Criminal Justice Policy during the Harper Era: Private Member's Bills, Penal Populism, and the *Criminal Code* of Canada

James B. Kelly and Kate Puddister

Abstract

During the 2015 Maclean's election debate, Stephen Harper commented, "we have more private member's legislation that has gone through Parliament under this government than multiple governments before us." This statement is borne out by empirical evidence: more private member's bills (PMBs) have become law during Harper's time in government, compared with most previous parliaments. However, PMBs are subject to less analysis than government bills and do not receive legal scrutiny by the Department of Justice, potentially implicating the protection of rights. Moreover, while one might assume that PMBs concern innocuous local and/or specialized interests, many Harper era PMBs effect substantive legal change to national issues like criminal justice policy. This paper examines the law and order trend in PMBs and addresses the following: why would the PMO under Stephen Harper, noted for its centralized control over all aspects of public policy, permit backbench MPs a role in criminal justice policy, through PMBs?

Keywords: criminal justice policy, Harper era, penal populism, criminal justice reform, parliament, legislative studies, private member's bills

Résumé

Durant le débat électoral organisé par le magazine Maclean's en 2015, Stephen Harper a déclaré : « Plus de projets de loi d'initiative parlementaire ont été soumis au Parlement pendant notre gouvernement que pendant bien d'autres gouvernements avant nous. » Cette déclaration se base sur une évidence empirique. Effectivement, un nombre plus important de projets de loi d'initiative parlementaire ont éventuellement eu force de loi durant le gouvernement de Stephen Harper comparativement aux gouvernements antérieurs. Toutefois, il faut savoir que ce type de projets de loi n'est pas assujetti à des analyses aussi poussées que les projets de loi du gouvernement. De plus, les projets de loi d'initiative parlementaire ne subissent pas non plus l'examen juridique approfondi du ministère de la Justice, lequel tient compte de la protection des droits. Par ailleurs, on présume souvent que les projets de loi d'initiative parlementaire portent sur des questions pointues et anodines, alors qu'en réalité, plusieurs de ces projets de loi apportent des changements substantifs à l'égard de questions pouvant avoir des répercussions majeures à l'échelle nationale, comme par exemple, les politiques en matière de justice pénale. Durant l'ère Harper, le nombre de projets de loi d'initiative parlementaire

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2017, Volume 32, no. 3, pp. 391–415. doi:10.1017/cls.2017.25

a augmenté considérablement. Le présent article se penche sur la tendance en matière de loi et d'ordre en ce qui concerne les projets de loi d'initiative parlementaire et tente de répondre à la question suivante : pourquoi le cabinet du premier ministre Stephen Harper, connu pour son contrôle centralisé sur tous les aspects des politiques publiques, a permis à de simples députés de jouer un rôle crucial dans l'élaboration des politiques en matière de justice pénale par l'entremise des projets de loi d'initiative parlementaire?

Mots clés : politiques en matière de justice pénale, ère Harper, « populisme pénal », réforme de la justice pénale, Parlement, études législatives, projets de loi d'initiative parlementaire

At the Maclean's National Leaders Debate during the 2015 federal election campaign, Green Party leader Elizabeth May questioned Conservative Party leader Stephen Harper on whether he had instructed Conservative Senators to defeat Bill C-311, the Climate Accountability Act. This private member's bill was introduced by former NDP leader Jack Layton and was passed by the House of Commons on May 5, 2010, during the second Harper minority government. The Conservative-controlled Senate defeated C-311 on November 16, 2010.[1] Harper responded to May by stating that Members of Parliament (MPs) were actually freer and more effective as legislators during the Conservative government: "But what I would say is this: look at the facts of the Parliament under this government. This is often not reported. We have backbenchers operating and voting more freely than we've had in decades. We have more private member's legislation that has gone through Parliament under this government than multiple governments before us. That's the reality of the situation."[2]

This pivot was an attempt by Stephen Harper to address a narrative advanced by the opposition parties and much of the Canadian media during the 2008, 2011, and 2015 federal election campaigns. This narrative centred on an unprecedented concentration of power within the Prime Minister's Office (PMO) during the Harper era, and an extreme level of party discipline demanded of the Conservative Party of Canada (CPC) caucus by unelected officials within the PMO. Peter Russell has since summarized this narrative as a 'miserable ten years' for Canadian parliamentary democracy.[3]

This article evaluates Stephen Harper's statement regarding private member's bills (PMBs), with a particular focus on criminal justice policy. We find evidence to support his position that a greater amount of PMBs were passed during the Harper era in comparison with the Liberal governments led by Jean Chrétien and Paul Martin.

[1] Bill C-311 was originally introduced by Jack Layton as a private member's bill in 2006 and was reintroduced by Bruce Hyer in 2009 before he left the NDP caucus in 2012. After a brief stint as an Independent, the Speaker of the House of Commons would recognize Hyer as the second Green Party MP in 2013.

[2] Stephen Harper, *Maclean's National Leaders Debate 2015* (August 6), Segment Three: Democracy, Part Two.

[3] Peter H. Russell, *The Harper Decade: A Miserable Ten Years*, www.theharperdecade.com/blog/2015/4/20/peter-russell.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Our study also finds that the type of legislation passed as PMBs during the Harper decade is significantly different from that of the Chrétien and Martin governments, suggesting a more substantive policy role for backbench MPs.[4] It is important to note that the parliamentary process for PMBs is distinct from routine government legislation in several respects, most significantly for the role of the Department of Justice (DOJ). For all routine government bills, the DOJ plays an important role of ensuring compliance with the *Charter of Rights and Freedoms*. However, because PMBs are created without the resources of the government, the DOJ is not involved in the process.

The lack of constitutional oversight in the PMB process merits closer scrutiny, especially when PMBs consider substantive policy areas with clear rights implications, like criminal justice policy. Through an analysis of all PMBs passed from 1910 to 2015, with a particular focus on the Harper era (2006–2015), we find that PMBs passed during the Harper era demonstrate several notable features distinct from all other eras. The Harper era is marked by the passing of the highest number of PMBs since the Pierre Trudeau era. While this finding provides evidence to support Harper's claim, a closer examination of the nature of the PMBs passed during the Harper era uncovers two important and distinct features. First, the Harper era PMBs are notable for their focus on areas of public policy traditionally the domain of government, such as the *Criminal Code*, rather than the traditional focus of PMBs on matters of local importance to a MP such as constituency renaming, or establishing national days of remembrance. Comparatively, since 1910, a total of thirty-three PMBs have passed that amended criminal justice policy, and twenty, or 61 percent, occurred during the Harper years. Second, the seventeen, or 85 percent of, criminal justice policy PMBs passed were sponsored by Conservative MPs or Senators, indicating an important role played by the CPC caucus in the successful PMBs.

These findings merit closer analysis and raise the following question: why would the PMO under Stephen Harper, noted for its centralized control over all aspects of public policy, permit backbench MPs a role in criminal justice policy, a central piece of the CPC election platforms? Two related arguments are advanced to explain this puzzle of greater centralization *and* greater use of PMBs, particularly their use to amend the *Criminal Code*. Our central argument contends these PMBs were not independent legislative initiatives by backbench members of the conservative caucus, but part of a legislative strategy emanating from the PMO during the Harper decade. Instead of private members countering the centre,[5] or "privatizing" criminal justice policy, we contend that PMBs were used during the Harper decade for a very specific reason—to extend the PMO's control over criminal justice policy by marginalizing the Department of Justice as a constitutional counterweight.

Under the Department of Justice Act, the Minister of Justice is required, in accordance with section 4.1.1, to certify that all *government* bills are consistent with the *Charter*, and to "report any such inconsistency to the House of Commons

[4] Kelly Blidook, "Exploring the Role of 'Legislators' in Canada: Do Members of Parliament Influence Policy?" *The Journal of Legislative Studies* 16, no. 1 (2010), 32–56.

[5] Kelly Blidook, *Constituency Influence in Parliament: Countering the Centre* (Vancouver: UBC Press, 2012), 98–108.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

at the first convenient opportunity."[6] The Department of Justice Act does not apply to PMBs, which are drafted by the sponsoring member, with the support of the Office of the Law Clerk and Parliamentary Counsel.[7] Even though institutional responsibility for the *Criminal Code* is allocated to the Department of Justice (DOJ), its responsibility in relation to PMBs that amend the *Criminal Code* is simply to answer technical questions raised at the parliamentary committee stage. DOJ officials are prohibited from commenting on constitutional questions surrounding PMBs because the DOJ only provides constitutional advice on government bills. In this respect, amendments to the *Criminal Code* and related statutes by private members can be viewed as a strategic decision by a government committed to pursuing a questionable constitutional approach to criminal justice policy.

