminal

jury trial, it could be a family law trial, it could be an injunction involving a labor dispute, or it could be nearly anything. It seems like an incredibly broad jurisdiction, but it does work. I have been at it for almost twenty years now so perhaps it is easier for me than a new appointment. I agree with Rosemary Gartner that in Canada politics is not an issue in judicial appointments. I am appointed for life. The down side is that we are stuck with the judges that are appointed. That, in very brief form, is the Canadian judicial system.

I would like to make one observation regarding Rosemary Gartner's presentation on differences of criminality between Canada and the United States. The movie *Bowling For Columbine* really hits home; although Michael Moore undoubtedly took license with some of the numbers and the reasons for differences in criminal behavior. The key reason for the huge differential in crime rates is drugs and inner-city problems. It is just at the heart of so much of what judges do. Insofar as Vancouver is concerned, it is no mystery to me that a lot of cars are stolen when our street problem with drugs is so terrible. In Toronto we are seeing a vast increase in the use of handguns—much of it is a Jamaican issue where a lot of crime goes unprosecuted because people are not prepared to testify. It is a very significant problem in Toronto. It tends to be localized in that it is gangs and they tend to get after each other.

The Comparative Fact Scenario

The objective today is to present a fact scenario in the context of the Canadian Charter of Rights and Freedoms which came into effect in 1982. The Charter changed the judge's and prosecutor's roles. It has had some negative impact on our police force, but I think a massive improvement overall.

The scenario is a case that I had the opportunity to judge some years ago. Basically, a police officer was murdered in the small community of Ingersoll, Ontario. The prime suspect was a member of a motorcycle gang. The police knew he took a certain route to his girlfriend's home in St. Thomas. The police set up a RIDE program whereby they have the right under the Highway Traffic Act to stop persons and to make inquiries about the driver's state of impairment. The car coming along the road was known to be the suspect's car. When they stopped it they found the driver was not the suspect but an acquaintance of the suspect. They asked for identification and she got out of the car and said her name. When the officers repeated their request for identification the driver said she did not have any.

They ran a check on her name and nothing came back on it. She then gave a slightly different spelling so, now thoroughly suspect of this woman, they requested her purse. She turned it over to the police officer who thought he felt a handgun in the purse. He opened the purse to find not only a loaded handgun, but cocaine. She was then placed under arrest, the car was searched and marijuana was found in the vehicle.

After the Charter, this seemingly straightforward case became far more difficult. In the days before the Charter this was hard evidence with no major intrusion. This person had brought suspicion on herself and the arrest would be proper. The handgun would be seized and she would be charged with the various crimes that relate to the discovery. With the advent of the Charter, we now have a balancing system regarding the search and seizure of evidence. Canadian criminal law and the Charter are inextricably linked. Section 8 of the Charter states that “Everyone has the right to be secure against unreasonable search or seizure.” Section 9 states that “Everyone has the right not to be arbitrarily detained or imprisoned.”

These are primarily the sections with which our fact scenario will be concerned. However, Section 24(2) of the Charter is very important.

Where, in proceedings, a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Unlike violations of U.S. amendments, if the Charter is violated, the evidence may still be admissible into court. Canadian and U.S. law is similar in that evidence may be admissible if that evidence would have been found in any event, notwithstanding illegal search. However, under Section 24 of the Charter, evidence may be admitted if the exclusion of such evidence would bring the administration of justice into disrepute. I will explain this in another scenario.

Excluding Evidence

In 1987 there was a case called *Collins* that went to our top court. The police were in a bar where there was a prostitute who was thought to be associated with a drug trafficker. The police saw her take a condom and put it in her mouth. They suspected that it

probably contained heroin so they grabbed her by the throat to prevent the swallowing of the condom. They retrieved the condom and found heroin. She felt that her rights had been infringed by the behavior of the police and the Supreme Court of Canada agreed with her. The Supreme Court said the judge has to determine whether or not

- a Charter right has been infringed,
- the evidence was obtained in a manner that infringed a Charter right, and
- having regard to all the circumstances, its admission would bring the administration of justice into disrepute.

The *Collins* decision said that judges should look at what evidence was obtained, what Charter right was infringed, and whether:

- the violation was serious,
- the violation was willful or committed in good faith,
- the violation occurred in circumstances of urgency or necessity,
- other investigatory techniques were available,
- the evidence would have been obtained in any event (likely),
- the offence was serious,
- the evidence is essential to substantiate the charge, and
- other remedies are available.

