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**The Influence of Victims' Advocacy on Criminal Justice Policy:
The Case of CAVEAT**

By

Michelle Berthiaume

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements of the degree of

Master of Arts
Department of Law

Carleton University
Ottawa, Ontario
June 8, 2001
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**The Influence of Victims' Advocacy on Criminal Justice Policy:
The Case of CAVEAT**

Submitted by

Michelle Berthiaume, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

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June 2001**

Abstract

It is often argued that victims of crime offer a unique perspective on criminal activity and therefore have a valuable contribution to make to crime control policy. Research has shown, however, that victims' advocacy can hinder the development of progressive justice policy by supporting and providing justification for punitive measures which fail to address the sources of crime. To further explore the importance of victims' advocacy for the development of criminal justice policy, this research examines the law reform efforts of the victims' group CAVEAT and the extent to which its demands are invoked as a rationale for implementing more punitive crime control measures. The analysis reveals that CAVEAT has had some success in having punitive measures introduced. There is no support for the contention of some theorists that victims have been co-opted by conservative policy makers to justify the expansion of state power through punitive crime control. Rather, the conclusion here is that CAVEAT's proposals, although not always implemented, were accurately represented by the political actors involved. More importantly, this thesis argues that the ultimate value of CAVEAT's representations lies not in the success it had at the legislative level but in the promotion and acceptance of an ideological stance favouring punitive criminal justice policies.

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CHAPTER 1

INTRODUCTION

In recent years, increasing attention has been given to victims of crime. The emergence of victims' rights organizations such as CAVEAT (Citizens Against Violence Everywhere Advocating its Termination) has helped draw attention to the ways in which the criminal justice system has neglected crime victims in the past. The efforts of victims' advocacy groups to increase services provided to victims and to improve their treatment within the criminal justice system are unquestionably much needed. As victims' groups argue, consideration for the victims of crime can increase their willingness to co-operate with criminal justice officials and there is no point in prolonging their pain by treating them insensitively. However, the value of their impact on crime control is dubious. As Clear observes, criminal justice policy introduced in the name of victims often has more to do with harming offenders than it does with helping victims.¹ Some critics have even gone so far as to attribute the rise in the incarceration rate during the 1990s to the victims' movement.²

Given the failure of the punitive approach to crime control, and its inability to address the sources of crime, endorsing such measures is arguably counterproductive if the ultimate goal truly is to increase public safety. However, insofar as punitive criminal

¹ T. Clear, Harm in American Penology: Offenders, Victims, and Their Communities (Albany: State University of New York Press, 1994) at 128.

² D. Cayley, The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives (Toronto:House of Anansi Press Ltd., 1998) at 36.

justice policy enhances state control it may serve political interests.³ There is some indication that the policy recommendations of victims' advocates are frequently manipulated in the political process in order to justify punitive legislative reform.⁴ As a result, the impact of victims' advocacy on criminal justice is obscured by the possibility that victims are being used to rationalize the expansion of state power through punitive justice policy.

Research Focus

In light of the uncertainty about the influence of victims' advocacy on criminal justice, this research will examine the law reform efforts of one of Canada's largest victims' advocacy group, CAVEAT, to determine whether victims' advocates have facilitated the development of punitive criminal justice, either directly or by fostering attitudes supportive of such policies. This research will also explore the symbolic value of crime victims and the extent to which they are used as a rationale for punitive crime control measures.

In order to examine these issues in depth, this research will be limited to CAVEAT's federal legislative reform efforts since 1995. Because the research is concerned with CAVEAT's impact on the development of criminal justice policy, the direct support provided to crime victims by CAVEAT's volunteers and CAVEAT's efforts to promote violence prevention in the community will not be evaluated. Although

³ See R. Elias, Victims Still: The Political Manipulation of Crime Victims (Newbury Park: Sage Publications, 1993); Clear, supra note 1.

⁴ Ibid.

CAVEAT's influence on provincial legislation would be of interest. they have made too few policy recommendations at the provincial level to develop a meaningful analysis.

Key Concepts

For the purposes of this research, the most difficult concept to define is punitive criminal justice policy. What constitutes punitive policy is certainly debatable as it is possible for a particular policy to have several objectives. The proposed research will consider punitive recommendations to be those in which the dominant objective appears to be to punish offenders by restricting their liberty (either through increasing the severity of punishment or altering conditions for release) or removing services provided to offenders.

Progressive approaches to crime control will be considered to be those which recognize the sources of crime and attempt to address the factors which contribute to an offender's criminal activity. This concept is quite broad: it is open to including such things as increasing opportunities for meaningful employment, improved access to education and substance abuse programs.

There has been some debate in the criminal justice literature regarding the conception of crime victims within victims' advocacy groups.⁵ Clear argues that the images of victims conveyed in much of the work of victims' advocates distorts reality and perpetuates public misconceptions by focusing selectively on children, the elderly and victims of violent street crime, while ignoring a wide range of corporate crime which is

⁵ See *eg.* Clear, supra note 1; Elias, supra note 3.

equally harmful.⁶ In order to address this conceptual limitation, the following analysis will rely on Clear's definition of victim: "a person who suffers harm as a result of the wrongdoing of another; the nature of the harm is an attack upon the victim's self-worth".⁷ This definition draws attention to the suffering of all types of crime victims and emphasizes the need to address their loss independently of the treatment of the offender.⁸

Methodology

CAVEAT's impact on criminal justice policy will be evaluated in part by examining the outcome of its legislative recommendations and submissions to Parliamentary committees since 1995. However, CAVEAT's influence may not depend entirely on having its legislative proposals enacted. Even the demands which do not result in legislative reform have the potential to either challenge existing justice policy by introducing counter-hegemonic ideas into criminal justice debates or to reinforce dominant understandings of crime control. Although it is not possible to determine precisely how CAVEAT's efforts have influenced the belief-systems of others, this research will evaluate CAVEAT indirect impact by examining the messages conveyed through its legislative proposals and the extent to which its reasoning provides support for punitive approaches to crime control.

The symbolic value of victims' advocacy will be explored primarily through legislative debates surrounding CAVEAT's proposals for reform. References to the

⁶ Clear, *ibid* at 121.

⁷ *Ibid* at 124.

⁸ *Ibid*.

policy preferences of victims will provide an indication of the extent to which politicians invoke victims' demands as justification for legislative reform. In addition, the consistency between CAVEAT's recommendations and legislation enacted for victims will be taken into account.

Significance of the research

Considering the amount of attention crime victims are currently receiving, and the number of policies introduced in the name of victims, it seems reasonable to question the contribution that victims' groups are actually making to crime control. If victims' advocates do in fact endorse largely self-defeating approaches to crime control, we ought to remain sceptical when these are introduced under the guise of promoting public safety. Alternatively, if victims' advocates have been manipulated by politicians to legitimize the implementation of more conservative crime control measures, the role of victims' advocacy may be interpreted as being largely symbolic.

By examining whether CAVEAT's law reform efforts challenge the existing crime control strategy or just endorse more of the same punitive approaches which have failed in the past, and relating these findings to the criminal justice literature, this research will help to determine whether victims' advocacy presents a barrier to more promising approaches to crime control.

Overview of the Chapters

In order to provide some context to the issues examined in this analysis, the following chapter outlines the role of crime victims in criminal justice over time and the

principal factors which influenced the development of the victims' movement. Chapter three illustrates the limitations of a punitive approach to crime control by reviewing the criminal justice literature concerning the efficacy of incarceration. The association in the criminal justice literature between victims' advocacy and punitive crime control measures is then described. Chapter three also explores the arguments of those who contend that victims' advocates have been co-opted by conservative policy-makers to advance their own agenda. The fourth chapter presents an analysis of CAVEAT's influence on criminal justice. CAVEAT's legislative proposals are summarized by category and their success is evaluated. In addition, the way in which CAVEAT's recommendations are presented in the political process is examined. The final chapter provides a discussion of these findings with reference to the research literature and suggests areas for future research.

CHAPTER 2

THE DEVELOPMENT OF THE VICTIMS' MOVEMENT

The current plight of crime victims and the goals of victims' advocacy groups such as CAVEAT can be better understood by examining the history of the victims' movement. The following discussion will explore the changing nature of the victim's involvement in the criminal justice system over time and the major influences on the emergence of the victims' movement. Attention will be given to the differences between the growth of the movement in the United States and the Canadian victims' movement. The development of CAVEAT will then be situated within the broader victims' movement.

The Changing Role of the Victim in Criminal Prosecutions

Although the movement on behalf of crime victims was motivated by centuries of neglect by the criminal justice system, victims had not always been excluded from the justice process. In fact, at one time victims of crime dominated criminal justice.⁹ Prior to the development of a formal legal system victims and their families were given the responsibility of carrying out punishment for wrongful acts as a form of retaliation. In the early Middle Ages, it became more common for the victim and the accused to settle disputes through restitution rather than violence, and a system of composition was

⁹ R. Elias, The Politics of Victimization: Victims, Victimology, and Human Rights (Oxford:Oxford University Press, 1986) at 10.

developed.¹⁰ This time period has been referred to as “the golden age of the victim”¹¹ because of the extent of the involvement of victims in the decision-making process and the likelihood of receiving restitution for physical harm or property loss.

Soon after, however, state authority figures became involved as third parties in conflict settlements and disputes between victims and alleged offenders became “judicial duels”.¹² Authority figures first joined the justice process to clarify rules and to assist in reaching satisfactory resolutions, but as the rules regarding dispute settlement grew and became more complicated, so did the role of the arbiter.¹³ As a result, victims lost some of the influence they had previously had on the justice process and their role began to diminish.

The State’s Involvement in Criminal Prosecutions

Until this time, all wrongful acts had been seen as private wrongs, but when a distinction was made between private disputes and incidents which threatened society, criminal acts were redefined as offences against the state or the king rather than the victim.¹⁴ As a result, the state, representing the interests of the entire population, adopted the role of the injured party. As crime developed into a conflict between the accused and

¹⁰ Ibid. at 11.

¹¹ S. Schafer, The Victim and His Criminal (New York: Random House, 1968) at 7.

¹² E.A. Ziegenhagen, Victims, Crime, and Social Control (New York: Praeger, 1977) at 58.

¹³ Ibid.

¹⁴ P. Clarke, “Is There a Place for the Victim in the Prosecution Process?” (1986) 31 Canadian Criminology Forum at 61.

the state. compensation which had previously gone to the victim was gradually taken over by the state as fines and administration fees.¹⁵ At the same time, restrictions were being placed on the conditions for obtaining restitution.¹⁶ As fines and administrative fees became increasingly common, restitution for the victim was replaced entirely.¹⁷

Despite the state's encroachment on victim compensation, crime victims continued to participate in the justice process as prosecutors until the late 18th century when the state took over the responsibility of initiating proceedings on behalf of victims or their families.¹⁸ The reasoning behind this development was that the consequences of crime go beyond the injuries suffered by the victim. It was a recognition that criminal behaviour violates the state's commitment to ensuring social order and in doing so raises fear in the community and challenges social norms about acceptable behaviour.¹⁹ As a result, everyone has an interest in the outcome of particular cases and it is the responsibility of the state, as a representative of all citizens, to affirm certain standards of behaviour and protect the public from criminal acts.

When the victim was replaced as the prosecuting party, Christie argues, the conflict between the victim and the accused, and hence the potential for participation

¹⁵ B.L. Smith, "Trends in the Victims' Rights Movement and Implications for Future Research" (1985) 10 *Victimology* 34 at 35.

¹⁶ Clarke, *supra* note 14 at 62.

¹⁷ Schafer, *supra* note 11 at 12.

¹⁸ J. Beattie, "Administering Justice Without Police: Criminal Trial Procedure in Eighteenth Century England", in R. Donelan, ed., The Maintenance of Order in Society: A Symposium (Ottawa: Canadian Police College) cited in Clarke, *supra* note 14.

¹⁹ Office for Victims of Crime Report (Government of Ontario: June, 2000) at 24.

which such conflict represents, became the property of the state.²⁰ Framed in this way, the offender's debt is to society rather than to the victim and the victim is completely removed as a significant figure in the process. Having lost the right to participate as prosecutor, the victim's role was reduced to that of "judicial consultant"²¹, needed only to provide information to their representatives and to decision-makers.

Victims' Growing Dissatisfaction

The poor treatment of crime victims continued to worsen into the 20th century. Victims became almost, if not completely, forgotten parties in the criminal justice process, participating primarily to give needed testimony.²² There were few services available to assist crime victims. Compensation schemes, if available at all, were grossly inadequate.²³ Victims of crime were for the most part poorly informed about the details of the accused's case, and were frequently mistreated by justice officials.²⁴ The sexist attitudes of police, lawyers, and judges working within the patriarchal justice system and the rape myths embedded in the criminal law contributed to particularly insensitive

²⁰ N. Christie, "Conflict as Property" (1977) 17 *British Journal of Criminology* 1.

²¹ H. Barlow, "Crime Victims and the Sentencing Process", paper presented at the 2nd International Symposium on Victimology (Boston, 1976) cited in Ziegenhagen, supra note 12.

²² J. Hagan, Victims Before the Law: The Organizational Domination of Criminal Law (Toronto: Butterworths, 1983) at 12.

²³ G. Norquay, & R. Weiler, Services to Victims and Witnesses of Crime in Canada (Ottawa: Supply and Services, 1981) at 5.

²⁴ I. Waller, "The Needs of Crime Victims", in The Plight of Crime Victims in Modern Society E.A. Fattah, ed. (New York: St. Martin's Press, 1989) at 254.

treatment of sexual assault survivors.²⁵ In an early expression of dissatisfaction with the criminal justice system, the intrusive and accusatory nature of sexual assault trials led feminist activists to describe the experience as a second assault for victims.²⁶

It is not surprising that crime victims were becoming increasingly disillusioned with criminal justice, and in the latter part of the 20th century this discontent developed into a social movement on behalf of victims. Although the injustice experienced by Canadian crime victims was profound and badly in need of redress, the frustration with the system's failure to meet victims' needs developed into a social movement in the United States years before it reached Canada. Consequently, the American victims' movement had a significant influence on the subsequent emergence of a similar movement in Canada.²⁷ The development of the American victims' rights movement, and indirectly the Canadian movement, was facilitated by the law and order movement, the women's movement and, to a lesser extent, the self-help movement. While it is clear that all of these movements influenced and interacted with the victims' movement, it is difficult to establish a causal relationship between them. Rather than one movement acting directly on the other, the relationship may be more accurately described as a number of events that came together to create a climate responsive to victims' rights.

²⁵ D. Martin, "Commentary: Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall Law Journal at 12.

²⁶ L. Madigan, & N. Gamble, The Second Rape: Society's Continued Betrayal of the Victim (New York: Lexington, 1991) at 6.

²⁷ P. Rock, A View From the Shadows: The Ministry of the Solicitor General of Canada and the Making of the Justice for Victims of Crime Initiative (Oxford: Clarendon Press, 1986) at 27.

The Law and Order Movement

The law and order movement has been credited as the first to rediscover the crime victim.²⁸ The law and order movement emerged during Nixon's presidential campaign in 1968 and gained momentum as American politics became increasingly conservative in the early 1970s.²⁹ Nixon, who was critical of attempting to control crime by addressing poverty, argued that it was necessary to increase criminal convictions in order to reduce crime³⁰, a reasoning which characterized the law and order movement. The movement began in response to a rising fear of street crime and focused on the need to address the perceived leniency of the criminal justice system in dealing with offenders. The law and order movement favoured a 'get tough' approach to criminal activity and opposed attempts to restrict the state's control over those accused and convicted of crime.³¹ The rehabilitative approach to crime control was viewed as ineffective and incapable of ensuring justice was served.³²

The law and order movement's objection to what it perceived to be permissive treatment of offenders naturally led to an interest in crime victims. Law and order advocates reasoned that society could demonstrate its recognition of the harm which had

²⁸ A. Karmen, Crime Victims: An Introduction to Victimology, 2d ed. (Pacific Grove: Brooks/Cole: Wadsworth, 1990) at 30.

²⁹ Elias, supra note 3 at 19.

³⁰ K. Beckett, Making Crime Pay: Law and Order in Contemporary American Politics (New York: Oxford University Press, 1997) at 8.

³¹ Karmen, supra note 28 at 30.

³² Ibid.

been inflicted on the victim by demanding offenders be more severely punished for their crimes. By linking the treatment of the offender with acknowledgement of the victim's suffering, the failure to impose harsher penalties on offenders was interpreted as an affront to the victim and yet another example of the criminal justice system's failure to take the victim's experience seriously.

As Karmen points out, adopting the cause of the crime victim provided legitimacy to the concerns raised by the law and order movement.³³ Many of the measures endorsed by law and order advocates allowed for more coercive forms of state intervention and threatened the civil liberties of those who came into conflict with the law. The crime victim served as a sympathetic figure to place in opposition to the offenders who were targeted by law and order policies, and by allying themselves with crime victims, law and order advocates were better able to justify more severe criminal penalties and the further erosion of offenders' rights.

There was no similar movement in Canada at this time. Law and order did not become a significant issue in Canadian politics until the early 1980s when the public's concern about offenders living in the community led to a reduction in the number of inmates released on parole³⁴ and the rate of incarceration in Canada subsequently increased. Although the Canadian victims' movement did not develop until after these events, it does not appear to have been influenced in any significant way by a Canadian law and order movement. The law and order movement in the United States did

³³ *Ibid.*

³⁴ Cayley, *supra* note 2 at 35.

influence the Canadian victims' movement indirectly, however, by shaping the development of the American victims' movement which was later to provide an example to Canadian victims' advocates³⁵.

The Women's Movement

Victims first became of interest to the women's movement through feminist concerns about crimes against women.³⁶ During the late 1960s and early 1970s, rape crisis centres and battered women's shelters were developed as a result of the efforts of the women's movement. Sexual assault and woman battering were identified as products of patriarchy and as a means of maintaining control over women. While the women's movement recognized that men could be victims of crime, it focused attention on the distinct types of violent crime experienced almost exclusively by women.³⁷ Efforts to draw attention to crimes such as sexual assault and battering were consistent with the movement's overall concern with promoting gender equality because crimes perpetrated primarily against women by men oppress all women by perpetuating male domination and present a barrier to women's liberation.³⁸

Observers of the development of the victims' movement have noted the apparent

³⁵ Rock, supra note 27 at 84.

³⁶ G. Geis, "Crime Victims, Practices and Prospects", in Victims of Crime: Problems, Policies, and Programs A.J. Lurigio, W.G Skogan, & R.C. Davis, eds. (Newbury Park: Sage Publications, 1990) at 253.

³⁷ H. Wallace, Victimology: Legal, Psychological, and Social Perspectives (Needham Heights: Allyn and Bacon, 1998) at 122.

³⁸ Karmen, supra note 28 at 31.

irony of both the law and order movement and the women's movement, whose goals would ordinarily be quite different, contributing to the creation of an environment supportive of victims' interests³⁹, but frustration with the criminal justice system's treatment of crime victims provided some common ground. While the law and order movement argued that failing to punish offenders severely was unjust to victims, the women's movement expressed concern that the inherently patriarchal criminal justice system could not respond adequately to the needs of female victims of male violence and emphasized that survivors of rape and woman abuse deserved the same treatment as other victims of violent crime.⁴⁰ The women's movement drew attention to the ways in which the criminal justice process re-victimized female victims by blaming them for provoking an assault.⁴¹ The poor treatment of female victims of male violence, the women's movement argued, made it more difficult to prosecute and convict alleged offenders.⁴²

This position, and the perceived need to draw a clear distinction between criminal and victim to guard against victim-blaming and further injustice, brought the women's movement closer to the anti-offender position of both law and order advocates and of much of the future victims' movement.⁴³ This response to the treatment of rape victims

³⁹ F. Weed, Certainty of Justice: Reform in the Crime Victim's Movement (New York: Aldine De Gruyter, 1995) at 133.

⁴⁰ Karmen, supra note 28 at 31.