While PMBs have the appearance of greater independence for backbench Conservative MPs and Senators, it is our contention that it actually provided greater independence for the Harper government to pursue its preferred legislative approach to criminal justice policy. As the Department of Justice Act does not apply and the DOJ is reduced to providing "technical" advice, PMBs allow a government to pursue constitutionally suspect amendments such as mandatory minimum sentences to the *Criminal Code* with minimal, or non-existent, constitutional scrutiny. It is important to note that the *Charter* scrutiny provided by the DOJ has been criticized (and indeed was the subject of a lawsuit) for setting the threshold for constitutionality too low for government bills. We agree that this presents a problem for government bills. However, the fact remains that PMBs are not subject to *any* oversight or review by the DOJ.

The growing use of PMBs to amend the *Criminal Code* is also explained by the predominance of penal populism as the criminal justice policy framework advanced by the Harper Conservatives. Penal populism is characterized in the following way:[8]

- "Common sense" approach to criminal justice policy and a disdain for evidence-driven policy;
- A marginalization of traditional policy actors, such as the DOJ in the formation and development of criminal justice policy;
- A reliance on non-traditional actors for policy validation and formation;
- A discourse that centres on victims' rights and tougher sentences for the incarcerated;
- A desire to appear 'tough on crime' with limited concern whether the policy is necessary, redundant, realizable or implementable; and, finally,
- The politicization of criminal justice policy as a wedge issue to differentiate a political party from its competitors, who are labelled as "soft on crime."

---

6 Department of Justice Act, R.S.C, 1985, c. 31 (1st Supp.), s. 93; 1992, c. 1, s. 144(F).

7 Evan Sotiropoulos, "Private Members' Bills in recent Minority and Majority Parliaments," *Canadian Parliamentary Review* (Autumn 2011), 34–35.

8 John Pratt, *Penal Populism* (London: Routledge, 2007), 12–20; Julian V. Roberts, Loretta J. Stalans, David Indermaur, and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2003), 5–6; David Green, "Penal Populism and the Folly of 'Doing Good by Stealth'", *The Good Society* 23, no. 1 (2014), 77.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Penal populism can be largely about *appearing* to be tough on crime through the introduction of a steady stream of criminal justice policy bills by a party to satisfy its core supporters, with little concern about effect or implementation. To be sure, some policies enacted in the framework of penal populism can also have a real impact and significant consequences for the criminal justice system. The two case studies examined in this paper demonstrate elements of both styles of penal populism.

It is our contention that the passage of PMBs by Conservative MPs and Senators was a strategic decision by the Harper government to marginalize the DOJ, as well as being consistent with penal populism as a policy framework. We find that the bills sponsored by Conservative parliamentarians often do not demonstrate a great deal of independence on behalf of the sponsoring parliamentarian and are perhaps nominally PMBs. In the 17 PMBs sponsored by Conservative parliamentarians that involve amendments to the *Criminal Code*, the *Controlled Drugs and Substances Act*, or the *Corrections and Conditional Release Act*, the Parliamentary Secretary to the Minister of Justice (or other Parliamentary Secretaries) supported the bill during the parliamentary debate, or the Minister of Justice publicly supported the bill as it progressed through the House of Commons. Additionally, the sponsoring parliamentarian regularly (if not always) linked their bill to the broader Conservative Party narrative on law and order, and justified their bills as consistent with criminal justice policy amendments passed by the Harper government, such as Bill C-10 (Safe Streets and Communities Act) or Bill C-25 (Truth in Sentencing Act). Finally, the opposition parties and expert witnesses that reviewed or opposed these PMBs regularly raised, and demonstrated, that the proposed amendments were unnecessary, as they legislated long-standing practice or replicated existing provisions of the *Criminal Code* or other criminal justice policy statutes.

This paper proceeds in the following way. The first section provides an empirical comparison of PMBs across time, highlighting the explicit focus on criminal justice policy by the Harper conservatives. In section two, the emergence of penal populism as a policy framework is explored through a review of Conservative Party platforms during the 2004, 2006, 2008, 2011, and 2015 federal elections. Section three considers what the use of PMBs for criminal justice policy means for the broad trend of a centralization of power in the Canadian executive. Section four provides an analysis of key PMBs passed during the Harper decade: Bill C-309: An Act to Amend the Criminal Code (Concealment of Identity); and, Bill C-479: An Act to Amend the Corrections and Conditional Release Act (Fairness for Victims). The case studies are used to illustrate two important aspects of criminal justice policy during the Harper decade: first, the ability to govern from the centre through PMBs; and second, the politicization of criminal justice policy for electoral advantage through the framework of penal populism.

Private Member's Bills from Laurier to Harper

There are two statements made by Stephen Harper in regard to PMBs that need to be unpacked: first, that an unprecedented number of PMBs passed during his time

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

as Prime Minister, in comparison with his two immediate predecessors, and second, that this is the result of greater independence experienced by private members during the Harper decade.

Table 1 provides an overview of all PMBs passed from 1910 to 2015, comprising the last years of the Laurier era (1910–1911) to the end of the Harper decade. A total of sixty-three PMBs were passed during the Harper decade, which nearly equals the number passed (sixty-eight PMBs) from the Mulroney to Martin governments (1984 to 2005). Indeed, the only period in which the number of PMBs exceeded the Harper decade was the Trudeau era, which saw eighty-one PMBs passed. However, the Trudeau era was nearly six years longer than the Harper years, giving the Harper era a higher yearly average of seven PMB per year (63/9 years), compared with 5.4 per year (81/15 years) during the Trudeau era.

The second notable feature of PMBs passed during the Harper decade is their subject matter, both in comparison with his two immediate predecessors (Chrétien and Martin), as well as the historical nature of PMBs since 1910. A total of ninety-nine PMBs passed from the Harper to Chrétien ministries. The PMBs passed from Laurier to Martin largely involve local matters of importance to a sitting MP or Senator, such as renaming their constituency (C-445), establishing a national day for important communities within an MP's constituency (C-331), the establishment of parliamentary associations (C-275), or the creation of a Parliamentary Poet Laureate (S-10). While the largest number of PMBs were passed during the Trudeau era, 84 percent (68/81) involve renaming parliamentary constituencies, which also occurred in 56 percent (18/32) of PMBs during the Mulroney decade. In the case of Chrétien, more than half of PMBs either renamed a parliamentary constituency (7/27) or established a national day of remembrance (7/27).

In the Harper era, we see a significant decline in the use of PMBs to rename electoral constituencies, although a consistent number of bills did establish national days of recognition or remembrance. However, the point of departure during the Harper decade is the passage of PMBs involving policy areas of national importance, such as amendments to criminal justice policy legislation like the *Criminal Code*. The single largest category of PMBs passed during the Harper decade involves criminal justice policy, which accounts for nearly 32 percent of those passed by Conservative MPs and Senators.

This is even more significant when placed in historical context. Between 1910 and 2015, a total of thirty-three PMBs passed that involved criminal justice policy legislation such as the *Criminal Code*, and 61 percent were passed during the Harper decade. The second largest number of criminal justice policy amendments occurred at the end of the Laurier era (1910–11), with the passage of four PMBs that amended the *Criminal Code*. In this respect, the frequency of PMBs amending criminal justice policy legislation during the Harper decade is unprecedented. The passage of PMBs during the Harper decade suggests direct policy influence by MPs in an area of national policy importance such as the *Criminal Code*. On the surface, therefore, both claims made by Stephen Harper during the 2015 Leaders Debate hosted by Maclean's magazine—the greater number of PMBs being passed, and the greater independence of private members—appear to be substantiated.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Table 1
Private Member's Bill's 1910 to 2015

