

**The Role of the Victim
in the Criminal Process:
A Literature Review —
1989 to 1999**

VICTIMS OF CRIME RESEARCH SERIES
The Role of the Victim in the Criminal Process:
A Literature Review 1989 to 1999

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The views expressed in this report are those of the author and do not necessarily represent the views of the Department of Justice Canada.

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1.0 Introduction

1.1 PURPOSE OF THE REPORT

Public discontent appears to be an inevitable and constant response to institutionalized justice. In 1906 Roscoe Pound noted that “dissatisfaction with the administration of justice is as old as our own legal system” and that “discontent has an ancient and unbroken pedigree” (Pound, 1906:1)¹. In 1989 an Environics Research survey commissioned by the Solicitor General of Canada reached the disconcerting conclusion that the prevailing public sentiment with respect to criminal justice was that the system was “ineffective”, “impotent” and “perceived by many to be . . . a joke, not to be taken seriously” (Vienneau, 1989). It may be that this public assessment is an unfair critique because it is based upon a naive assumption that the institution of criminal justice is primarily responsible for the perceived increase in crime, especially violent crime in North America². Nevertheless, this growing public disdain suggests that there is a pronounced “legitimacy crisis” in the administration of criminal justice.

In attempting to understand public discontent, it is impossible to ignore the growing body of literature that chronicles the plight of victims of crime. In 1987 the Canadian federal Minister of Justice encapsulated this entire body of literature with his assertion that “the victim of crime is often a forgotten person in our criminal justice system” (Cleroux, 1987). Much ink has been spilt in the 1990s over the plight of this forgotten participant in the criminal justice system resulting in numerous piecemeal reforms (see for example, Elias, 1986; Fattah, 1986; Victims’ Rights Symposium, 1983–84; Hagan, 1983; Ziegenhagen, 1977). The reforms commenced with the creation of compensation schemes in the 1970s and have expanded to include victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs (Elias, 1986; Federal/Provincial Task Force, 1983).

Recognition of the plight of the victim first emerged in the 1960s with disturbing revelations concerning the treatment of rape victims in the criminal process. The 1970s was a decade of significant reform with respect to compensation for injury from crime and the 1980s was a decade of the institutionalization of victim participation in the process through the creation of rights and entitlements for victims. The 1990s was a

decade of taking stock of the rapid changes in the status of the crime victim, and this report serves to outline the academic literature produced during that decade. The literature review produced in this report is not intended to be a sterile catalogue of articles and books, but rather it is intended to be a compendious summary of recurring themes found in the literature. The ultimate objective is to review the literature with the intent of discovering if victims’ rights reform has had any meaningful impact upon the criminal process and its unfortunate side effect of secondary victimization. The report will attempt to identify goals which have been achieved, goals which have not been realized and recommendations for enhancing the effectiveness of victims’ rights projects.

There are a myriad of issues which can be explored with respect to victims of crime; however, this report will primarily focus upon the role of the victim within the criminal process. Developments with respect to the participatory rights of the victim in the process form the core component of the report; however, some time will be spent examining the literature relating to the victims’ welfare rights (e.g., rights to counselling, financial assistance and protection). Social science perspectives will be briefly canvassed but will not be extensively discussed. In a nutshell, this review will attempt to determine if the extensive legal reforms of the 1980s have been the subject of favourable or critical assessment in the 1990s.

1.1.1 Scope of Inquiry

Initially, the literature review for the 1989–1999 time period was to focus on Canadian perspectives; however, it became readily apparent that Canadian scholars have taken little interest in the topic of victims’ rights. By contrast, at the international level, especially in the US, the topic has been explored ad nauseam, and the available literature would fill a small auditorium. In fact, the topic of victims’ rights has received so much academic attention in the US that legal casebooks have been published for teaching courses in victims’ rights (see, for example, Beloof, 1999). Accordingly, it was decided to expand the scope of this inquiry to include reference to international developments. With respect to the American literature, the bibliographical listing is not intended to be exhaustive; the available material is simply too voluminous (and repetitive) to be encompassed in a report of

¹In this address the author was speaking of dissatisfaction with the administration of civil justice; however, his attribution of discontent to factors such as the absence of a coherent legal philosophy and the game-like nature of adversarial justice apply with equal force to the administration of criminal justice.

²I say “perceived increase” because representative surveys over the past 20 years have demonstrated the existence of a number of misperceptions about crime and justice. For example, in 1999, an Angus Reid survey found that 50% of the public believed that crime was increasing, while in fact it had been decreasing for seven years (Angus Reid Group). Most Canadians also over-estimate the percentage of crime that involves violence (see Doob & Roberts, 1982; Roberts, 1994). A significant proportion of the population also believe that leniency on the part of the criminal justice system is responsible for rising crime rates (see Roberts & Stalans, 2000, for a review).

this nature. In addition, it also became apparent that it was necessary to include in the bibliography, reference to seminal articles and texts published before 1989. As in any discipline, contemporary works can only be understood by reference to earlier publications, and to a limited extent the collected bibliography will include reference to works which the author believes had a significant influence on the contemporary literature.

The relative dearth of Canadian legal scholarship designed to explore and assess victims' rights issues remains a mystery. In contrast, the American scholarship may seem excessive. It is rare to find so many scholars all writing the same thing over and over again. In the American literature, scholarship and politics meet head-on and this has produced a prodigious amount of political rhetoric masquerading as legal or criminological scholarship. Andre Gide once said that "everything that needs to be said has already been said. But since no one was listening, everything must be said again" (Elias, 1993:1), and this statement perfectly describes the state of victims' rights literature in the US and around the world.

The American influence with respect to the evolution of victims' rights cannot be overstated. Although the bulk of empirical work evaluating the progress of the victims' rights movement is American in origin, caution must be exercised before readily extrapolating the conclusions into a Canadian perspective. Despite the common legal heritage, there are sufficient dissimilarities between the Canadian and American legal cultures to call into question the assumption that the American results would be replicated in Canadian studies. Professor Matti Joutsen, a prominent European scholar in the area of victims' rights, reflected on the exponential growth of American literature on the plight of the victim and noted the following:

Why did these first strands of victimology and the victim movement develop primarily in the US, and not in Europe? Possible reasons include the severity of the problem, the strength of research and an American activist tradition. . . It is true that people are victimized — and have problems as victims — everywhere in the world. However, the problems faced by victims in the criminal justice system in the US may well be greater than elsewhere. When this is combined with the sheer volume of victimization in the US, the problems may have become more visible. Second, the US has been the powerhouse of empirical (and, to a lesser extent, theoretical) criminology, and victimology-related sciences in general. Both academic and government funds are more widely available for research. The number of professional publications quickly spread the word of interesting phenomena and research results. Third — and this is the most nebulous reason — Americans may tend less than Europeans to wait passively for the government to define and deal with a prob-

lem. . . The common law tradition may make victims more prepared to assert their rights as citizens. There may also be a cultural factor: the tradition of self-help may make concerned citizens more prepared to organize ways of helping victims when the government seems unable (or unwilling) to do so. (Joutsen, 1991:785)

As will be discussed, the evolution of victims' rights in Canada and the US has followed a similar path; however, the motivations underlying these similar journeys were different. Nonetheless, an evaluation of the American experience is indispensable to understanding the research that needs to be conducted in Canada. Most of what has been done in Canada to empower victims is based upon assumptions regarding the needs of victims and the most effective way to address these needs. Much of the literature in the 1990s, whether Canadian or international, suggests that crime victims have not been successfully integrated into the criminal justice system — with the exception of some successful programs, victim dissatisfaction remains profound. Therefore, it is clear that it may be time to evaluate some of the assumptions we have relied upon in law reform measures adopted to date. To that end, the American literature must be reviewed in order to gain a sense of the type of evaluative studies that must be undertaken in Canada.

1.2 SOURCES OF INFORMATION

In preparing this report the literature was collected from many diverse sources: 1) the library catalogues at York University, The Library of Congress and the University of Toronto; 2) various periodical indexes including PsychInfo, Sociological Abstracts, Social Sciences Abstracts and Frances Index; 3) legal periodical indexes including Current Law Index, Index to Canadian Legal Literature — Journals and Text, Index to Canadian Legal Periodical Literature, Westlaw CJ-TP Criminal Justice; 4) Government websites; 5) Private Organization websites including International Victimology Website (www.victimology.nl/rechts.htm), Access to Justice Network (www.acjnet.org/victims), Office for the Victims of Crime (www.ojp.usdoj.gov/ovc), NOVA (www.try-nova.org), CAVEAT (www.caveat.org), Canadian Resource Centre for the Victims of Crime (www.crcvc.ca), Canadian Criminal Justice Association (home.iSTAR.ca/-ccja/angl/index/shtml).

Internet research posed unique problems in that an enormous amount of literature is contained in the websites of various victims' rights groups; however, it is impossible to truly ascertain the weight which should be given to these articles. (It should be noted that the International Victimology Website is one of the best sources for current evaluative studies by reputable scholars.) Nonetheless, Internet research raised an interesting question which is beyond the scope of this report; that is, what type of information does the public rely upon in developing opinions with respect to the role of the victim in the criminal process?

The question arose as a result of the easy access to literature on the Internet as opposed to the obstacles presented by the collection of traditional, textual materials. In collecting the materials identified by the various indexes, it became apparent that a substantial amount of material was not readily available or accessible to the public. Even government document libraries did not have full collections of relevant government reports. Of course, materials on the Internet are readily accessible and it is these types of materials which are presumably being read by most members of the public.

This problem in collecting traditional scholarship raises the question of the impact that academic scholarship has on a movement which is populist in nature. Despite the volume of academic literature being produced at the international level, it may be the case that this literature is not accessible to the very audience being discussed in the literature. Clearly, popular media and Internet access is having a far more significant impact on public and victim perception of the criminal process, and a review of popular literature may provide greater insight into the paramount issue of victim satisfaction with the process. Although it is acknowledged that media hysteria can trigger moral panic that bears no relationship to the reality of an emerging social problem, it is recommended that a literature review of popular media be commissioned. The thorny topic of the relationship between victim perception and popular media presentation of crime issues is beyond the scope of this report.