⁴¹ Geis, supra note 36 at 253.

⁴² D.P. Kelly & E. Erez, "Victim Participation in the Criminal Justice System", in Victims of Crime, 2nd ed. R.C. Davis, A.J. Lurigio, & W.G. Skogan, eds. (Thousand Oaks: Sage, 1997) at 74.

⁴³ Geis, supra note 36 at 253.

was inconsistent with the women's movement's history of viewing offenders as victims of oppression⁴⁴, facing obstacles not unlike those faced by women.

There was clearly a strong association between the women's movement and the developing victims' movement in the United States. Women who had been victimized by male violence were instrumental in developing both the anti-rape movement and the movement on behalf of battered women, and in turn several members of the women's movement later became leaders of the victims' movement in its earliest stages. There is some indication, however, that the relationship between the women's movement and the development of the victim's movement in Canada was more uneasy.⁴⁵

The goals of the women's movement diverged in many ways from those of victims' advocates. Although concern for female victims of crime did motivate the women's movement to draw attention to the plight of victims before a formal victims' movement existed, the dominant problem for the women's movement was gender inequality, not crime or the perceived limitations of the criminal justice system.⁴⁶ Services for rape victims were made available as a result of the efforts of the women's movement but these efforts were not identified as being part of a victims' movement. According to feminist activist Loreenne Clark "no rape crisis centre even saw itself as a fundamentally victim-oriented service centre".⁴⁷ Some feminists worried that it would be

⁴⁴ *Ibid.* at 254.

⁴⁵ See Rock, *supra* note 27.

⁴⁶ *Ibid.* at 76.

⁴⁷ Quoted in M. Amir & D. Amir, Rape Crisis Centres in Ontario: An Appraisal (A Report to the Solicitor General of Canada, Ottawa: 1977) at 6 cited in Rock, *supra* note 27.

difficult to draw attention to the unique problems faced by victims of violence against women within a broader victims' movement.⁴⁸ For this reason, "...many women did not claim an affinity with the victims' movement, did not allude to victims, displayed a distaste for victimology, and preferred to discuss 'violence against women' as a theme".⁴⁹

The Self-Help Movement

Although less significant in its influence, the self-help movement also helped shape victims' advocacy. The protest movement of the 1960s, combined with the desire for self-improvement which was popular in the 1970s, contributed to the development of the self-help movement.⁵⁰ The movement was based on the idea that people who have experienced a particular problem can help others in the same situation by coming together to create networks of mutual support.⁵¹ According to the reasoning of the self-help movement, in helping others people can heal themselves and gain control of their lives. The principles of the movement helped facilitate the development of support groups intended to empower participants by sharing experiences.

The emergence of the self-help movement in the second half of the twentieth century was somewhat overshadowed by the many other social and political movements of the 1950s and 1960s, but it was not long before the movement was gaining

⁴⁸ P. Rock, "Victims and Policy in Canada: the Emergence of the Justice for Victims of Crime Initiative" in From Crime Policy to Victim Policy: Reorienting the Justice System E.A. Fattah, ed. (New York: St. Martin's Press, 1986) at 266.

⁴⁹ Rock, supra note 27 at 78.

⁵⁰ Karmen, supra note 28 at 33.

⁵¹ A. H. Katz, Self-Help in America: A Social Movement Perspective (New York: Twayne, 1993) at 22.

recognition.⁵² Alcoholics Anonymous and groups for physically and emotionally ill children were among the first to develop. By the late 1960s, self-help groups were quite popular. Although groups had been formed in response to a wide variety of issues, they most often developed in order to address major social problems.⁵³

The victims' movement was made up of many self-help groups, not only for victims of crime, but also support groups for families and friends of crime victims. Many of these groups began as a means of dealing with the psychological and emotional consequences of victimization and eventually took on an activist role, in much the same way as some survivors of rape and woman abuse opened rape crisis centres and women's shelters.⁵⁴

It has been suggested that one of the difficulties of forming a victims' movement was that apart from having been victimized, victims may not have any similar traits, and do not share a common identity in the same way as other social groups.⁵⁵ As a result, it is less likely that victims of crime would come together and have an opportunity to share their experiences. In addition, crime victims may feel ashamed of their experience⁵⁶ and consequently remain isolated. Self-help groups provided the opportunity for victims to meet others in the same situation to discuss their common problems, and eventually become more actively involved in the policy-making process.

⁵² Ibid. at 8.

⁵³ Ibid. at 2.

⁵⁴ Karmen, supra note 28 at 33.

⁵⁵ Ibid. at 29.

⁵⁶ Wallace, supra note 37 at 79.

Other Influences

Concern for crime victims was promoted to some extent in many other ways. Victimology, the scientific study of victims which emerged in the 1940s, gave new attention to victims by pointing out their long history of neglect by the criminal justice system. Victimology was in part a response to the perceived failure of criminology to adequately examine the plight of crime victims⁵⁷, and in addressing this omission victimology brought to light the experiences of victims and the need to improve their treatment.

The public's rising fear of crime was also a significant factor in the development of the victims' movement. It led to sympathy for those who had been victimized and support for more punitive crime control measures, which were thought necessary to enhance public safety.⁵⁸ The rising fear of crime also contributed to concern for victims by generating support for some of their strongest advocates within the law and order movement.

The development of movements representing various social groups also influenced concern for crime victims. The movement on behalf of senior citizens helped create a climate responsive to victims' rights by raising awareness about elder abuse and fear of street crime among the elderly.⁵⁹ Increasing concern for the rights of children led

⁵⁷ Ibid. at 93.

⁵⁸ K. Roach, Due Process and Victims' Rights: The New Law and Politics of Criminal Justice (Toronto: University of Toronto Press, 1999) at 289.

⁵⁹ Karmen, supra note 28 at 33.

to stricter reporting requirements for suspected cases of abuse and drew attention to the need to behave more sensitively towards children who were testifying as witnesses in court, while the gay liberation movement pointed out the prevalence of hate crime against lesbians and gay men and the failure of police to take such violence seriously.⁶⁰

Although the various factors which influenced the development of the victims' movement each had its own history and distinct objectives, when they interacted with growing frustration among crime victims and their supporters, a social movement dedicated to the amelioration of the victim's experience with the criminal justice system emerged.

History of the Victims' Movement

The modern victims' movement originated with the law reform efforts of Margery Fry, an English Quaker. Fry's interest in developing a way to help both offenders and victims of crime led her to advocate compensation programs for victims of crime.⁶¹ In the 1950s, Margery Fry made connections with the Howard League for Penal Reform and her efforts to develop victim compensation received support from within the Home Office.⁶² In the late 1950s, Reg Prentice became interested in Fry's work on compensation and it was he who introduced the first victim compensation bill to Parliament in 1959.⁶³ It was not until 1964, however, after Margery Fry's death, that the

⁶⁰ *Ibid.* at 32.

⁶¹ R.I. Mawby & D. Walklate, S. Critical Victimology (London: Sage, 1994) at 21.

⁶² *Ibid.* at 22.

⁶³ P. Rock, Helping Victims of Crime. (Oxford: Clarendon Press, 1990) at 16.

first victim compensation scheme was implemented.

In the 1950s, violent street crime had begun to be identified as a serious problem and the compensation programs that were subsequently developed reflected this concern by focusing on this type of crime.⁶⁴ They also clearly distinguished between ‘deserving’ and ‘undeserving’ victims by defining specific criteria which made one eligible for compensation.⁶⁵ This was a pattern followed by many compensation programs which developed in the following years.⁶⁶

In the late 1960s and early 1970s, crime victims became more organized and gained more political prominence in the United States. Dissatisfaction with recent criminal justice reforms thought to benefit criminals at the expense of victims, a perception facilitated by growing political conservatism, helped in building support for victims of crime.⁶⁷ The desire to redress the perceived imbalance between the rights of offenders and the rights of victims became a strong mobilizing force for the victims’ movement.⁶⁸

In an attempt to ensure the accused was not unfairly treated by the more powerful justice system, much attention had until then been given to safeguarding the rights of the accused. The emphasis on offenders’ rights was not intended to diminish the rights of

⁶⁴ Mawby & Walklate, supra note 61 at 27.

⁶⁵ Ibid.

⁶⁶ See R. Elias, “The Symbolic Politics of Victim Compensation” (1983) 8 *Victimology* 1

⁶⁷ Weed, supra note 39 at 132.

⁶⁸ Smith, supra note 15 at 36.

victims, but the result was that victims were given less attention.⁶⁹ The fear that involving victims in the criminal justice process would make the system less efficient and would risk subjecting offenders to unreasonably harsh penalties kept victims in a relatively minor role,⁷⁰ one of the perceived inadequacies of the system which victims' advocates aimed to rectify.

In the 1970s and early 1980s the number of groups working on behalf of victims grew rapidly. Most victims' organization within the movement were small and were developed as a result of specific incidents of crime. The early work of the victims' movement concentrated on the need for restitution to the victim and adequate compensation programs, but efforts were soon extended to improving information services to victims, developing support services, and obtaining more severe penalties for certain types of crime.⁷¹

Most groups concentrated on one area of reform and, as a result, the objectives of the many victims' advocacy groups varied considerably. Groups designed to provide counselling and support to crime victims were often significantly different from groups working toward a more punitive response to violent crime. The formation of the National Organization for Victim Assistance in 1975 provided some coherence to the movement.⁷² The organization's objective was victims' advocacy and it was designed to exchange

⁶⁹ J. Zambrowsky & D.T. Davies, (eds.) Seminar on Victim's Rights and the Judicial Process (Toronto, 1985) at 11.

⁷⁰ Ibid.

⁷¹ J. Shapland, J. Willmore & P. Duff, Victims in the Criminal Justice System (Vermont: Gower, 1985) at 2.

⁷² Rock, supra note 27 at 69.

information between the various victims programmes in operation and to act as a resource centre for these groups. Although NOVA had considerable influence, and provided some unity, it was still difficult to speak of a single victims' movement with common concerns and similar goals.⁷³

The Emergence of Crime Victims in Canada

Despite all the activity in the United States, the Canadian victims' movement did not emerge until the mid-1980s. By the time the Federal-Provincial Task Force studied the role of crime victims in the criminal justice system in the early 1980s, it was recognized by many that legislative reform was necessary in Canada.⁷⁴ Although a few Canadian victims' groups had developed in the late 1970s, there was no strong pressure from victims' advocates for such change. At this time, the attention given to victims of crime appeared to come mostly from governments.⁷⁵

The Influence of Government

The work of Irvin Waller, the Director General of Research for the Ministry of the Solicitor General, was instrumental in defining crime victims as a social problem in Canada.⁷⁶ Waller introduced many of the ideas of the American victims' movement and victimology into the research at the Ministry and the research department eventually

⁷³ Elias, *supra* note 3 at 53.

⁷⁴ Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime. (Ottawa: Supply and Services, 1983).

⁷⁵ See Rock, *supra* note 27.

⁷⁶ *Ibid.*

reflected Waller's interest in crime victims.⁷⁷ As Waller became more influential within the Ministry, his ideas contributed to the creation of an environment sympathetic to crime victims.⁷⁸

Once the plight of victims became of greater concern within the Ministry of the Solicitor General, it was not long before victims became a policy issue. When the decision was made to abolish capital punishment in Canada in 1976, a 'peace and security' package was designed to address concern about public safety, and it was with the introduction of this package that the federal government first expressed an interest in crime victims.⁷⁹ The package allowed for "...the establishment of victims as a central topic and problem in the work of the Ministry [of the Solicitor General]. Hitherto, victims had been a peripheral matter. They could now be awarded attention".⁸⁰

In an attempt to demonstrate the government's concern about criminal activity, a crime-prevention strategy was established, and victimization studies were carried out to measure the efficacy of the strategy. Before long, however, the government's focus had shifted from the incidence of victimization to improving the treatment of crime victims.⁸¹ Victims came to be seen as a good source of information regarding limitations of the criminal justice system because of their direct contact, and as a result '[t]he personal and

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Roach, supra note 58 at 276.

⁸⁰ Rock, supra note 27 at 139.

⁸¹ Ibid. at 136.

emotional experiences of crime victims became politically salient”.⁸²

The Justice for Victims of Crime Initiative

In 1981, the Justice for Victims of Crime Initiative was created at the Federal-Provincial Conference of Ministers Responsible for Criminal Justice. The conference recognized that “...victims suffer from the problems that are inflicted both by the criminal act itself and by subsequent encounters with the criminal justice system”⁸³ and proposed that an effort be made to improve the treatment of victims within the criminal justice system.

Although there was a growing victims’ movement in the United States, this initiative emerged in Canada with very little influence from victims’ advocates. In fact, according to Rock’s study “The Making of the Justice for Victims of Crime Initiative”, the Ministry experienced very little outside pressure from any organization.⁸⁴ Rock’s research indicates that the only noticeable political pressure throughout the development of the initiative came from the women’s movement, but few feminists within the movement identified themselves as victims’ advocates and they did not see themselves as part of a larger victims’ movement.

It is perhaps to be expected that feminist activists were more involved in the development of victim policy at this stage than were representatives of victims since the

⁸² Roach, *supra* note 58 at 280.

⁸³ Rock, *supra* note 27 at 1.

⁸⁴ *Ibid.*

women's movement was well-established by the early 1980s, whereas crime victims were not yet represented by a national movement. However, feminists emphasized victims of male violence and patriarchy, and their reluctance to adopt the cause of crime victims as a group⁸⁵ meant that the nature of the political pressure faced by the government in designing this initiative was quite different from that experienced in the development of victim policy after the victims' movement had emerged. The women's movement did not adopt the ideology that had developed around victims by the early 1980s, but rather pursued its own interests with respect to crime victims⁸⁶, namely bringing to light male violence against women as an expression of gender inequality. Therefore, despite their role as virtually the sole advocates for victims outside the government during the making of the Justice for Victims of Crime Initiative, feminist activists could not be considered representatives of the interests of crime victims at large.

There were organizations other than those run by feminist activists working in the community on behalf of crime victims when the initiative was developed. The Salvation Army, the United Way, Mennonites and church groups were all in some way offering support to victims of crime, but these groups were not organized politically and they did not make an effort to significantly influence victim policy.⁸⁷ After the Justice for Victims of Crime Initiative had been established, some social groups did come together as political advocates for victims, but this development was in large part the result of the

⁸⁵ *Ibid.* at 210.

⁸⁶ *Ibid.* at 211.

⁸⁷ *Ibid.* at 240.

work of federal and provincial officials.⁸⁸

The Federal-Provincial Task Force on Justice for Victims of Crime

Following the Justice for Victims of Crime Initiative, the Federal-Provincial Task Force on Justice for Victims of Crime was developed. The Task Force came about after it was acknowledged during the 1979 Conference of Ministers Responsible for Criminal Justice that there was a need to address problems relating to the treatment of crime victims. The purpose of the Task Force was to review victims' issues, increase public awareness, collect information, and make recommendations to improve the treatment of crime victims within the criminal justice system.

In the United States, the President's Task Force on Victims of Crime also studied the problems facing victims, but the American Task Force focused on ensuring adequate punishment of offenders, whereas the Federal-Provincial Task Force in Canada concentrated on compensation and restitution.⁸⁹ Only the American Task Force included members of victims' advocacy groups. In Canada, the Task Force was made up of representatives from the federal and provincial governments.

The report of the Federal-Provincial Task Force, released in June 1983, acknowledged that, unlike in the United States, the Canadian victims' movement was still in an "embryonic stage"⁹⁰, but interest in victims had arisen nevertheless. The Task Force

⁸⁸ Ibid.

⁸⁹ Roach, supra note 58 at 89.

⁹⁰ Report of the Canadian Federal Provincial Task Force, supra note 74 at 2.

attributed concern for victims partly to the recognition that “...it would seem just or equitable that the state owes an obligation to the victim beyond that owed to citizens in general”.⁹¹

The Federal-Provincial Task Force recommended an improvement in information sharing with victims, development of victim services and compensation programs and the inclusion of victim impact statements at the time of sentencing. The need to improve the way crime victims are treated by criminal justice professionals was emphasized. The Task Force also supported the use of restitution and acknowledged how such orders can benefit not only the victim, but also help to rehabilitate the offender.

When amendments were made to the Canadian Criminal Code in 1988, many of the Task Force’s recommendations were implemented. In this way, the Task Force had a direct impact on victim policy, but it also helped guide the evolution of the victims’ movement which was to develop later in Canada.⁹²

The Victims’ Movement in Canada

By the mid-1980s the victims’ movement became “more populist and less dominated by government”.⁹³ As in the United States, most victims’ advocacy groups were developed in response to a particular crime. In many Canadian cities, citizens groups were formed to represent the interests of victims following a murder or a fatal

⁹¹ *Ibid.*

⁹² Roach, *supra* note 58 at 282.

⁹³ *Ibid.* at 294.

incident of drinking and driving.⁹⁴ In the beginning, most of these organizations were run locally on a voluntary basis and some relied on the federal and provincial governments for financial assistance. Some programs were delivered through the courts or police departments, but the services available to victims were not yet nationwide.

Like their American counterparts, Canadian victims' advocates were motivated by a desire to improve the criminal justice system's treatment of crime victims and reform laws and policy to control crime.⁹⁵ As a result, the efforts of the victims' movement were directed toward both the federal government and provincial governments.

Once the movement had been established, the use of lobbying, petitions, and private members bills became increasingly common to pressure government to respond to the policy recommendations of victims' advocacy groups.⁹⁶ When the interest in victims first developed in Canada the emphasis was on providing services to victims, but as the movement developed and involved more grass-roots organizations, it demonstrated increasing concern with the punishment of offenders and opposition to due process rights.⁹⁷ Despite the comparatively late emergence of the Canadian victims' movement, by the 1990s it was beginning to look remarkably similar to the American movement.

⁹⁴ Waller, supra note 24 at 74.

⁹⁵ Office for Victims of Crime Report, supra note 19 at 28.

⁹⁶ Roach, supra note 58 at 296.

⁹⁷ Ibid. at 279.

CAVEAT

Background

One of the largest and most influential victims' advocacy organizations in Canada was formed in 1992 by Priscilla de Villiers following the murder of her daughter, Nina, a 19 year-old university student. On August 9, 1991, Nina de Villiers was abducted while jogging on a well-travelled path around the tennis club to which she and her family belonged in Burlington, Ontario. It was early evening and several people subsequently reported having seen her jogging. After Nina's disappearance, police made a plea to the community for help in searching the area for clues. As news of Nina's disappearance spread throughout the community, it became clear that residents were deeply concerned, yet nobody expected the more than 5,000 people who showed up to assist in the search.⁹⁸

On August 17, the police informed the de Villiers family that they had discovered a woman's body in a creek near Kingston, Ontario. The next day, nine days after Nina's disappearance, the de Villiers were told that the body had been identified as Nina's and that she had been killed by a gunshot wound to the back of her head.

The following week, Jonathan Yeo became the prime suspect in the murder of Nina de Villiers. Jonathan Yeo had a history of violent behaviour and involvement with the criminal justice system and, on the day of Nina's abduction, he had recently been released on bail after allegedly committing a violent offence. A police investigation later revealed that, in the days following Nina's murder, Yeo had unsuccessfully attempted to

⁹⁸ K. Marron, Fatal Mistakes: The Disturbing Events that Led to the Murder of Nina De Villiers and a Nationwide Campaign Against Violence (Toronto:Doubleday, 1993) at 155.

abduct a young woman, and went on to murder Karen Marquis in New Brunswick before committing suicide during a police pursuit in Hamilton, Ontario.

The Development of CAVEAT

The death of Nina de Villiers had a profound impact on the community in which she lived and intensified a growing fear of crime.⁹⁹ The discovery that her murderer was on bail and had been charged for committing a sexual assault at the time the offence was committed confirmed the community's belief that they could not rely on the criminal justice system to protect them.¹⁰⁰

The fear and frustration with the justice system evoked by Nina's murder led to the formation of CAVEAT, an acronym for Citizens Against Violence Everywhere Advocating its Termination. CAVEAT's main objective was to promote public safety through education, crime prevention and legislative reform. The first members of the group included Nina's family and friends and women who belonged to the tennis club near where Nina was abducted. As the organization grew, it included victims and members of the general public who had not been victimized but were concerned about controlling crime. Today, 80% of CAVEAT's members have not yet been victimized by violent crime.