Ministry	Criminal Justice (%)	Riding (%)	Memorial/ Day (%)	Total PMB (% of PMBs)	PMB/year
Harper	20 (31.7%)	0 (0.0%)	16 (25.4%)	63 (22.7%)	7
Martin	1 (11.1%)	2 (22.2%)	1 (11.1%)	9 (3.2%)	4.5
Chrétien	1 (3.7%)	7 (25.9%)	7 (25.9%)	27 (9.7%)	2.45
Mulroney	1 (3.1%)	18 (56.3%)	4 (12.5%)	32 (11.5%)	3.56
Turner	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	
Clark	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	
Trudeau	0 (0.0%)	68 (84.0%)	1 (1.2%)	81 (29.1%)	5.4
Pearson	1 (14.3%)	2 (28.6%)	0 (0.0%)	7 (2.5%)	1.4
Diefenbaker	0 (0.0%)	4 (80.0%)	0 (0.0%)	5 (1.8%)	1
St. Laurent	0 (0.0%)	3 (50.0%)	0 (0.0%)	6 (2.2%)	0.67
King (1935–48)	1 (10.0%)	0 (0.0%)	0 (0.0%)	10 (3.6%)	0.77
Bennett	1 (11.1%)	0 (0.0%)	1 (11.1%)	9 (3.2%)	1.8
King (1921–1930)	1 (10.0%)	0 (0.0%)	0 (0.0%)	10 (3.6%)	1.11
Meighen/Borden	2 (20.0%)	2 (20.0%)	1 (10.0%)	10 (3.6%)	1
Laurier (1910–1911)	4 (44.4%)	0 (0.0%)	0 (0.0%)	9 (3.2%)	4.5
Total	33 (11.9%)	106 (38.1%)	31 (11.2%)	278	2.65

PMB – Private Member's Bill; **Criminal Justice** – subject matter of PMB is criminal justice policy; **Riding –** subject matter of PMB involves the name of the local riding held by Member of Parliament; **Memorial/Day** – subject matter of PMB is the establishment of a national memorial or day of remembrance.

There are two important aspects of PMBs in this period that cast doubt whether the Harper decade represents a golden era for private members of Parliament: first, important rule changes to the Standing Orders of Parliament in 2003 that were adopted provisionally in the 37th Parliament in 2003, and second, the direct linkages between party affiliation of the sponsoring MP or Senator, public endorsement by the ministry, and the successful passage of PMBs involving policy areas of national importance such as criminal justice policy.

A number of changes were introduced as Provisional Standing Orders in 2003 that greatly increased the number of PMBs introduced into the House of Commons.[9] These changes would become part of the Standing Orders of the House of Commons in 2005. The most important change is that all PMBs are deemed "voteable" unless they are considered non-admissible by a panel of the House of Commons. In 2003, the Standing Committee on Procedure and House Affairs tabled a motion in the House of Commons that listed the criteria for non-admissible bills.[10]

[9] James R. Robertson, *The Evolution of Private Members' Business in the Canadian House of Commons* (Library of Parliament, Parliamentary Information and Research Service, September 22, 2005), 10–14.
[10] Robertson, 10–14.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

As outlined by the Subcommittee on Private Members' Business of the Standing Committee on Procedure and House Affairs:

> The first criterion is that bills and motions must not concern questions that are outside of federal jurisdiction. Next, bills and motions must not clearly violate the Constitution Acts, including the Canadian Charter of Rights and Freedoms. Bills and motions must not concern questions that are substantially the same as ones already voted on by the House of Commons in the current session of Parliament, or as one preceding them in the order of precedence.[11]

The rule changes to the Standing Orders, therefore, appear to have increased the number of PMBs, as well as coinciding with the following change in the type of PMB passed: from largely local in character to national in policy scope and significance. According to the Hon. Don Boudria, the designation of all PMBs as "voteable" in 2003 and adopted as Standing Orders of the House of Commons in 2005 explains the rapid increase of PMBs passed during the Harper decade, as well as the national policy character of bills passed after 2005.[12]

While changes to the Standing Orders may explain the increased number of nationally significant PMBs *considered*, this does not necessary result in a greater number being passed by Parliament. Table 2 provides a breakdown of PMBs passed by party affiliation from Chrétien to Harper (37th to 41st Parliaments). In addition to a more substantive policy orientation during the Harper decade, the PMBs passed demonstrate a strong connection between the member sponsoring the bill and the governing party. For instance, nearly 70 percent of the PMBs passed during the Harper decade were introduced by Conservative parliamentarians, whereas 25 percent were sponsored by members of the Liberal caucus, with the vast majority (11/16) passed when the Liberal party served as the Official Opposition to the two Harper minority governments.

Further, the relationship between party affiliation of the sponsoring member and the governing party increased significantly between the Harper minority and majority governments (see Table 3). For instance, a relatively balanced approach to party affiliation existed during the Harper minority governments, as a near equal number of PMBs passed were sponsored by Liberals (11/20) and Conservatives (9/20). However, once the Conservatives formed a majority government, the importance of party affiliation for successful PMBs is evident, as nearly 82 percent (35/43) were sponsored by Conservative MPs or Senators. What this suggests is that a PMB has a higher probability of being passed by the two houses of parliament if the sponsoring MP is a member of the governing caucus.

---

[11] Alexandre Lavoie (Committee Researcher), Subcommittee on Private Members' Business of the Standing Committee on Procedure and House Affairs, Evidence (No. 1), 1st Session, 42nd Parliament (Thursday, March 24, 2016), 1.

[12] Interview with the Hon. Boudria (May 11, 2016). Don Boudria held several positions during the Chrétien government in relation to government business: Chief Government Whip (1994–96), and Leader of the Government in the House of Commons (1997–2002). During the Martin government, Don Boudria chaired the Standing Committee on Procedure and House Affairs.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Table 2
Private Member's Bills by Party Affiliation, Chrétien to Harper

Ministry	#	LPC (%)	CPC (%)	NDP (%)	BQ (%)	GPC (%)	PC (%)	RPC (%)
Chrétien	27	15 (55.6%)	1 (3.7%)	2 (7.4%)	4 (14.8%)	0 (0.0%)	3 (11.1%)	2 (7.4%)
Martin	9	4 (44.4%)	4 (44.4%)	1 (11.1%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Harper	63	16 (25.4%)	44 (69.8%)	1 (1.6%)	1 (1.6%)	1 (1.6%)	0 (0.0%)	0 (0.0%)
Total	99	35 (34.3%)	49 (49.5%)	4 (4.0%)	5 (5.1%)	1 (1.0%)	3 (3.0%)	2 (2.0%)

LPC – Liberal Party of Canada; **CPC** – Conservative Party of Canada; **NDP** – New Democratic Party; **BQ** – Bloc Québécois; **GPC** – Green Party of Canada; **PC** – Progressive Conservative Party of Canada; **RPC** – Reform Party of Canada.

If we focus on the twenty PMBs in the area of criminal justice policy passed during the Harper decade and consider minority versus majority government, a strong relationship exists between sponsor and governing party (see Table 4). For instance, during the period of minority governments (2006–2011), Conservatives sponsored 67 percent (4/6) of PMBs passed involving criminal justice policy, and the Liberal party sponsored 33 percent (2/6). In contrast, members of the Conservative caucus sponsored 93 percent (13/14) of PMBs during the Harper majority government (2011–2015) in the area of criminal justice policy.

Arguably, a greater number of PMBs passed by opposition parties in the area of criminal justice policy would provide evidence for the "independence thesis" advanced by Stephen Harper, particularly during the period of majority government. While party affiliation of the sponsoring member and its relationship to the governing caucus may not completely debunk the claim of greater backbencher independence by Harper, the consistent participation of Parliamentary Secretaries and Cabinet ministers in support of PMBs introduced by Conservative parliamentarians does. We find that every criminal justice policy PMB introduced by a Conservative MP or Senator saw either the Parliamentary Secretary to the Minister of Justice or other parliamentary secretaries participate in House debates to support the bill. Further, the Minister of Justice also supported a number of PMBs that amended the *Criminal Code*, the *Controlled Drugs and Substances Act*, or the *Corrections and Conditional Release Act* (C-293, C-309, C-217, C-394, C-489), as is shown in Table 5. This provides further empirical evidence that supports media

Table 3
Private Member's Bills in the Harper Minority and Majority Eras

Parliament	#	LPC (%)	CPC (%)	NDP (%)	BQ (%)	GPC (%)
Minority	20	11 (55.0%)	9 (45.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Majority	43	5 (11.6%)	35 (81.4%)	1 (2.3%)	1 (2.3%)	1 (2.3%)
Total	63	16 (25.4%)	44 (69.8%)	1 (1.6%)	1 (1.6%)	1 (1.6%)

LPC – Liberal Party of Canada; **CPC** – Conservative Party of Canada; **NDP** – New Democratic Party; **BQ** – Bloc Québécois; **GPC** – Green Party of Canada; **PC** – Progressive Conservative Party of Canada; **RPC** – Reform Party of Canada.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Table 4
Criminal Justice Private Member's Bills Passed by Party Affiliation Harper Era