This is a particularly good example because in nearly every instance a little bit of patience might have brought about a result that would allow the police to proceed. Then the court directed clarification as to whether or not the violation was undertaken in good faith. The police said they were concerned that if she did swallow, it would be gone and she would take off. Therefore, the officers felt they had to take immediate action. Bad faith violation is very serious and when an arrest is obviously unlawful, then it is likely the evidence will be excluded.

The next stage involves balancing whether or not, considering the seriousness of the crime, the admission of the evidence would bring greater harm into repute of justice than its exclusion. In a case called *Feeney* a person was charged with second degree murder. The police had little or no evidence to connect the person with the crime but had very good reason from other insider information to believe that the man had committed the crime. They arrest him and let him sit and stew—and that is a polite way of putting it—for a considerable period of time until he finally acknowledges he was involved in the crime. They then go to his house, which is a place

police should not go, and seize an item which ties him directly in with the crime through DNA. The court said after looking at the bad faith arrest and the warrantless search of the house that the admission of the evidence would result in justice being brought into disrepute. The evidence was excluded and he is a free man.

Returning to the original fact scenario; we are now at the point involving seizure of a weapon. The analysis that we would have to go through in Canada as a result of this particular setup is to see whether or not the car was properly stopped. The RIDE program is undoubtedly an intrusion on an individual's rights to privacy. However, under Section 1 of the Charter—which is a global section—the rights of individuals are protected but under certain circumstances intrusions are permitted. The good government and law enforcement effects of stopping impaired driving is significant enough that the privacy infringement is deemed as legal. Having stopped the person, all the officer is entitled to do at that point is to obtain the identification. Absent articulable cause or reasonable and probable grounds to pursue any other investigation identification is as far as they can go. So a RIDE program staged for the purpose of furthering an ongoing criminal investigation, the murder in this scenario, would arguably not be constitutional. The use of this tool by police officers for a purpose other than the Highway Traffic Act would probably succeed in having the evidence thrown out. That argument was not raised in the actual case, though it may well be an argument that we could raise today. Assuming the officers legally staged a RIDE program along the route, it would be within their purview to stop all motor vehicles. They can legitimately look at all people to decide whether or not they have been drinking. If they did not have grounds to pursue it further, they can not take it any further. If they happen to see or smell or feel an item, then they can proceed. Taking a person's purse is probably going too far, but if the officer happens to put her hand on something just by coincidence, then she would probably be entitled to seize that item.

There is what has become known as the “sports bag” case in Canada. This involved a young fellow who was driving and was stopped by the police. They looked in the back and saw the sports bag and thought they would just check it out. They found marijuana but the courts held that this was an improper intrusion on an individual's rights and that evidence was excluded.

Arrest

The next area that the police must be concerned about is the arrest. In Canada, police are allowed to arrest a person who has committed an offense or who, on reasonable grounds, the officer believes is about to commit an offense. If the search is incident to the arrest then they are entitled to carry out a search. The purpose of the search must be ensuring the safety of the police and public, protecting evidence from destruction, and discovering evidence to be used at the arrestee's trial. Whether or not the search of a vehicle is justified will depend on a number of factors such as the reason of the arrest, the location of the vehicle in relation to the place of the arrest, and the time of the search in relation to the arrest. In this case, I can describe what the Charter has done to some police practices. I have had cases where police officers make an arrest. When I ask why they were there the response is well, we were there because we were concerned about a murder. Then I ask of the officers, what did you do? Well, we asked for identification. I then probe, anything else? Well, I smelled alcohol on her breath. So, as a result, the officer can go on and take further steps. And the judge accepts that. I hate to say it because I am a former prosecutor, but sometimes police think they have to take an extra step and say that the person smelled of alcohol. At which point they are entitled to take further steps. It is something with which they have to live.

I recently had a case where the police officers stopped a car under very similar circumstances. As they were walking around the truck they shined the flashlights in the back and found there were these marijuana plants evidently being transported to the next growing location. Spotlights are allowed in concern for officer safety. That was the Crown's case. Then a professor from University of Western Ontario examined the truck and the glass in the back. There was absolutely no way the spotlight could go through that glass and identify anything in the back. So the police officers clearly had invented a scenario. The driver said that he opened up the back of the truck and that is how it was discovered. I had to accept that the driver provided the correct scenario. Since the police were not permitted to do that, he was not convicted.