It was not long before CAVEAT extended beyond the local community. Priscilla de Villiers began speaking at various gatherings for church groups, women's

⁹⁹ *Ibid.* at 152.

¹⁰⁰ *Ibid.* at 191.

organizations, and service clubs. In response to the public's overwhelming concern about violent crime, CAVEAT began a petition to express dissatisfaction with the criminal justice system and received more than 2.5 million signatures in the following two years. The petition drew attention to what CAVEAT perceived to be deficiencies in the criminal justice system, including conditions for release, leniency in sentencing and consideration for rights of offenders outweighing the protection of the public. On February 7, 1994, the petition was presented to Justice Minister Allan Rock, but public demand led CAVEAT to continue circulating the petition to allow interested members of the public who had not already done so to demonstrate their support. An additional 500,000 people signed the petition before it was discontinued.

CAVEAT's efforts to reform the justice system gained momentum when several months after the formation of CAVEAT an inquest was held to investigate the circumstances of Nina's murder and the history of Jonathan Yeo. CAVEAT's concerns were given wide publicity as a result of the inquest and the circumstances surrounding the murder of Nina de Villiers helped convince more people of the need for justice reform.¹⁰¹ After the inquest, Priscilla de Villiers' appearance on a national talk-show further promoted CAVEAT's interests. CAVEAT eventually developed connections with other victims' advocacy groups around the country and is today considered a national organization.

¹⁰¹ Ibid. at 210.

The Organization

CAVEAT is a charitable organization and relies primarily on the financial support of concerned members of the public. 93% of its funding comes from private donations. CAVEAT is governed by a volunteer board of directors headed by Priscilla de Villiers, while programs are run by both volunteers and professional staff.

The main office of the organization is located in Burlington, Ontario, a regional office is operated in Langley, British Columbia and a regional volunteer committee has been developed in Edmonton, Alberta. CAVEAT is affiliated with a number of other victims' organizations internationally, including the World Society of Victimology, the National Organization for Victim Assistance (NOVA), the National Victim Centre, the National Justice Network, Bereavement Ontario Network; and Crime Prevention Ontario.

CAVEAT's Work

CAVEAT maintains that violence prevention is the most effective way to end violent crime. As a result, much of its work is directed toward educating the public. In recent years CAVEAT has developed a youth council, currently made up of over forty students, designed to prevent violence among young people. CAVEAT has also held three Youth Challenges to teach students how to develop violence prevention programs within their own schools, and the organization presents awards annually to students who have made a significant contribution to the prevention of violence.

In an attempt to generate public support for its cause, representatives of CAVEAT regularly speak at events and conferences and the group also holds its own workshops.

The organization runs media campaigns and publishes a national newsletter entitled **Stopwatch** which raises current issues of concern to crime victims, and issues relating to justice and violence prevention.

CAVEAT's desire to improve the treatment of victims and the justice system led to the organization of two national SafetyNet Conferences in which proposals for legislative changes at the Federal, Provincial, and Territorial level were developed. Following the submission of these proposals, CAVEAT published a SafetyNet Report Card evaluating government on their response to the proposals. CAVEAT also makes submissions when requested by government on various issues from the victim's perspective and has participated in several federal government committees.

Because CAVEAT is a charitable organization, it is technically not allowed to lobby the government. CAVEAT sees its law reform efforts as falling within victims' advocacy, and therefore a legitimate form of work for a charitable organization. Whatever the title such work is given, CAVEAT has demonstrated a clear desire to influence not only victim policy, but also the way offenders are treated. The charitable status certainly has not prevented CAVEAT from undertaking initiatives which have the potential to influence criminal justice policy. Whether these efforts have in fact had an impact on policy will be examined in Chapter 4.

Conclusion

Since the emergence of the victims' movement in Canada, many reforms directed toward assisting victims and expanding their participation in the criminal justice system have been implemented at the federal, provincial and territorial levels. Most provinces and territories have now enacted legislation recognizing the needs of crime victims. Many provinces have legislation entitling victims to compensation for injuries suffered as the result of a criminal offence. If they so desire, the views of crime victims can now be considered at sentencing hearings and they may obtain information about cases concerning them, even after the offender has been sentenced. Victims also have the right to express their views when decisions are made about parole and conditional release.

However, law reform efforts have not been limited to improving victims' services and addressing the needs of crime victims. Victims' advocacy groups have demonstrated some support for policies intended to prevent future victimization by altering the treatment of offenders, and many such initiatives have been criticized as being excessively punitive. Given the limitations of punishment as a response to criminal activity, to be examined in the following chapter, such policies are likely counterproductive, and should therefore, despite their seemingly laudable objective, be subject to scrutiny.

CHAPTER 3

THE LIMITATIONS OF PUNISHMENT AND THE POSSIBLE DANGERS OF VICTIMS' ADVOCACY

To the extent that the victims' movement contributed to the improvement of the crime victims' experience within the criminal justice system, it began a move toward a more humane approach to dealing with victimization. The value of victims' advocates' efforts to reduce crime by reforming penal policy, however, is more questionable. An extensive body of research regarding the efficacy of punishment as a method of crime control raises doubts about the benefit of relying on punitive strategies to promote public safety. Yet, despite the professed desire of many victims' groups to prevent future victimization, there appears to be an association between victims' advocacy and support for punitive criminal justice policy. While the victims' movement has demonstrated an interest in the punishment of offenders, it is unclear to what degree the efforts of advocacy groups are responsible for the enactment of punitive crime control measures. The way in which the law reform efforts of victims' groups have influenced criminal justice policy may have been distorted if, as some theorists suggest, victims' advocacy has been used by conservative policy-makers to justify a punitive crime control strategy.

The Perceived Leniency of the Criminal Justice System

At first glance, the argument that offenders should be subject to more punishment in order to reduce crime may seem reasonable. Punishment provides an immediate response to behaviour which the public finds unacceptable and it seems just for someone

who has committed a wrongful act to be punished accordingly. In addition, the public's fear of crime requires a crime control strategy which appears to take the problem seriously, and frequently this means treating offenders punitively. The demand for a more punitive justice system is to some extent fuelled by the notion, frequently conveyed by law and order advocates and political conservatives, that crime is out of control because the criminal justice system is not punitive enough.¹⁰² As a result of this perception, the public is highly critical of the judiciary and attribute crime largely to lenient sentencing.¹⁰³

The perception that the criminal justice system is failing to protect the public is not supported by a significant rise in crime. In fact, the crime rate in Canada decreased by 5% in 1999, the eighth consecutive year in which the rate dropped, while the overall violent crime rate had been steady since 1994 and declined last year.¹⁰⁴ Nevertheless, research conducted in 1996 indicated that the public remained fearful of crime.¹⁰⁵ although according to a 1999 survey, fear of crime among Canadians has declined.¹⁰⁶ The public's dissatisfaction with the criminal justice system, however, remains high,

¹⁰² Martin, *supra* note 25 at 16.

¹⁰³ J.V. Roberts, Public Knowledge of Crime and Justice: An Inventory of Canadian Findings (Ottawa: Department of Justice Canada, 1994).

¹⁰⁴ The Juristat Reader: A Statistical Overview of the Canadian Justice System Canadian Centre for Justice Statistics. (Toronto: Thompson Educational Publishing, 1999).

¹⁰⁵ Statistics Canada, Canadian Centre for Justice Statistics (1998) 18 Juristat 9.

¹⁰⁶ S. Besserer & C. Trainer, "Criminal Victimization in Canada", Statistics Canada, Canadian Centre for Justice Statistics (1999) 20 Juristat 10.

particularly in Western Canada.¹⁰⁷

When the perceived crime problem is linked to the lenient treatment of offenders, the obvious solution is to impose more severe penalties. Though punishment can take many forms, it is the most serious types of violent crime which generally concern the public and victims' advocates. As a result, discussions about crime control often centre around the use of incarceration to more effectively protect the public. There is little reason to believe, however, that prison will contribute to a significant reduction in criminal activity.

The Failure of Incarceration

There are four commonly cited functions of imprisonment: incapacitation of the offender; rehabilitation of the offender; deterrence of both the offender and the public from future criminal acts; and retribution. In an examination of the research which had been conducted to date on each of these functions, Mathiesen concludes that none of them provides strong justification for incarceration.¹⁰⁸

Incapacitation

Clearly, for the length of time offenders are incarcerated they are prevented from committing further criminal offences, at least outside of the prison. However, the value of incapacitation may frequently be outweighed by the social costs of such punishment. It

¹⁰⁷ J. Tufts, "Public Attitudes Toward the Criminal Justice System", Statistics Canada, Canadian Centre for Justice Statistics (1999) 20 Juristat 12.

¹⁰⁸ T. Mathiesen, Prison on Trial (London: Sage, 1990).

is well recognized that prisons are violent, dangerous environments¹⁰⁹ which not only foster and perpetuate antisocial attitudes and behaviour but which make such patterns virtually essential to an inmate's survival.¹¹⁰ According to a study conducted by the Correctional Service of Canada in 1990, Canada's prisons are unusually violent.¹¹¹ In comparing federal prisons in Canada to those in forty American states, the research found that over a seven year period, Canadian federal prisons had the highest mean rate of prisoner suicide and the fourth highest rate of homicide. A study examining the rate of victimization among inmates in Canada's federal prisons indicated that 42% had been victimized at least once in the past year and the majority of the reported incidents were physical assaults.¹¹² In addition to threats to their physical well-being, inmates may experience difficulty coping psychologically with the prison experience.¹¹³

Research examining the consequences of living in an environment characterized by violence and deprivation suggests that adaptation to a prison culture which embraces antisocial values and behaviour is a natural defensive response for inmates.¹¹⁴ The prison

¹⁰⁹ Clear, supra note 1 at 117; See D. Lockwood, Prison Sexual Violence (New York: Elsevier, 1980).

¹¹⁰ Cayley, supra note 2 at 4.

¹¹¹ D. Cooley, Prison Violence in the Correctional Service of Canada: An Analysis of Security Incidents and Cross-Jurisdictional Data (Correctional Service of Canada, Research and Statistics Branch, 1990).

¹¹² D. Cooley, "Criminal Victimization in Male Federal Prisons" (October, 1993) *Canadian Journal of Criminology* 479.

¹¹³ H. Toch, Coping: Maladaptation in Prisons (New Brunswick: Transaction, 1989).

¹¹⁴ G.M. Sykes, The Society of Captives: A Study of a Maximum Security Prison (Princeton: Princeton University Press, 1958); G.M. Sykes & S.L. Messinger, Theoretical Studies in Social Organization of the Prison (New York: Social Science Research Council, 1960).

environment demands that the inmates accept the prison culture and adopt its norms and codes of conduct.¹¹⁵ At the same time, prison restricts the inmates' exposure to socially desirable attitudes and behaviour, and confines them to association with people who accept and engage in criminal activity. Such an environment is more likely to reinforce the inmates' deviant attitudes, and introduce new ones, than it is to denounce their criminal conduct and encourage pro-social behaviour.¹¹⁶ Consequently, the possibility of learning to engage in further criminal activity and to justify this conduct to oneself¹¹⁷ is much more likely than learning to refrain from such behaviour.

The process of 'prisonization', whereby inmates are socialized into prison culture¹¹⁸ appears to have a stronger influence on offenders incarcerated for long periods of time.¹¹⁹ Extending the length of prison terms to prevent future crime therefore risks further immersing offenders in the criminal subculture and marginalizing them from conventional society. In addition, segregating offenders from society not only makes it more difficult for them to maintain supportive relationships with friends and family members, it makes it difficult to maintain employment. By severing these attachments

¹¹⁵ D. Clemmer, The Prison Community (New York: Holt, Rinehart, & Winston, 1940).

¹¹⁶ J. Reiman, The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice, 5th ed. (Needham Heights: Allyn and Bacon, 1998) at 30.

¹¹⁷ See, for example, D. Scully & J. Marolla, "Convicted Rapists' Vocabulary of Motive: Excuses and Justifications" in H.N. Pontell, ed. Social Deviance (Saddle River: Prentice Hall, 1993).

¹¹⁸ See Clemmer, supra note 115.

¹¹⁹ S. Wheeler, "Socialization in Correctional Communities", 26 *American Sociological Review* 697.

with conventional society, criminal activity becomes more attractive.¹²⁰

Given that the majority of inmates will eventually be released into society, it is in the best interest of the public to consider the adverse effects prison can have on those who are incarcerated. The value of incapacitation must be weighed against the consequences of imprisoning an offender to determine whether a prison sentence will ultimately be worthwhile. It is hardly worth isolating offenders from society for a few months if they are angrier and more dangerous when released and have fewer opportunities to lead a law-abiding life.

The value of incapacitating offenders is also limited by the difficulties of predicting who is likely to recidivate. Although the likelihood of recidivism for offenders who have committed property crimes can be predicted reasonably accurately, it is much more difficult to predict serious personal injury offences, which are of most concern.¹²¹ In order to prevent a few offenders from recidivating, many would have to be incapacitated to account for inaccuracy in prediction. As a result, it is likely that many offenders who would not otherwise have recidivated are imprisoned and these inmates are exposed to the adverse effects of prison despite the fact that they pose little risk to society.

Ethically, Mathiesen argues, the value of incapacitation is questionable because it requires incarcerating people for acts which they may, or may not, commit in the future.¹²²

¹²⁰ T. Hirschi, Causes of Delinquency (Berkeley: University of California Press, 1969).

¹²¹ Penal Council Report NOU 1974, No. 17: 128, cited in Mathiesen, supra note 108.

¹²² Mathiesen, supra note 108 at 81.

This becomes an even more valid concern in light of the knowledge that it is difficult to accurately predict who will commit serious offences. It is difficult enough to justify incarcerating people for acts which they might commit, but it is particularly difficult to justify when many of those incarcerated have been falsely predicted to be at risk of recidivating.

Rehabilitation

Considering the environment inmates are exposed to while incarcerated, it is not particularly surprising that prison does not facilitate the rehabilitation of offenders. The pervasiveness of criminal attitudes and beliefs within prisons makes it difficult to promote behavioural change¹²³ and the results of many empirical studies reflect the limitations of rehabilitation.¹²⁴

A classic review of literature conducted by Martinson examined two-hundred and thirty-one controlled studies from 1945 to 1967 which were designed to evaluate rehabilitation programs.¹²⁵ In his analysis of the studies which measured the rate of recidivism as an indication of success, Martinson concluded "...with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no

¹²³ Clemmer, *supra* note 115 at 54.

¹²⁴ See especially J. Robinson, & G. Smith, "The Effectiveness of Correctional Programs", 17 *Crime and Delinquency* 67; D.F. Greenburg, "The Correctional Effects of Corrections: A Survey of Evaluations", in D.F. Greenberg, ed. Corrections and Punishment (Beverly Hills: Sage, 1977); G. Trasler, "Reflections Upon the Use of Custody" (1976) 6 *Howard Journal*.

¹²⁵ R. Martinson, "What Works? Questions and Answers About Prison Reform", (1974) 35 *The Public Interest* 22.

appreciable effect on recidivism. Studies that have been done since our survey was completed do not present any major grounds for altering that original conclusion".¹²⁶

Several years later Martinson acknowledged that, while some programs had no effect on recidivism and some increased recidivism, some types of treatment appeared to have a positive effect.¹²⁷ A few subsequent studies of rehabilitation programs have also found favourable outcomes in certain cases.¹²⁸ As a result, it would be unfair to completely dismiss the value of rehabilitation under all circumstances. Certainly, it is possible for particular inmates to benefit from some types of individual intervention in spite of the criminogenic influences in prison. However, researchers have yet to find a treatment program which works well for most offenders most of the time and successful programs appear to be the exception rather than the norm.¹²⁹

Early research on the success of rehabilitation programs indicated barriers to effective treatment of inmates. According to McCorkle and Korn, incarceration serves as a message to inmates that they have been rejected from society.¹³⁰ Rather than internalizing this rejection as part of their self-image, McCorkle and Korn argue that

¹²⁶ *Ibid.* at 25.

¹²⁷ R. Martinson, "New Findings, New Views: A Note of Caution Regarding Prison Reform", (1979) 7 Hofstra Law Review 243.

¹²⁸ See D.A. Andrews *et al.*, "Does Correctional Treatment Work? A Psychologically Informed Meta-Analysis", (1990) 28 Criminology 369; P. Gendreau, & R. Ross, "Revivification and Rehabilitation: Evidence from the 1980s", 44 Justice Quarterly 349.

¹²⁹ See Mathiesen, *supra* note 108; J. Wright, & J. Devine, Drugs as a Social Problem (New York: HarperCollins College Publishers, 1994).

¹³⁰ L.W. McCorkle, & R.R. Korn, "Resocialization Within Walls" (1954) Annals of American Academy of Political and Social Science 88 at 91.

inmates control the psychological consequences of rejection by developing a contemptuous attitude toward the justice system and rejecting those who have rejected them. When such attitudes are widely held within prisons, it is to be expected that inmates will not be responsive to attempts to treat their behaviour.

There is some indication that programs delivered outside of the prison setting are more likely to be successful,¹³¹ but even when not conducted within the counterproductive environment of prison, rehabilitation still suffers serious limitations. The notion of rehabilitation assumes that the sources of crime are located within the individual and neglects the influence of social forces. Years of sociological research has demonstrated that certain social environments, namely those characterized by economic and racial inequality, little support for families, and few opportunities for meaningful employment, produce more criminal behaviour than others.¹³² The measures most frequently associated with crime are not individual characteristics but social conditions such as unemployment¹³³ and economic inequality.¹³⁴

Rehabilitation serves an ideological function by reinforcing the appealing notion

¹³¹ See M.W. Lipsey, "The Efficacy of Intervention for Juvenile Delinquency: Results From 400 Studies", Paper presented at the 41st annual meeting of the American Society of Criminology, Reno, NV, 1989, cited in D.A. Andrews, & J. Bonta, The Psychology of Criminal Conduct (Cincinnati: Anderson, 1994).

¹³² Reiman, supra note 116 at 29.

¹³³ See *eg.* S. Box, Recession, Crime, and Punishment (London: Macmillan, 1987); D.P Farrington, The Cambridge Study on Delinquency: Long-Term Follow-Up (Cambridge: Cambridge University Press, 1986); R. Sampson, & J.O. Wooldredge, "Linking the Micro and Macro Levels of Lifestyle: Routine Activity and Opportunity Models of Predatory Victimization" 3 *Journal of Quantitative Criminology* 371.

¹³⁴ See *eg.* J. Braithwaite & V. Braithwaite, "The Effect of Income Inequality and Social Democracy on Homicide", 20 *British Journal of Criminology* 45.

that the causes of crime can be attributed to weaknesses within individual offenders.¹³⁵

Concentrating on rehabilitation allows society to avoid taking responsibility for its role in the development and maintenance of criminal behaviour. Certainly, it is easier to attribute the crime problem entirely to wayward individuals who are innately bad and deny that social policies have any influence on their behaviour. However, focusing crime control efforts on individual intervention limits an effective response to crime by directing attention away from the need for broad structural changes within society.¹³⁶

Although there may be some merit in treating inmates on an individual basis, for the most part, it is more useful to examine the social situation in which offenders live rather than their personality traits.¹³⁷

Deterrence

Prison is intended to act as a general deterrent by providing the public with an example of the consequences of crime and also as a specific deterrent by convincing the offender exposed to such punishment not to recidivate,¹³⁸ but it is doubtful whether incarceration can successfully achieve either of these goals. The best indication that the threat of prison is not much of a deterrent is its failure to significantly reduce the crime

¹³⁵ W. DeKeseredy, & M. Schwartz, Contemporary Criminology (Belmont: Wadworth, 1996) at 461.