Private Member Party Affiliation				
Harper	#	CPC (%)	LPC (%)	BQ (%)
Minority	6	4 (66.7%)	2 (33.3%)	0 (0.0%)
Majority	14	13 (92.9%)	0 (0.0%)	1 (7.1%)
Total	20	17 (85.0%)	2 (10.0%)	1 (5.0%)

LPC – Liberal Party of Canada; **CPC** – Conservative Party of Canada; **NDP** – New Democratic Party; **BQ** – Bloc Québécois; **GPC** –Green Party of Canada; **PC** – Progressive Conservative Party of Canada; **RPC** – Reform Party of Canada.

accounts by former and current MPs that PMBs have increasingly come under the control of the ministry during the Harper era, particularly in relation to PMBs introduced by members of the governing caucus.[13]

Parliamentarians have not remained silent on the increasing role played by the party in PMBs. Samara Canada conducted exit interviews with departing MPs, and noted a growing frustration by backbenchers over "heavy party interference" in PMBs: "Other MPs complained that political parties were increasingly limiting the abilities of MPs to introduce their own private member's bill, instead using them to test a potential piece of legislation. One MP, appointed as a critic by her party, claimed that a great deal of the legislation she dealt with was, in fact, "private member's bills disguised as government feeler."[14] According to Nathan Cullen, a current MP and former NDP House Leader: "I think the government is trying to bring in some of the policies that they don't necessarily want their names attached to but they really want to have happen. Either for political reasons, to feed their base and give them the wink and nod or just things they think the Canadian public would have a problem with."[15]

Arguably, there is a strategic reason to introduce criminal justice policy amendments through PMBs: they bypass the DOJ for review and are not subject to the Minister of Justice's reporting duty under section 4.1.1 of the Department of Justice Act. Mary Campbell, a retired senior official with Public Safety Canada, has speculated that the greater use of PMBs in the area of criminal justice policy is designed to sidestep *Charter* scrutiny by the DOJ: "That leaves some people to suggest that, on some of these private members' bills, they're actually a government idea and they've shopped it around to a government MP to avoid Charter scrutiny."[16] The strategic use of PMBs has also been noted by Liberal and NDP

[13] Bruce Cheadle, "Tories back record number of private member's bills," *Globe and Mail*, May 8, 2013; Jennifer Ditchburn, "Private Member's Bills: Backbench Success Story or Strategy?" *The Canadian Press*, March 7, 2014; Aaron Wherry, "The little guy's big chance: private member's bills are have a moment in Ottawa – at least, if you're a Conservative MP," *Maclean's*, October 6, 2014.
[14] Samara Canada, *'It's My Party': Parliamentary Dysfunction Reconsidered*, 21.
[15] Alison Crawford, "Public business through private member's bills," CBC (May 2, 2012).
[16] Sean Fine, "Major Tory crime bills get scant scrutiny,' *The Globe and Mail* (August 29, 2014).

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Table 5
Participation by Parliamentary Secretaries and Cabinet Ministers in Private Member's Bills Amending Criminal Justice Policy (2006–2015)

Bill	Parliament	Sponsor	Party	Parliamentary Secretary(s)	Minister
C-277 An Act to Amend the Criminal Code (luring a child)	39th, 1st	Ed Fast (Abbotsford)	CPC	PS to the Minister of Justice; PS to the Minister of Environment	
S-203 An Act to amend the Criminal Code (cruelty to animals)	39th, 2nd	Senator John G. Bryden (NB)	LPC		
C-268 An Act to Amend the Criminal Code (minimum sentences for offences involving trafficking of persons under the age of eighteen years)	40th, 3rd	Joy Smith (Kildonan–St. Paul)	CPC	PS to the Minister of Justice; PS to the Minister Responsible for Official Languages; PS to the President of the Treasury Board	Minister of State for Democratic Reform
C-464 An Act to amend the Criminal Code (justification for detention in custody)	40th, 3rd	Scott Andrews (Avalon)	LPC	PS to the Minister of Justice	
C-475 An Act to amend the Controlled Drugs and Substances Act (methamphetamine and ecstasy)	40th, 3rd	John Weston (West Vancouver–Sunshine Coast–Sea to Sky Country)	CPC	PS to the Minister of Justice	
S-215 An Act to amend the Criminal Code (suicide bombings)	40th, 3rd	Senator Linda Frum (Ontario)	CPC	PS to the Leader of the Government in the House of Commons; PS to the Minister of Industry	
C-293 An Act to amend the Corrections and Conditional Release Act (vexatious complainants)	41st, 1st	Roxanne James (Scarborough Centre)	CPC	PS to the Minister of Public Safety	Minister of Justice

Continued

Table 5. Continued

Bill	Parliament	Sponsor	Party	Parliamentary Secretary(s)	Minister
C-299 An Act to amend the Criminal Code (kidnapping of young persons)	41st, 1st	David Wilks (Kootenay–Columbia)	CPC	PS to the Minister of Justice	
C-309 An Act to amend the Criminal Code (concealment of identity)	41st, 1st	Blake Richards (Wild Rose)	CPC	PS to the Minister of Environment	Minister of Justice
C-310 An Act to amend the Criminal Code (trafficking in persons)	41st, 1st	Joy Smith (Kildonan–St. Paul)	CPC	PS to the Minister of Justice	
C-316 An Act to amend the Employment Insurance Act (incarceration)	41st, 1st	Richard Harris (Cariboo–Prince George)	CPC	PS to the Minister of Human Resources and Skills Development	
S-209 An Act to amend the Criminal Code (prize fights)	41st, 1st	Senator Bob Runciman (Ontario)	CPC	PS to the Minister of Justice	
C-217 An Act to amend the Criminal Code (mischief relating to war memorials)	41st, 2nd	David Tilson (Dufferin–Caledon)	CPC	PS to the Minister of Veterans Affairs; PS to the Minister of Justice	Minister of Justice
C-394 An Act to amend the Criminal Code and the National Defence Act (criminal organization and recruitment)	41st, 2nd	Parm Gill (Brampton–Springdale)	CPC	PS to the Minister of Justice; PS to the Minister of Finance	Minister of Justice
C-444 An Act to amend the Criminal Code (personating peace officer or public officer)	41st, 2nd	Earl Dreeshen (Red Deer)	CPC	PS to the Minister of Justice	

Continued

Table 5. Continued

Bill	Parliament	Sponsor	Party	Parliamentary Secretary(s)	Minister
C-452 An Act to amend the Criminal Code (exploitation and trafficking in persons)	41st, 2nd	Maria Mourani (Ahuntsic)	BQ	PS to the Minister of Justice	
C-479 An Act to amend the Corrections and Conditional Release Act (fairness for victims)	41st, 2nd	David Sweet (Ancaster-Dundas-Flamborough-Westdale)	CPC	PS to the Minister of Public Safety and Emergency Preparedness	
C-483 An Act to amend the Corrections and Conditional Release Act (escorted temporary absence)	41st, 2nd	Dave MacKenzie (Oxford)	CPC	PS to the Minister of Public Safety and Emergency Preparedness; PS to the Prime Minister and for Intergovernmental Affairs	
C-489 An Act to amend the Criminal Code and the Corrections and Conditional Release Act (restrictions on offenders)	41st, 2nd	Mark Warawa (Langley)	CPC	PS to the Minister of Justice	Minister of Justice
S-221 An Act to amend the Criminal Code (assaults against public transit operators)	41st, 2nd	Senator Bob Runciman (Ontario)	CPC	PS to the Minister of International Trade	

LPC – Liberal Party of Canada; **CPC** – Conservative Party of Canada; **NDP** – New Democratic Party; **BQ** – Bloc Québécois; **GPC** – Green Party of Canada; **PC** – Progressive Conservative Party of Canada; **RPC** – Reform Party of Canada.

opposition MPs during the Harper decade, that, in addition, to sidestepping the DOJ, are designed to appeal to the Conservative party's "law and order" base. Former Liberal solicitor general Wayne Easter criticized the use of PMBs by the Conservatives, arguing that this "back door" practice allows the party to put forward a policy in a manner that can circumvent opposition from the Privy Council or responsible department. Similarly, NDP justice critic Françoise Boivin argued that the Conservative party sees the PMB "as another tool to control even more the message and the agenda."[17]

In respect of PMBs, the Harper decade is an outlier. While a larger number passed, the most telling is the growing use of PMBs to amend criminal justice policy legislation. Although this did occur before 2006, it was a rare occurrence, as criminal justice policy was considered the prerogative of the Minister of Justice. Indeed, only three PMBs were passed that amended criminal justice policy between the Trudeau and the Martin governments, a period spanning thirty-eight years (1968–2006). This figure only increases to five PMBs if we extend the analysis to the second King government that began in 1935, or a period encompassing ten prime ministers or seventy-one years (1935–2006).