Finally, it should be noted that, for ease of reference, there is a bibliographical listing located at the end of each of the chapters of this document. On occasion, reference is made to a book or article that is not directly related to victims' rights and as such the reference is not included in the bibliographical listings which are exclusively devoted to victims' rights literature. For these few incidental references, the citation for these books or articles is found directly in the body of the report closely following the quotation or reference. Also, where a reference to another source is made within a quotation, this reference will not be found in the bibliographical listings.

1.3 VICTIMOLOGICAL CONCERNS AND VICTIMS' RIGHTS

Another topic beyond the scope of this report concerns the insights gained from the pure academic discipline of victimology. Victimology is concerned with the relationship between offender and victim and the characteristics of each that can serve as predictors of future victimization. The birth of victimology in the 1940s may have been a contributing factor in the development of the victims' rights movement in the 1960s, but the academic discipline and the political movement are not similar entities. The literature reviewed for this report concerns the sole issue of crime victims and their involvement in the criminal process. Although some victimologists have studied this issue, the vast majority of victimological literature

relates to the study of the victim as social actor and not legal actor.

Accordingly, this report excludes from consideration the vast body of literature that relates to victimization surveys, crime prevention studies and victim-offender characteristics. In addition, there is a significant body of literature, including Canadian literature, dealing with the attributes of particularly vulnerable victims such as children, the elderly and battered women; however, a review of this literature is beyond the scope of this report. Although it is clear that victimological research should be an animating force behind law reform, it must be recognized that an ever-widening gap is developing between the academic discipline and the social movement. As Professor E. Fattah has noted:

At the First National Conference of Victims of Crime (held in Toronto, 1985) the victim movement was called the growth industry of the decade. In the United Kingdom it is considered the fastest-developing voluntary movement. Victim groups and associations are mushrooming all over North America and Europe. Inevitably, this fantastic growth has had a significant impact on victimology. Victimology meetings are no longer scholarly meetings where the findings of scientific research on victims are presented and discussed, they have become a forum for political and ideological rhetoric. They mirror the transformation of victimology from an academic discipline into a humanistic movement, the shift from scholarly research to political activism. . . Willingly or unwillingly, consciously or unconsciously, victim lobbyists are playing into the hands of the neo-conservatives and the neo-classicists and are helping propagate the ideas and philosophy of right-wing criminology. In such a climate, scientific inquiry into victim-offender interactions and the victim's contribution to the genesis of crime is likely to be summarily dismissed as an attempt to blame the victim. (Fattah, 1989:59-60)

Thus, pure victimological literature is left to be reviewed another day, and this report will focus exclusively on literature chronicling the role of the victim in the criminal process.

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2.0 History and Theory

2.1 INTRODUCTION

Most of the available literature relating to victims' rights concerns the proper theoretical understanding of the role of the victim. Beyond evaluating the proper sphere of victims' rights by the yardstick of philosophical theories of punishment, much of the commentary revolves around the historical position of the victim in the criminal process. It is often argued that historically the victim played a central and controlling role in the administration of criminal justice and therefore there are no theoretical obstacles to the re-integration of the victim in the process. Of course, this line of argument is based upon a genetic fallacy in that a proper historical foundation does not inexorably lead to the conclusion that there exists a proper contemporary foundation.

In reviewing the literature available on this topic, extensive reference has been made to pre-1989 articles and books as history and theory were the primary concerns of the early literature. By 1989, the historical and theoretical perspectives had been exhaustively canvassed, and very little new ground was broken in the 1990s. Nonetheless, the literature of the 1990s continued to explore these perspectives despite the fact that nothing unique or earth shattering was revealed in the contemporary writings. In the introduction to this report it was noted that much of the 1990s literature attempted to evaluate the projects and programs established in the 1980s for crime victims. Although there is a significant body of this evaluative literature, the majority of literature in the 1990s continued to dwell upon the theoretical concerns that had been exhaustively canvassed in previous decades.

Finally, it should be noted that the bibliographical listings provided herein contain articles which canvass theoretical issues but which may also contain concrete evaluations or concrete proposals for law reform. Accordingly, some of the listed readings will also be included in the bibliographical listings found in the other parts of this report.

2.2 DISCUSSION

Providing support and respect for those victimized by criminal acts, especially acts of violence, is a moral position that has been almost universally endorsed throughout the published literature. Nonetheless, there is great reluctance to convert this sympathy into structural legislative reform because law makers and legal professionals see the victim as an upstart who is trying to gain entry into an institution that is not designed for the remedy of private interests. Nothing could be farther from the truth. If one views the victim's role divorced of historical considerations then it is understandable that this player will be seen as an intruder. However, as Robert Elias has noted, "[w]hile we have recently isolated crime victims for

special attention, we have only rejuvenated their much more prominent past from a relatively long dormancy" (Elias, 1986:9). In fact, from the historical perspective it is the defence lawyer and the public prosecutor who are the historical upstarts; prior to the mid-19th century, criminal trials proceeded without the intervention of legal professionals except for the judge (Langbein, 1978).

2.2.1 Historical Origins of Contemporary Criminal Justice

The historical record reveals a fairly simple pattern in the evolution of Anglo-American and Canadian criminal process. Although greater elaboration will be provided at a later point, the simple historical pattern is aptly summarized by Professor William McDonald:

The age-old struggle of civilization has been to persuade people not to take justice into their own hands but rather to let their vengeance and righteous indignation be wrought by the law. Western civilization had by the Middle Ages succeeded in substituting private prosecutions for blood feuds. The next step was to replace private prosecution with public prosecution, while asking the victim to forego whatever satisfaction he might derive from personally prosecuting his transgressor and settling for the more intangible satisfaction of knowing that justice would be done. Now, the modern criminal justice system operates in an age of computers and instant telecommunications, disposing of large numbers of cases without trial and without bothering to give the victim even the minimal satisfaction of knowing what happened to his case and why. (McDonald, 1976:663-4)

In a brief report of this nature, I cannot do justice to the historical record (nor do I naively believe that history provides only one clear and incontrovertible narrative, although the literature appears to present a rather consistent historical perspective). However, the following summary does demonstrate the historical primacy of the victim.

The "golden age" (Schafer, 1977) of the victim lasted into medieval times. Prior to the 13th century revolution in legal process, all wrongdoing (with the exception of a few collective crimes relating to public order and religious taboo) was perceived as tortious (i.e., private) in nature. Procedural forms contemplated confrontation between accused and accuser, and legal remedies emphasized restorative justice. Sir Henry Maine (1861) characterized the original form and structure of criminal law as follows:

Now the penal laws of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. (Maine, 1861:328)

Early attempts at state regulation of the field of wrongdoing was largely premised upon eradication and containment of the blood feud (the “blood” refers to kinship ties and not to the barbarity of the feud). The first written law in England (between 600 and 615 A.D.) reflects this process of converting the feud into a system of composition in which every injury attracts a specified level of compensation. As this developing state set up tribunals for the assessment of injury and compensation, it required that offenders pay court and administrative costs on top of the designated compensatory award. Recourse to these tribunals was not mandatory, and the Norman invaders had to employ another artifice to curtail the disruptive impact of constant feuding. The Normans brought with them the Germanic conception of the King’s Peace, and any injury to a person or in a place that was protected by the King’s Peace converted the private injury into a public wrong. This conversion enabled the emerging state to take complete control over a conflict between accuser and accused, and resulted in the transformation of a compensatory award into a fine for the benefit of the royal coffers. Eventually the King’s Peace covered all of England and all of its inhabitants. Professor Schafer concluded that this transformation of the law of wrongdoing into criminal law was nothing more than a power play in which the state enriched itself at the expense of the victim:

It was chiefly owing to the violent greed of feudal barons and medieval ecclesiastical powers that the rights of the injured party were gradually infringed upon, and finally to a large extent, appropriated by these authorities, who exacted a double vengeance, indeed, upon the offender, by forfeiting his property to themselves instead of to his victim, and then punishing him by the dungeon, the torture, the stake or the gibbet. But the original victim of wrong was practically ignored. (Schafer, 1977:15–16)

Historians are not clear on how this complete submergence of the law of wrongdoing into the law of crime occurred, but many historians agree with Professor Schafer that the creation of criminal law was an economic concern — in the 13th century judicial fines made up one-eighth of all revenue to the king. Two well-respected legal historians, Pollock and Maitland (1968), believe that greed was only one factor in this progression from tort to crime, and they list other factors such as the dilution of the ties of kinship, jurisdictional squabbles between church and king and the inequities found in the com-

pensatory tariffs. However, other commentators believe that the creation of the law of crime was not a conscious process and was simply an incidental by-product of continual resort to royal tribunals for the assessment of compensatory awards.

Whatever the reasons may be, by the 14th century the victim was no longer the focus of attention, and compensation was not a stated purpose of the criminal process until its re-emergence in Europe in the 19th century. The obliteration of the victim’s interest in restorative or corrective justice was so complete that it took a 19th century statute to once again recognize the right of a victim’s family to compensation in any case of wrongful death [Lord Campbell’s Act 1846 (U.K.) c. 93]. Oddly enough, even though victim satisfaction became an irrelevancy in the criminal process, the common law still relied upon private enforcement and prosecution as the means for upholding the public order. Deep into the 19th century, responsibility for law enforcement fell upon the community and responsibility for prosecution fell upon the victim and his/her representative. Therefore, the victims were saddled with enforcement and prosecutorial responsibilities for a process that did not address their needs or their losses.