¹³⁶ B.C. MacLean, "Crime, Criminology, and Society: A Short but Critical Introduction" Crime and Society B.C. MacLean, ed. (Toronto: Copp Clark, 1996) at 6.

¹³⁷ G. Vold, & T. Bernard, Theoretical Criminology, 3rd ed. (New York: Oxford University Press, 1986) at 293.

¹³⁸ F. Zimring, & G. Hawkins, Deterrence (Chicago: University of Chicago Press, 1973) at 2.

rate. Although the crime rate has declined while prisons were being used as a method of crime control, there does not appear to be a causal relationship between the two.¹³⁹

Research has demonstrated that the rate of incarceration and the crime rate rise and decrease independently of one another.¹⁴⁰ As a result, an increase in the use of incarceration will not necessarily lead to a reduction in criminal activity. While this may seem contrary to common sense, it is clearly demonstrated in the United States, a country which incarcerates more people than any other industrialized democracy, yet continues to have a serious problem with crime and violence.¹⁴¹

The value of prison as a general deterrent is limited in several ways. If increasing the number of people behind bars is to have an effect on crime by sending a message to others, the intended target of the message, the general public, would have to be aware of the punishment being given. Most people have a general idea about what is and is not against the law, and what is likely to warrant a prison sentence, but few people have detailed knowledge of how serious the court considers each possible offence, and the length of time one can expect to serve for committing this offence.¹⁴² As a result, a slight change in the way the court responds to crime, such as increasing the use of prison as a punishment for law violation, would not necessarily translate into a greater public fear of

¹³⁹ Cayley, supra note 2 at 3.

¹⁴⁰ See A. Blumstein, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C: National Research Council, 1978).

¹⁴¹ W. Selke, Prisons in Crisis (Bloomington: Indiana Press, 1993) at 23.

¹⁴² A. Doob, "Punishment in Late Twentieth Century Canada: An Afterword" in Qualities of Mercy: Justice, Punishment and Discretion, C. Strange, ed. (Vancouver, UBC Press, 1996) at 167.

committing crime, for in all likelihood they would have little knowledge of this change. With the exception of the occasional sensational case reported in the media, most people are unaware of the sentences offenders are receiving,¹⁴³ and therefore cannot be deterred by the severity or the increasing number of people being given sentences of imprisonment.

Even if the increase in the use of prisons was legislated, it would serve little purpose, for it is unlikely that potential offenders regularly consult a Criminal Code before deciding to commit an offence. The notion of general deterrence implies forethought, an element which is frequently absent from criminal offences, particularly the violent, interpersonal offences which are of most concern to the public.¹⁴⁴ It also ignores the complexity of human nature. People who violate the law are motivated by more than the knowledge that the punishment is relatively lenient,¹⁴⁵ just as those who refrain from engaging in criminal activity, particularly serious, violent crime, generally do so for reasons other than simple fear of severe punishment.¹⁴⁶ As Cayley points out, the preventative effect of increasing incarceration would be strongest for those who would never commit crime anyway.¹⁴⁷

Perhaps more important than the message to society conveyed by the threat of prison is its influence on the individual given the punishment. Although the belief that

¹⁴³ Ibid.

¹⁴⁴ E. Currie, Confronting Crime (New York: Pantheon, 1985) at 68.

¹⁴⁵ MacLean, supra note 136 at 8.

¹⁴⁶ See Hirschi, supra note 120.

¹⁴⁷ Cayley, supra note 2 at 48.

lengthy incarceration will prevent recidivism appears to be widely held, "...prison does not deter people from committing crime - a finding of almost every responsible study in the past twenty-five years".¹⁴⁸

The failure of prison as a specific deterrent, that is, its inability to prevent offenders from recidivating upon release, has indeed been well documented. Currie's research, for example, suggests that the majority of offenders continue to engage in criminal activity after they have been released from prison.¹⁴⁹ A meta-analysis conducted by Andrews *et al.* also indicates that criminal sanctions in general are not effective deterrents.¹⁵⁰ Not only did punishment fail to prevent recidivism, it was associated with increased recidivism rates. Similarly, in a sample of young offenders, Lipsey found that of all sanctions compared in the analysis, incarceration resulted in the worst overall effect, with an average increase of 24% in recidivism rates.¹⁵¹

It is particularly significant that people who have been incarcerated continue to offend, for, as Reiman points out, "...if prisons are built to deter people from crime, one would expect that ex-prisoners would be the most deterred because the deprivations of prison are more real to them than to the rest of us. Recidivism is thus a doubly poignant testimony to the job that prison does in preparing its graduates for crime".¹⁵² For those who have never been incarcerated, prison likely seems like an experience to avoid at all

¹⁴⁸ Dekeseredy, & Schwartz, *supra* note 135 at 449.

¹⁴⁹ Currie, *supra* note 144 at 76.

¹⁵⁰ Andrews *et al.*, *supra* note 128.

¹⁵¹ Lipsey, *supra* note 131.

¹⁵² Reiman, *supra* note 116 at 31.

costs, but for those who have adapted to the prison culture and have had to learn to become threatening and dangerous for their own well-being while incarcerated, the threat of returning is no longer so great.¹⁵³

Further evidence demonstrating the failure of prison as a specific deterrent is provided by offenders themselves. In an unusual study, Kolstad examined how offenders thought imprisonment was going to influence their future behaviour.¹⁵⁴ He also asked which alternatives they felt were most promising. Two-thirds of those questioned felt prison was either unable or unlikely to prevent them from reoffending. They expressed more optimism for some type of community work as a form of rehabilitation.

Some people would no doubt attribute the inefficacy of incarceration to the perceived leniency of the sentences offenders receive. Following this logic, the solution would naturally be to incarcerate offenders for longer periods of time to prevent them from recidivating. Such an approach, however, assumes that the legal consequences of the offender's actions are of primary importance in controlling criminal behaviour. In fact, most deterrence studies indicate that neither the perceived certainty nor the perceived severity of punishment are given much consideration in the decision to refrain from criminal activity.¹⁵⁵ Rather, the guilt and shame associated with punishment appear to be the most important determinants of conformity to social expectation.¹⁵⁶ As Currie

¹⁵³ Cayley, *supra* note 2 at 112.

¹⁵⁴ A. Kolstad, "Imprisonment as Rehabilitation: Offenders' Assessment of Why it Does Not Work" (1996) 24 *Journal of Criminal Justice* 323.

¹⁵⁵ See R. Paternoster, "The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues" (1987) 4 *Justice Quarterly* 173.

¹⁵⁶ *Ibid.*

reports, offenders are more likely to stop committing crime because of the perceived rewards of being a productive member of the community and earning the approval of family and friends than because they fear being caught and punished.¹⁵⁷ Such findings are consistent with Sherman's research, which suggests that crime can be reduced more by treating all citizens with fairness and respect than by increasing punishments.¹⁵⁸

Retribution

Although incapacitation, rehabilitation and deterrence may be questionable functions of punishment, incarceration can serve to denounce criminal conduct and subject offenders to punishment in equal proportion to the seriousness of the offence. Though there is some doubt as to whether this is a valid objective of the criminal law, those who support retributive responses to crime contend that it is important to impose penalties which reflect the gravity of the crime and recognize the offender's moral guilt by enforcing the deserved consequences in order to remain consistent with the principles of justice.¹⁵⁹ In addition, retribution is intended to symbolically restore the moral balance between the offender and society which is disrupted when a crime is committed.¹⁶⁰

Some technical difficulties with retribution as a goal of punishment have been

¹⁵⁷ Currie, *supra* note 144 at 80.

¹⁵⁸ L.W. Sherman, "Defiance, Deterrence, and Irrelevance - A Theory of the Criminal Sanction" (1993) 30 *Journal of Research in Crime and Delinquency* 445.

¹⁵⁹ Mathiesen, *supra* note 108 at 111.

¹⁶⁰ L. Finstad, "Sexual Offenders Out of Prison: Principles for a Realistic Utopia" (1990) 18 *International Journal of the Sociology of Law* 157 at 164.

raised. In practice, it is difficult to balance the penalty to be imposed on the offender with the severity of the offence, as it is not always clear how much punishment is necessary for the offender's suffering to be proportional to the harm caused by the offence.¹⁶¹ The perceived seriousness of crime varies considerably, as Mathiesen's own research demonstrates,¹⁶² which makes it virtually impossible to apply penalties which are generally seen as proportionate to the harm caused by the crime.

In addition, it is difficult to equate the harm experienced as a result of crime with the harm offenders are subject to in prison. Crime undoubtedly causes suffering to the victim and has a detrimental impact on the community and society at large, and prison clearly imposes suffering on the offender. However, as Mathiesen points out, these two types of pain are significantly different and cannot be compared and balanced against each other to create a just resolution.¹⁶³

Although they are worth taking into account, the technical difficulties of retribution are not as serious as the limitation in its reasoning. Retribution is designed to serve two significant symbolic functions. By treating offenders as "persons of moral significance", retribution is intended to demonstrate respect for offenders' dignity, while providing them an opportunity to be reinstated in society by fulfilling their social obligations.¹⁶⁴

¹⁶¹ J. Braithwaite, & P. Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (Oxford: Clarendon Press, 1990) at 49.

¹⁶² Mathiesen, supra note 108 at 113.

¹⁶³ Ibid.

¹⁶⁴ Clear, supra note 1 at 33.

Secondly, retribution is thought to be more respectful of offenders by treating them as ends rather than means.¹⁶⁵ Unlike other functions of punishment, retribution is not intended to use offenders as a way of achieving another goal. Punishment imposed on offenders for retribution is seen as valuable in itself.

Both of these purported functions have been criticized on several grounds. Clear argues that retribution is not in fact respectful of individuals subject to punishment as it neglects the adverse consequences of incarceration which may perpetuate harm, both to the offender and to society.¹⁶⁶ The nature of the contemporary prison system prevents retribution from serving as an opportunity for offenders to pay their debt to the public and reintegrate into society. Offenders who are given penalties proportionate to their crimes do not experience the harm as just,¹⁶⁷ and the impact prison has on them does not encourage stronger ties with conventional society, nor does suffering fair punishment appear to make offenders feel as though they have regained their dignity.¹⁶⁸ In order for punishment to be successful, it would have to be imposed in the kind of supportive environment which is unlikely to be found in a prison.¹⁶⁹

A further limitation with retribution is its exclusive focus on the crime committed. In failing to give consideration to individual circumstances and to a particular offender's

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ See L. Goodstein, & J.R. Hepburn, Determinate Sentencing and Imprisonment: A Failure of Reform (Cincinnati: Anderson, 1985).

¹⁶⁸ Cayley, *supra* note 2 at 94.

¹⁶⁹ *Ibid.* at 97.

situation, those who support retribution violate their own stated desire to treat offenders as ends rather than means.¹⁷⁰ It may seem fair to treat individuals who have committed the same crime similarly, but offenders may experience the penalty imposed on them quite differently, and neglecting these individual differences detracts from the recognition of the offender's dignity.¹⁷¹ As Clear argues, "[t]o set abstract interests of justice above the need to deal with the lawbreaker in ways that fit the lawbreaker's circumstances is to use the lawbreaker as an instrument of some abstraction called justice - as a means, not an end...[I]f the retributivist cannot find a way to take...[personal characteristics] of the law violator into account, then the claim that the harm affirms the dignity of the person is exposed as hollow".¹⁷² Evidently, retribution is not so unlike the other purposes of punishment in using the offender as a means through which some other objective is met, nor is it any more successful.

Relying on the Criminal Justice System to Reduce Crime

There is some doubt as to whether it is even reasonable to rely on the criminal justice system to reduce crime.¹⁷³ The limitations of using criminal law to address social problems have been well documented.¹⁷⁴ The primary purpose of the criminal justice

¹⁷⁰ Clear, supra note 1 at 36.

¹⁷¹ Ibid. at 35.

¹⁷² Ibid.

¹⁷³ See J.C. Hackler, Crime and Canadian Public Policy. (Scarborough: Prentice-Hall, 1994); Martin, supra note 25.

¹⁷⁴ See especially D. Currie, "Battered Women and the State: From the Failure of Theory to a Theory of Failure", (1990) 1 *Journal of Human Justice* 77; K. Daly, "Men's Violence, Victim Advocacy and Feminist Redress", (1994) 28 *Law and Society Review*

system is to control and coerce, ostensibly in order to protect society, and consequently, it operates differently than other mainstream institutions which provide some benefit to people.¹⁷⁵ The criminal justice system cannot address the social conditions which foster criminal behaviour. It can only define criminal activity and ensure those definitions are enforced by charging, prosecuting and punishing those who have violated the law after the crimes have been committed.¹⁷⁶ As a result, the justice system functions more effectively as a symbol of social control and as a method of preserving power relations in society than as a community protector.¹⁷⁷ As Martin argues, expanding the system's powers by increasing punishment of offenders is unlikely to control crime and empowers the state and courts, not individual citizens.¹⁷⁸

If the goal is to reduce crime, addressing the sources of crime and making a non-criminal lifestyle not only attractive to ex-offenders but feasible offers more promise than focusing on the way in which offenders are penalized for their actions. Nevertheless, the severity of punishment continues to be criticized as inadequate and incarceration remains a common and popular social response to crime.¹⁷⁹ Even in the face of a wealth of contradictory evidence, the belief that prison is the solution to crime is difficult to refute because no matter how great the failure, one can always contend that the justice system is

777; L. Snider, "Toward Safer Societies", (1998) 38 British Journal of Criminology 1.

¹⁷⁵ Snider, ibid. at 8.

¹⁷⁶ Martin, supra note 25 at 4.

¹⁷⁷ Clear, supra note 1 at 40.

¹⁷⁸ Martin, supra note 25 at 4.

¹⁷⁹ Reiman, supra note 116 at 19.

still too lenient, and this misconception is easily facilitated by media reports and political rhetoric.¹⁸⁰ Crime control efforts have relied so heavily on the criminal justice system that harsh punishment has become the standard, and any other response now appears absurdly permissive in comparison.¹⁸¹ Consequently, the obvious limitations with the punitive approach to crime control do not necessarily translate into significantly less use of imprisonment, as the recent history of Canadian criminal justice policy demonstrates.

Canadian Criminal Justice Policy

The incarceration rate in Canada is higher than in most western nations.¹⁸² Between 1980/81 and 1994/95, the Canadian prison population increased by 50%, and the number of young people incarcerated rose 26% between 1986/87 and 1994/95.¹⁸³ In addition to being largely ineffective, this reliance on imprisonment requires 25% of the criminal justice budget.¹⁸⁴ For good reason, then, a reduction in the use of prison has become an important policy goal for the federal government in the last ten years.¹⁸⁵

While it is promising that the government has officially recognized the problems associated with overuse of imprisonment, so far, the measures taken to address the

¹⁸⁰ Dekeseredy & Schwartz, supra note 135 at 4.

¹⁸¹ Cayley, supra note 2 at 21.

¹⁸² National Crime Prevention Council of Canada, Incarceration in Canada, (Ottawa: National Crime Prevention Council, 1997).

¹⁸³ Roach, supra note 58 at 4.

¹⁸⁴ J.V. Roberts, "The Evolution of Penal Policy in Canada", (1998) 32 Social Policy and Administration" 420 at 425.

¹⁸⁵ See Government of Canada, Sentencing, 1984 (Ottawa: Government of Canada); Government of Canada, Directions for Reform, 1990 (Ottawa: Department of Justice Canada).

problem have been modest and do not appear to have made a significant difference.¹⁸⁶

For example, the sentencing reforms introduced in 1996 included a statement of the purpose and principles of sentencing which was intended to reduce imprisonment by guiding judges in deciding when to incarcerate an offender. According to this statement, judges should avoid imposing a prison term if any other less restrictive alternative is appropriate. Naturally, this is reasonable advice, but as Roberts points out, it is doubtful whether merely suggesting that judges take into account the various alternatives to incarceration will lead to obvious changes in the treatment of offenders.¹⁸⁷ One would expect that most judges already take such information into consideration before imposing a sentence as serious as imprisonment.

The 1996 sentencing reforms also introduced conditional sentencing in an attempt to provide alternatives to imprisonment. The conditional sentence allows an offender to serve a sentence of up to two years in the community, subject to certain conditions, rather than in prison. The provision was designed to replace incarceration, and was not intended for those offenders who would otherwise have received a non-custodial sentence. However, there is some indication that it has not, in practice, functioned this way. While the conditional sentence has frequently been imposed, there has not been a corresponding decrease in the incarceration rate, as one would expect if the provision were effectively diverting more offenders from prison.¹⁸⁸

¹⁸⁶ Roberts, supra note 184 at 426.

¹⁸⁷ Ibid. at 427.

¹⁸⁸ Ibid.

Not all of the reforms made in recent years have been directed toward reducing the prison population. Amendments to the young offenders act which have raised the maximum penalty for murder from three years to ten years in prison and which have made it easier to transfer youth to adult court rely on more use of prisons, not less. Mandatory minimum sentences for a number of offences committed with firearms have also been implemented in recent years, despite research which indicates that such minimum penalties are ineffective.¹⁸⁹

In fact, Roberts observes that much of the criminal justice reform which has occurred in recent years has not been founded on research.¹⁹⁰ While a significant body of research clearly indicates the limitations of prison, the attempt to reduce incarceration has had to be balanced with the need to appease public anxiety about crime and political pressure to punish criminals more severely.¹⁹¹ As a result, Roberts argues, public opinion toward criminal justice issues, which is frequently based on misconception, has not only encouraged the more punitive developments in criminal justice policy, but it has hampered efforts to move toward a more progressive crime control strategy.

Much of the discontent with the criminal justice system expressed by the general public has been reflected in the lobbying efforts of victims' advocates. The extent to which victims' advocacy has influenced Canadian criminal justice policy is not entirely clear, but given that some research literature suggests victims' groups have generally

¹⁸⁹ See C. Meredith, B. Steinke, & S. Palmer, Research on the Application of Section 85 of the Criminal Code of Canada (Ottawa: Department of Justice Canada, 1994).

¹⁹⁰ Roberts, supra note 184 at 434.

¹⁹¹ Ibid. at 422.

tended to support harsher responses to criminal behaviour, it may be that pressure to punish offenders more severely and opposition to decarceration has also come from victims' advocates, both directly and through their interactions with the public.

Victims' Advocacy and Punitive Crime Control

Victims' advocates are sometimes seen as the best representatives of community concerns about crime because they have had first hand experience with the costs of crime and can introduce important values neglected by professionals into the political process.¹⁹² Nevertheless, there is reason to be sceptical about the impact of victims' advocacy on criminal justice policy. As Fattah has noted, it is remarkable that the efforts of victims' advocates to reform the criminal justice system have faced so little opposition.¹⁹³ The assumption that the policy recommendations of those who represent victims will necessarily be sound appears to be widely held. For good reason, most people are sympathetic toward the plight of crime victims and nobody wants to be anti-victim, but the symbolic significance of recognizing victims' rights may sometimes overshadow the importance of scrutinizing the work of victims' advocates.¹⁹⁴

It would certainly be unfair to characterize all victims' advocacy groups as

¹⁹² S.A. Scheingold, T. Olson, & J. Pershing, "Sexual Violence, Victim Advocacy and Republican Criminology: Washington State's Community Protection Act" (1994) 28 Law and Society Review at 729.

¹⁹³ E.A. Fattah, "Prologue: On Some Visible and Hidden Dangers of Victim Movements", in From Crime Policy to Victim Policy: Reorienting the Justice System E.A. Fattah, ed. (New York: St Martin's Press, 1986) at xi.