Penal Populism and Criminal Justice Policy

While the punitive turn in criminal justice policy predates the Harper government, the emergence of penal populism as a policy framework overlaps with the formation of the Conservative Party of Canada in 2003 and the first Harper government in 2006.[18] According to Pratt, "penal populism speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general." There is a "commonsensical anti-intellectual nature to penal populism," a view that "anecdote and personal experience are better able to convey the authenticity of crime experiences than mere statistics."[19] Penal populists' reliance on common sense often results in "an intentional or negligent disregard for evidence of the effects of various criminal justice policies."[20] In some instances, style trumps substance, and penal populism is just as concerned with rhetoric and framing of various aspects of the criminal justice system, especially individuals in conflict with the law, as it is about pursuing substantial policy change.

Penal populism as a policy framework has its roots in the Reform movement that preceded the Canadian Alliance and the Conservative Party of Canada. As demonstrated by Sawer and Laycock, the emergence of "market populism" in Australia and Canada was particularly influential in shaping the electoral strategies of the principal conservative parties in these countries, the Australian Liberal Party and the Conservative Party of Canada: "Like all populisms, market populism

17 Tonda MacCharles, "Private member's bills cut corners on lawmaking, say critics," *The Star* (May 10, 2012).

18 Cheryl Marie Webster and Anthony N. Doob. "US punitiveness 'Canadian style'? Cultural Values and Canadian punishment policy," *Punishment & Society* 17, no. 3 (2015): 309–14.

19 Ibid., 17.

20 Roberts et al, *Penal Populism and Public Opinion,* 8.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

presents society as divided between elites and "ordinary people" and seeks to mobilize the latter against the former."[21]

Stephen Harper initiated the populist rhetoric that would inform criminal justice policy during his leadership launch in 2004 for the newly created Conservative Party of Canada: "He asked Conservatives to imagine a 'country of freedom and rights for ordinary people, taxpayers and families, not just for criminals, political elites and special interests.'"[22] In important respects, the politicization of criminal justice policy was an attempt by the Harper Conservatives to gain "issue ownership" of this policy area. As Bélanger has demonstrated, "law and order" was not an area in which Canadian political parties attempted to gain issue ownership between 1953 and 2001.[23] The growing use of penal populism as political rhetoric is evident in every Conservative party election platform between 2004 and 2015 (further discussed below). For Kerr and Doob, the politicization of criminal justice policy has led to three types of change: rhetorical, consequential, and unconstitutional.[24] The latter type of change is argued to be short-term, as the consequential component of its law and order agenda—mandatory minimum sentences—is likely to be found unconstitutional by the courts, according to Kerr and Doob.[25]

In the 2004 platform, *Demanding Better*, the emergence of penal populism as a central narrative in the Conservative attempt to gain ownership of this issue appeared, as the party committed a future Conservative government to tougher sentences:

> **Life sentences must mean life**
>
> We will ensure truth in sentencing based on the principle of "if you do the crime, you do the time." Life sentences must mean life, and multiple sentences must be served consecutively not concurrently—no "volume discounts" for multiple crimes. "Conditional sentences," which have allowed child sex offenders, murderers, rapists, and impaired drivers the opportunity to serve their sentences at home rather than in prison, must be eliminated for serious offenders.[26]

The populist themes of a tougher Conservative approach to law and order, and an end to the "revolving door justice system" under Liberal governments are apparent in the 2006 election platform, *Stand Up For Canada*: "The drug, gang, and gun-related crimes plaguing our communities must be met by clear mandatory minimum prison sentences and an end to sentences being served at home. Parole must be a privilege to be earned, not a right to be demanded."[27]

---

21 Marian Sawer and David Laycock, "Down with Elites and Up with Inequality: Market Populism in Australia and Canada," *Commonwealth & Comparative Politics* 47, no. 2 (2009): 133–34.

22 Quoted in Sawer and Laycock, 141.

23 Éric Bélanger, "Issue Ownership by Canadian Political Parties 1953–2001," *Canadian Journal of Political Science* 36, no. 3 (2003): 539–58.

24 Lisa Kerr and Anthony N. Doob. 2015. *The Conservative Take on Crime Policy*, 3–6. www.theharperdecade.com/blog/2015/8/17/the-conservative-take-on-crime-policy

25 Indeed, the Supreme Court has recently struck down two mandatory minimums introduced by the Harper ministry in *R v. Nur* (2015) and *R v. Lloyd* (2016).

26 Conservative Party of Canada 2004, Demanding Better: Conservative Party of Canada, Platform 2004, 36. http://www.cbc.ca/canadavotes2004/pdfplatforms/platform_e.pdf

27 Conservative Party of Canada 2006, Stand Up For Canada: Conservative Party of Canada Federal Election Platform 2006, 22. www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf

Once in office with a record of legislative accomplishments, the populist rhetoric of the Harper Conservatives would continue, as the 2011 and 2015 election platforms prioritized the rights of "law-abiding Canadians" and politicized criminal justice as a wedge issue in federal elections: "Law-abiding Canadians expect to live in a country where they don't have to worry when they go to bed at night; where they don't have to look over their shoulders as they walk down the street; where they can expect to find their car where they parked it."[28] Further, the 2011 election platform, *Here for Canada*, highlights the "tough on crime" bills introduced by the Conservative government, refers to the "soft on crime" credentials of the opposition parties, and references the "common-sense" approaches demanded by ordinary Canadians to this issue:

> Canadians agree that the justice system should not put the rights of criminals ahead of the *rights of victims and law-abiding citizens*. They believe that one victim is one victim too many. […]
>
> Since we were first elected in 2006, Stephen Harper's Government has made *tackling crime* one of our highest priorities. The Ignatieff-led Coalition—true to its soft-on-crime ideology—has resisted and blocked our efforts.[29]

The politicization of criminal justice policy and the growing use of penal populist rhetoric reached a crescendo during the 2015, when the party platform, *Protect Our Economy*, outlined the risks the opposition parties posed to this law-and-order agenda:

> Since 2006, we've introduced and passed over 60 substantive pieces of legislation to help keep criminals behind bars, protect children, put the rights of victims ahead of criminals, and crack down on drugs, guns, and gangs. The result is that our streets are safer, our children are better protected, and victims are where they belong—at the center of our criminal justice system.
>
> The Liberals and NDP don't share our vision. They make excuses for criminals and think incarceration—for public safety reasons, or even as punishment—is rarely warranted.[30]

How does the Harper government compare against its two immediate predecessors in criminal justice policy? Did it produce "consequential" change? Finally, did it manufacture "issue ownership" over law and order? A review of the Chrétien (1993–2003), Martin (2003–2005), and Harper (2006–2015) governments demonstrates that criminal justice policy was a clear priority for the Harper government. The Chrétien, Martin, and Harper governments passed a total of 1101 public bills, and 19 percent involve criminal justice policy, with more than half (nearly 58 percent) of these bills being passed during the Harper era. Looking exclusively at the legislative agenda of the Harper government (2006–2015) reveals that 26 percent

[28] Conservative Party of Canada 2011, Here for Canada: Stephen Harper's Low-Tax Plan for Jobs and Economic Growth, 45. https://www.poltext.org/sites/poltext.org/files/plateformes/can2011pc_plt_en_12072011_114959.pdf

[29] Ibid., 45 (emphasis in original).

[30] Conservative Party of Canada 2015, Protect our Economy: Our Conservative Plan to Protect the Economy, 119. https://www.poltext.org/sites/poltext.org/files/plateformes/conservative-platform-2015.pdf

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

of all public bills passed concern criminal justice policy (119/455). Not only was criminal justice policy a key element of Conservative party platforms, it also formed a significant portion of its legislative agenda.