Victim participation was the paradigm of the adversarial trial and has been for close to one thousand years. A paradigm shift took place in the 19th century with the creation of the first public police force and public prosecutorial branch of government. These innovations were largely the product of “market-force” arguments (Cardenas, 1986). The inefficiency of private prosecution for a rapidly growing industrial state prompted the take-over of criminal law enforcement by agents of the state. Nils Christie sees the historical record as an example of the stealing of criminal conflicts from the real parties to the conflict, and he notes that “lawyers are particularly good at stealing conflicts” (Christie, 1977:4). The net product of this conflict-stealing is summarized by Professor Christie as follows:

So, in a modern criminal trial, two important things have happened. First, the parties are being represented. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, vis-a-vis the offender, but secondly and often in a more crippling manner by being denied rights of full participation in what might have been one of the most important ritual encounters in life. The victim has lost the case to the state. (Christie, 1977:3–4)

The historical literature does not suggest that the state has no legitimate interest in defining and enforcing crime. It is always recognized that criminal wrongdoing does significantly affect the public order, and this dimension is not adequately

reflected in private litigation. As Robert Nozick (1974) has contended:

Private wrongs are those where only the injured party need be compensated; persons who know they will be compensated fully do not fear them. Public wrongs are those people are fearful of, even though they know they will be compensated fully if and when the wrongs occur. (Nozick, 1974:67)

Criminal wrongdoing affects the public order. It thus engages a public interest that extends beyond any individual interest, because people will experience insecurity, fear and the erosion of trust notwithstanding the knowledge that their personal victimization can be compensated in a civil action. However, the critical point is that even once we recognize the public dimension of wrongdoing, most writers still contend that this does not erase the private interest calling for vindication. Twentieth-century criminal justice has allowed this private interest to be completely overrun by the state's interest, and we have forgotten Blackstone's simple insight that "the public good is in nothing more essentially interested than in the protection of every individual's private rights" (Blackstone's Commentaries 1803, Book I, Vol. II:139). Although criminal law engages a public interest beyond the interests of the victim, this does not justify or necessitate the treatment of the victim as "evidentiary cannon fodder, or witness or claimant, not of citizen with participatory rights and obligations" (Cavadino & Dignan, 1996:155).

Does the recognition or re-discovery of the victim's compelling private interest inevitably lead to the re-emergence of private prosecution or full victim participation in a public prosecution? Not necessarily. Most commentators acknowledge that private prosecution is still the cornerstone of our legal heritage but go on to also recognize that despite its availability it is rarely employed. Therefore, most commentators agree that it is reasonable to conclude that public prosecution will remain the norm even in an era in which the victim's private interests are recognized. However, the outstanding question still subject to debate in the literature is whether victim participation entails the right to exercise some degree of control over the process despite the delegation of prosecutorial responsibility to a public official.

In discussing victim participation, most writers only consider participation at the sentencing stage. Some writers advocate participation and control at the pre-trial stage (Kennard, 1989; Welling, 1987, 1988), but fewer writers consider participation at the trial stage even though there is a considerable amount of literature chronicling the ways in which European victims participate in criminal trials (see Chapter 4.0 of this report). Unlike the European process, the Anglo-American-Canadian trial process is divided into two distinct phases: the guilt/innocence determination and the sentencing phase. It appears that most Anglo-American-Canadian scholars assume that victim participation and control would be somewhat muted at the trial phase for the

simple reason that the trial process is governed by distinct constitutional norms. Legal guilt is distinct from factual guilt and the victim, as surrogate prosecutor, is more driven to establish factual guilt regardless of whether factual guilt is consistent with legal guilt as defined by our common law and constitutional heritage. The bottom line is that in creating the institution of public prosecutors we have entrusted these public servants with the task of identifying the perpetrator of a crime in a manner in accordance with law. Procedural control over the trial process will remain with the prosecutor even in an era of recognition of victims' interests as the commentators do not appear to think that the victim can contribute to the actual trial process in a constitutionally sound manner.

However, once the state has proved in a manner in accordance with law that it has identified and apprehended the true perpetrator then the victim's interests need no longer remain dormant and invisible. At this stage of the proceedings, the presumption of innocence has been ousted and there is no longer the danger that private interests would skew the delicate process of determining legal guilt or innocence. The sentencing process serves as an expression of the community's denunciation of the criminal act and surely the person most directly and dramatically affected by the criminal act should have meaningful input into the expression of this sentiment. Accordingly, many writers conclude that active and meaningful participation by the victim at the sentencing stage should be the norm. It is, however, important to understand from the outset that no consensus exists in the literature as to whether providing the victim with some procedural control over the sentencing phase of the process entails more than last-minute input via a victim impact statement. For others, it is argued that sentencing is directly affected by both the charging process and the plea bargaining process, and therefore procedural control at the sentencing phase will entail some degree of control at these pre-trial stages (Kennard, 1989; Starkweather, 1992).

The arguments in favour of victim participation in the criminal process have been endlessly repeated in the literature of the 1970s, 80s and 90s. Conveniently, Professor Erez has recently provided this summary of the position advocated in this vast body of literature. She states that:

Supporters of the victim's right to participate in the criminal justice process have presented various moral, penological and practical arguments in its favour. Some argue that the effectiveness of sentencing will increase if victims convey their feelings, and that the process will become more democratic and reflective of the community's response to crime (Rubel, 1986). Victim participation will provide recognition of the victim's wishes for party status and individual dignity (Henderson, 1985). It will also remind judges, juries and prosecutors that behind the 'state' is a real person with an interest in how the case is resolved (Kelly, 1987). Victim integration will, it is

said, result in increased victim co-operation with the criminal justice system, thereby enhancing system efficiency (McLeod, 1986), while the provision of information on the harm suffered by the victim will increase proportionality and accuracy in sentencing (Erez, 1990). Fairness also dictates that when the court hears, as it may, from the offender, the offender's lawyers, family and friends, the person who has borne the brunt of the offender's crime should be allowed to speak (Sumner, 1987). (Erez, 1994:18)

Professor Erez also provides a summary of the arguments against increased victim participation:

The objections to victim input in sentencing center mostly on legal arguments concerning the appearance of justice and actual justice, and on practical concerns (Erez, 1990). Some argue that allowing victims' input will undermine the court's insulation from unacceptable public pressures (Rubel, 1986) or will result in substituting the victim's subjective approach for the "objective" one practised by the court (Victorian Sentencing Commission, 1988). Conceivably, similar cases could be disposed of differently, depending upon the availability of a VIS to the judge (Hall, 1991). Allowing victims to express their wishes concerning the offender will also inject a source of inconsistency and disparity in sentencing dependent on the "resiliency, vindictiveness or other personality attributes of the victim" (Grabosky, 1987). Because victims are thought to be as often vindictive as forgiving, their participation will result in both disparate treatment and increased sentence severity (Hall, 1991). Opponents of victim integration in the criminal justice process often portray the victim as a vindictive individual whose main objective in providing input will be to ensure severe punishment of the offender. With regard to the victim's statement of opinion (on the disposition of the offender) it has been argued that the victim's opinion is "irrelevant to any legitimate sentencing factor, lacks probative value in a system of public prosecution, and is likely to be highly prejudicial" (Hellerstein, 1989). (Erez, 1994:19)

Although the arguments in favour of victim participation have been advanced far more often than the arguments made by detractors, we have not yet seen full victim participation at the sentencing phase in most jurisdictions. In 1988 the Canadian Criminal Code was amended to allow for the introduction of victim impact statements, but even with the availability of this forum for presenting information to the court, the victim's interests remain largely invisible even at this stage.

Academics and lay people may accept the legitimacy of victim participation, but legal professionals have been more influenced by the arguments made by the detractors. Lawyers and judges appear lukewarm in embracing victim participation and this has been justified on the basis that it contradicts the justifiable goals of sentencing. Some think that the victim's interest is so inextricably linked to vengeance that it cannot be accommodated in a modern and civilized criminal process.

Even if the philosophical objections of legal professionals are unfounded, sociological perspectives suggest that legal professionals will be resistant to increased victim participation due to institutional demands and the reluctance to consider institutional change (Erez & Laster, 1999; Davis, Kunreuther & Connick, 1984). Professor Erez has noted:

Reports from jurisdictions that have introduced victim participatory rights suggest that allowing victims' input into sentencing decisions does not raise practical problems or serious challenges from the defense. Yet there is a persistent belief to the contrary, particularly among legal scholars and professionals. The disagreement between social scientists and legal scholars concerning the appropriateness of victim input into sentencing, or its possible effects, is due primarily to the socialization of the latter group in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings. This belief is reinforced by the practice of different methods of study and argument by legal scholars, compared to their counterparts in social sciences. (Erez, 1994:28-9)

For legal professionals, the pursuit of dispassionate justice does not readily accommodate the emotional needs of crime victims. This is reflected in the British Columbia Court of Appeal's analysis of the victim impact statement. The Court stated:

[Victim impact statements] do not purport, and I do not believe they were ever intended, to require the sentencing court to take a retributive approach when sentencing an offender. . . This court concluded that there is no role for revenge in a principled system of sentencing. . . Such a system requires a balanced, objective approach, separate and detached from the subjective consideration of retribution. The dilemma of the sentencing court is to balance a proper consideration of the consequences of a criminal act against the reality that the criminal justice system was never designed or intended to heal the suffering of the victims of crime. [R. v. Sweeney (1992), 71 C.C.C. (3d) 82 at 95 (B.C.C.A.)]

Arguably, this excerpt reflects the deep lack of understanding that courts have with respect to theories of punishment. Retribution is dismissed as mere vindictive savagery, and the court is then left with pure utilitarian justifications for punishments which do not readily accommodate the interests of victims (utilitarian justifications such as rehabilitation and deterrence speak to the 'good' of society at large and not to individual or private interests). A more realistic characterization of sentencing theory is found in these often-quoted words of the Ontario Court of Appeal:

The true function of criminal law in regard to punishment is in a wise blending of the deterrent and reformative, with retribution not entirely disregarded, and with a constant appreciation that the matter not merely concerns the Court and the offender but also the public and society as a going concern. [R. v. Willaert (1953), 105 C.C.C. 172 at 176 (Ont. C.A.)]

This comment was made in 1953 when the deterrent and reformative aspects of sentencing were ascendant. Since then these utilitarian justifications have come under attack with deterrence being viewed as a weak theory due to its incapability of being verified or falsified, and rehabilitation being dismissed as an unattainable ideal. Under the current approach to the 'wise blending' of sentencing principles, retribution has once again resurfaced as the predominant justification for punishment but it is masked in semantic word games so as to avoid the perplexing question of how to reconcile retribution with our moral aversion to vengeance. In R. v. M (C. A.) the Supreme Court of Canada endorsed the importance of taking a retributive stance at sentence and held as a matter of law that there does not exist a 20 year maximum ceiling for sentencing crimes of violence. The Court stated:

It has been recognized by this Court that retribution is an accepted, and indeed, important, principle of sentencing in our criminal law. . . . Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. . . .