¹⁹⁴ L. Henderson, "The Wrongs of Victims' Rights", 37 Stanford Law Review 936 at 941.

favouring harsh treatment of offenders, but the victims' movement has primarily been made up of politically conservative organizations which support conservative policies.¹⁹⁵

Victims' advocates who attempt to challenge the status quo have for the most part remained on the periphery of the movement, while those who have supported a law and order agenda have dominated.¹⁹⁶ It is not surprising, then, that some observers of the victims' movement have come to associate victims' advocacy with demands for more severe punishment of criminals and consequently regard victims' advocates as a potential threat to sound criminal justice policy.¹⁹⁷

Punishing Offenders to Protect the Public

Since the emergence of the victims' movement in Canada, victims' advocates have sought to improve the treatment of crime victims within the criminal justice system, but they have also demonstrated a concern for promoting public safety. Reforming the criminal justice system has been one of the avenues through which victims' advocates have attempted to improve the protection of the public from crime. Echoing many of the criticisms of law and order advocates, victims' advocates have argued that the criminal justice system is too lenient to adequately protect the public.¹⁹⁸ This dissatisfaction with the treatment of offenders has led some victims' advocates to develop an interest in

¹⁹⁵ F. Carrington & G. Nicholson, "The Victims' Movement: An Idea Whose Time Has Come" (1984) 11 *Pepperdine Law Review* 1 at 9.

¹⁹⁶ D. Gordon, *The Justice Juggernaut* (New Brunswick, NJ: Rutgers University Press, 1990) at 153.

¹⁹⁷ A. Sarat, "Vengeance, Victims and the Identities of Law" (1997) 6 *Social and Legal Studies* 163 at 181.

¹⁹⁸ Cayley, *supra* note 2 at 218.

punishment, not just to ensure justice is served, but as a means of public protection.¹⁹⁹

Though it would be inaccurate to suggest that victims' groups have pursued a single agenda, the amount of attention given to each area of interest seems to have shifted over the years. According to Roach, victims' advocacy in Canada became more oriented toward penalizing offenders following the report of the Federal-Provincial Task Force on Victims of Crime in 1983,²⁰⁰ perhaps reflecting the influence of the American victims' movement, which had demonstrated an earlier preoccupation with criminal sanctions. In part, he argues, the focus on punishment was driven by the same fear and concern which led to the development of the victims' movement.²⁰¹ The results of victimization surveys which indicated low rates of reporting crime were interpreted as evidence that victims were discouraged by what they perceived as the lenient treatment of criminals and did not feel that reporting crimes was worthwhile. Roach points out that it would have been just as reasonable to interpret the amount of unreported crime as an indication that state intervention and punishment were not of paramount concern for crime victims, but the way the problem was presented led victims' advocacy in a more punitive direction.

Research conducted by Scheingold, Olson, and Pershing examining the influence of victims' advocates on the development of the Community Protection Act in Washington State highlights the potential dangers of punishment-oriented victims'

¹⁹⁹ Balancing the Scales: The State of Victims' Rights in Canada, (Ottawa:Canadian Resource Centre for Victims of Crime, 1998).

²⁰⁰ Roach, supra note 58 at 281.

²⁰¹ Ibid.

advocacy.²⁰² The Community Protection Act introduced several controversial provisions designed to control sexual offences: it increased penalties for violent sexual offences; required sex offenders to register with the police upon release from prison; allowed authorities to notify the community of an offender's release if the offender was deemed dangerous and likely to reoffend; and allowed for the indefinite incarceration of offenders determined to be sexually violent predators. While critics expressed concern that these reforms would be ineffective and threatened civil liberties, the proposals were endorsed by victims' advocates "because of, not in spite of, their exclusionary consequences".²⁰³

That is not to say that victims' groups were interested solely in punishment. The study revealed that victims' advocates also proposed preventative measures, but their lobbying efforts for increased punishment were more successful. This suggests that although victims' advocates were able to exert significant political pressure and, to some extent, shape the development of the legislation, their influence interacted with other political forces in the outcome of the Community Protection Act. Nevertheless, Scheingold, Olson, and Pershing conclude that, given the nature of the policies they embraced, the law reform efforts of victims' advocates present a challenge for the development of effective and just crime control policy.

The approach taken by victims' advocates in Washington assumed that victims are helped by promoting better crime control and that improving crime control requires a more punitive response to crime. According to this reasoning, the interests of crime

²⁰² Scheingold, Olson & Pershing, supra note 192.

²⁰³ Ibid. at 744.

victims are better served by developing a more retributive system, and anything less risks jeopardizing the safety of the community. Those who are critical of the influence of victims' advocacy point to such reasoning as a significant limitation to progressive reform.²⁰⁴ If the goal is to enhance public safety, this position is problematic because focusing on the penalty imposed on the accused rather than the sources of crime may impede attempts to reduce crime. Emphasizing punishment as a solution implies that crime can be dealt with on an individual basis and diverts attention away from exploring the structural context in which crime occurs.

In addition, there is some question as to whether the efforts of victims' advocates encompass those crimes which most commonly threaten the safety of the public. Critics have noted the tendency of victims' advocacy groups to focus almost exclusively on violent street crime, even though it accounts for only 11% of Criminal Code offences,²⁰⁵ and to define the crime problem narrowly and selectively.²⁰⁶ Little attention is given to corporate and white collar crime, which frequently present a greater risk to the public than street crime.²⁰⁷ Although disenfranchised members of society are much more likely

²⁰⁴ Roach, supra note 58 at 291.

²⁰⁵ The Juristat Reader, supra note 104.

²⁰⁶ R. Elias, "Community Control, Criminal Justice, and Victim Services", in E. Fattah, ed., From Crime Policy to Victim Policy: Reorienting the Justice System (New York: St. Martin's Press, 1986) at 301; Clear, supra, note 1 at 115.

²⁰⁷ See Reiman, supra note 116.

to be victimized by street crime than the general population,²⁰⁸ this is generally not reflected in the make-up or the focus of victims' advocacy groups, nor is the fact that offenders are rarely strangers to their victims.²⁰⁹ Even in discussing conventional crime, the focus is often on aberrational cases involving extreme violence, which are unquestionably serious, but are not representative of the majority of crime and are therefore a poor basis on which to design crime control policy.²¹⁰

Punishing Offenders to Help Victims

Imposing harsh penalties on offenders is often seen as society's obligation to the crime victim.²¹¹ The punishment given to the offender is constructed as a measure of society's concern for victims. If punishment perceived as inadequate is imposed on the offender, it may then be interpreted as an affront to the victim. Cayley maintains that victims' advocacy has promoted the perception that the interests of victims and offenders are inversely related, and that, as a result, helping one inevitably means harming the other.²¹² At the centre of the legislative reform efforts of victims' advocates is a desire to redress the perceived imbalance between the rights of the accused and the rights of crime

²⁰⁸ See R.C. Davis, Providing Help to Victims: A Study of Psychological and Material Outcomes, (New York: Victim's Services Agency, 1987) cited in M. Maguire, "The Needs and Rights of Victims of Crime", in M. Tonry, ed., Crime and Justice: A Review of Research, vol. 14. (Chicago: University of Chicago Press, 1992).

²⁰⁹ A. Karmen, Crime Victims (Belmont: Wadsworth, 1984) at 54.

²¹⁰ A.J. Reiss, "Public Safety: Marshalling Crime Statistics" (1981) 45 *Annals of the American Academy of Political and Social Science* 222 at 234.

²¹¹ Clear, supra note 1 at 113.

²¹² Cayley, supra note 2 at 218.

victims. Striking the correct balance is a constant struggle, but it has been argued that simply imposing more punishment on the offender is of no real benefit to the victim.²¹³ and in fact simply contributes to the government's ability to control its citizens.²¹⁴

In Canada, as in the United States, most of the reforms introduced in the name of victims in the last decade have been directed toward harming offenders rather than helping victims.²¹⁵ As a consequence of associating the punishment of offenders with assisting crime victims, the problem of victimization has been redefined according to the offender's experience, rather than the victim's. In other words, "...sympathy with victims is not used to give victims anything; rather it is used to urge actions against criminals".²¹⁶ The importance of addressing the true needs of crime victims is therefore further neglected in order to pursue the punishment of the offender, and the assumption is that as long as the penalty is adequate, the victim's needs have been met.

Prior to the victims' movement, accused's rights were frequently placed in opposition to the state's interest in prosecuting and convicting those who were a threat to the community. Clear suggests that victims' advocates have transformed the conflict by demanding a greater role in the punishment process:

The victim's suffering is used as a lever to create a version of legal standing in the penalty the offender should receive. The state becomes the agent acting in the victim's interest against the offender. What had heretofore been seen by legal theorists as a contest between the state and the accused becomes, after the rise of the victim's rights movement, a struggle between

²¹³ Fattah, *supra* note 193 at 12; Clear, *supra* note 1 at 114.

²¹⁴ Karmen, *supra* note 209 at 164.

²¹⁵ Roach, *supra* note 58 at 279.

²¹⁶ Clear, *supra* note 1 at 132.

the state and the victim over who gets to determine the offender's fate.²¹⁷

For this reason, there is some doubt as to whether the victims' movement is really a social movement at all.²¹⁸ Elias observes that unlike most social movements which attempt to challenge the government's response to a social problem and introduce new strategies, the victims' movement has conceptualized offenders, rather than the government, as the main obstacle for victims.²¹⁹ As a result, it is not incongruous for victims' groups to ally themselves with conservative policy-makers or police organizations to address the crime problem. By accepting government definitions of the crime problem and promoting a law and order approach to crime control, victims' advocacy does not challenge the status quo, it reinforces it.

Clear maintains that reforms which have given victims a greater role in the criminal justice process have done little to help victims with their experience of victimization, but they have provided an opportunity for victims to more directly influence the punishment imposed on offenders.²²⁰ While there is reason to believe that victims' participation in decisions regarding sentencing and parole for offenders may lead to more punitive outcomes,²²¹ it is evident that not all crime victims want offenders to be severely punished. In a study examining the influence of victims on sentencing, Erez and Tontodonato found that only about one-third of the participants, all of whom had been

²¹⁷ Ibid. at 120.

²¹⁸ Elias, supra note 3 at 55.

²¹⁹ Ibid. at 54.

²²⁰ Clear, supra note 1 at 128.

²²¹ Fattah, supra note 193 at 2.

victimized by a serious crime, wanted the offender to be incarcerated.²²² Nevertheless, it is wise to be cautious about reform which moves away from providing valuable services to victims and simply replaces it with their involvement in the justice process.

Serving Political Interests

While there is some indication that victims' groups have supported punitive crime control measures, it may be unfair to suggest that pressure from victims' advocates has prevented the government from introducing more progressive policy. Clear contends that punishment-oriented victims' advocacy provides as much benefit to the state as it does to victims.²²³ According to Elias, despite how the needs of crime victims may be initially presented, the claims which appear to receive the most attention and to which politicians respond are those which call for more punitive measures.²²⁴ If a concern with penalizing offenders appears to have dominated the agenda of victims' advocates, it may in fact be that such policy recommendations are the most politically useful and successful, or it may be that the demands of victims' advocates become distorted in the political process.

Creating the Appearance of Concern for Crime Victims

Policy introduced on behalf of victims may not have led to a significant reduction in levels of crime in society or greatly improved the treatment of victims, but it may have provided certain symbolic benefits. The extent to which the needs of victims are met by

²²² E. Erez & P. Tontodonato, "The Effect of Victim Participation in Sentencing on Sentencing Outcome" (1990) 28 *Criminology* 451.

²²³ Clear, *supra* note 1 at 133.

²²⁴ Elias, *supra* note 3 at 4.

the penal harm done to the offender is questionable, but linking the interests of victims with the punishment of offenders allows the state to avoid having to address the real needs of victims or the sources of crime.²²⁵ When a crime is committed the state has the obligation to treat the accused fairly and to compensate the victim for its failure to protect one of its citizens.²²⁶ The victims' movement combines the otherwise unrelated interests of victims and offenders by drawing a connection between the penalty imposed on the offender and recognition of the harm done to the victim, and in doing so reduces the state's obligation; "[I]nstead of being required to give both the offender and the victim their due, the state can answer these claims by giving neither their due",²²⁷ while at the same time creating the appearance that something is being done.

Despite all the discussion surrounding the rights and needs of crime victims, the state's commitment to addressing the interests of victims has not been supported by many substantive improvements.²²⁸ In his study of victims' services in the United States, Elias found that such services were a means of controlling discontent rather than providing real benefits to victims or reducing crime.²²⁹ In Canada, inadequate attention has been given to crime prevention and useful services, such as victim compensation programmes.²³⁰

²²⁵ Clear, supra note 1 at 122.

²²⁶ Ibid. at 121.

²²⁷ Ibid. at 122.

²²⁸ Roach, supra note 58 at 308.

²²⁹ Elias, supra note 66.

²³⁰ Roach, supra note 58 at 298.

While some compensation is available, programmes tend to be underfunded²³¹ and many victims are either ineligible or their applications are unlikely to be successful.²³²

Applicants must satisfy a number of conditions, including having been the victim of a violent offence, which reinforces society's traditional view of the victim as a victim of street crime, and ignores victims of white-collar and corporate crime.²³³

Many reforms which have been made, such as the right to introduce victim impact statements and amendments to parole eligibility, simply give victims more of an influence in the punishment process rather than concrete benefits. While the penal system is far from a cost efficient method of dealing with victimization, it is more expedient than concentrating on crime prevention and providing effective services to crime victims would require as much, if not more, of a financial investment.²³⁴

Victim impact statements in particular appear to have served a symbolic political function. Roach maintains that victim impact statements have provided a politically popular way of doing something for victims.²³⁵ In 1992, the year in which the federal government stopped funding victim compensation programs and could easily have been criticized for neglecting crime victims, victim impact statements were allowed in federal parole hearings. According to Roach, victim impact statements have been used in criminal cases primarily to encourage punitive outcomes and have offered little benefit to

²³¹ Clarke, *supra* note 14 at 65.

²³² Elias, *supra* note 206 at 300.

²³³ Reiman, *supra* note 116 at 110.

²³⁴ Roach, *supra* note 58 at 289.

²³⁵ *Ibid.* at 292.

victims, but they do contribute to the appearance that crime victims have not been forgotten.

Co-opting the Victims' Movement

Punitive crime control policy contributes to the power of traditional agents of crime control and benefits those in positions of power, rather than average citizens and potential victims.²³⁶ Insofar as such policies can be attributed to the demands of victims' advocates, victims' advocacy serves a useful ideological function by creating public support for policy which might otherwise be controversial. For this reason, several critics have argued that the victims' movement has been co-opted by the state and conservative forces for their own political gain.²³⁷ According to Elias, victims' advocates have been diverted from their original desire to reduce victimization and have been used to justify punitive crime control policy and the expansion of state control over citizens. When introduced ostensibly out of concern for victims, he argues, restrictive measures appear more legitimate.

Definitions of crime and criminals are developed and imposed on society by those in positions of power and these definitions reflect the types of behaviour which can be recognized as wrongful without threatening the existing social structure.²³⁸ According to

²³⁶ See S.A. Scheingold, The Politics of Law and Order (New York: Longman, 1975).

²³⁷ See L.Henderson, "The Wrongs of Victim's Rights", 37 Stanford Law Review 936. E. Viano, "Victims' Rights and the Constitution", 1987 Crime and Delinquency 33, 438; S.R. Smith & S. Freinkel, Adjusting the Balance : Federal Policy and Victim Services, (Westport: Greenwood, 1988); Elias, supra note 3.

²³⁸ Reiman, supra note 116 at 102.

Reiman, more punitive responses to crime are beneficial to the state because criminal justice policy is selective in punishing offenders and it is the predatory street criminals, largely disenfranchised offenders, who are most likely to be affected by more severe penalties.²³⁹ Conversely, white collar crime and corporate crime are all but ignored.²⁴⁰ Reiman argues that this serves the state's interest very well since it reinforces the public's belief that they should fear the underprivileged and diverts attention away from crimes of the upper-class: "The effect of this message is to funnel the discontent of [the public]...into hostility...toward the poor. It leads [them]...to ignore the ways in which they are injured and robbed by the acts of the affluent...and nudges them away from a progressive demand for equality and an equitable distribution of wealth and power".²⁴¹ However, there is still a need to maintain legitimacy. Increasing punishment under the guise of victims' rights helps to justify the expansion of social control over the underprivileged and marginalized members of society, without creating the impression that the state is acting on behalf of those who will benefit from a 'get tough' stance on crime.

Following the enactment of the Canadian Charter of Rights and Freedoms, the Canadian government claimed a desire to help victims in order to justify upholding criminal laws which some critics argued violated the accused's due process rights.²⁴²

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid. at 152.

²⁴² Roach, supra note 58 at 278.

Roach contends that this was a trend which continued throughout the 1980s and 1990s as victims' rights were used to legitimate punitive crime control.²⁴³ In this sense, the victims' advocacy movement may have been exploited to legitimate existing policies or to introduce new reforms which in truth have less to do with victims than the desire to perpetuate conservative crime and social policies.²⁴⁴

This is not to say that criminal justice officials and law and order advocates have conspired to manipulate victims' advocates, but rather that the opportunity may have presented itself as the movement developed and victims' advocacy became an easy and obvious means of generating support for coercive policies and enhanced social control.²⁴⁵ Elias adds that victims' advocates themselves are partly responsible for the development of criminal justice policy which empowers the state more than those on whose behalf the measures are introduced. This is supported by Scheingold, Olson, and Pershing's study of the victims' advocacy movement in Washington, which concluded that victims' advocates appear to be both 'players and pawns' in the policy-making process, to some extent shaping the punitive outcome but also being manipulated for other ends.²⁴⁶

Theoretical Framework: Critical Criminology

This research will be informed by critical criminology, a theoretical perspective which examines the association between social inequality and criminal activity. Critical

²⁴³ *Ibid.*

²⁴⁴ See Elias, *supra* note 3.

²⁴⁵ *Ibid.* at 62.

²⁴⁶ Scheingold, Olson & Pershing, *supra* note 192 at 751.

criminology emphasizes the cultural and structural sources of crime, and rejects short-term and individualistic approaches to crime control, such as increasing the severity of punishment imposed on the offender.²⁴⁷ According to critical criminology, an effective response to crime requires addressing the social forces which perpetuate social inequality, and punitive policies are clearly incapable of achieving this goal.

This perspective is also useful because it recognizes the role of the state in defining criminal activity and draws attention to the ways in which this works to the advantage of the affluent, while exploiting the powerless.²⁴⁸ If, as some critics suggest, victims' advocates have been manipulated for political gain, critical criminology would be able to account for how the state benefits from victims' advocacy.

In evaluating CAVEAT's impact on criminal justice policy from a critical criminological perspective, the value of CAVEAT's criminal law reform efforts will be determined by the extent to which they support punitive approaches, including increased use of incarceration, which emphasize individual accountability and ignore the importance of social forces in sustaining crime. Similarly, the government's response to CAVEAT's policy proposals will be evaluated by considering how well the successful proposals promote a response to crime which, according to the principles of critical criminology, is likely to be effective.

²⁴⁷ Dekeseredy & Schwartz, *supra* note 148 at 239.

²⁴⁸ G. Marshall, *The Concise Oxford Dictionary of Sociology* (Oxford: Oxford University Press, 1994) at 99.

Conclusion

Punishment (particularly incarceration) has not proven to be a very effective means of reducing crime. In fact, a largely punitive approach to crime control may perpetuate the conditions under which crime flourishes and impede attempts to develop a more promising strategy. If indeed victims' advocacy groups like CAVEAT have successfully promoted punitive crime control measures, they have, in stark contradiction to their purported objectives, potentially compromised public safety. Considering the apparent popularity of victims' groups, such a finding would provide reason to be wary of their influence. However, the possibility that the efforts of victims' advocates are interacting with the desire of policy-makers and conservative forces to perpetuate a punitive crime control strategy may make CAVEAT's impact on criminal justice policy less clear. The potential for the policy preferences of victims' advocates to become manipulated in the political process must be taken into account to obtain an accurate reading of CAVEAT's influence on criminal justice policy.