The tendency of penal populists to prioritize rhetoric over effective policy is demonstrated in the naming of criminal justice bills by the Harper Conservatives. A review of the criminal justice bills passed by the Chrétien and Martin governments as public bills demonstrates the use of neutral bill titles, such as C-17 (An Act to amend the Criminal code and certain other Acts), whereas those introduced by the Harper Conservatives are heavily laden with the oratory of penal populism.[31] In particular, the Harper Conservatives regularly adopted short titles for criminal justice policy bills with strong references to penal populist rhetoric.[32] Examples include C-2 (Tackling Violent Crime), C-25 (Truth in Sentencing Act), C-36 (Serious Time for the Most Serious Crime Act), C-10 (Safe Streets and Communities Act), S-7 (Zero Tolerance for Barbaric Cultural Practices Act), and finally, C-53 (Life Means Life Act). We suggest the largely unprecedented use of short titles in criminal justice policy bills was an attempt to manufacture "issue ownership" and to identify the Conservatives as a "law-and-order" party.

In summary, the Harper government is a criminal justice policy outlier. While it is not the first Canadian government to politicize justice issues in an effort to gain an electoral advantage, as the long gun registry passed by the Chrétien government had elements of politicization, it is the first government clearly determined to "own" the law-and-order file.[33] Second, it has introduced the highest number of criminal justice bills of any of its immediate predecessors. Third, it has abandoned the past governmental practice of adopting neutral titles for criminal justice bills, using short titles heavily laden with the rhetoric of penal populism.

Governing from the Centre through Private Member's Bills

In *Governing from the Centre*, Donald Savoie provides a convincing case of the growing importance of the Prime Minister since 1945, the decline of cabinet as a counterweight to the "first" minister, and the further marginalization of Parliament as a political institution. Savoie argues that Canada has moved from cabinet-centred to prime-ministerial government in the post-1945 period, and attributes this shift to the rise of central agencies, such as the Prime Minister's Office (PMO) and the Privy Council Office (PCO).[34] While Savoie focuses on the central agencies

[31] We reviewed all criminal justice policy bills passed as government bills by the Chrétien and Martin governments (35th to 38th Parliaments) and compared their titles with criminal justice policy bills passed by the Harper government. The use of neutral titles for government bills is a continuation of past practices that was abandoned by the Harper Conservatives.

[32] In some instances, the names of the bills were also misleading, and at times, the titles did not accurately reflect the intended effect of the bill. For example, the proposed Bill C-53 "Life Means Life" appears to convey that Canada does not already have life sentences, when this is simply incorrect. We thank an attentive reviewer for reminding us of this important point.

[33] Dave Snow and Benjamin Moffitt, "Straddling the divide: mainstream populism and conservatism in Howard's Australia and Harper's Canada," *Commonwealth & Comparative Politics* 50, no. 3 (2012): 271–92.

[34] Donald J. Savoie, "The Rise of Court Government in Canada," *Canadian Journal of Political Science* 32, no. 4 (1999), 635.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

that report directly to the Prime Minister—the PCO and the PMO—Kelly and Hennigar suggest that the Department of Justice has emerged as a central agency in two ways. First, the DOJ is the lead agency responsible for ensuring *Charter* compatibility across government departments,[35] and second, the Attorney General's branch within the Department of Justice has the sole responsibility for defending the constitutionality of statutes before the courts.[36]

Bond and Dodek have recently argued that the Harper Conservatives weakened the DOJ as a central agency, as a legal services unit was established within the PCO to serve as a counterweight to the DOJ, that "may attempt to shape or control the legal advice provided by the Department of Justice."[37] As well, an important central agency function of the DOJ was discarded during the Harper era.[38] Previously, the Minister of Justice was required to provide a legal risk assessment of all cabinet submissions, as required by the PCO, and this included a consideration of *Charter* incompatibility. In their study, Bond and Dodek note that this is no longer required: "According to the current template and instructions for drafting memorandum to cabinet, legal risk assessment is now permissive not mandatory. The Attorney General no longer needs to provide formal sign off on submissions to cabinet."[39]

The expansion of the centre of government considered in Savoie's work involved the ability of central agencies that report directly to the Prime Minister to exert greater control over the Cabinet and line departments. We suggest that the greater use of PMBs by the Harper Conservatives in amending criminal justice policy is a new strategy for the centre to exert greater control over the machinery of government, as well as being consistent with penal populism. In particular, the establishment of a legal services unit within PCO can be viewed as an attempt to downgrade the influence of the DOJ, as it relates to the *Charter of Rights* and the vetting of criminal justice policy. Changes to the cabinet submission template can also be viewed as an attempt to downgrade the central agency function of the DOJ and its ability to block constitutionally questionable proposals.

As previously argued, the PMBs introduced by members of the Conservative caucus are PMBs in name only. Further, there is a strategic reason to amend

---

35 James B. Kelly, "Bureaucratic Activism and the *Charter of Rights and Freedoms:* The Department of Justice and its entry into the Centre of Government," *Canadian Public Administration* 42, no. 3 (1999), 476–511.

36 Matthew Hennigar, "Conceptualizing Attorney General Conduct in Charter Litigation: From Independence to Central Agency," *Canadian Public Administration* 51, no. 2 (Summer 2008): 193–215.

37 Jennifer Bond and Adam Dodek, "The Promise and Peril of Executive Responsibility for Rights Protections: Section 4.1 of Canada's Department of Justice Act," *The Consideration of Rights in the Policy Making Process: What Enhances their Influence and What Leads to their Disregard?* Madrid, June 14, 2015, 2015, 9 (paper on file with author). The Trudeau government has continued the Harper practice of an independent legal services unit to advise the PCO, as the Counsel to the Clerk and the Legal Operations/Counsel unit still exist.

38 Privy Council Office, A Drafter's Guide to Cabinet Documents (2013) at 8: "If drafters are including a legal risk assessment as a consideration, they should indicate the likelihood of a legal challenge being initiated, as well as the likelihood of the challenge being successful. If there is an appreciable likelihood of success, the MC (memoranda to cabinet) should also note the likely remedy to be ordered." The 2013 version is currently in use, and this practice has continued under the Trudeau government. www.pco-bcp.gc.ca/docs/information/publications/mc/docs/dr-guide-eng.pdf

39 Bond and Dodek, 9.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

criminal justice policy via PMBs as opposed to government bills—PMBs are not subject to legal risk assessment by the Department of Justice, PMBs are not drafted by the DOJ, and the Minister of Justice's reporting duty under section 4.1.1 of the DOJ only applies to public bills. Indeed, the standard used to assess the compatibility of government bills versus PMBs with the *Charter of Rights* is fundamentally different, which suggests that it is easier to pass constitutionally suspect bills involving criminal justice policy as PMBs.

The use of PMBs publically supported by the Minister of Justice and various Parliamentary Secretaries also downgrades the Department of Justice while simultaneously strengthening the centre and its preference for populist criminal justice legislation. Under section 4.1.1 of the Department of Justice Act, the Minister of Justice is required to review all government bills and report any inconsistency to the House of Commons at the first opportunity. An equivalent reporting duty does not exist in relation to PMBs, as the member introducing the bill is not required to certify that it is compatible with the *Charter of Rights*. Further, it is unclear whether the Office of the Law Clerk and Parliamentary Counsel, which provides support to private members in the drafting of bills, delivers *Charter* vetting services such as those the DOJ offers in relation to public bills. Finally, the standard of introducing a bill into Parliament is fundamentally different between public and private bills. A public bill must not be "inconsistent" with the *Charter*, as this would require the Minister of Justice to report this inconsistency to the House of Commons. In contrast, a PMB is deemed "votable" by a much lesser constitutional standard—that it must not "*clearly* violate the Constitution Acts, including the Canadian Charter of Rights and Freedoms"[40] (emphasis added).

The support extended by Parliamentary Secretaries and the Minister of Justice to PMBs that amend criminal justice policy demonstrates several important dimensions of penal populism. First, it denies any role for the Department of Justice, which has statutory responsibility for the *Criminal Code* and other criminal justice policy statutes. Thus, it freezes out "policy elites" in the DOJ who formerly monopolized criminal justice policy and *Charter* scrutiny and relies on non-traditional policy actors such as "ordinary" caucus members. Finally, it allows criminal justice policy to be based on "common-sense" approaches, and to be free from rigorous scrutiny by the DOJ. We now turn to a consideration of two case studies to demonstrate the use of penal populism to understand criminal justice policy in the Harper years.

Private Member's Bills to Amend Criminal Justice Policy

Bill C-309: An Act to Amend the Criminal Code (Concealment of Identity)

In the fall of 2011, Conservative Party of Canada MP Blake Richards introduced private member's Bill C-309: An Act to Amend the Criminal Code (Concealment of Identity) against the backdrop of the 2011 Stanley Cup riots in Vancouver,

[40] Subcommittee on Private Member's Business of the Standing Committee on Procedure and House Affairs, Number 001, March 24, 2016, 1.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

a high profile, but extremely rare event.[41] Known as the Preventing Persons from Concealing Their Identity during Riots and Unlawful Assemblies Act, Bill C-309 amends the *Criminal Code* to create a separate offence of criminalizing the use of a mask while participating in a riot.