The legitimacy of retribution as a principle of sentencing has often been questioned as a result

of its unfortunate association with "vengeance" in common parlance. . . . As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. . . .

Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. [R. v. M (C.A.) (1996), 105 C.C.C. (3d) 327 at 366–9 (S.C.C.)]

Whether we now call retribution by the names of denunciation, public revulsion or just deserts, the re-emergence of retributive sentencing requires us to rethink the age-old problem of the relationship between the victim and retribution. By returning to retributive justifications for punishment we have provided a principled foundation for the introduction of victim's interest into the criminal process because it is only the recent utilitarian justifications of deterrence and rehabilitation that, by definition, exclude private interests as irrelevant to the cost-benefit analysis that characterizes those practices. Retributive thinking revolves around fundamental notions of the restoration of balance and a proportionate response to injury, and this penological perspective invites, indeed embraces, victim participation in the process.

A great deal of the literature grappling with the relationship between victims' rights and retributive theory was written prior to 1989 and for the most part scholars concluded that retributive theory and victim participation are philosophically compatible. In the 1990s this issue was revisited in an extensive debate over the justifiability of introducing victim impact statements in capital sentencing cases. With the death penalty looming in the background, the issue of victim participation within a retributive framework triggers fears of lynch-mob justice. However, with the US Supreme Court ruling that victim impact statements are properly admissible at a capital sen-

tencing hearing in 1991 (*Payne v. Tennessee* 111 S. Ct. 2597), many commentators followed suit and concluded that victim impact evidence is “ethically permitted in a theory of retribution” (Sperry, 1992; Cronille, 1993).

Regardless of whether or not victim participation fits neatly within current penological theory, some lawyers and criminologists suggest that we must be hesitant to encourage this input because victim participation will invariably result in harsher sentences. Considering that North American sentencing practices are significantly harsher than European approaches, and that our prisons are already overcrowded, a general increase in sentence severity would be an undesirable development. However, neither the empirical evidence nor the case law conclusively show that victim impact statements to date have resulted in longer sentences (see Chapters 3.0 and 5.0 of this report). In fact, it has even been argued that “if victims’ actual injuries were systematically ascertained, hostility, and accordingly, severity of punishment, would decrease” (Zeigenhagen, 1977). In 1989, Karen Kennard wrote:

That observers may assume that crime victims are motivated by a desire for vengeance is understandable. However, commentators have pointed out that no evidence supports the assumption that victims uniformly seek harsh penalties. In fact, the evidence is to the contrary.

A 1981 case study of one hundred criminal cases found that, when victims of various crimes were given the opportunity to select from several viable sentencing alternatives, all but one were willing to accept alternatives to incarceration. In addition, a study of 417 sexual assault victims in a metropolitan Ohio county revealed that victims who implicitly recognized that they had played some role in the offense had a slight tendency to make lenient sentencing recommendations. Moreover, when the defendant was not a repeat offender, these victims’ recommendations of leniency influenced the judge’s ultimate sentencing decision.

Finally, the experimental program in Florida that permitted crime victims to sit in on pretrial settlement conferences revealed that victims generally did not demand the maximum authorized punishment and most often concurred with the disposition the attorneys proposed. The available evidence therefore suggests that involving crime victims in the criminal disposition process will not necessarily encourage retributive attitudes. If anything, many victims may exercise their influence in the direction of leniency. (Kennard, 1989:446–7)

As will be discussed later, there has been little evidence in the literature of the 1990s to call into question the conclusion reached in the 1980s that victims of crime are not

unduly harsh and punitive in their approach to sentencing. In general, it has been concluded that victim participation has little impact on sentencing outcomes.

On the other hand, opinion polls indicate that the majority of Canadians believe that sentences are insufficiently harsh [A. Reid, 1992], and this leads us naturally to assume that members of the public who have been victimized would demand harsher sentences if they are given greater input into the process. However, more detailed and controlled studies (Roberts & Doob, 1989) demonstrate that public perceptions of leniency are unduly influenced by media misrepresentations, and that when people are given greater information about a case their punitive response becomes muted:

The lesson to be drawn from the research is clear: public reactions to actual sentencing decisions are not as uniformly negative as one might expect. . . . In fact, there was evidence that in some cases the public may be less, not more, punitive than judges. (Roberts & Doob, 1989:501)

The 1989 Roberts and Doob study compared official incarceration rates with the rate of incarceration that would have resulted had members of the public acted as sentencing judges. The study demonstrated that while the sentencing decisions of the public would have resulted in 81,863 admissions to prison, judges actually sent 92,415 offenders from the same offender group to prison.

The literature suggests that victim satisfaction is more related to process than to outcome. The consequence of this is that victims may not be advocating disproportionately punitive sentences. Being treated with dignity and respect is more important than seeing that the offender is punished as severely as legally possible. As Professor Fattah has noted:

At the outcome stage, again, it appeared that process was more important than the actual result of the case. Perhaps surprisingly in our study, victims were often quite happy if the police did not catch the offenders, provided that they felt that the police had been interested and had kept them informed. They wanted, however, to be told the outcome clearly and fully — to know that enquiries were no longer continuing. Victims were, again, not particularly punitive either in the sentence that they would wish their offender to get or in their reactions to the sentence that those offenders who were convicted finally received. Their suggested sentences seemed to be very much within current English sentencing practice. (Fattah, 1986:214)

Once again, the assumption that victims will be unjustifiably punitive is based upon a lack of appreciation of the historical and political evolution of criminal justice. In a comprehensive

study of the history of penal practices, Graeme Newman (1985) concludes that there are two models of punishment: the reciprocity model and the obedience model. The former describes the proportionate responses of victims of wrongdoing and the latter describes the repressive response of a state undertaking the difficult exercise of social control through legal regulation. The most barbaric punishments are found in attempts by the state to compel legal obedience through the use of deterrent sanctions. By 1820 there were over 250 capital offences (mostly for property crimes) and it is clear that execution for property offences served state interests and was not dictated by the interests of victims.

One need not rely exclusively on the historical record of beheading, disemboweling and public execution for collective crimes (i.e., crimes such as treason or heresy that challenge the public order or the administration of justice) to prove that the state is responsible for the most vindictive and punitive responses to crime. In contemporary times, we can see that a 'victimless' crime (e.g., a narcotics offence) attracts the severest penalties next to homicide, or that judicial sentencing tariffs commonly are increased on the basis of furthering state interest in general deterrence. Tariff sentencing for robbery was created in the 1980s in Alberta and Nova Scotia and this punitive approach was premised upon the abstract notion of general deterrence and not on the concrete demands of actual victims.

It is not entirely true that the state is the fearsome, vindictive player and that the victim will always be moderate and forgiving. The important point to understand is simply that individual victims do not clamor for immoderate and disproportionate responses to crime. On occasion, an individual victim will be motivated by unbridled vengeance; however, the historical record convincingly demonstrates that sentencing excess is more often than not a product of state terror or mob violence. Mob or group violence is characteristically motivated by racial, ethnic or religious fervor. Individual victims who are not overwhelmed by group membership do not generally advocate lawless lynch-mob justice. It is fear of mob violence, not individual vindictive responses, which led to the creation of an impersonal and professional system of justice:

Maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about. Distinctive legal rules of procedure, jurisdiction, and evidence insist upon and define law's autonomous character — indeed constitute the very basis of a court's authority. The mob may have their faces pressed hard against the courthouse windows, but the achievement of the trial is to keep those forces at bay, or at least to transmute their energy into a stylized formal ritual of proof and judgment. (Gerwitz, 1996:863)

In the early 1990s popular media reported on a phenomena related to the victims' rights movement. Community representatives sought standing to provide community impact

evidence at sentencing hearings of prostitutes and drug dealers who worked the streets of the community. Surprisingly, this novel sentencing development has not attracted academic attention. In the one article chronicling the rise of community involvement in sentencing, the author expresses the concern that "enlarging its [the community's] role at sentencing only further tips the scales in favor of vigilante justice and against the criminal defendant" (Long, 1995:229).

It has also been suggested that victim input can lead to sentencing disparity, with crimes against worthy, high-status victims attracting severe sanctions and crimes against the disadvantaged and lower socio-economic class attracting lesser sanctions. This fear is well founded but is irrelevant to the issue of victim input. Sentencing disparity exists as a result of our reliance upon discretionary sentencing structures, and the solution to this problem lies not in the muzzling of victims but in a movement towards more determinate sentencing structures. In fact, in 1987 the Canadian Sentencing Commission recommended the establishment of sentencing guidelines to reduce disparity; however, the recommendation appears to have been ignored (Canadian Sentencing Commission, 1987). This recommendation should be revisited in the era of victim participation in sentencing because it has been found that victim impact statements have little effect upon sentences in American jurisdictions that have moved towards presumptive, determinate sentencing (Hellerstein, 1989; Hall, 1991).

If victim participation cannot influence sentencing practices then it may be argued that there is no point in wasting court time with this practice. This argument misses the point because it evaluates the value of victim input on instrumental grounds. The argument fails to recognize that victim participation is inherently valuable because of the due process value of fostering dignity through participation in a decision making process that has direct relevance to one's welfare interests. It is clear that a "lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable" (Mashaw, 1976:49).