Search Incident to an Arrest

A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstance. The police in the scenario of the gun in the purse acted too quickly under the circumstances

and consequently the charge was thrown out. If they had been ingenious, they probably could have found a way to get the gun into evidence. If that gun had been identified as the weapon in the murder, then justice might go into disrepute if the weapon were excluded. That would be a very different and difficult call. Very seldom do we see in Canada that evidence is allowed in on the basis that the exclusion will be justice into disrepute. I personally disagree with that. In this situation, with this woman having a purse with a loaded handgun in it, would you want that evidence to go in or not? I would venture that most people would say it should go in. Leaving it out would in fact bring justice into disrepute. However, I am bound by the precedents in the Supreme Court of Canada. I made the ruling and I remember within about a week a ruling came down from the Supreme Court of Canada on a case very similar to this that confirmed that decision. Now, we turn to the U.S. system and how this fact scenario would be handled in Ohio.

An Outline of the United States Judicial System—Judge Reddin

I also must listen to those courts that are above me and follow the lead that they give. Justice John McGarry and Terrance Sweeney have given you a little background about the Canadian justice system so some background on the U.S. judicial system is now in order. The Constitution of the United States vests judicial power in one Supreme Court and in several inferior courts as Congress may from time to time ordain. These are the U.S. Court of Appeals, the U.S. District Courts which are broken down into the various judicial districts within the U.S., the U.S. Court of International Trade, and the U.S. Court of Federal Claims. There are a host of Administrative Courts and Military Courts that are not necessarily inside the judicial branch.

The U.S. operates under a two-tier federal and state system. On the state tier, in Ohio, there is the Supreme Court, then the Courts of Appeals. Other courts are the Courts of Common Pleas, the Court of Claims, Municipal Courts, County Courts, and Mayor's Courts. The court I preside over is the Bowling Green Municipal Court. The district encompasses approximately eighteen of twenty-five Wood County municipalities, fifteen of twenty townships, approximately 460 square miles, and a population of about 61,000 people. So ours is a small slice of jurisdiction geographically compared to Justice McGarry's jurisdiction. The Bowling Green Municipal Court handles civil matters, contract law, negligence law, conversion, and forcible entry and detainer (evictions). Those are matters of controversy up to

about \$15,000. Anything over that has to be handled in the Court of Common Pleas. The court also has a small claims division, otherwise known as the People's Court, where individuals on their own can deal with issues up to \$3,000 of claims. On the criminal side we handle misdemeanor matters. This court can sentence on any one offense up to one year. Generally, these are multiple DUI offenders. Typical types of cases are domestic violence and assaults. As you might imagine in a college town, there are more than a few charges of underage possession and consumption of alcohol, speeding, and possession of drugs and drug paraphernalia. We also do some initial appearances on felonies. If we find probable cause to believe that a crime was committed and the defendant committed it, then we send that case over to the Court of Common Pleas for the grand jury and if they find probable cause they indict.

Unlike the Canadian justice system, all Ohio Court judges are elected—except for those judges that sit in Mayor's Courts who are mayors. In Ohio, to be eligible for election a candidate must have been an attorney for at least six years. The Chief Justice is suggesting that be increased to ten years. As a Municipal Court judge my role is to decide all the cases that are brought before me, do motion hearings (i.e. motions to suppress evidence), and conduct trials and jury trials as well. We are supposed to file monthly financial reports. I am a single judge court so we do not have anyone doing administrative things for us. We are rolled all into one and are required to do all of those things. We file an annual report to the municipality, foster a greater understanding of the judicial system with programs for both the bar and the public, and promote respect for the law.

Comparative Fact Scenario

The fact scenario that Justice McGarry has outlined, if it happened in the United States would call into play the U.S. Constitution and the Bill of Rights. These provisions define what our citizens decided that they are willing to accept as government intrusions into their lives and what they will not accept. Terrance Sweeney has already outlined the Fourth Amendment (search and seizure). The Ohio Constitution is nearly the same as the Fourth Amendment under article 1, Section 14. The only difference is that instead of being secure in your "effects" the Ohio Constitution says in your "possessions." Otherwise, they are exactly the same, but they are not necessarily interpreted the same. A note about the interplay

between the U.S. Constitution and the various constitutions of the states: the U.S. Constitution is supposed to be the baseline, the trip wire for government conduct of which neither the federal government nor the state governments are supposed to go below. However, a state, if it decides to do so, may interpret its constitution to grant its citizens greater individual rights so long as the judge who is making that interpretation is smart enough to lay it out as a finding under a state constitution.