With Bill C-309, police officers now have a separate summary offence to charge individuals who partake in riots or unlawful assemblies while concealing their identity through a mask or other face covering, as took place in the Vancouver riots and the equally destructive G8/G20 riots in downtown Toronto in summer of 2010. There are several aspects of the Bill C-309 policy making process and the law itself that demonstrate many aspects of the Harper government's penal populist approach to criminal justice reform through PMBs. These elements include: the clear support of the government for the bill, a disregard for the necessity of the law, and a lack of concern for the constitutionality/*Charter* compliance of the bill.

C-309 received the formal support of the government through an endorsement by Minister of Justice Rob Nicholson in a press release.[42] Along with the support of the Minister of Justice, it also received important endorsement from other high profile members of the Conservative party caucus, such as Michelle Rempel, a parliamentary secretary. Rempel gave a lengthy speech in the House of Commons in support of the bill as "…consistent with our government's commitment to protect law-abiding citizens and keep our communities safe."[43]

These remarks demonstrate that members of the Conservative caucus do not make a clear distinction that the bill is not an official government bill. The lack of clear indication that Bill C-309 was not a government bill was subject to criticism by parliamentarians from other parties. Liberal Party MP Sean Casey criticized the government for taking such a strong position on the bill, when it could have simply introduced the legislation itself: "This is a government bill in disguise. The suggestion that a backbench MP, in this environment, in this controlled and contrived Conservative government, such as this one we have now, would produce a bill without the consent of the PMO and its House leader's office is quite frankly a stretch. If the government were serious about amending the Criminal Code…it should have introduced a government bill."[44] With C-309, the government can be criticized for appearing Janus-faced, by taking a strong stance in supporting the private member's bill, but avoiding the greater debate and scrutiny that would take place with an official government bill.

In terms of demonstrating elements of penal populism, C-309 makes amendments to the *Criminal Code* that are arguably unnecessary and redundant. Both rioting (an indictable offence) and unlawful assembly are already criminalized in

[41] The 2011 Vancouver Stanley Cup riots broke out in downtown Vancouver on June 15, 2011. In the process of the riots, approximately 140 people were injured, and over 100 people arrested. Following police investigation, almost 900 charges were laid against 301 people.

[42] Bruce Cheadle. "Tories back record number of private member's bills," *Globe and Mail,* May 8, 2012.

[43] Canada. 2011a. House of Comments Debates, November 17, 5041.

[44] Canada. 2011b. House of Commons Debates (November 17), 3246.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

the *Code*,[45] and, more specifically, section 351(2) makes it an indictable offence to cover one's face while intending to commit an indictable offence.[46] The redundant nature of Bill C-309 was a recurring theme articulated by opposition to the Bill throughout the legislative process.[47] Indeed, law Professor James Stribopoulos (as he then was), an expert on constitutional and criminal law, provided testimony to the Standing Committee on Justice and Human Rights: "So there is already an offence that can be charged if someone is participating in a riot and covers their face with the intention of facilitating that participation. There is already an existing criminal offence that can be charged to get at that conduct. It's already unlawful… Frankly, therefore, I don't see the need for the proposed amendment to the code."[48]

Indeed, participating in a riot is an indictable offence, and therefore, any individual participating in a riot when concealing their face would already be subject to criminal charges under section 351(2). When questioned about the criticisms of possible redundancy and the unnecessary nature of the bill, Bill C-309's sponsor, Blake Richards, provides anecdotal evidence from conversations he has had with police officers, who have expressed support for the bill as a means to "prevent and deter" situations like the Stanley Cup Riots from happening.[49]

Furthermore, with its restrictions placed on expression and participation in protests, Bill C-309 has clear implications for the *Charter*-protected rights of freedom of assembly and expression. The *Charter* implications would have likely been flagged by the Department of Justice had C-309 been a government bill. Senator Serge Joyal noted the lack of constitutional scrutiny and oversight by Justice: "…this is a private member's bill. The Minister of Justice has therefore not confirmed its constitutionality… We cannot be sure that the bill before us is constitutional."[50] The implications for *Charter* compliance was noted by House of Commons and Senate committee witnesses, notably from the legal profession, as well as parliamentarians from opposition parties, but received little comment or defence by the bill's sponsor or members of the Conservative party. This is not to say that the restrictions placed on these *Charter* rights are indefensible, rather that the private member process precludes a formal acknowledgement of the *Charter* implications.

Richards's and the Conservative Party's defence of Bill C-309 throughout the policymaking process demonstrate penal populist rhetoric: a desire to exclude or ignore expert opinion because policies are enacted with little concern for effectiveness. This enactment of unnecessary provisions demonstrates one of the central tenets of penal populism, insofar as populist penal policies can arise from the negligence or disregard for evidence of the possible effects or implementation

45 Section 63 concerns unlawful assemblies; section 64 concerns riots.

46 Section 351(2): everyone who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

47 The redundancy of C-309 was noted by several participants in the policymaking process such as Irwin Cotler, LPC (Mont Royal); Francoise Boivin, NDP (Gatineau); Thomas Mulcair, NDP (Outremont); and Professor Dr. James Stribopoulos.

48 Canada. 2012a. Standing Committee on Justice and Human Rights (May 8).

49 Canada. Standing Committee on Justice and Human Rights, May 1, 2012.

50 Canada. Senate Debates, May 23, 2013, 4011.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

of a policy.[51] Green refers to such measures as "loud low-roading" to describe instances where policies are enacted with the political goal of providing reassurance or appeasing the public, with little concern of whether the policy has any true impact on the criminal justice system.[52]

Bill C-479: An Act to Amend the Corrections and Conditional Release Act (Fairness for Victims)

Bill C-479, introduced by David Sweet (CPC), amends the *Corrections and Conditional Release Act* and makes two substantial changes to the parole process and the powers of the Parole Board of Canada. First, the bill increases the parole hearing eligibility from two to five years for individuals who have committed violent offences and were denied parole during their first hearing. This increase of time for parole eligibility has the potential to keep individuals incarcerated for longer periods of time, having substantial implications for correctional budgets and space.[53] Second, C-479 provides victims greater access to information about the offender and increased opportunities for the participation of victims in the parole hearing process, including a mandatory requirement that the parole board consider the opinion of victims. As a result, Bill C-479 makes substantial changes to the work of Correctional Service of Canada and the National Parole board, with the potential to affect thousands of federal prisons.

While Bill C-479 was introduced as a PMB, it received official support by the government through a ministerial endorsement. The Minister of Public Safety, Vic Toews, provided support for C-479 through a press release that explained how the goals of the bill are well aligned with the priorities of the government and that, "Supporting this legislation is in keeping with the Government's plan for safe streets and communities."[54] Not only did C-479 receive the backing of the minister responsible for the affected governmental departments, it also received the support of the Parliamentary Secretary to the Minister for Public Safety, Roxanne James, through her participation in the parliamentary process. Indeed, in a speech in the House of Commons on the bill, James makes several references to the Conservative party's stance on criminal justice policy and victims' rights, "The bill would help our government fulfill our commitments under our plan for safe streets and communities, including our promise to strengthen victims' rights."[55] Similarly to other instances of criminal justice reform through private member's bills, parliamentarians representing opposition parties are quick to criticize the government's involvement in the private member's process.

Many critics of Bill C-479 were concerned about the lack of scrutiny by the DOJ and the implications for compliance with the *Charter*. For example, Randall

[51] Roberts et al. *Penal Populism and Public Opinion,* 8.
[52] Green. "Penal Populism and the Folly of 'Doing Good by Stealth'", 77.
[53] Steve Sullivan. "A Sloppy Attempt at Parole System Reform," *iPolitics* (March 12, 2014); Ivan Zinger. "Conditional Release and Human Rights in Canada: A Commentary," *Canadian Journal of Criminology and Criminal Justice* 54, no. 1 (January 2012): 117–35.
[54] Public Safety Canada. Harper Government Reinforces Support for Victims of Crime, May 8, 2013. www.publicsafety.gc.ca/cnt/nws/nws-rlss/2013/20130508-en.aspx
[55] Canada. House of Commons Debates, May 23, 2013, 131.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

Garrison, MP for the NDP, explains that there is cause for concern with private member's bills because "they are prepared by a single member of Parliament, who does not have access to the large legal and policy expertise a federal department would have if it were drafting the same bill." This lack of resources also means a lack of examination for *Charter* compatibility.[56] As it happens, Garrison was right to be concerned about the lack of legal oversight for Bill C-479. By the time C-479 was addressed by the Senate, the Supreme Court of Canada had released its decision in *Canada (Attorney General) v. Whaling* (2014),[57] a decision that struck down a provision of the *Abolition of Early Parole Act* because it provided additional punishment to individuals that were currently incarcerated when the act passed by changing the process and timing of early day parole requirements, as a violation of section 11(h) of the *Charter*.