Participation is intrinsically valuable. The perception of some degree of control empowers and strengthens the individual. At a trivial level, studies have shown that dental patients can endure more pain when they are falsely advised that the mere press of a button will make the pain stop. On a more significant level, it is clear that providing an individual with some degree of control and autonomy is an important first step in the healing process. Victim participation is the first step in regaining self-esteem lost as a result of criminal victimization. Kilpatrick and Otto (1987) aptly outline the importance of participation in reducing crime-related psychological harm:

Finally, it should be noted that equity theory places heavy emphasis on the relative treatment of the victim and criminal. From this perspective, equity can be restored by improving victim treatment, increasing punishment of criminals, or some

combination of the two. Thus, it is not necessary to compromise the rights of defendants in order to increase the rights of the victims. From the perspective of learned helplessness theory, ample reasons exist for predicting that criminal justice system treatment of the victims would affect the victims' perceptions of control and helplessness and, thus, their psychological well-being. Specifically, a criminal justice system that provides no opportunity for victims to participate in proceedings would foster greater feelings of helplessness and lack of control than one that offers victims such rights. Since this theory emphasizes perceived rather than actual helplessness and control, offering victims an opportunity to participate, thereby giving them control over the choice of whether to participate, is more important psychologically than whether they actually participate. However, the theory also predicts that victim perceptions of helplessness and lack of control are maximized by raising the expectation that a right to participate exists, the victim electing to exercise that right, and then being denied that right. (Kilpatrick & Otto, 1987:19)

A recurring theme in the popular media in relation to victim dissatisfaction with the process revolves around personal tragedies wherein the victims did not agree with a plea resolution agreement and felt excluded from the plea bargaining process. Nonetheless, victim participation in plea bargaining has not generated a great deal of support and most government reports fall short of recommending mandatory victim input for plea bargaining. However, the commentators do recognize that plea bargaining is a serious problem for victims' rights advocates:

The primary reason that impact-oriented reforms have faltered is that the great majority of criminal cases are disposed of through guilty pleas negotiated prior to trial. Plea negotiations are not public, and victims traditionally have been excluded from participation. Experimental attempts to involve crime victims in plea negotiations have been infrequent. Moreover, when attempted, these programs have tended to create a rubber-stamp procedure in which the victim essentially acquiesces to a bargain already negotiated by the prosecutor and the defense attorney. The programs have not given victims who participate any opportunity to influence the outcome of their cases.

Consequently, it is not surprising that victims do not consistently report that their participation in negotiations increased their satisfaction with the criminal justice system. (Kennard, 1989:418)

The disapproval of plea bargaining by victims groups even led California to ban plea bargaining in the lower courts; however, a study of this reform concluded that plea bargaining surfaced in other forms and in other forums (McCoy, 1993; Brown, 1994).

In analyzing the relationship between plea bargaining and a retributive approach to sentencing, it has been suggested that, divorced of mandatory victim input, plea bargaining is inconsistent with the theory of retributive sentencing:

Victims have been gaining many new rights in the criminal system. These gains have been attributed mainly to victims' desires for revenge or retaliation. However, victim participation in the plea-bargaining process is appropriate under a just deserts theory of retribution. Victim participation in plea bargaining would protect a victim's interest in both financial and psychic restitution without encroaching on the interests of the traditional plea bargain parties — judge, defendant, and prosecutor.

The present plea bargain system undermines the retributive theory of just deserts by excluding considerations of a victim. The defects in plea bargaining can be cured and reconciled with just deserts retribution by (1) requiring a prosecutor to provide a victim with a written statement setting forth a proposed plea offer and other information relevant to a victim's case, (2) requiring a prosecutor to consult with victims before a plea proposal is made to the defendant, (3) giving a victim and an offender an opportunity for reconciliation, and (4) giving a victim the right to be heard at a plea hearing. (Starkweather, 1992:877-8; see also Fenwick, 1997)

The academic enterprise of struggling to provide a proper penological foundation for victims' rights has spawned a large body of literature which has reformulated the nomenclature and philosophical underpinnings of a retributive theory of justice (Cavadino & Dignan, 1996; Sebba, 1996). Whether it is called "reconciliation" (Marshall 1985; Umbreit, 1985; Galaway & Hudson, 1990), "reparative justice" (Dignan, 1992), "relational justice" (Baker & Burnside, 1994) or "restorative justice" (Cragg, 1992; Zehr, 1990), the focus has been on emphasizing the "restoring the balance" function of retributive justice. Reflected in the steady growth of mediation and alternatives to criminal courts, restorative justice is an attempt to heal the wounds attendant upon victimization and to instill a feeling of accountability within the offender. In 1999, the Law Commission of Canada released a report on restorative justice and they begin by outlining the shortcomings of the current criminal process even with the progressive reforms in favor of the victim:

Many positive steps have been taken to assist victims. For example, victim impact statements may now be introduced in court. Victim/witness support programs have also been introduced in many jurisdictions. The goal of these programs is to assist victims and witnesses in understanding the trial process and to help avoid re-victimization. Nonetheless, neither alters the structural position of victims within the system. Victims remain on the outside looking in, rather than being engaged as direct and active decision-makers.

The current criminal process also does not always do justice for offenders. It encourages many to be passive and to plead guilty in order to receive the most lenient sentence possible. Their crime is objectified and abstracted from the context in which it took place. Offenders' actions are cast in terms of violations of the Criminal Code rather than as violations of others. The offenders lawyer uses the law to distance the offender as far as possible from the conflict. Offenders are rarely provided the opportunity to develop an appreciation of the impact their actions have on the lives of victims, and seldom are they asked to repair any damages they have caused. Because it offers few incentives for offenders to accept responsibility for their actions, the trial process does little to instill in them respect for the law or respect for others. (Law Commission of Canada, 1999:18–19)

The report continues by providing the following description of the theory and practice of restorative justice:

Restorative justice is an approach to resolving conflict that places much attention on the physical, economic, emotional, psychological and spiritual elements of the conflict. As such, it can be well-suited to achieving justice within a diverse population. Sentencing circles, for example, operate in many Aboriginal communities in Canada. Sentencing circles allow victims, offenders, community elders, other community members and court officials to discuss together the consequences of a conflict and to explore ways of resolving the aftermath. Restitution for damages and reintegrating the wrongdoer into the community are high priorities. Community members play an active role in assisting the victim and the wrongdoer with the healing process. Youth justice committees operate similarly to sentencing circles, although they are also used for non-Aboriginal offenders as well as Aboriginal offenders. . . .

Restoration has different meanings for victims, offenders, and the community. For victims,

restoration has a healing component. It may involve restoring victims' sense of control over their lives by providing them the opportunity to express their anger, to get answers to questions they may have about the incident and to re-establish order and predictability in their lives. For offenders, restoration involves accepting responsibility for their actions by repairing the harm they have caused. This also means addressing the issues that contribute to their propensity to engage in harmful behavior. This may require dealing with anger management or chemical dependency. For the community, restoration involves denouncing wrongful behavior and reaffirming community standards. Restoration also includes ways of reintegrating offenders back into the community. (Law Commission, 1999:26–7)

2.2.2 Victims' Rights and Models of Criminal Justice

Struggling to find a proper theoretical model to provide a foundation for victims' rights, Professor Roach in 1996 proposed a third model of criminal process. For decades, academic commentators extolled the descriptive and prescriptive virtues of Professor Herbert Packer's two models of the criminal process. In *The Limits of the Criminal Sanction* (1968) Professor Packer outlines the assembly-line crime control model with its focus on the repression of crime in an efficient manner and the obstacle-course due process model with its focus on civil liberties and reliability of verdict as opposed to efficiency of process. Professor Roach proposed:

The crime control and due process models of criminal justice are no longer sufficient to describe the modern criminal justice system. A third model, the victim rights model, should be added to the mix. This model is complex and multi-faceted. It involves calls for more laws and prosecutions, greater sensitivity to the accused, such as battered women, who claim to be the true victims, a greater role for the victim in the accused's trial and more services and support for victims. Providing the victim a role and support in the criminal trial has the potential to correct the closed and sometimes insensitive nature of both the due process and crime control models. On the other hand, there is a danger that crime victims will receive only a symbolic stake in the criminal process and that the use of the criminal sanction in their name will not improve their lives. There may also be divisive competition among victims for preference from policy makers. (Roach, 1996:21)

Unfortunately, Professor Roach's formulation of a third model is rather nebulous; however, in 1999 he published the

first and, thus far, only academic text on victims' rights in Canada (Roach, 1999b). In this book, his third model is clarified and analysed in a more nuanced manner. He suggests that there are two formulations of the victims' rights model of the criminal process — the punitive approach and the non-punitive or restorative approach. He describes the punitive approach as follows:

A punitive victims' rights model resembles the crime control model by assuming that the enactment of a criminal law, prosecution, and punishment controls crime. Some victims' advocates demonstrate the same enthusiasm for the criminal sanction that characterizes the crime control model. This may represent the capture of victims' rights by professionalized interests in crime control or the domination of victims' advocacy groups by those who have experienced the most serious of crimes. The nature of criminal justice politics, which are often mobilized by well publicized and horrible cases of violence, lead some to conclude that it is "unrealistic to expect victim advocacy to spearhead the movement toward re-integrative shaming". Victim advocacy is often focused on creating new criminal laws in the hope that they will prevent future victimization. Feminist reforms of sexual assault laws and new laws targeting the sexual abuse of children are designed not only to protect the privacy and integrity of victims, but to make convictions easier to obtain. Victim impact statements and victim involvement at sentencing and parole hearings are often directed towards greater punishment. Much more directly than due process, victims' rights can enable and legitimate crime control. (Roach, 1999b:30–31)

He then described the non-punitive model of victims' rights as follows:

A concern about victims does not produce an inescapable dynamic towards reliance on the criminal sanction and punishment. An alternative direction is away from the roller coaster of relying on an inadequate criminal sanction and countering due process claims, and towards the prevention of crime and restorative justice once crime has occurred. Both the processes of prevention and restoration can be represented by a circle. One manifestation of the circle may be the gated community with its own private police force. Another example would be successful neighbourhood watch or the self-policing of families and communities. Once a crime has occurred, the circle represents the processes of healing, compensation, and restorative justice. Normatively, the circle

model stresses the needs of victims more than their rights, and seeks to minimize the pain of both victimization and punishment.

A non-punitive approach is not deferential to traditional crime control strategies and agents, but unlike the punitive model de-centers their importance. Families, schools, employers, town planners, insurers, and those who fail to provide social services and economic opportunities are also responsible for crime. The challenge is to jump traditional jurisdictional lines and not to diffuse responsibility too thinly. Crime prevention can be achieved through social development to identify and provide services for those at risk of crime. Early childhood intervention targeting disruptive and anti-social behavior and poor parenting skills may help prevent future crime as well as blur bright line distinctions between victims and offenders. At the same time, more immediate forms of crime prevention including target hardening, better lighting, information exchange among bureaucracies, and changing high risk activities also play a role. Public health approaches focus much more on the victim than do traditional criminal justice responses which attempt to deter and punish offenders. Unlike in the punitive model, there is little concern about blaming offenders or victims. Following a public health approach, the non-punitive model recognizes that offenders and victims often come from similar populations and that these populations are disproportionately exposed to harms other than crime. Crime prevention may evolve into a more comprehensive approach to safety, security, and well-being which does not make hard and fast distinctions between the risk of victimization by crime and other harms and risks.