CHAPTER 4

EVALUATION OF CAVEAT'S INFLUENCE ON CRIMINAL JUSTICE POLICY

This chapter examines the nature and success of thirty-five of CAVEAT's legislative recommendations and all eight of its submissions to Parliamentary committees since 1995. Legislative changes endorsed through CAVEAT's press releases and legislative debates surrounding CAVEAT's proposals are also examined to help establish the relationship between victims' advocacy and criminal justice policy.

Method

The impact of CAVEAT on criminal justice policy is examined in two ways. While the policies which CAVEAT endorses provide a good sense of the group's position on crime control, the symbolic significance of crime victims is equally important.²⁴⁹ As a result, this research explores both the functional and ideological role of CAVEAT's law reform efforts.

Victims' advocacy groups may play a functional role by actively endorsing particular approaches to crime control, and to the extent that they are successful in having their policy recommendations enacted, they influence the direction of crime policy. Victims' groups may also serve an ideological role by fostering attitudes supportive of punitive crime control measures and providing a rationale for enhanced state control. In this way, victims' advocacy may serve political purposes as much as it advances the

²⁴⁹ See Elias, *supra* note 3.

interests of crime victims.²⁵⁰

In 1995, CAVEAT held a National SafetyNet conference to develop recommendations for legislative change. Following the conference, a report on their recommendations was released, and the content of this report will be examined. Submissions made by CAVEAT to the federal government and bills endorsed by the group also provide an indication of CAVEAT's law reform efforts. Even if they did not lead to direct action, CAVEAT's submissions and policy recommendations convey a message about the support of victims' advocates for certain approaches to crime control and consequently may indirectly encourage punitive crime policy.

CAVEAT's press releases are a less direct indication of CAVEAT's law reform efforts. However, the nature of the messages conveyed in their attempt to influence public perception about crime and offenders suggests both CAVEAT's position and the extent to which they promote particular approaches to crime control.

A further indication of the ideological role of victims' advocacy is provided by examining legislative debates for the way in which the concerns of victims are presented in the political process. References to crime victims or the policy preferences of CAVEAT suggest the extent to which the wishes of victims and victims' advocates are used as justification for legislative changes. CAVEAT's policy recommendations are also examined to determine whether they are distorted in the legislative process. Examining the consistency between the recommendations made by victims' advocates and political discussion about victims' interests illuminates the nature of CAVEAT's

²⁵⁰ Ibid.

impact on criminal justice policy and the possibility of ulterior functions of victims' advocacy.

Exploring the relationship between crime control measures endorsed by CAVEAT and the approaches with which they become associated in the political process also involves some statutory analysis to determine the consistency between the policy recommendations of victims' advocates and legislation subsequently enacted. Disparities between CAVEAT's policy proposals and subsequent legislative action may support the observation that victims' advocates are manipulated by state representatives to advance their own interests.²⁵¹

All the submissions made by CAVEAT to the Federal government since 1995 were examined, but some of the recommendations developed during the SafetyNet conference were eliminated from the analysis. The final report contains sixty-seven recommendations. Eight recommendations were eliminated because they were directed toward provincial governments, and this research is concerned with CAVEAT's influence at the federal level. Six recommendations were eliminated because they did not require legislative reform, but rather some form of community action. For example, CAVEAT recommends that "...each community in Canada be responsible for promoting awareness of resources within their community, and means of accessing information".²⁵² While this may be a commendable goal, CAVEAT's influence in this area is not within the scope of this research. Most of the recommendations which were excluded were far too general to

²⁵¹ Ibid.

²⁵² SafetyNet Final Report (CAVEAT, 1995) at 64.

adequately assess their outcome. For example, the SafetyNet report recommends that “interpreters of community standards within the Canadian Criminal Justice System re-evaluate and reflect on the need to protect vulnerable groups from victimization, exploitation and violence” and “Correctional Agencies and Parole Boards ensure that individual inmate program evaluations, psychiatric assessments, case management reports, and other critical information be of a consistently high quality”.²⁵³ The remaining thirty-five recommendations were used in this research.

It is important to note the difficulty of isolating CAVEAT’s influence on the outcome of the SafetyNet conference, as other victims’ groups, justice reform advocates, and crime victims themselves participated in the development of the proposals. However, while they are not solely responsible for the content of the SafetyNet report, CAVEAT did endorse all of the report’s recommendations and committed themselves to seeing that the concerns expressed within it were addressed. As a result, it is reasonable to regard these recommendations as representative of CAVEAT’s law reform efforts.

ANALYSIS OF CAVEAT’S IMPACT ON CRIMINAL JUSTICE

For purposes of analysis, CAVEAT’s law reform efforts are separated into five categories - victims of crime, crime and violence prevention, detection/information sharing, criminal justice procedure, and punishment/incapacitation - according to what appears to be the dominant purpose of the proposals.

Within each category, a list of the legislative recommendations and submissions

²⁵³ Ibid. at 7.

made by CAVEAT to Parliamentary committees is provided. The results of CAVEAT's recommendations and submissions are broken down into direct and indirect impact. Any legislative action following CAVEAT's proposals is included in a discussion of CAVEAT's direct impact on criminal justice. CAVEAT's indirect impact - the ideological implications of CAVEAT's proposals and the use of crime victims in criminal justice rhetoric - is then evaluated. Each category concludes with a summary of CAVEAT's direct and indirect influence in the given area.

Much of the following discussion centres around CAVEAT's success in the political arena. Consequently, the analysis draws connections between CAVEAT's proposals and bills which appear to respond to CAVEAT's concerns. In evaluating the overall impact of CAVEAT's law reform efforts, one must recognize that there is of course an important distinction between government bills and private members' bills. While the former represent government policy and, subject to amendment, are likely to be enacted, the latter are often used as a vehicle for promoting a relatively narrow agenda and their impact is therefore largely symbolic. Regardless of its origin, once proposed legislation is raised for debate it contributes to the rhetoric surrounding victims and criminal justice and as a result provides an indication of CAVEAT's impact. For this reason, both government bills and private members' bills are taken into account in this analysis.

Victims of Crime

Recommendations

1. Victims should have input when a court reviews a youth's disposition
2. Victims and their families should be able to participate in National Parole Board Hearings and they should be given the right of appeal
3. Informing victims of the offender's age, location of incarceration, time of temporary release, dates of statutory release hearings, and destination upon release should be mandatory
4. Informing victims of the offender's application for conditional release and the result of this application should be mandatory
5. Victims should be involved in bail decisions
6. The discretion of the judge should be removed so that victims have the right to present Victim Impact Statements
7. Victims should have the option of presenting oral as well as written statements

Submissions to Parliamentary Committees

1. Bill C-79, Victims of Crime (enacted, 1999)
 - a) support person should be available for witnesses under 18, rather than 14
 - b) protection for witnesses under 18 from cross-examination by the accused should apply to all witnesses, or those older than 18 should at least be allowed to apply not to have the accused cross-examine them
 - c) victim fine surcharges should be applied to the Young Offenders Act
2. Victims' Bill of Rights
 - a) CAVEAT urge the government to adopt a Federal Victims' Bill of Rights

Results:

Direct impact

Before assessing CAVEAT's influence on criminal justice policy affecting crime victims, it is important to note that since 1995, the most significant federal legislation in this area was enacted by Bill C-79 (Victims of Crime).²⁵⁴ The initiative for the bill began

²⁵⁴ Bill C-79, An Act to amend the Criminal Code (victims of crime) and another Act in consequence, 1st Sess., 36th Parl., 1999.

with a motion introduced by the Reform Party in 1996 to create a Victims' Bill of Rights. The issue was referred to the Justice and Legal Affairs Committee, which consulted victims' groups before releasing its report, "Victims: A Voice, Not a Veto", outlining the changes needed to improve the treatment of crime victims in the justice system. In April, 1999, Justice Minister Anne McLellan, who had previously declared victims' rights one of her three top priorities, announced that the government had "moved beyond the rhetoric of a victims' bill of rights and engaged in a dialogue with victims and their advocates about concrete measures to support concerns of victims".²⁵⁵ Shortly thereafter, Bill C-79 was passed, and although CAVEAT was not entirely satisfied with the result, it recognized the amendments as an improvement.

Despite the enactment of a so-called victims' rights bill, several of CAVEAT's recommendations related to victims' rights have not led to legislative change. Crime victims have not been given the right to participate in judicial reviews of young offenders' dispositions, nor have they been given the rights to participate in and appeal the outcome of National Parole Board Hearings. Sharing with the victim information such as the offender's age, location of incarceration, time of temporary release, dates of statutory release hearings, destination upon release and conditional release has not been made mandatory, as CAVEAT suggested: it is still subject to the discretion of the Commissioner of the Correctional Service of Canada and the Chairperson of the National Parole Board. However, after meeting with CAVEAT and several other victims' advocacy groups in April 1997, the Justice and Legal Affairs Committee did recommend

²⁵⁵ House of Commons Debates (20 April 1999) at 1015.

such amendments to the Corrections and Conditional Release Act and the government faced criticism from the Reform Party for failing to address these recommendations.

On the other hand, Bill C-79 did address some of CAVEAT's concerns.

CAVEAT's recommendation that victims be given input in the decision to grant bail to the accused has not been enacted, but Bill C-79 did compel police officers and judges to consider the victim's safety in all bail decisions. Bill C-79 addressed other SafetyNet recommendations more directly. It removed the discretion of judges in allowing victim impact statements and provided crime victims an opportunity to present the statement orally if they wished to do so.

CAVEAT endorsed this bill in its entirety, but during the Justice and Human Rights Committee's examination of the bill, it made a submission to have several rights for victims added to the amendments. CAVEAT suggested that the age limitation for witnesses allowed a support person and protection from cross-examination by the accused should be raised. This amendment would have further increased protections provided to crime victims during the criminal justice process. In addition, CAVEAT recommended including victim fine surcharges in the Young Offender Act. These recommendations, however, were not reflected in the final draft of the bill.

In their presentation to the Committee, CAVEAT emphasized the need for legislation to validate the victim's role in the criminal justice system and to improve public confidence in the system by increasing victim participation. All of the victims' groups consulted during the Committee's examination of the bill endorsed this position and when the report was released, it essentially received all-party support.

It is difficult to isolate CAVEAT's influence on Bill C-79 because many victims' advocacy groups were involved in its development. It is clear, however, that CAVEAT was an active participant in the legislative process. While not all of CAVEAT's recommendations respecting victims' rights were included in the final draft of Bill C-79, by recognizing that "...views and concerns [of victims] should be considered, and that information should be provided to victims and witnesses regarding specific decisions that have an impact on them..."²⁵⁶ the bill did, at least in principle, encompass CAVEAT's demand for an enhanced role in the criminal justice system.

Indirect impact

As one would expect, CAVEAT's efforts to improve victims' rights have concentrated on the needs of crime victims, so there is little discussion of the accused. In their submissions and recommendations to the federal government, CAVEAT frequently cited Canada's history of neglecting crime victims to demonstrate the need for greater victim involvement in the justice system, but did not place the existing rights of victims in opposition to those of the accused. During legislative debates, the perceived imbalance between the rights of the victim and the rights of the accused was occasionally raised by politicians as justification for reform. In discussing Bill C-79, Chuck Cadman of the Reform Party, for example, argued that "...for years, the government has fallen all over itself to safeguard the rights of criminals. Victims in many respects have been completely forgotten. There must be a proper balance between the rights of the criminal and the

²⁵⁶ Preamble, Bill C-79, An Act to amend the Criminal Code (victims of crime) and another Act in consequence, 1st Sess., 36th Parl., 1999.

rights of the victim".²⁵⁷ To some extent, then, the rights of victims were pitted against those of offenders in the legislative process, but the issue was not constructed by CAVEAT in this way.

The amendments finally enacted did not distort CAVEAT's original recommendations, but this is not surprising since the nature of CAVEAT proposals did not leave them open to being co-opted for other ends. Because these recommendations only indirectly affected the accused, exaggerating the demands of victims' advocates to gain greater control over offenders was not really feasible. Even if this were not the case, given the popularity of victims' rights, supporting CAVEAT's recommendations as they were originally presented likely offered its own political advantages.

Considering that CAVEAT is a group designed to represent victims, it is interesting that so few of CAVEAT's public awareness announcements promote the needs of victims within the criminal justice system. Since 1995, CAVEAT has issued twenty-two official press releases, only two of which related to the rights and needs of crime victims, which is consistent with CAVEAT's more direct legislative reform efforts. Only two of the eight submissions and six of the concrete recommendations made by CAVEAT to the federal government since 1995 involve victims rights. Of course, CAVEAT may assist crime victims in other ways, but victims' rights do not appear to be a priority for federal legislative reform.

²⁵⁷ House of Commons Debates (20 April 1999) at 1025.

Summary

Given that it does not make up a significant part of their law reform efforts, CAVEAT has been at least moderately successful in getting response to concrete recommendations to improve the treatment of victims. Its influence has been more direct than ideological, and is most apparent in the development of Bill C-79. It is not clear that the legislation enacted was a direct result of CAVEAT's law reform efforts, as there were certainly other factors involved, but CAVEAT did participate in the reform process and the direction of victim policy in the last six years has reflected CAVEAT's desire for a greater role for victims in the criminal justice system.

Crime and Violence Prevention

Recommendations

1. Every computer sold in Canada should be legally bound to include software enabling the restriction of offensive material over the internet.
2. Toys and entertainment items should be rated for their level of violence in a method similar to movie ratings.

Submissions to Parliamentary Committees

1. Bill C-68, Gun Control (enacted, 1995)
 - a) 5 year time frame allowed for compliance is overextended
 - b) Penalties for using a firearm in the commission of an offence should be further increased

Results:

Direct impact

Although some of CAVEAT's proposals did recognize the importance of addressing the social conditions which lead to crime, there were few concrete recommendations for crime prevention. CAVEAT maintained that "society must recognize the critical importance of prevention as a means of ensuring that children and youth are not entering the cycle of violence, victimization and exploitation themselves" and they recommended implementing "large-scale prevention programs grounded in the realities of how violence occurs". These recommendations reinforce the notion that effective crime control requires prevention, not just punishment, but legislative action is unlikely to be achieved without specific proposals for change.

The proposals which did offer concrete changes have not resulted in any legislative reform. No apparent attempt was made to respond to CAVEAT's suggestion that computers be required to be sold with software to restrict access to offensive material on the internet. CAVEAT's desire for a violence rating system for toys and entertainment items was not specifically addressed, but in March 1998, Pierre Brien introduced Bill C-374 to restrict the sale of toys which incite children to violence.²⁵⁸ Like CAVEAT, Mr. Brien argued that exposure to violence promoted antisocial values in children and encouraged similar behaviour. The bill was dropped from the Order Paper May 3, 1999 and the issue was never re-introduced.

²⁵⁸ Bill C-374, An Act to amend the Custom's Tariff (prohibited toys), 1st Sess., 36th Parl., 1998.

Without question, CAVEAT's most significant influence on crime prevention legislation was in regard to gun control. In their 1994 recommendations, CAVEAT urged the government to adopt improved controls on firearms and more severe penalties for those who violate these restrictions. Bill C-68,²⁵⁹ introduced the next year, addressed these concerns. In May 1995 CAVEAT appeared before the Justice and Legal Affairs Committee which was examining the bill. They expressed their general support for the bill, but argued that the five year time frame allowed for compliance with the new regulations was too generous. In addition, CAVEAT proposed further increasing mandatory penalties for using a firearm during the commission of an offence.

Further amendments were not made to the bill, but the influence of victims' groups on the enactment of the bill was acknowledged in legislative debates. Justice Minister and Attorney General of Canada Allan Rock noted that Bill C-68 was a response to the demands of victims' advocates and CAVEAT in particular:

Victims groups, including CAVEAT, urged us to have universal registration. Priscilla de Villiers, the president of CAVEAT, lost a daughter in a dreadful tragedy. She was murdered by a man in respect of whom the police had investigations concerning firearms. In the Jonathan Yeo case, there was an inquest into Nina de Villiers' death. The jury at that inquest recommended universal registration of all firearms. Priscilla de Villiers has spoken out strongly in favour of that measure, explaining her conviction that it will help the police to deal with crime.²⁶⁰

²⁵⁹ Bill C-68, An Act respecting firearms and other weapons, 1st Sess., 35th Parl., 1995.

²⁶⁰ House of Commons Debates, (16 February 1995) at 1210.

Indirect impact

One of the on-going debates surrounding gun-control legislation concerned which political party was best supporting the wishes of crime victims. Several times, in response to the Reform Party's criticism that the Liberal government was neglecting crime victims, Allan Rock pointed out that the Liberal Party had addressed the demands of victims for gun control legislation. For example, when criticized by Garry Breitkreuz for not doing as much for victims as the Reform Party, Allan Rock responded:

The government has on many justice issues stood four square with victims of crime. Victims of crime were in this very building the day that Bill C-68 came up for a vote in the House of Commons, the gun control bill. My honourable colleague and his fellow members of the Reform Party voted against the gun control bill. Victims of crime were one floor away in tears as they recalled their tragedies. They implored the members of the Reform Party to vote for gun control, and the members of the Reform Party voted against it. This government stood with victims.²⁶¹

Similarly, Gordon Kirby, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, defended the Liberal government against accusations that they were not listening to the demands of victims: "the government, the Minister and all members of the House are very interested in doing what we can to assist the lot of victims of crime. We are introducing various forms of legislation. I wonder when so many victims groups across the country support the gun control legislation why did the Reform Party vote against it?."²⁶²

It may be that CAVEAT were very persuasive in their demands for stronger gun

²⁶¹ House of Commons Debates, (17 March 1997) at 9087.

²⁶² House of Commons Debates, (29 April 1996) at 2044.

control and were in fact influential in bringing about new legislation, but emphasizing the connection between the demands of victims' groups and gun control also provided political benefits. As the Reform Party suggested, Bill C-68 was a convenient opportunity to appear to be acting on behalf of victims and their advocates.²⁶³ Politicians on all sides were clearly eager to adopt the role of the victim's champion and avoid appearing unresponsive to their proposals.

For the most part, Bill C-68 did meet CAVEAT's demands, so it would be unfair to suggest that the government was unjustly taking credit for listening to victims' advocates. In a press release, CAVEAT, at the Justice Minister's request, acknowledged that "significant steps have been taken to address some of [our] concerns. Although much still needs to be done, this government has shown a willingness to listen and to act".²⁶⁴ CAVEAT cited gun control as one of the areas in which the government had been particularly responsive.

Summary

As there have been few concrete recommendations for legislative change at the federal level in the area of crime prevention, the analysis is limited almost exclusively to CAVEAT's influence on the development of Bill C-68. The bill was closely associated with the wishes of victims and their advocates throughout the legislative process. CAVEAT were not the only advocacy group involved in pressuring the government to

²⁶³ House, *supra*, note 261.

²⁶⁴ CAVEAT statement, "RE: Letter read by Allan Rock in the House of Commons", (11 April 1997).

adopt stronger gun control legislation, but the Justice Minister's specific reference to CAVEAT's recommendations and CAVEAT's satisfaction with the outcome of Bill C-68 suggests that they were successful in having their demands heard.

Detection/Information Sharing

Recommendations

1. The community should be notified about the release of an offender where a threat to public safety exists
2. Police officers should be given the power to arrest without a warrant offenders in violation of parole
3. Criminal records of convicted sex offenders should not be removed from the Canadian Police Information Centre with a granting of a pardon
4. All name changes of convicted sex offenders should be listed in the Canadian Police Information Centre so as to maintain a current record
5. The Identification of Criminals Act should be amended to provide for the obtaining and seizing of DNA samples from people charged with the offences as set out in the Act
6. A National DNA bank should be established which is compulsory for violent offenders upon arrest

Submissions to Parliamentary Committees

1. Bill C-3, DNA data bank (enacted, 1998)
 - a) retroactivity of the bill should be extended to include more offenders
 - b) should not allow exception for offenders who can demonstrate that providing a DNA sample would impact on their privacy and security in a way that would outweigh the public interest of obtaining the sample

Results:

Direct impact

The area in which CAVEAT has received the least response from government is community notification. The issue has been given little attention in Parliament since 1995. The only evident attempt to address CAVEAT's concern came from Liberal Lynn

Myers who introduced Bill C-425²⁶⁵ in June 1998. The bill provided a mechanism for disclosing the names of sexual offenders upon release from prison, but did not lead to any legislative change as it was subsequently withdrawn.