Exclusionary Rule

Ohio has an exclusionary rule similar to what Justice McGarry was talking about in Section 24 of the Canadian Charter. Ohio judges and most state court judges do not have a lot of choice about excluding evidence if it falls within the various parameters. The exclusionary rule was developed originally as a sanction for illegal police conduct beginning in the late 19th century. The rationale behind that can be seen in some opinions and statements.

These constitutional safeguards would be deprived of a large part of their value if they could be involved only in the preventing of obtaining of such evidence and not for the protection against their use. Not to exclude is to emasculate the constitutional guarantee and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures.

Much like the current Canadian analysis, courts originally did not express that deterring illegal police conduct was the primary focus of the exclusionary rule. Courts expressed that they were concerned that by admitting constitutionally tainted evidence they would somehow be putting the court's seal of approval or sanction on the illegal police conduct and thus, as seen in the Canadian legal system, would in essence bring the courts into disrepute in the legal system. Prior to 1961, the exclusionary rule was only mandated in federal court proceedings or under federal law. State courts at the time were entitled to fashion their own remedies for state court constitutional violations. After 1961, the case of *Mapp v. Ohio*, the Supreme Court said that failure to apply the exclusionary rule in state court proceedings was to make the right of privacy meaningless and amounted to withholding of its privilege and enjoyment. State courts then were required to exclude evidence from admission in state court trials if the same was illegally obtained in violation of the Fourth Amendment of the Constitution.

Arrest and Search

Regarding arrest powers in Ohio, much like in Canada, a law enforcement officer may arrest where the officer has suspicion that a person has committed, is committing, or is attempting to commit a felony. Further, an officer may arrest on a misdemeanor if that offense occurs in the officer's presence. An arrest for a minor misdemeanor violation is generally unlawful except in limited circumstances in the state of Ohio. The analysis for suppression then in Ohio follows this general path. Was there a reasonable, articulable suspicion to make a stop or seizure, such as a vehicle weaving within its own lane? Was there probable cause developed either before the stop—seeing the actual violation—or after the stop? If probable cause was developed after the stop, how did that happen? As indicated by Justice McGarry, was it a plain smell situation where the officers use their senses and can smell the odor of alcoholic beverage upon the defendant, or perhaps the smell of freshly burnt marijuana within a vehicle? Those are the sorts of things that are considered.

Warrants, of course, are preferred under the U.S. Constitution. If no warrant is issued, any search or seizure is presumed to be unreasonable. However, there are multiple exceptions. Those exceptions can include seizure of obvious contraband in plain view and searches of automobiles upon plain smell. We have this happen here in Bowling Green. Officers are going through a parking lot and they see smoke coming out of a vehicle, they walk over to the parked vehicle and smell marijuana. Under Ohio law, they have probable cause to search the vehicle for marijuana. There is also the removal of contraband pursuant to a concept called “plain feel” as might happen during a frisk of an individual. This is maybe what was going on in our fact scenario where we had a frisk of a purse and there was the plain feel that it held a weapon in it. Then, there is search incident to a lawful arrest. If an individual is arrested, especially in an automobile, the automobile can be searched. There is something called an automobile inventory search as well. All of these are exceptions to searches without a warrant.

In our fact scenario, articulable suspicion is normally required to stop a vehicle. A traffic violation would suffice as well. In this case, they set up a RIDE program which is, as I understand it, not very different from Sobriety Checkpoints that are legal in the state of Ohio. Police can set up roadblocks, but primarily the roadblocks are supposed to be for purposes of checking the sobriety of drivers, their

licensure, and usually to check if they have proper registration and insurance. The U.S. Supreme Court threw a new curve into things this week by indicating that it might be okay to have a roadblock for purposes of asking drivers if they knew anything or had seen anything about a particular crime that occurred near the roadblock. Once again, there is a balancing activity going on by the court, balancing the individual's right to be left alone and privacy with the greater good of society. What has happened is the U.S. Supreme Court has determined that the scourge of drunk driving is sufficiently grave that everyone of us should be able to suffer through a roadblock checkpoint because the intrusion is looked upon as small in an effort to get at those impaired drivers and get them off the road. So, to a certain extent, there is now a balancing going on with respect to trying to find witnesses to crimes. That last pronouncement from the U.S. Supreme Court is somewhat divergent from what they said in Indianapolis; which is, they said you cannot have roadblocks for general law enforcement purposes or for drug stops. So, clearly, this person being stopped at the RIDE roadblock would be legal.