Once a crime has been committed, the focus is on reducing the harm it causes through healing, compensation, and restorative justice. The circle can be closed without any outside intervention as crime victims take their own actions to heal and attempt to prevent the crime in the future. More prosaically, the circle of restoration may simply be a claim on an insurance policy which returns the money to the policy-holder invested in insurance premiums. When the victim does report crime, the circle can be represented by a process of restorative justice which allows the offender to take responsibility for the crime and attempt to repair the harm done to victims. This is often achieved through informal proceedings such as Aboriginal healing circles, family conferences, and victim-offender reconciliation programs in which all of the actors are seated in a circle. All of these interventions are united by their concern for the welfare of

both offenders and victims, informal non-punitive approaches, and wide community participation. The key players in these circles should be the victim, offender, and their families and supporters — not police, prosecutors, defense lawyers or judges who may appropriate their dispute. Victims play the most crucial role and this gives them some of the power to decide whether to accept apologies and plans for reparation. In a punitive victims' rights approach, however, they can only make representations to legislators, judges, and administrators who retain the ultimate power to impose punishment. (Roach, 1999b:33–4)

Although the formulation of the punitive and non-punitive model of victims' rights is informative, it is interesting to note that in this first ever academic book on victims' rights in Canada, Professor Roach only devotes one chapter to victims' rights. Many of the other chapters largely explore the issue of whether or not increased protection for victims is achieved at the expense of the accused's rights. Whether the penal philosophy underlying victims' rights is called retributive or restorative, there still exists a recurring refrain in the literature that complete realization of victims participatory rights will only serve to eviscerate the constitutional rights of accused persons (Acker, 1992). There is a sense that without proper constraints the victims' rights movement will prejudice civil liberties. Professor Hall, an advocate for victims' rights in the 1980s, expresses caution about the steady growth of victims' rights in the 1990s:

Many years ago I, along with a small group of others, urged that victims of crime be given more considerate and compassionate treatment by criminal justice officials. Pleas were made to afford victims opportunities to be more significant actors in the criminal justice system. Many positive and sweeping changes described here and elsewhere have occurred in a relatively short period of time. While we should applaud the general thrust of these efforts, the time has come to signal the call for a proper balance between victim and offender.

It is axiomatic that crime victims are important participants in the criminal justice system and that they must not be the recipients of uncaring or insensitive treatment. However, with regard to criminal case dispositions, we must move cautiously and prudently in deciding the kind of information that we should solicit from victims for consideration by judges in imposing sentence. The victim impact statement is an appropriate conduit through which certain data should flow to court officials. The VIS contents, however, should be restricted to factual descriptions of harm suffered by the victim so that a rea-

sonably accurate measure of the defendant's culpability is obtained. Victim participation statutes calling for the victim's opinion or recommendation as to case disposition are ill-conceived measures triggering far more harmful consequences than their meager benefits. They should not be enacted. Where legislatures have already approved such measures, they should be rescinded. (Hall 1991:265–6)

Despite the claims of well-intentioned lawyers, victim participation, in most circumstances, will not serve to erode the accused's right to due process, nor will it transform the sentencing process into a ceremony of cruelty. There are sufficient statutory and constitutional safeguards to ensure that victims' rights will not trump the accused's rights. To date, only one area of conflict has arisen where the rights of victims appeared to irreconcilably clash with the rights of accused persons. Primarily in the area of sexual assault we find an irreconcilable clash between the victim's right to privacy and the accused's right to full answer and defence. With respect to the production of third party counselling records (*R. v. O'Connor*, [1995] 4 S.C.R. 411) and with respect to the rape shield law (*R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Seaboyer*, [1991] 2 S.C.R. 577), the Supreme Court of Canada attempted to fashion a compromise solution; however, the truth remains that one can never perfectly balance the right to full answer and defence and the right to privacy. With the exception of this narrow but significant clash of interests, the recognition of victims' rights has not been gained at the expense of the rights of the accused.

The fear of trampling upon fundamental constitutional rights relates solely to the growth of participatory rights for the victim and is not directed to welfare rights which are provided outside of the context of the criminal trial. As Professor Black has stated:

If victim participation disserves penal policy, if only by cluttering an already crowded stage with walk-ons, it does not really serve the interests of victims, nor those of the far larger class of potential victims — all of us. The truth is we punish criminals for reasons unrelated to the immediate interests of victims.

If victims need services, by all means let us provide them; afford them compensation and rehabilitation. But it is much easier for a legislature to concoct new "rights" than to fund new services. Few victims may exercise their rights anyway, but the politicians claim credit for the gesture of bestowing them. Courtroom rituals like victim allocation are sops. The self-styled victims' rights advocates point with pride to these rights, but of no jurisdiction can it be said, as it can of Britain: "Victims' support schemes are sensible, effective, and soundly constructed; they are now quite hand-

somely endowed by the State; and many victims of crime are well served. ” Crime victims have been made the pawns of law-and-order campaigns — ironically so since their best interests are ill-served by other aspects of the get-tough package. (Black, 1994:239–240)

The last comment in the quotation reflects another growing concern in the literature of the 1990s. Putting aside any question of philosophical justification, many writers have expressed concern that the victims’ rights movement has been hijacked by a conservative, law and order platform (Mosteller, 1998; Henderson, 1998). Unwittingly, crime victims have been unduly influenced by conservative claims that an increasing punitive response to offenders is the only mechanism to curb victimization. Professor Fattah has noted:

Crime victims are not the first group whose cause is exploited by unpopular governments seeking a higher rating in public opinion polls, by opportunistic politicians seeking electoral votes, or by incompetent public officials trying to detract attention from their failure to control crime or to reduce its incidence. Showing concern for crime victims acts as a cover-up to the inefficiency of the system, and its inability to prevent victimization. Demanding that something be done to help and to alleviate the plight of victims masks society’s unwillingness to deal squarely with the problem of crime. In times of growing concern about crime, showing sympathy for the victim and committing a handful of dollars to victims’ programs and services relieves the pressure on politicians to confront social injustices, ethnic conflict, inequalities in wealth and power, and the frustrations of seeing too much and having too little. (Fattah, 1989b:57)

Not only has recent literature suggested that victims have become political pawns, but in addition, there has been a recent slew of very negative literature that has cast victims in a more sinister light. With Professor Alan Dershowitz’ coining of the phrase “abuse excuse” there has been a movement towards disparaging the claims of victims by viewing their claims as an endless clamour for entitlements which are not deserved. Professor Best notes:

The growing attention to victims has not gone unnoticed. Robert Hughes remarks: “As our 15th century forebears were obsessed with the creation of saints and our 19th century ancestors with the production of heroes. . . so are we with the recognition, praise, and when necessary, manufacture of victims. Contemporary critics complain that our society fosters crybabies,

complaints, excuses, pique, busy-bodies, meddlers, “the moral prestige and political spoils of victimhood [and] whining rights in the victimization bazaar”; that the ‘route to moral superiority and premier griping rights can be gained most efficiently through being a victim’”. (Best, 1999:138; see also Sykes, 1991)

Despite the critical claims listed herein, the vast majority of literature, especially American, advocates support for current victims’ rights initiatives. Since the 1960s virtually every jurisdiction has continued to explore and propose reform measures to improve the plight of crime victims. The short history of major American developments with respect to victims’ rights reform in the US is reflected in this brief summary:

In 1982, the US Presidential Task Force on Victims of Crime made 69 recommendations for governments, lawyers, mental health specialists and six other groups of Americans. These recommendations included a constitutional amendment to give victims, “in every criminal prosecution, the right to be present and to be heard at all critical stages of judicial proceedings”. The Task Force reported after high profile hearings held with victims, victim advocates, researchers and the legal community.

In 1983, the US administration introduced the guidelines for all federal investigative and legal personnel. It required victims to be informed about all stages in the prosecution and mandated “consultation with the victim” in the criminal process. At the US Federal legislative level the 1982 Victim and Witness Protection Act provided for written “Victim Impact Statements”, compulsory consideration of restitution, harsher penalties for threatening witnesses, state accountability for grossly negligent release of offenders, access by victims to criminals’ royalties and for legal personnel guidelines for victim and witness assistance. In 1984 the Victims of Crime Act provided funding for compensation and services to reinforce the earlier legislation. (Waller, 1985:9)

From this point in the mid-1980s the volume of victims’ rights legislation grew exponentially with the enactment of statutory Bills of Rights for victims, state constitutional amendments enshrining constitutional rights for victims and the contemporary debate raging about amending the American Constitution to recognise victims’ fundamental rights.

The history in Canada follows a similar pattern except that “the interest in crime victims in Canada came mostly from governments, whereas in the US it was a populist movement” (Roach, 1999b:281). Paul Rock recounted how victims’ rights

were raised at the 1979 Federal-Provincial Conference on Ministers Responsible for Criminal Justice by the provincial ministers and this compelled the Federal government to enter the debate. Rock contends that the federal government recognition of the issue of victims' rights was a key starting point but that the victims' rights movement in Canada primarily grew as a result of three factors: a loose coalition of Canadian feminists organizations; Canadian victim assistance programs and the American victims' rights movement (Rock, 1986).

The most significant development in Canada, as in the US, was a 1983 Federal-Provincial Task Force which made numerous recommendations with respect to the victim. Professor Waller outlines the recommendations as follows:

The Federal-Provincial Task Force made 79 recommendations to improve justice for victims. If implemented, they would make major improvements in emotional and practical assistance for victims. However, there were few relating to the criminal process. Those that did, focussed on more efficient property return, information about the trial date and outcome, and notification about release from custody. Recommendations were made requiring the consideration of restitution and an opportunity for the victim to make representations. An undefined Victim Impact Statement was to be included in the presentence report. (Waller, 1985:12; see also Waller, 1990; Barfknecht, 1985)

Most jurisdictions around the world have proposed similar law reform measures and welfare measures in aid of victims. The uniformity of approach is partly a reflection of the fact that many countries are signatory to the 1985 United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuses of Power (see Chapter 4.0 of this report). This declaration is a statement of general principles and it contains few concrete details with respect to implementation. Stated at a high level of generality it is virtually impossible to criticize proposals of this nature for affording victims greater respect and dignity. The thrust of these principles was adopted by the Federal/Provincial/Territorial Ministers responsible for justice.