Private member's Bill C-211,²⁶⁶ introduced by Randy White of the Reform Party in September 1997, responded to one of CAVEAT's recommendations by proposing that the Criminal Code be amended to allow police officers to arrest without a warrant and detain anyone reasonably believed to be in breach of a bail or probation order, a condition of statutory release, parole or unescorted temporary absence. The majority government demonstrated little support for the bill, however, and it did not pass second reading.

CAVEAT's desire for improved access to information about offenders was partially addressed by the enactment of Bill C-69²⁶⁷ in May 1999. The bill amended the Criminal Records Act to provide police officers with access to information about pardoned sex offenders in the RCMP database which can then be used for screening purposes. Bill C-284²⁶⁸ also proposed that such records be made available, but the Justice and Legal Affairs committee recommended that the bill not be proceeded with as its subject matter was captured by Bill C-69. In addition to CAVEAT's support for retaining

²⁶⁵ Bill C-425, An Act to amend the Criminal Code (public disclosure of the names of persons who have served a sentence of imprisonment for an offence of a sexual nature), 1st Sess., 36th Parl., 1998.

²⁶⁶ Bill C-211, An Act to amend the Criminal Code (arrest of those in breach of condition of parole or statutory release or temporary release), 1st Sess., 36th Parl., 1997.

²⁶⁷ Bill C-69, An Act to amend the Criminal Records Act and to amend another Act in consequence, 1st Sess., 36th Parl., 1999.

²⁶⁸ Bill C-284, An Act to amend the Criminal Records Act and the Canadian Human Rights Act (offences against children) 1st Sess., 36th Parl. 1999.

the records of pardoned sex offenders, the government received a large petition from concerned citizens urging that such information be made available. In debating the proposed legislation, Conservative MP Peter McKay noted the strong support from crime victims for the bill²⁶⁹ and Richard Marceau of the Bloc Quebecois indicated the influence of victims' advocates in initiating the bill: "The purpose of this bill is to respond to requests by associations promoting the rights of victims of criminal acts".²⁷⁰ The bill did not, however, respond to CAVEAT's proposal that name changes of sex offenders be listed in the Canadian Police Information Centre.

CAVEAT's recommendation that DNA samples of certain offenders be collected to facilitate future crime solving was addressed by Bill C-3²⁷¹ which provided for the development of the National DNA data bank. The bill applied retroactively to offenders meeting specified criteria and it provided for the possibility of exemption for those who could demonstrate that the collection of a DNA sample would impact on their privacy and security in a way that would outweigh the public interest of obtaining the sample. While the bill was before the Standing Committee on Legal and Constitutional Affairs, CAVEAT presented a submission recommending that the retroactivity of the bill not be limited to offenders who have committed two or more sexual offences, dangerous offenders and offenders who have killed more than one person at different times and they objected to allowing any exemptions from DNA collection.

²⁶⁹ House of Commons Debates (14 May 1999) at 1205.

²⁷⁰ Ibid at 1225.

²⁷¹ Bill C-3, An Act respecting DNA identification and to make consequential amendments to the Criminal Code and other acts, 1st Sess., 36th Parl., 1998.

Despite CAVEAT's efforts, these amendments were not included in the final draft of the bill.

Indirect impact

One of the issues raised by CAVEAT's recommendations for improving crime detection is the potential erosion of offenders' rights. As criminal justice policy becomes increasingly victim oriented, there is a risk that it will present more of a threat to the rights of those accused and convicted of crime. Accordingly, most of the concerns raised in response to CAVEAT's proposals were related to offenders' privacy rights. These recommendations are clearly more contentious than those which provide a direct benefit to crime victims. Consequently, they are more difficult to justify. In its submission to expand the application of DNA legislation, CAVEAT recognized the importance of protecting the privacy rights of offenders, but implied that this concern was outweighed by the value of protecting potential victims: "I noted that many of your questions were with regard to the privacy rights of the accused and convicted people. Those are important and valid concerns. I too have concerns about privacy but my concerns are about the privacy of future victims who are not covered by this legislation".²⁷² While CAVEAT did not explicitly dismiss the impact of its proposals on the privacy rights of offenders, the nature of its proposals indicates support for more intrusive methods of crime detection.

²⁷² Steve Sullivan, speaking on behalf of CAVEAT and Victims of Violence, Evidence Presented to the Standing Committee on Legal and Constitutional Affairs (2 December 1998).

CAVEAT's press releases demonstrate additional support for expanding measures of social control. On March 13, 1997 it commended Revenue Canada Minister Jane Stewart for the enactment of new legislation designed to increase the powers of Customs Inspectors to detain individuals at the border. This development was consistent with a CAVEAT recommendation in 1994 that border protection officers be given full peace officer status. Surprisingly, CAVEAT's public announcements provide no other discussion of issues related to crime detection.

During legislative debates on some of CAVEAT's recommendations, the perception that a preoccupation with offenders' rights is harmful to victims was frequently relied upon to justify questionable legislative proposals. Speaking in support of CAVEAT's proposal to make DNA legislation more inclusive, Paul Forseth of the Reform Party argued "...unfortunately it appears that Bill C-3 does not go the distance. The Liberals are afraid of going all the way. They are more concerned with the privacy rights of the accused and less concerned with innocent victims".²⁷³ Reform MP Randy White, who introduced Bill C-211 addressing CAVEAT's proposal to give police the power to arrest without a warrant anyone in violation of conditions of release, commented "I feel sad that a country like this which once had a great criminal justice system now has a legal industry. I feel sad for the victims of crime who watch every day as prisoners get overtime pay, the right to vote, the right to sue, free medical, dental and television...all this indicates we have a justice system in decay".²⁷⁴ Similarly, Reform MP Chuck

²⁷³ House of Commons Debates (11 March 1997) at 1245.

²⁷⁴ House of Commons Debates (30 March 1998) at 1410.

Cadman endorsed CAVEAT's proposal and criticized the emphasis in criminal justice on offenders' rights:

I came here to advocate the protection and interests of victims of crime. I become greatly concerned when I can think of many examples whereby the present legislation is so limited in scope as to inhibit the ability of police to provide that protection. It complicates procedures to the extent where additional crime is a very real possibility... Are we to put our children at risk because of technicalities and procedure?.²⁷⁵

If this justification did have an impact on the perceived legitimacy of the bill, it apparently was not strong enough since the bill was never enacted. Nevertheless, the tendency of politicians to invoke victims' rights as justification for coercive policies demonstrates the symbolic function of victims' advocacy. Even without CAVEAT's endorsement, these initiatives may still have been presented as beneficial to victims in general, but CAVEAT's recommendations give added validity to politicians' claims about what victims want. The contention that criminal justice policy focuses excessively on the rights of offenders at the expense of victims was more evident during legislative debates than it was in CAVEAT's own rationale for its proposals, but the proposals themselves were accurately represented in the legislative process. To some extent, then, the interests of crime victims were used as a political tool by those who favour enhanced state control over offenders, but politicians did not attribute to victims and their advocates any proposals that CAVEAT had not specifically endorsed.

Summary

As many have observed, striking the appropriate balance between the rights of

²⁷⁵ House of Commons Debates, (3 February 1998) at 1730.

offenders and the rights of victims is a constant challenge. The enactment of the DNA data bank and the flagging system for pardoned sex offenders proposed by CAVEAT indicates some willingness to alter the current balance at the expense of offenders, but several of its recommendations which would have encroached even further on offenders' rights were not successful. The perception that offenders have too many rights was conveyed in legislative discussions regarding CAVEAT's proposals. Although this argument was more explicitly developed in the political process, CAVEAT provided the initial proposals and as a result CAVEAT's law reform efforts helped strengthen the perception that the legal protections given to offenders compromise the rights of victims and public safety.

Criminal Justice Procedure

Recommendations

1. Protocol for taking statements from young people, as set out in s.56 of the Criminal Code, should be the same as for adults, except for the added protection of providing youths with the option to request the presence of an adult during the taking of such a statement
2. In those cases where a youth is transferred to adult court, the provisions of s.56 should not apply
3. Preliminary hearings should be abolished

Results

CAVEAT have not been successful in their attempts to reform criminal justice procedure. In their SafetyNet recommendations, CAVEAT argued the existing procedure for taking statements from young people accused of crime was onerous and unnecessarily complicated. With the exception of allowing youths to have an adult present when giving

a statement, CAVEAT maintained that the special protections available through the Young Offenders Act should be replaced by those in the adult system. It further recommended that if a youth is transferred to adult court, these special provisions should not apply. Neither of these recommendations has led to any legislative action.

CAVEAT also proposed that the preliminary hearing be abolished. It reasoned that the preliminary hearing served little purpose and could be emotionally damaging to the victim and their families. Although Bill C-36²⁷⁶ attempted to limit the use of preliminary hearings, it was not enacted and the preliminary hearing was not abolished.

It appears that reforming criminal justice procedure has not been a high priority for CAVEAT, as the group has made relatively few recommendations in this area and has not attempted to use press releases to promote its proposals for such reform. Certainly, it has been least influential in this area.

Punishment/Incapacitation

Recommendations

1. Bail should not be available in first degree murder cases
2. Schedule 1 offenders should serve their full sentence before release
3. The maximum age to be tried in Youth Court should be lowered from 17 to 15
4. There should be a mechanism to return youth to their original, higher level of custody
5. Section 7.2 of the Young Offenders Act (failure to supervise) should be made a hybrid offence
6. Concurrent sentencing should be abolished
7. The narrow window of opportunity to designate an offender "High Risk" should be expanded
9. The Criminal Code should be amended to require an indefinite sentence be imposed

²⁷⁶ Bill C-36, An Act to amend the Criminal Code (criminal harassment, home invasions, applications for ministerial review--miscarriages of justice and criminal procedure) and to amend other acts, 2nd Sess., 36th Parl., 2000.

- upon the court making a Dangerous Offender Finding
10. Dangerous offenders should not be allowed in front of a parole board until they have served 10 years in prison
 11. The first parole eligibility following the imposition of an indefinite sentence should be increased to seven years with further review of that status every five years thereafter
 12. Legislation should be enacted to provide for long term supervision of High Risk Offenders past warrant expiry date
 13. The Criminal Code should be amended to create a reviewable, discretionary Long Term Offender Status which allows for the imposition of a supervisory period, up to life, following completion of a determinate sentence for any person convicted of a listed sexual or violent offence
 14. The violation of the above order should be made an indictable offence
 15. The Criminal Code should be amended so as to allow the imposition of a Post-Sentence Intervention Order featuring the following tiered restrictions:
 - a) Indeterminate incarceration
 - b) Secure Residential Placement Order
 - c) Intensive Community Supervision Order
 - d) Community supervision
 - e) Section 810.1 Order
 16. Breach of such an order should be an indictable offence
 17. Legislation should be passed to permit the incarceration of sexual predators and to further permit monitoring of other predators beyond warrant expiry

Submissions to Parliamentary Committees

1. Bill C-55, High-Risk Offenders (enacted, 1997)
 - a) the process whereby an offender is classified as "High-Risk" should be made easier
 - b) legislation to deal with serious offenders who escape both 'dangerous offender' and 'long-term offender' classifications is needed
2. Bill S-17, Criminal Harassment (enacted, 1998)
 - a) sections 264 (3), subsections 372 (2) and (3) and subsection 423 (1) (criminal harassment) should be amended to provide a mandatory minimum sentence of four months incarceration when the offence is committed in violation of a no contact order
 - b) the same subsections should be amended to provide a mandatory minimum two year prison sentence for subsequent offences
3. Bill C-37, Young Offenders Act (enacted, 1995)
 - a) the process for transferring youths to adult court should be made easier and faster
 - b) the transfer process for 16 and 17 year olds to adult court should have been made automatic, rather than left to the discretion of each province

- c) there should be a mechanism for the Crown to apply to have cases of children under 12 considered under the Young Offenders Act
 - d) the words “not to exceed” should be removed from amendments to increase youth sentences for first degree murder from a maximum of 5 years to a maximum of 10 years and for second degree murder to a maximum of 7 years
4. Bill C-45, Judicial Review of Parole Ineligibility (enacted, 1996)
- a) Section 745.6 should be abolished
 - b) If not abolished, the category of murderers excluded from applying for a judicial review should be expanded

Results:

Direct impact

Only a few of CAVEAT's recommendations have not been addressed at all by the federal government. Despite CAVEAT's proposal, those accused of first degree murder have not been denied the right to be released on bail. The recommendations that Schedule I offenders serve their full sentence in prison before release and that the Young Offenders Act apply only to youths up to 15 did not lead to any legislative reform, though both proposals received some political support, particularly from the Reform Party. The Young Offenders Act was reformed following the release of CAVEAT's SafetyNet report, but these changes did not include CAVEAT's desire for a mechanism to return young offenders to their original, higher level of custody if necessary following a review of their disposition which places them in a lower level of custody.

Some attempt has been made to address CAVEAT's proposal that section 7.2 of the Young Offenders Act, which provides a mechanism for parents to be held liable for abdicating responsibilities of supervision under a bail order, should be made a hybrid

offence. Private member's bill C-235²⁷⁷ which proposes such an amendment has recently been introduced in the House of Commons.

Private Member's Bill C-274,²⁷⁸ introduced in April 1996 by Albina Guarnieri of the Liberal Party, partially responded to CAVEAT's recommendation that concurrent sentencing be abolished. The bill aimed to "reduce our inhumanity to the families of victims" by requiring serial rapists and serial murderers to serve sentences for multiple crimes consecutively. In June 1996 the bill was dropped from the Order Paper, but was re-submitted several weeks later as Bill C-321.²⁷⁹ When the bill reached second reading, Albina Guarnieri pointed out that it was something "every major victims group in the country [was] demanding".²⁸⁰

CAVEAT's success in eliminating concurrent sentencing has been limited. When the bill was finally passed in October 1999, concurrent sentencing was not completely abolished; the amendments applied only to sexual assault and first or second degree murder and the sentences could still be served concurrently if the judge felt it was appropriate.

Many of CAVEAT's recommendations were addressed by the enactment of Bill C-

²⁷⁷ Bill C-235, An Act to amend the Young Offenders Act, 1st Sess., 37th Parl., 2001.

²⁷⁸ Bill C-274, An Act to amend the Criminal Code and the Corrections and Conditional Release Act (cumulative sentences), 2nd Sess., 35th Parl., 1996.

²⁷⁹ Bill C-321, An Act to amend the Criminal Code and the Corrections and Conditional Release Act (cumulative sentences), 2nd Sess., 35th Parl., 1996.

²⁸⁰ House of Commons Debates, (3 December 1996) at 1750.

55²⁸¹ in 1997. The bill, as CAVEAT proposed, expanded the time limit for making a dangerous offender application to six months after conviction for a serious personal injury offence. Consistent with CAVEAT recommendations, Bill C-55 also required that an indefinite sentence be imposed on an offender found to be a dangerous offender. The amendments to the high-risk offender provisions increased the period of parole ineligibility for dangerous offenders from three to seven years, but not to ten years as CAVEAT suggested. However, CAVEAT also recommended a seven year parole ineligibility period, with review every five years thereafter, for offenders given an indefinite sentence. Since dangerous offenders are given indefinite sentences, this recommendation could also apply to them. Bill C-55 came close to enacting this recommendation, but the review period imposed on dangerous offenders following the initial seven year review of their status is two years, not five, as CAVEAT suggested.

Long-term supervision of certain sex offenders beyond the sentence imposed for the offence was provided through the new long term offender classification enacted by Bill C-55. Again, the amendments did not go as far as CAVEAT suggested and allow for life-time supervision, but they did create a mechanism for ordering up to ten years' supervision. As CAVEAT recommended, violating a long-term supervision order was made an indictable offence punishable by up to ten years imprisonment.

With the exception of the judicial restraint order, CAVEAT's recommendations for the development of post-sentence intervention orders were not enacted. Bill C-55

²⁸¹ Bill C-55, An Act to amend the Criminal Code (high-risk offenders) the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, 2nd Sess., 35th Parl., 1997.

established a new form of restraining order, modelled after section 810.1 of the Criminal Code, to place controls on offenders who clearly pose a threat to the community.

CAVEAT proposed that a breach of such an order should be an indictable offence, and Bill C-55 allowed for the offence to be punished either as an indictable or a summary conviction offence.

Apart from the dangerous offender and long-term offender legislation, no special amendments were made to address CAVEAT's recommendations for incarcerating sexual predators and monitoring other predators following the expiration of their sentence.

While Bill C-55 was being examined by the Justice and Legal Affairs Committee, CAVEAT made a submission to have further amendments added to the bill. Although it supported the enactment of the bill, CAVEAT argued that the process for classifying offenders as high-risk was complicated by the proposed legislation and should be changed to facilitate such a designation. It also expressed concern that there were still serious offenders who were not targeted by Bill C-55. However, CAVEAT's objections were not reflected in the final draft of the legislation.

A submission was also made by CAVEAT to the Legal and Constitutional Affairs Committee in regard to Bill S-17,²⁸² which proposed amendments to legislation regulating criminal harassment. According to CAVEAT, the most significant change proposed by Bill S-17 was that it increased maximum penalties on summary convictions from six months imprisonment or a \$2,000 fine, or both, to 18 months imprisonment with no fine

²⁸² Bill S-17, An Act to amend the Criminal Code respecting criminal harassment and other related matters, 1st Sess., 36th Parl., 1998.

option. If prosecuted as an indictable offence, the maximum penalty was increased from five to ten years imprisonment. CAVEAT applauded these changes but recommended creating a mandatory minimum sentence of four months incarceration when offences constituting criminal harassment are committed in violation of a no contact order, and a mandatory minimum two years imprisonment for subsequent offences. Bill S-17 was enacted but the amendments did not include CAVEAT's recommendations.

CAVEAT's submission regarding Bill C-37²⁸³ to amend the Young Offenders Act recommended that the process for transferring youths to adult court be made easier and faster, and criticized the bill for allowing each province to decide whether or not to transfer 16 and 17 year olds to adult court. It recognized that the proposed legislation aimed to address growing public pressure to 'get tough' on youth crime and argued that the amendments fell short of this goal: "That the transfer [of 16 and 17 year olds to adult court] is not automatic is hardly likely to assuage the public's concern about the perceived leniency of the Young Offenders Act...nothing has changed, despite the impression that there would be a major toughening up of transfer provisions".²⁸⁴ CAVEAT also recommended the inclusion of a mechanism for the Crown to apply to have cases of children under 12 considered under the Young Offenders Act and urged the government to remove the maximum sentences for first and second degree murder to allow for more severe penalties. Noting that "the current trend in sentencing is to impose the minimum

²⁸³ Bill C-37, An Act to amend the Young Offenders Act and the Criminal Code, 1st Sess., 35th Parl., 1995.

²⁸⁴ Priscilla de Villiers, Evidence presented to the Standing Committee on Justice and Legal Affairs, (1 May 1995).

sentences possible”²⁸⁵ CAVEAT expressed skepticism about the value of simply increasing maximum sentences. Despite CAVEAT’s submission, its proposals did not influence the amendments to the Young Offenders Act.

One of the issues of most concern to CAVEAT and many other victims advocates in the last few years has been the repeal of section 745 of the Criminal Code which allows those convicted of first degree murder to apply to have a judicial review of their 25 year parole ineligibility period after 15 years in prison. CAVEAT recommended the repeal of this section in its 1994 SafetyNet recommendations. It followed up its recommendation by launching a postcard campaign, encouraging members of the public to mail postcards to the government expressing their opposition to early parole for first degree murderers. On November 30, 1995, under the auspices of CAVEAT, victims and victims’ groups held eight simultaneous press conferences across Canada to demand that the federal government repeal section 745.