The next issue is, upon the stop, the person did not have an ID handy. If the police can reasonably ID the individual and they are determined to be valid operators of the vehicle then, unless there is some other articulable suspicion generated such as odor of alcohol, the inquiry must end. So even though this person was an acquaintance of the suspect in the murder of the police officer, this acquaintance would have to have been let go unless there was truly some issue as to the ID. If she did smell like alcohol, they could inquire further into that. They could request her to take field sobriety tests. If she failed the field sobriety tests, she could be arrested. Then there would be no problem going into her purse to get the weapon or to go into the car and seize anything they found there, whether or not related to operating a vehicle under the influence of alcohol or not.

Sentencing—Justice McGarry

Rosemary Gartner did bring up the concept of conditional sentencing. Canada has taken a potentially major step in the area of sentencing. In almost any sentence under two years the court must consider non-custodial sentencing. In other words, people are going to be required to reside in their residences under certain curfew requirements. In many instances where it is imposed, they are only allowed out to seek medical help, go to church, and for emergency purposes. They are basically under house arrest. The Supreme Court

of Canada and other courts have said that is punishment. They do not say it is equivalent to jail time but that the public may look upon it as being a severe form of punishment. This was brought down without any consultation that I am aware of with the judges, but we are asked to impose it without any guidelines. Some judges were imposing it for everything under two years less a day, and only when there were prior convictions or a very compelling fact situation would they impose a jail sentence. Gradually the pendulum started to swing back and now the Superior Courts and Court of Appeals are saying under situations of sexual offence or fraud send them away to jail. The first requirement of a judge who is dealing with a person who is sentenced under two years is to keep them out of jail if they can. There is also a restorative aspect of assisting a person with re-entering the community. In our fact scenario the three factors outstanding are the situation of the arrest, no permit for the gun, and the cocaine. These indicate she would get something less than two years and it would be incarceration.

Sentencing—Judge Reddin

When we are talking about felony matters, I do not sentence on these, but I did take a look at the various factors regarding this scenario. For the most part, if the individual did not have a criminal history, the key factors that would be looked upon are the weapon with the drugs. Unless the weapon was brandished or there were some sort of physical threats made, this individual would have an opportunity to go to a program if there was found to be a chemical dependency problem. She would probably only do local time and would not be sentenced. Possession of a handgun, loaded and ready at hand, at the current time in Ohio is a felony of the fourth degree which carries a possible penalty of six to eighteen months and a possible \$5,000 fine. The drugs themselves, depending on the quantity, are a felony of the fifth degree. It is presumed on a felony of the fifth degree that there is not going to be any incarceration under the guidelines. Under the municipal code that was just updated in Ohio, the sentencing matrices for driving under the influence, driving under suspension, those sorts of things we have to go through the same kinds of considerations, although with more discretion than the judges do in the felony systems. Two of the reasons that we have filled so many jails in the United States are the war on drugs and mandatory sentences. More and more the legislatures are deciding that there should be mandatory sentences on

various crimes, taking away the discretion of the judges. That is going to fill the jails even further.

**JOHN F. MCGARRY IS A SUPERIOR COURT JUSTICE
IN LONDON, ONTARIO.**

**MARK REDDIN IS A MUNICIPAL COURT JUDGE IN
BOWLING GREEN, OHIO.**

Question and Answer Session for
Justice John F. McGarry and Judge Mark Reddin

Tom Silvia, Indian Law Section of the State Bar of Michigan: In the case of mentally ill people the first line of delivery of mental health services appears to be somebody gets arrested to get treatment. Do you agree with this observation?