CANADIAN STATEMENT OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, Federal and Provincial Ministers Responsible for Criminal Justice agree that the following principles should guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime.

- 1) Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.
- 2) Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.
- 3) Information regarding remedies and mechanisms to obtain them should be made available to victims.
- 4) Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.
- 5) Where appropriate, the view and concerns of victims should be ascertained and assistance provided throughout the criminal process.
- 6) Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.
- 7) Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.
- 8) Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate for this purpose.
- 9) Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.
- 10) Victims should report the crime and cooperate with the law enforcement authorities.

The literature of the 1970s and 1980s debated the proper role and function of the victim, and despite some remaining philosophical objections, a consensus emerged that affording rights to victims was a sound state policy. Article after article implored legislatures to develop fresh perspectives which would be responsive to the needs of victims. By the end of the 1980s law-makers around the world embraced victims' rights in principle, and the question for the 1990s should have changed to one of exploring implementation of the principle. In reviewing the American experience, Professor Tobolowsky wrote:

Unlike the situation existing prior to the Task Force Work (pre-1982), the relevant inquiry is no longer whether victims should

have participatory rights in the criminal justice process. The incredibly rapid adoption of constitutional and legislative victim rights provisions over the last fifteen years ensures that victims will have a participatory role in the criminal justice process. The relevant current focus therefore must be to ensure that these victim participatory rights are appropriate and meaningful in the context of the varied individual and societal interests involved in criminal prosecutions. (Tobolowsky, 1999:103)

The question that remains is whether the 1990s witnessed the concrete realization of these ideals or whether the Statement of Basic Principles remains an unrealized aspiration. With respect to the American experience, Robert Elias concluded that:

For all the new initiatives, victims have gotten far less than promised. Rights have been unenforced or unenforceable, participation sporadic or ill-advised, services precarious and underfunded, victims needs unsatisfied if not further jeopardized, and victimization increased, if not in court, then certainly in the streets. Given the outpouring of victim attention in recent years, how could this happen? (Elias, 1993:45)

The remainder of this report will explore whether Elias' indictment of victims' rights initiatives is well-founded, or whether law reform efforts around the world have actually begun to yield tangible results.

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3.0 Victims' Rights in Canada

3.1 INTRODUCTION

Both in Canada and abroad the first official legislative act designed to address the plight of victims was the creation of compensation boards. Although governmental compensation has an ancient pedigree stemming back to the Babylonian Code of Hammurabi (approximately 1775 B.C.), the gradual conversion of the law of wrongdoing into the law of crime erased all memory of the victim's private interest and compensation was left to the individual initiative of victims in launching civil suits. New Zealand was the frontrunner by establishing the first legislative scheme in 1963 for state compensation to those injured by crime (in fact, this scheme was amended in 1972 to create the most comprehensive compensation scheme in the nature of no-fault insurance). In 1963 Britain established a royal commission to study the issue and by 1964 Britain established its first compensation scheme. California followed suit in 1965 and in 1969 Alberta established the first Canadian legislative scheme for victim compensation. By 1988 similar schemes had been enacted in all Canadian provinces.

Within the criminal process itself, the Criminal Code had contained for the past thirty years provisions allowing for compensation/restitution as part of the sentencing process; however, these provisions have been underutilized and limited in scope of operation. Due to the unique structure of Canadian federalism, the Federal government has limited jurisdiction respecting compensation and thus compensation within the process is limited to damage awards that are readily ascertainable and relate to quantifiable and concrete losses. Needless to say, the provincial schemes do not suffer from the same constitutional restrictions, and the provincial entry into the compensation field propelled provinces into the general field of the provision of welfare rights to crime victims.

Building on the welfare model of victims' rights, other government social services were extended to victims. Beyond the compensation schemes of the 1970s, most provincial jurisdictions began to offer victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs. In 1988 the Federal government lent some assistance to the development of provincial programs by amending the Criminal Code to require the imposition of a small victim surcharge to be applied to provincial victim assistance schemes.

Spread throughout the country is a patchwork quilt of victim services. Clearly, these programs must be nurtured and expanded; however, as already discussed, this report will not exhaustively canvas the welfare model of victims' rights (as reflected in various provincial programs) as the focus will be on the rights-based model of empowerment through participation in the process. Nonetheless, reference to the

provincial provision of services is unavoidable for the simple reason that the vast majority of studies (almost all commissioned by the federal and provincial governments) concern the provision of welfare services. The issue of participatory rights forms a large part of the platform of political activism, but surprisingly, has received little academic attention. In terms of government studies, participatory rights have also received little attention except for an extensive evaluation of the utilization of victim impact statements in Canadian courts.

In general, there is a dearth of Canadian literature discussing the role of the victim in the criminal process. Although this report is designed to review literature produced between 1989–1999, on occasion it will be necessary to refer to pre-1989 literature due to the absence of any contemporary work. There appears to be one catalyst for academic attention and this is the constitutional challenge to legislation that is designed, directly or indirectly, to protect the interests of victims. Constitutional challenges to the rape shield law or the production of counselling records produced an outpouring (by Canadian standards) of law review articles, and scholars were compelled to address victims' rights issues. However, without the spectre of a constitutional challenge looming in the background, few Canadian academics have chosen to explore victims' rights issues. By way of contrast, criminologists and victimologists in Canada have produced an impressive array of literature dealing with victimological concerns that are beyond the scope of this report.

As alluded to in the introduction to this report, the collection of the identified literature was fraught with obstacles as many articles and reports are simply unavailable. Certain Department of Justice Canada reports were difficult to locate possibly due to the fact that they had been archived or out of print. Difficulties were also experienced in locating documents from other government departments. Ironically, the following statement was found while reviewing the literature for this report:

In 1982 a National Victim Resource Centre was established in Ottawa. Phase one of the project, a basic collection of literature about victims and victimization, was completed in 1983. During phase two, records on new government funded victim research and demonstration projects were added, as well as more descriptions of written materials. In 1984 detailed information was added on victims services operating across Canada. The Federal government has approved operation of this data collection on an experimental purpose until March of 1986. (Barfknecht, 1985:84)

Although attempts were made to establish this data collection centre, no central repository for literature pertaining to victims' rights currently exists. The Department of Justice Canada has commissioned literature reviews (Meredith, 1984) and inventory reviews of public legal education materials relating to crime prevention and victims (Gill, 1994); however, materials included in these bibliographical listings were often difficult to retrieve.

Although there does exist a considerable body of Canadian literature dealing with restorative justice and mediation within the criminal process, these topics will not be discussed in this part of the report. Numerous mediation programs have been initiated in Canada and to a certain extent mediation programs are an important component of the restorative aspects of the victims' rights movement. However, this part of the report will not discuss Canadian developments with respect to restorative justice as the general topic of mediation is discussed in Chapter 5.0 of this report dealing with social science perspectives.

3.2 DISCUSSION

3.2.1 Federal Initiatives

In October 1998, the House of Commons Standing Committee on Justice and Human Rights released a report, *Victims' Rights — A Voice, not a Veto*, in which the Committee reflected on progress to date and the need for further reform. They begin the analysis with the conventional assumptions that most politicians make, regardless of whether or not the assumptions are supported by a solid, empirical foundation. Despite the absence of a solid empirical foundation, these assumptions are constantly echoed by victims who are asked to provide testimony before government standing committees. The testimony inexorably leads to the following conclusion drawn by the Standing Committee on Justice and Human Rights:

To summarize, victims ask for a voice, not a veto over, what happens at each stage of the criminal justice process. They ask for information and notification — about how the criminal justice system functions, about the programs and services available to them, and about the various stages of the case in which they are involved. They argue that they are entitled to be treated with dignity. They urge the provision of adequate financial, human, and other resources to programs intended for victims of crime. They identify as a critical problem the uneven availability of victims' programs and services both between provinces and territories, and within them. In their view, addressing all of these issues will restore the imbalance they see in the criminal justice system. (Standing Committee, 1998:2)

The report contains 17 recommendations to strengthen existing provisions that serve to protect victims' interests. However the Committee did not recommend any reform which could be characterized as novel or innovative. It may be that conventional wisdom suggests that the Federal government lacks extensive constitutional authority to establish dramatic reform (Pilon, 1995a), and the Committee did note that we must recognize the "primary role of the provinces and territories in relation to victims in the criminal process" (Standing Committee, 1998:12). The constitutional shortcomings may be somewhat overstated considering that the provisions for restitution [*R. v. Zelensky* (1978) 41 C.C.C. (2d) 97 (S.C.C.)] and the provisions for the victim surcharge have been upheld as a valid exercise of Federal criminal law power [*R. v. Crowell* (1992) 76 C.C.C. (3d) 413 (N.S.C.A.)]. Nonetheless, the Committee called for a "coordinated strategy between all levels of government" (Standing Committee, 1998:6) with recognition of the provinces' leading role, and this may account for the rather modest nature of the reforms initiated in 1998.

The following discussion will focus on the state of Federal victims' rights reform as it applies in four areas: 1) Restitution; 2) Victim Surcharge; 3) Victim Impact Statements and Sentencing Reform; 4) Victims of Violence.

3.2.1.1 Restitution (Sections 738–741.2 & 491.2 of the Criminal Code)

Restitution as a sentencing option has been available for decades, yet somehow this restorative sanction has remained obscure, both in terms of practical implementation and academic commentary. Restitution within the Canadian criminal process is limited by constitutional principle to readily ascertainable damages. In 1967 it was noted that "these sections are rarely used by our courts, except as a condition of the imposition of a suspended sentence" and that the reluctance to employ this sanction continued due to two related factors: difficulties in assessing loss and concern that the assessment is properly in the realm of the civil courts (Burns 1992:12–13). In his book *Criminal Injuries Compensation* (1992), Professor Burns devotes only 20 pages to this topic and he confirms that the available evidence suggests that restitution within the criminal process is largely ineffective.