The Court's decision in *Whaling* has clear implications for Bill C-479, as the act contains provisions that would apply to individuals currently incarcerated at the time of passage, in a similar nature to those struck down in the *Abolition of Early Parole Act*. To be fair, the Supreme Court had not rendered its decision in *Whaling* when the House of Commons passed Bill C-479. However, had C-479 been a government bill it would have received scrutiny by the DOJ, and it is likely that the Department would have known that a case concerning a similar retroactive parole provision was before the courts and had already been struck down by the British Columbia Court of Appeal. Bill C-479 not only reached the Senate with concerns regarding compliance with a Supreme Court decision, the Bill was passed with several errors and the version of the Bill analyzed by the Senate was missing several amended provisions.[58]

The parliamentary process for Bill C-479 not only excluded the DOJ, the House committee considering the bill did not hear from any officials from Correctional Service of Canada, the National Parole Board, or any individuals responsible for offender management and/or supervision. This is concerning because, unlike some populist measures, Bill C-479 moves beyond rhetoric and has the potential to greatly impact the parole system, as it contains a provision that could increase the time of incarceration for approximately 16,000 to 23,000 federal inmates.[59] The lack of evidence from the individuals with expertise on in the area of policy directly affected by Bill C-479 was subject to criticism by some opposition members on the House of Commons committee, with one member requesting the clause-by-clause analysis be delayed because of this exclusion.[60] The motion to delay C-479 in order to receive testimony from expert witnesses was voted down by the members on the committee from the Conservative party. The exclusion of criminal justice policy experts demonstrates a key element of penal populism, the lack of concern for evidence-driven policy,[61] resulting in the exclusion or marginalization of traditional policy experts from the formation and development of policy. As Roberts et al. explain, "Penal populism involves a wilful disregard of evidence or knowledge, and this knowledge

[56] Canada. House of Commons Debates, April 30, 2014, 4776.
[57] *Canada (Attorney General) v. Whaling* (2014) SCC 20, [2014] 1 S.C.R. 392.
[58] Sean Fine. "Conservatives Crime Bill Endangered by 'Administrative Error,'" *Globe and Mail,* August 28, 2014.
[59] Sullivan. "A Sloppy Attempt at Parole System Reform."
[60] Canada. Standing Committee on Public Safety and National Security (February 27, 2014), 1.
[61] Pratt, *Penal Populism*, 16–17.

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press

is accumulated and held, typically, by those who work within, or are closely involved with the criminal justice system."[62] The exclusion of individuals with direct expertise in offender management and parole from analysis of C-479 typifies this element of policymaking influenced by penal populist sentiments.

From the title of the bill, "Fairness for Victims," to Bill C-479's contents, Bill C-479 demonstrates two core elements of penal populism: a discourse that focuses on victims' rights and tougher sentences for criminal offenders. The central thrust of the bill and the impetus for its introduction by the bill's sponsor is to increase rights of victims. This rhetoric is present all throughout the policymaking process for Bill C-479, most often employed by the bill's sponsor and members of the Conservative Party caucus.

In terms of specific aspects of the bill, C-479 includes provisions that require that the opinion of victims be considered at parole hearings and provides victims access to information about the offender's correctional plan and dates of temporary absences.[63] Additionally, the bill enacts provisions with a tough-on-crime approach that makes it more difficult for specific incarcerated individuals to obtain parole, by increasing the period of time between parole hearings. Not only does this policy engage in the discourse that appeals to penal populist sentiments, it does so in ignorance of the importance of expert opinion (including that of victims' rights advocates) and academic research that demonstrates that access to parole (rather than relying on statutory release) is essential for the protection of the public.[64]

Conclusion

The politicization of criminal justice policy during the Harper years is unprecedented, as is the large number of PMBs passed by Conservative MPs and Senators that amended statutes such as the *Criminal Code*. Indeed, criminal justice policy reveals a paradox of the Harper years—governing from the centre, in a different way and perhaps to new heights, and a greater role for backbench MPs in a policy area in which the Conservative government sought "issue ownership" for electoral advantage: "It was widely known among Conservatives that bills dealing with justice or finance issues were to be introduced by cabinet only, as justice and the economy are the pillars of this government."[65] For a Prime Minister suggested to exercise "tight, almost manic control" over all facets of the Conservative Party,[66] the higher number of PMBs passed in criminal justice policy is significant and noteworthy.

Most PMBs introduced in Parliament are not passed, and a high proportion often do not proceed past first reading. As we argued, the passage of PMBs in criminal justice demonstrates several characteristics that question whether, in fact, private members experienced greater policy influence during the Harper years. Although a

62 Roberts et al. *Penal Populism and Public Opinion*, 65.

63 Canadian Criminal Justice Association. 2014. Brief to the Standing Committee on Public Safety and National Security (December).

64 James Bonta, Tanya Rugge, Terri-Lynee Scott, Guy Bourgon, and Annie K. Yessine. "Exploring the Black Box of Community Supervision," *Journal of Offender Rehabilitation* 47, no. 3 (2008): 248–70.

65 Mia Rabson, "Raitt's shot at Manitoba MP Joy Smith caught on tape," *Winnipeg Free Press*, June 9, 2009.

66 David Taras and Christopher Waddel, "The 2011 federal election and the transformation of Canadian media and politics," in *How Canadians Communicate IV: Media and Politics,* ed. David Taras and Christopher Waddel (Edmonton: Athabasca University Press, 2012), 72.

significant number of PMBs were passed (sixty-three), the largest number (forty-four or 69.8 percent) were introduced by Conservatives, suggesting that party affiliation of the sponsoring MP is a critical factor in the success of a PMB. In the area of criminal justice policy, with twenty PMBs passed during the Harper years, party affiliation was even more relevant, as 85 percent (17/20) were introduced by Conservative MPs.

We conclude that the use of PMBs by Conservative backbenchers was a strategic decision by the Harper government to advance its law-and-order agenda without sufficient oversight from the Department of Justice. This is both consistent with the "governing from the centre" thesis and the use of penal populism as a framework to understand the approach to criminal justice policy during the Harper era. The unprecedented public support of parliamentary secretaries and the Minister of Justice for PMBs introduced by Conservative MPs and Senators *before* their passage into law question the "independent" nature of these amendments.[67]

Department of Justice resistance to the Harper criminal justice policy agenda can perhaps explain the downgrading of its central agency functions during the Harper years within the centre of government. Indeed, the creation of a legal services unit within the PCO, and the relegation of legal risk assessment from a requirement to a discretionary part of a cabinet submission have penal populist dimensions. The reduction of the DOJ to merely a technical advisory role when PMBs amend legislation such as the *Criminal Code* did limit the ability of the DOJ to act as a counterweight to the Harper criminal justice policy agenda. Not only does this limit the constitutional oversight function of the DOJ, it arguably contributes to the centralization of power in the Canadian executive. The unparalleled use of PMBs to amend criminal policy legislation, therefore, is part of the attempt to govern from the centre in a different way, employing a new policy framework, and without the Department of Justice during the Harper years.

James B. Kelly
Professor
Department of Political Science
Concordia University
james.kelly@concordia.ca

Kate Puddister
Assistant Professor
Department of Political Science
University of Guelph
kpuddist@uoguelph.ca

[67] Department of Justice, "Government Supports Private Member's Bill, the Criminal Organization Recruitment Act." Media Release, May 1, 2012, "'The Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada announced that the Government's support for a Private Member's Bill, the Criminal Organization Recruitment Act, sponsored by Parm Gill, M.P. for Brampton-Springdale. 'Our government is committed to keeping our streets and communities safe, which is why our government will vote in support of this Private Members' Bill,' said Minister Nicholson. 'I applaud Parm Gill for this efforts to help protect youth from the threat posed by organized crime groups.'"

https://doi.org/10.1017/cls.2017.25 Published online by Cambridge University Press