Justice McGarry: I can address this very personally. My son suffers from manic depressive disorder. He committed a robbery and a number of other offenses. This was just at the time when we were changing our code in Canada so we had a defense known as ‘not criminally responsible.’ I am not sure if there is a counterpart to this in the states. I sat in my office reading about this particular change in the legislation as my son was sitting in the cells downstairs. I had no idea what was wrong with my son other than that he was in very serious trouble and he had an ongoing mental problem which I thought was perhaps associated with drugs. The Canadian system works like this. As soon as a person exhibits signs of mental illness they go through a thirty day assessment. My son went through another thirty day assessment at which point he consented to and then became part of the mental health system. In due course, about two years, there was a disposition that he was to remain within that regime rather than the criminal system. He was fortunate. He had a judge for a dad and he had very clear signs of mental illness. I am not sure that the same would happen to most of those people with whom I deal. At times I see very clear signs of mental illness, but the person may not pass the not criminally responsible threshold.

Judge Reddin: We have a number of residents here in Wood County that we see in Municipal Court on a regular basis who suffer from various mental illnesses. What we have tried to do is set up a group that meets called “The Collaborative” consisting of judges,

prosecutors, defense council, mental health professionals, and the jailers. The theory is that we are trying to divert and not use the jail as the first line of intervention. The normal scenario we see is that these folks have been receiving services for some period of time. They are probably receiving some medication. They go off their meds and, because of numbers and lack of funds, are not seen as regularly as they should be by the professionals. As a result, once off the meds for some period of time they go out and generally commit relatively modest offenses that bring them in contact with us. We then have to redirect them. The idea of The Collaborative is to try to keep tabs on these folks by exchanging information as much as privacy concerns will allow and make sure they are receiving the meds and the services they need so they can function in regular society instead of being locked up.

Joseph Spinelli, Bowling Green State University: Think of names such as OJ Simpson, Scott Peterson, Michael Jackson, Kobe Bryant, and Martha Stewart. Justice McGarry you said that when you sit on the bench you have to take on the role of a judge. How do you cope with celebrity trials? What can you do to keep the tabloid news from intruding?

Justice McGarry: Well, I can say that we do not have many Kobe Bryant trials in London, Ontario. The most difficult trials are the ones that lawyers create. As the Chief Justice it requires getting everyone to cooperate and move the trial along. The difficulties in trials for Canadian judges arise from Charter issues where lawyers can find a Charter issue under every stone. We will have two years of argument before we get to hear any evidence. For celebrity trials it is important for judges not to let the celebrity wear off on them but to keep their heads down and do their jobs.

Mark Kasoff, Bowling Green State University: In that context, what about the presentation of evidence in newspapers. There was a case where Canadian customs were seizing newspapers at the border because reporting in the press had been barred.

Justice McGarry: That is an example of case management. The Chief Justice who tried the case inspired respect which helped, but it comes down to the management of how to deal with people who are flouting your decisions by having press releases in the U.S. “Watch out for the bull and do not worry about the butterfly,” as

they say. Those are issues which are always going on out there and you cannot get distracted but have to keep your eye on what you are doing in the courtroom. Otherwise, if you keep worrying about these other things, you are going to make a bad mistake in the courtroom which will go to the Court of Appeal. So you have to keep everything in perspective. Breaching a ban on publicity is generally not countenanced in Canada and reporters in Canada are usually very good about honoring this.

Regina Silletti, Owens Community College: Regarding the lower incarceration rates in Canada, can you speak to any alternative community programs or the approaches used to address criminality beyond incarceration?

Justice McGarry: When I hear the sentences that American judges impose it staggers me. We have an expression, “incarcerate them, but do not crush them.” At the end of their sentences they are going to get out, so you hope there will be something left to the individual worth keeping. Canadian sentences are not nearly as long as U.S. sentences in most instances. If somebody gets convicted of first degree murder, it is a life sentence, no parole for twenty-five years. At the end of twenty-five years, most of them get out. They are out actually on a leave basis before that. Canadian prisons are just as bad as those in the U.S. I make a point of going to see them every five years or so.

Fionna MacKinnon, Bowling Green State University: I wonder about the philosophical differences between the two countries with juveniles being treated as adults. Do the two nations have differing philosophies on that?

Justice McGarry: I do not do juvenile judge work, but as it happens, I did do a case where there was a riot and a number of the guards were charged with assaulting the juvenile inmates. Roughly nine out of ten of the juveniles that testified may have had one assault conviction or one serious conviction in their history. Then it was breach, breach, and breach. Out too late, parents not around, behavior problems, et cetera. They are now in an institution which is only going to teach them to be tough, tough kids. I think the Canadian incarceration rate was higher for juveniles than in the U.S. We do not do a very good job in that area. I am not saying it is the court’s fault anymore than it is the family’s fault.