In June 1996, the government introduced Bill C-45²⁸⁶ to deny parole hearings to multiple murderers and those who could not pass a judicial screening process and to require that the jury’s decision to grant early parole be unanimous rather than 2/3 of the members. Gordon Kirby, Parliamentary Secretary to the Minister of Justice, later indicated that consideration for victims and their families influenced the development of the bill: “the prospect of victims’ families being re-victimized through a public review

²⁸⁵ Ibid.

²⁸⁶ Bill C-45, An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, 2nd Sess., 35th Parl., 1996.

conducted before a jury in cases where the offender has no reasonable prospect of success is one of the factors that has prompted the government to act by bringing this bill to the House".²⁸⁷ Although several officials from the Justice Department met with CAVEAT and other victims' groups prior to the drafting of the bill, CAVEAT was dissatisfied with the proposed amendments in Bill C-45. June 18, 1996, it made a submission to the Justice and Legal Affairs Committee as they reviewed the proposed legislation. CAVEAT supported the amendments, but saw them only as the first step toward full repeal of section 745. It recommended that, if not fully repealed, the section should at least be amended to expand the category of offenders excluded from applying for a judicial review.²⁸⁸

Though an attempt was made to pass the proposed legislation before the end of June, because of the Bloc Quebecois' opposition, the bill was not enacted in time to apply to Clifford Olson, the infamous child-murderer whose upcoming application for parole review had fuelled the debate over section 745. In August, 1996, CAVEAT held another news conference in British Columbia to express its disappointment with the proposed amendments and call for full repeal of 745. Although CAVEAT's active involvement in opposition to section 745 increased pressure on the federal government to make amendments, CAVEAT's efforts were not entirely successful. When Bill C-45 was passed by the House of Commons on October 2, 1996, it did not go so far as to repeal section 745.

²⁸⁷ House of Commons Debates, (19 September 1996) at 1520.

²⁸⁸ Priscilla de Villiers, Evidence presented to the Standing Committee on Justice and Legal Affairs (18 June 1996).

Indirect impact

Successful or not, the fact that so many of CAVEAT's proposals encourage greater use of incarceration reinforces the perceived value of punitive crime control. In addition to the large number of legislative proposals advocating greater use of incarceration, the majority of CAVEAT's press releases since 1995 have been devoted to endorsing punitive amendments, particularly the repeal of section 745. A particularly revealing magazine advertisement promoting CAVEAT's work depicted an image of a stereotypical offender behind bars with the caption "The Easiest Way Out is Through a Crack in the System". The advertisement, which appeared in magazines and on billboards, expresses clear discontent with the criminal justice system and promotes incarceration as a response to crime.

Although its legislative proposals and press releases leave little doubt that CAVEAT sees existing penal sanctions as inadequate, its submissions to various Parliamentary committees demonstrate further support for increasing reliance on incarceration. For example, in CAVEAT's submission regarding the proposed high-risk offender legislation, CAVEAT's president Priscilla de Villiers recognized but dismissed the concern that CAVEAT's recommendations, if enacted, would require more offenders to be incarcerated in already overcrowded prisons: "Personally, I don't think that the problems of overcrowding should be something that exercises you...if we have to ask for more prisons or more parole officers, so be it".²⁸⁹

²⁸⁹ Priscilla de Villiers, Evidence presented to the Standing Committee on Justice and Legal Affairs (11 February 1997).

Implicit in many of CAVEAT's proposals is the assumption that the leniency it perceives within the penal system threatens public safety. Comments such as the one made by CAVEAT representative Marilyn Cameron to the Committee examining high-risk offender legislation perpetuate not only the notion that the justice system is too lenient but that failing to 'get tough' will put the 'the innocent' at risk: "Don't let these monsters continue to walk the streets over and over again to prey on the innocent. I'm here today for many people who support Bill C-55. But is Bill C-55 tough enough? I don't think so. Let's get tougher in this country".²⁹⁰

This connection between incarceration and public safety was also emphasized by Priscilla de Villiers, who justified indefinite incarceration as a tool for crime prevention: "We're looking at a way of preventing acts before they occur...this [is] a very welcome opening up of a vision. We are beginning to look creatively at what in fact is crime prevention at its most elementary".²⁹¹

Given that the sources of crime are located within the social structure and that prisons have a poor record of reducing crime, reinforcing the association between prisons and improved crime control is misleading; it implies that more punishment will make the public safer, when in fact there is little reason to believe this is true. Such reasoning not only strengthens opposition to more progressive forms of crime control but provides a strong rationale for more punitive criminal justice policy.

²⁹⁰ Marilyn Cameron, Evidence presented to the Standing Committee on Justice and Legal Affairs (11 February 1997).

²⁹¹ de Villiers, supra note 289.

Coming from CAVEAT, demands for more punitive measures are given additional legitimacy by being associated with the needs of crime victims. Some politicians were indeed quick to argue that incarcerating offenders for longer periods of time could be justified on the grounds that it brings solace to victims and their families. For example, throughout legislative debates regarding the elimination of concurrent sentencing, the issue was presented as necessary for victims and families of victims: "It is about the interests of the families who need the peace only time can offer to salvage the remnants of their shattered lives. It is about the interests of victims who have every reason to fear the release of a predator and who can never escape the endless parole process that annually threatens to unleash the chained savagery of their assailants".²⁹² Because the bill was so closely associated with helping crime victims and their families, failure to support the proposed legislation was equated with failing to support victims:

Many victims have mustered the courage and drawn purpose from their personal horror by trying to change the system which treated them with such indifference. They journey here to Ottawa thinking that Parliament will listen and spare future victims. I ask members of this House to place their compassion where it is deserved. There is no compassion in inflicting a lifetime of parole hearings on a family already destroyed by a serial killer... [they] suffer from legislation that is focused on the welfare of killers rather than compassion for victims.²⁹³

During third reading, Conservative MP Peter McKay reinforced the connection between supporting the bill and helping victims by stating "I'm glad there's at least one member [Guarnieri, who introduced the bill] who does care for victims"²⁹⁴ and Reform MP Ken

²⁹² House of Commons Debates, (3 December 1996) at 1750.

²⁹³ House of Commons Debates, (21 October 1997) at 1005.

²⁹⁴ House of Commons Debates, (1 May 1998) at 1330.

Epp made the same association: “We will find out when we vote who actually speaks for victims”.²⁹⁵

Evidently, politicians were willing to rely on victims to justify amendments to concurrent sentencing, but the demands of CAVEAT were not misrepresented to advance more punitive legislative reform. In fact, the amendments to concurrent sentencing were not as punitive as CAVEAT recommended; they only limited the practice rather than abolishing it entirely.

In legislative debates surrounding the proposed high-risk offender legislation, the Reform Party made similar associations between helping victims and punishing offenders: “When we ask individuals who had offences committed against them why they did not report them, they say that due to this soft Liberal approach on crime, the criminals and their rights are up front and the victims and their rights are not considered”.²⁹⁶ Again, the needs of victims are used as a rationale for more punitive forms of crime control but, judging from CAVEAT’s dissatisfaction with these amendments, this is not an inaccurate representation of the views of at least some crime victims. CAVEAT did in fact indicate that they thought the amendments to the high-risk offender legislation were ‘too soft’ and argued that the lenient treatment of offenders was harmful to victims.²⁹⁷

The value of relying on punishment to help victims was also used by the Reform Party to generate support for the repeal of section 745 of the Criminal Code:

²⁹⁵ Ibid at 1350.

²⁹⁶ House of Commons Debates, (3 October 1996) at 1340.

²⁹⁷ de Villiers, supra note 289.

Which murderer ever provided his victim with a glimmer of hope? Why on earth do we extend the same hope to them? There is no hope for victims. None at all. They have lost someone and that someone will not be back. Where is their glimmer of hope? Their glimmer of hope lies in the fact that the people of this place will wake up and realize the value of life and make those who take a life pay the price...it is not what we can do for the criminal, not what we can do for the cold-blooded killer, but what can we do for the victims of our land?.²⁹⁸

Those who refused to support the full repeal of section 745 were accused of “not empathiz[ing] with the families of murder victims and the nightmares they endure as a result of the heinous crimes committed against their children and grandchildren...For the criminal justice system to provide the killer with a so-called glimmer of hope is a further injustice to the victim”.²⁹⁹ Such reasoning is not inconsistent with CAVEAT’s own justification for demanding that section 745 be repealed. Far from being manipulated to meet other ends, the proposal victims were being used to promote was one that CAVEAT and other victims advocates strongly supported. As with amendments to concurrent sentencing and the high-risk offender legislation, the final result was in fact less punitive than CAVEAT recommended.

Summary

Clearly, CAVEAT has concentrated its federal legislative reform efforts on punishing and incapacitating offenders. The comparatively large number of proposals in this area enhanced the likelihood of having some success. Indeed, all but a few of CAVEAT’s recommendations for incapacitating and punishing offenders have been at

²⁹⁸ House of Commons Debates, (16 September 1996) at 1605. .

²⁹⁹ *Ibid* at 1305.

least partially addressed. Where the government enacted only a modified version of CAVEAT's original recommendation, the final legislation was always less restrictive than CAVEAT proposed. Although politicians who favoured a law and order approach to crime control readily invoked victims' demands in order to justify punitive legislative proposals, victims were not used to meet objectives other than those which CAVEAT itself endorsed. Even if not enacted, the messages conveyed by CAVEAT's legislative reform efforts provided a rationale for the use of incarceration and helped create a climate supportive of punitive crime control.

Conclusion

The Liberal government has not always been entirely responsive to CAVEAT's demands, but, whether voluntarily or as the result of much political pressure, the government has demonstrated some commitment to enacting the recommendations of victims' advocates. With the exception of criminal justice procedure, CAVEAT had qualified success in its legislative reform efforts in each of the areas examined. CAVEAT's demand for a more active role for victims in the criminal justice process was partly addressed by Bill C-79 which expanded the use of victim impact statements and allowed them to be presented orally. Gun control legislation introduced in 1995 responded to one of CAVEAT's previous SafetyNet recommendations, but stopped short of implementing CAVEAT's proposal to increase mandatory penalties for the use of a firearm in the commission of an offence. The enactment of Bill C-69 in 1999, which allowed police officers access to information about pardoned sex offenders in the RCMP

database, and the development of a National DNA databank were also consistent with the general intent of CAVEAT's recommendations, although, again, CAVEAT's demands were not fully addressed. Similarly, amendments to concurrent sentencing, high-risk offender legislation, and judicial review of parole ineligibility partly responded to CAVEAT's legislative reform efforts, but did not go as far as CAVEAT wanted.

While some politicians emphasized the demands of victims to generate support for particular proposals, it is interesting that not all of them did so to the same extent. The Liberal government was willing to use crime victims as a rationale for some moderate legislative reform but ignored CAVEAT's most punitive recommendations. For example, the government readily allied themselves with victims in their support for gun control legislation and used this to criticize the Reform Party's purported concern for victims, but would not go so far as to side with victims in repealing judicial review of parole ineligibility for first degree murderers. On the other hand, the opposition went further than the government by frequently invoking victims to attack the perceived leniency of the criminal justice system and to justify more extreme legislative proposals, such as more intrusive DNA testing, more punitive high-risk offender legislation, and full repeal of judicial review of parole ineligibility. In gun control debates, however, the Reform Party not only distanced themselves from CAVEAT and other victims' advocates but demonstrated strong opposition to attempts to address their concerns.

It is clear, then, that both the Liberal government and the opposition responded selectively to the recommendations of victims' advocates. Insofar as politicians emphasized the recommendations which supported their own agendas and downplayed or

simply ignored others, they misrepresented CAVEAT's legislative reform efforts as a whole. Nevertheless, this research does not support the claims of some theorists that the apparent preoccupation of victims' advocates with punishment is largely a result of political manipulation. The government did not perpetuate the perception that victims' advocates want a more punitive justice system by responding disproportionately to their punitive proposals. CAVEAT itself concentrated its recommendations on punitive law reform. The relationship between victims' advocacy and punishment, then, was not an illusory one established in the legislative process; it originated with CAVEAT's own efforts.

Furthermore, the content of CAVEAT's recommendations was not distorted in the political process in order to justify more punitive policy. Of course, given the punitive nature of some of CAVEAT's proposals, if the government's goal was to implement more coercive measures of crime control, it would not have been necessary to distort CAVEAT's demands to justify such measures. Many of CAVEAT's recommendations lent themselves to being used by law and order advocates by demanding more punitive reform. But, if anything, the legislative process ultimately made CAVEAT's law reform efforts appear less, not more, punitive. Some of CAVEAT's recommendations did lead to more restrictive legislation, but in many of the most significant reforms the government did not go as far as CAVEAT wanted. Legislative changes regarding gun control, DNA data banks, concurrent sentencing, high-risk offenders, and judicial review of parole ineligibility, for example, partially responded to CAVEAT's demands but were less coercive.

Nevertheless, the reform which has taken place suggests that victims' advocates have been heard and will continue to exert influence over the development of criminal justice policy. As Justice Minister at the time Allan Rock observed while defending his government's accomplishments for crime victims, "at times there have been differences with victims on matters of principle, but victims know that the government stands with them in strengthening the criminal law of the country".³⁰⁰ While it seems certain that politicians will continue to respond selectively to the recommendations of victims' advocates, if CAVEAT persists in its punitive law reform efforts, even the government's partial commitment to enacting CAVEAT's demands will present a challenge for the future of sound criminal justice policy.

³⁰⁰ House of Commons Debates, (17 March 1997) at 9087.

CHAPTER 5

DISCUSSION

Summary and Observations

Whether or not one sees penal law reform as a worthwhile objective for victims' advocates, victims are clearly no longer willing to be passive participants in the justice process. Since the development of the victims' movement, the interests of crime victims have been incorporated into crime control discourse and victims' advocates have emerged as important players in the development of justice policy.

This research confirms the contention of some theorists that victims' advocacy presents a challenge for the development of a less punitive and more comprehensive crime control strategy. At a time when rhetoric from government is largely about decarceration, CAVEAT has successfully endorsed lengthier terms of incarceration and more stringent requirements for parole eligibility. Although CAVEAT's law reform efforts have faced little explicit opposition from government, the fact that the final result was frequently more moderate than CAVEAT's original recommendation suggests that the government is somewhat reluctant to wholeheartedly embrace CAVEAT's vision.

At the same time, however, legislative debates demonstrate the eagerness of politicians across the political spectrum to ally themselves with victims. Even the least cynical of observers would not be surprised by a discrepancy between rhetorical support for crime victims and concrete changes. Yet the concerns of victims' advocates appear to be a particularly attractive cause for politicians to champion. As Roach suggests, our

natural inclination to sympathize with crime victims and the apparent moral superiority of their position in the contest between victim and offender contribute to the popularity of endorsing the demands of victims' advocates.³⁰¹

The accuracy with which the proposals of victims' advocates were presented in the legislative process and the failure of CAVEAT's most punitive recommendations contradict the observation that the demands of victims' advocates are co-opted by conservative policy-makers to promote social control through punishment. Although many of the recommendations which led to legislative action were punitive in nature, there is no evidence to suggest that the federal government is more responsive to proposals which enhance social control. CAVEAT's recommendations and submissions concentrated on punitive reform but, proportionally, the punitive proposals were not significantly more successful. CAVEAT was, to some extent, exploited, as both the government and the opposition used CAVEAT's law reform efforts selectively for their respective purposes, but the final results of CAVEAT's proposals were always consistent with their original intention, even if the enacted legislation was more moderate.

Even though the government exercised restraint in addressing some of the punitive proposals submitted by CAVEAT, this was not necessarily because of an unwavering commitment to decarceration. The cost of incarcerating more people for longer periods of time may have been equally, if not more, influential. However, financial considerations were clearly not the determining factor in the success of those of CAVEAT's legislative proposals which were enacted, for many punitive measures were addressed over some of

³⁰¹ Roach, *supra* note 58 at 226.

the relatively cost-effective reforms which would have increased the victims' participation in the criminal justice process.

Perhaps even more significant than the qualified success of CAVEAT's punitive legislative proposals is the ideological support its law reform efforts have given to punishment as a method of crime control. Insofar as CAVEAT's recommendations concentrated crime control discussions on further penalizing offenders, they shifted attention away from the social conditions under which crime flourishes. There is no doubt that incarceration provides few long-term benefits, so concentrating on how to punish offenders offers little promise as a means of addressing crime. But reliance on incarceration is difficult to change, since it provides immediate results and is more symbolically satisfying than addressing cultural, social and economic conditions.³⁰² The development of a more effective approach to crime control requires a fundamental rethinking of justice and criminality, and proposals which reinforce traditional systems of social control can only hamper attempts to shift dominant understandings of crime.

Ironically, despite CAVEAT's efforts to introduce more punitive measures, it recognizes the limitations of prison and stresses the importance of addressing the social conditions which foster criminal activity. It is not that punishment and crime prevention are necessarily incompatible, but discussions about punishment often perpetuate the belief that the leniency of the penal system jeopardizes public safety, which naturally strengthens resistance to moving away from punishment and concentrating on the sources of crime. Overall, then, these punitive law reform efforts help perpetuate a profoundly flawed

³⁰² *Ibid.* at 247.

approach to crime control and impede the pursuit of alternatives.

Limitations and Future Directions for Research

Naturally, CAVEAT was not solely responsible for the legislative reform which responded to its proposals. Pressure from other advocacy groups, the general public, and various other sources also played a role in the ultimate success of each recommendation. In particular, gun control legislation and amendments to judicial review of parole ineligibility for first degree murderers were issues which received widespread attention. Consequently, CAVEAT's work should be interpreted as only part of a broader pressure for criminal justice reform.

Nevertheless, because this research indicates that the connection between victims' advocacy and punitive justice policy is not spurious, it would be worthwhile to further explore the influence of victims' advocacy on criminal justice. A more comprehensive examination of the efforts of victims' advocates would allow their law reform efforts to be interpreted in relation to other potential areas of influence, particularly at the community and individual level. In addition, it would be useful to examine the efforts of other victims' advocacy groups in order to draw conclusions about the victims' movement as a whole. Although several prominent groups appear on the surface to share CAVEAT's concerns, there is a wide range of work being carried out on behalf of crime victims.

The extent to which advocacy groups like CAVEAT are representative of the needs and desires of crime victims as a whole should also be explored. This is of particular interest since, contrary to what one might expect, CAVEAT is made up primarily of

individuals who have never been victimized by a serious crime. That is not to say that one must have personal experience in order to work on behalf of victims, but it would be interesting to note whether individuals who are drawn to such organizations share a common understanding of the crime problem, and whether those who claim to speak for victims are in fact representing their interests.

Of course, crime victims are a diverse group, and isolating a single ideological position is impossible, but the very heterogeneity of the group suggests that their views are likely greatly simplified and selectively represented by their advocates. The victims' demands we hear about are presented as if they were a united front. For this reason, if they appear to be largely punitive in nature, it may be that groups such as CAVEAT are more representative of those who perceive the justice system to be too lenient than of crime victims as a whole.

Conclusion

This research was not in any way intended to trivialize the tragedies experienced by victims of crime and their families or to denigrate the very real and invaluable contribution many victims' advocates have made to criminal justice. This research concentrates on one part of CAVEAT's work. One should keep in mind that CAVEAT's efforts extend well beyond legislative reform; this work can be equally significant and cannot be ignored in any examination of CAVEAT's overall efforts on behalf of crime victims. However, it is the relationship between victims' advocacy and punishment which is most alarming and which therefore forms the focus of this research. Certainly, we ought to be attentive to the

concerns of crime victims and their representatives, but we cannot allow our sympathy for their suffering to blind us to the need for effective approaches to crime control grounded in research rather than emotion. As Ezzat Fattah reasons “...in the long run, the interests of victims and society at large are best served by humanity and compassion, by tolerance and forgiveness, by the development of conciliatory and forgiving communities rather than hostile and vengeful ones”³⁰³.

³⁰³ Fattah, supra note 193 at 13.

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