Judge Reddin: I am not a Juvenile Court judge either. I observe that the media probably plays up these types of cases and creates the impression that they are more widespread than they, in reality, are.

Rosemary Gartner: Justice McGarry is, I believe, correct that for some years, depending on how you count the incarceration rate, the juvenile incarceration rate in Canada was at or close to the American rate. Canadians were quite worried about this. The recent Youth Criminal Justice Act is an interesting act in that, on the one hand, it actually appears to toughen up the law by allowing more juveniles to be tried in adult court for certain offenses. In fact, the law may look fairly harsh, but the extent to which it is used is quite limited. I think there are something like ten to twelve juveniles per year in Canada who are actually tried as adults. The law looks harsher than it is. In Canada, there is a tendency to put a lot of juveniles in some sort of confinement for short periods, something like 90 percent of them for less than three months. The response emphasizes certainty rather than severity. A murder conviction as a juvenile carries a maximum of three years. In the U.S., some juveniles are in confinement for very long sentences.

CLOSING PANEL

Jane Randall, Lawyer: Has September 11th caused any change in the Canadian judicial system with respect to either immigration or searches?

Justice McGarry: There was legislation that was very quickly brought into play, but we have not yet seen it get up to the Supreme Court of Canada. I think a lot of it will be watered down by the time the Supreme Court gets to deal with it.

Mark Kasoff, Bowling Green State University: It would seem that the advent of the Charter has not had any impact on the long-term trends on criminality. It would also seem that, post-Charter, the admissibility of evidence is more complicated. How can you reconcile the two views—one, that it does not matter in terms of crime rates and the other, that it does?

Rosemary Gartner: It might appear that given these various restrictions and greater due process our conviction rates might be expected to have gone down. But we do not have national level data or criminal court data that are amalgamated in any useful way for research purposes. I do not think anyone has been able to look at that in any depth. In the United States, there tends to be what some Canadians would characterize as naïve optimism that changes in the criminal justice system can effect crime. If we do something about sentencing, about incarceration, to toughen things up, or if we give the police more or less powers we will affect the crime rate. The Canadian criminal justice system has never placed that much faith in the criminal justice system's ability to control crime. They have tended to assume that controlling crime means doing something about health, education, and welfare. In some sense, the Canadian approach may be more accurate. There have been a lot of studies done on what happens when sentences are made tougher by introducing mandatory minimums. Those measures do not seem to alter crime rates.

Justice McGarry: As far as crime and Charter issues, the police have learned to use the tools. They realize that they have to act in a certain way and read people their rights and treat them properly. If they do not, the charge will be dropped.

Ramona Cormier, Bowling Green State University: We have a very litigious society. We are always going to court with some kind of problem. Is that true in Canada? Are the lawyers always encouraging us to go to court?

Terrance Sweeney: The problem with trying to define a sensible lawsuit depends on the point of view of the person involved. Suppose a person becomes pregnant and goes into a hospital where, sadly, a child is born horribly deformed. Surely you would not say that that person should not go to an aggressive lawyer and try to get compensation if negligence is proved.

Wanda Rich, Bowling Green, Ohio: What is the legal status of a fetus in Canada? We recently had a case where a woman was murdered and it was determined that her child would have survived so the perpetrator was going to be charged with two murders. This is related to the whole choice issue and I just wonder about the legal status and legal protection of a fetus?

Terrance Sweeney: The law is quite clear in Canada that abortion is allowed and there is no protection for the fetus.

Gene Tiell, Wood County Child Support Enforcement Agency: Is there anything comparable in Canada to the U.S. Second Amendment, the right to bear arms? How is gun control regulation handled in Canada?

Terrance Sweeney: There is no right to bear arms in Canada. The Canadian government embarked on an extensive gun registration program which sadly has not turned out well. It is costing large sums of money with very little impact on homicide rates. The new Prime Minister has promised to review it.

Rosemary Gartner: Distinct from gun registration is gun control. There are many kinds of weapons that you cannot buy in Canada that you can in the U.S. It is naïve to argue that gun registration will somehow make a difference in the use of guns in crimes. There is no evidence demonstrating that has transpired. The broader argument was made that it would have a symbolic impact to be able to state that the registration of guns is as important as the registration of cars. The chiefs of police of Canada continue to support gun registration because they see it as important to be able to consult the registry before they go onto a scene. Estimates of

how many people have complied with it suggest that compliance rates are low.

The critical issue is the distribution of guns. The best data we have suggests that about 22 percent of Canadian households have at least one gun. In American households, at least 49 percent have one gun. Guns in Canada tend to be concentrated in a small number of households, typically in rural areas with long guns used for hunting. They are particularly owned in Aboriginal communities. The interesting thing about this is while Aboriginal Canadians have a much higher rate of homicide than non-Aboriginals, they do not shoot each other. They are killing each other at higher rates but they do not use their guns to kill each other. So the NRA's argument that guns don't kill people, people kill people, gains some purchase. But this does not answer the question of why then are Americans so willing to use guns against each other?

APPENDIX A: SUGGESTED READING LIST

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APPENDIX B: FRIENDS OF THE REDDIN SYMPOSIUM

Roger Anderson	Dawn Glanz
Howard C. & Elaine Atkinson	Frank Goza
Mary Lou Baty	Mary Grant
Susan Bolanis	Mary Jane Hahler
Bowling Green Community Development Foundation	Linda L. Hamilton
Bowling Green Municipal Court Employees	James R. & Susan Hannon
Bowling Green State University Foundation, Inc.	Graham and Betty Hawks
Patricia Bruielly	Wesley K. Hoffman
Canadian Consulate General	Mark J. & Betty Kasoff
Canadian Embassy	Richard & Ilana Kennell
Beth Casey	Allen & Joyce Kepke
Stephen Chang	Dan Klein
Mona Claflin	Thomas A. Klein
Eloise E. Clark	L. Rex & Barbara J. Klopfenstein
Continuing Education Foundation	Stanley R. Lewis
Samuel Cooper*	Lawrence Libby
Ramona Cormier	Elmer Lotshaw
Charles Cranny	Gwendolyn Loughheed*
Suzanne Crawford	Deborah Magrum
Wayne & Lorlee Cunliffe	Justine Magsig
J. Christopher & Ellen Dalton	Joseph Mancuso
Edmund & Margaret Danziger	Virginia Marks
Kathy DeBouver	Neil McCabe
Gary & Janet DeLong	Daniel* & Patricia McGinnis
Linda Dobb	Joanne H. McPherson
Christine Drennen	John Meola
Agnes Drummer	William & Elizabeth Metcalfe
Sanford Dugan	William R. Midden
Bruce & Joan Edwards	Michael & Kay Miesle
Jeff Fallon	Paul W. & Mary Joan Miller
Rebecca Ferguson	Mark & Dorothy Moran
Patrick T. Fitzgerald	Adelaide Morse
Sarah Foster	Marilyn Motz
Henry & Mary Taylor* Garrity	Holly Myers-Jones
Elmer & Mavis Girten	Donald Nieman
Stuart R. & Florence Givens	Barbara A. O'Brien
	Arnold Oliver
	Paul Olscamp & Ruth Pratt
	Matthew & Stacey Osborn

FRIENDS OF THE REDDIN SYMPOSIUM

Janis L. Pallister
Thomas & Susan Palmer
Daniel Parratt
Adelia Peters
Janice L. Peterson
Roger & T. Grace Peterson
Allison Petit
Norton Petkwitz
Cynthia Phelps
Trevor & Lois Phillips
Barry & Vickie Piersol
John B. & Jane Quinn
Sally Raymont
The Reddin Family
Charles Rich
Kenneth & Jane C. Robb
Barbara, Paul & Nan Rothrock
Georgia Running
Murray & Judith Saffran
Marcia Salazar-Valentine
Randolph E. & Carol Sanner
Donald & Charlotte Scherer
Karen R. Schwab
Dorsey & Kay Sergent
Joanne Shiner
Jeff & Lee Anne Snook
Linda Snyder
Robert & Peggy Snyder
Norma J. Stickler
Mark Strazicich
Donald F. Stricker
James Sullivan
Roger E. & Mary Thibault
Duane & Margaret Tucker
Linda Ueltsch
Frederick & Liz Uhlman
Michael E. Unsworth
Marilynn Ward
James S. West
Edward Whipple

Patricia L. Wise
Donald T. Wismer
Sherry Wolpert
Floris W. Wood
** Deceased.*