Recognizing the shortcomings within the law, the Federal government has twice amended the Criminal Code to strengthen the regime. In 1988 the law was amended to allow the prosecutor to apply for restitution and relieve the victim of this burden. In 1995 the law was amended and the categories of potential recovery were expanded, especially with respect to assisting victims of domestic violence. Notwithstanding these developments, the assessment of restitution remains unchanged — "complex and underused and available only in cases of ascertainable damages" (Roach, 1999:298). In 1998, the Standing Committee on Justice and Human Rights reviewed the current regime and made only one recommendation in this regard — "to assist the Provinces. . . in the development of strategies and

resources to enable local agencies to help victims in the enforcement of restitution orders” (Standing Committee, 1998:34).

The available literature is consistent in tone and opinion (Muir, 1984; Ontario Legislative Assembly, 1994; Weitekamp, 1991). In 1986 the following observation was made:

Whether or not restitution is a “natural response”, there appears to be a number of reasons why judges are reluctant to use the existing provisions and legislators are reluctant to impose more effective ones — reasons involving the nature of the criminal process, the objectives of sentencing, constitutional division of powers, and sometimes no doubt a combination of ignorance and inertia. Judge Cartwright. . . in *R. v. Kallou*. . . commented:

“those few Crown counsel who are even aware of the existence of this section which allows the victim of an indictable offence to apply for an order to satisfy loss or damage to property caused in the commission of a crime are equally indifferent to its application”.

He went on to suggest that if the Attorney General were paid by commission on completed restitution orders, “blood would be flowing from stones” all over Ontario. (Clarke, 1986:36)

In the scant literature from the 1990s commentators remain “skeptical” notwithstanding the reforms enacted in 1995 (Gaudreault, 1997; Renaud, 1996; Weitekamp, 1991). It is somewhat surprising that so little attention has been paid to restitution in light of the fact that the absence of restitution remains a contributor to victim dissatisfaction (Bonta et al., 1983; see Chapter 5.0 of this report). For example, the early literature clearly identified the return of property as a basic need of a crime victim. In the 1980s the restoration provisions of the Criminal Code were amended to include a provision (s. 491.2) allowing the police to promptly return stolen property, or a victim’s property seized as evidence, by modifying the traditional rules of evidence and deeming a photograph of the property to be admissible evidence. Although the amendment appears responsive to victims’ needs, there is not one reported or unreported case on this provision, nor is there any discussion of the provision in the academic literature.

3.2.1.2 Victim Surcharge (Section 737 of the Criminal Code)

Section 737 of the Criminal Code came into force in July 1989. The creation of the victim surcharge was designed to collect revenue for provincial victim assistance programs. The surcharge could not exceed 15% of any fine imposed, or \$35.00 if no fine was imposed, and the Criminal Code dictates that

the proceeds “shall be applied for the purposes of providing such assistance to victims of offences as the Lieutenant Governor in Council of the Province in which the surcharge is imposed may direct from time to time”.

The only reference to this development in the academic literature is a brief comment introducing the concept of a victim surcharge (Libman, 1990), and a footnote in an article in which the program is criticized because of the failure of the province of Ontario to earmark the proceeds for victim services (Young, 1993). The difficult implementation of this reform is described in this summary of the experience in Ontario:

Currently, Ontario is the only province which does not have a designated fund into which revenues from the surcharge can be paid; rather, revenues from the surcharge are paid in the Consolidated Revenue Fund. The lack of a specific fund has resulted in some judges refusing to impose the victim fine surcharge. Judges have been doing this either by invoking the provision in the Code which allows them to waive the surcharge if its imposition would cause financial hardship to the offender or the offender’s dependents, or by reducing the fines imposed at sentencing on which the surcharge is calculated so that the total revenue collected is the same as it would have been before the surcharge came into effect. (Ontario Legislative Assembly, 1994:15)

The Province of Ontario remedied this omission and s. 737 withstood constitutional challenge in 1992 [*R. v. Crowell* (1992) 76 C.C.C. (3d) 413 (N.S.C.A.)] but problems remained. In 1998, the Nova Scotia Department of Justice noted that the expected revenue collected was less than anticipated (Standing Committee, 1998). This latter criticism is rather surprising in light of a study which concluded that “Nova Scotia is one of the provinces in which the surcharge has been fairly trouble-free” (Axon & Hann, 1994:84).

A 1992 study of the victim surcharge in British Columbia showed that the surcharge was applied in only 10% of eligible cases (Roberts, 1992). The lack of compliance appeared to be due to philosophical objection and resistance from the judiciary and, as in Ontario, the failure to establish a designated victims’ fund into which to apply the proceeds. The author also noted the dearth of readily available data in most jurisdictions, and despite general compliance in the Maritimes there is resistance and disparity in other provinces. In particular, there is very low compliance with the surcharge provisions when judges impose non-fine dispositions, and in 1990, the collected surcharge revenues were only 40% of the projected revenues.

A 1994 study commissioned by the Department of Justice Canada echoes the 1992 findings (Axon & Hann, 1994). Collected revenues across Canada were lower than expected with only 15% of the potential actually imposed and only 2.7%

actually collected. The lowest compliance rate was found with respect to non-fine dispositions with some judges simply forgetting and some thinking it is unreasonable to impose surcharges when imposing custodial sentences. Institutional resistance was confirmed with some judges and prosecutors reporting that they felt the surcharge was an inappropriate way to generate revenues for victims. At the time of this study many provinces had still not created designated funds for victim services and this may account for the low rate of compliance reported in the early part of the 1990s.

The surcharge has not been the subject of any detailed discussion since the publication of the 1992 and 1994 reports. However, Parliament did amend s. 737 in 1999 to strengthen the surcharge. The surcharge was raised to \$50.00 (summary conviction offences) or \$100.00 (indictable offences) for non-fine dispositions, judges were given the power to raise the maximum surcharge where “appropriate in the circumstances”, and the surcharge was now to be imposed automatically in all cases.

3.2.1.3 Victim Impact Statements and Sentencing Reform (Section 722 of the Criminal Code)

In 1988, there were three significant reforms: the introduction of victim impact statements, the prioritization of restitution over the fine, and the creation of the victim surcharge. Some reforms appear doomed to failure due to limited resources or a lack of political and legal will. In contrast, the introduction of the victim impact statement does not impose an enormous fiscal burden upon the government and as such should not be doomed to failure, yet studies suggest that the victim impact statement has not had a dramatic impact on the sentencing landscape.

Since 1988, there have been several reforms that provide a stronger foundation for the introduction of victim impact statements. In 1995, Parliament enacted within the Criminal Code a statement of the fundamental purposes of sentencing, and for the first time there is explicit recognition that sentencing also serves the interests of victims. Section 718 includes as two of the six stated objectives of sentencing that punishment is “to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community”. In addition, in 1999, s. 722 of the Code was amended to permit the victim to deliver the statement orally in open court, if so desired, and by requiring the judge to inquire whether or not the victim has been advised of his/her right to make this statement. Finally, the Corrections and Conditional Release Act, S.C. 1992, c. 20, was amended to permit introduction of these statements at parole hearings, and the Young Offenders Act, R. S. C. 1985, Y. 1, was amended in 1995 to allow the introduction of these statements in Youth Court (s. 14(2)(b)). Finally, in 1995 the Criminal Code was amended to allow these statements at “faint hope” hearings. According to s. 745.6, prisoners serving life terms with parole ineligibility in excess of 15 years

may apply for a jury review of their parole eligibility date. Victim participation at these hearings was extended in 1999 to include a right to make an oral statement.

In exploring the utility of victim impact statements, the Solicitor General Canada commissioned a study in 1985 to determine how these statements would impact upon sentencing judges. It was determined that the impact was modest, but that the statements did have a tendency to raise the tariff for crimes of violence but not for property crimes (Solicitor General Canada, 1985). In 1988, a two-year study of a pilot project involving victim impact statements in Winnipeg was published. The findings revealed little of great significance, save for the opposition demonstrated by law enforcement and judicial officials to the introduction of these statements (Clarke, 1988). In the Introduction to this report, reference was made to professional opposition to victim law reform and it is not surprising that two of the three academic articles on victim impact in Canada were written by defence lawyers who were concerned about the potential for these statements to inflame the court (Rubel, 1986; Skurka, 1993). The concerns expressed by defence lawyers have been addressed in an article which concludes that victim impact statements would not lead to more punitive sentencing (Young, 1993). This conclusion was based upon the existing empirical evidence in the US and a Department of Justice Canada study in 1990 which concluded that “victims do not seem to use these statements as a retributive tool and there is no evidence to suggest that statements are vengeful in nature” (Focus Consultants et al., 7, 1990:29).

The Department of Justice Canada conducted five pilot projects in Victoria, North Battleford, Winnipeg, Calgary and Toronto prior to the enactment of the legislation in 1988. The findings revealed great disparity with respect to the use of victim impact statements, with a low of 14% of cases in Calgary and a high of 83% in Toronto. As mentioned above, victims did not see the filing of the statement as a retributive tool; however, contrary to expectations, use of the statement in court did not lead to a greater level of satisfaction with the process. It appeared from the study that the process of completing the statement (and perhaps being able to discuss the matter with probation officers or other officials) is what leads to greater satisfaction with the process, and that the ultimate use of the statement is not a primary consideration for victim satisfaction. Victims who participated in the program expressed higher levels of satisfaction with the administration of justice than those who did not participate; however, all victims still expressed concerns over the provision of information concerning the progress of their cases (Focus Consultants et al., 1990).

The results of these Canadian victim impact statement pilot projects were summarized in a European collection of articles dealing with victims' rights and the author concluded that the studies teach us two lessons. First, they dispel the myth that victims are seeking vengeance at sentencing and second:

. . . the research has dispelled any illusions about the overall utility of the VIS to the criminal justice system. Completing a statement does not necessarily lead to greater victim satisfaction with the system, nor does it increase the victims' willingness to cooperate with the systems in the future. Completing a statement does not, by itself, make the victims feel better about how the system is handling their case. They want to be informed about the progress of their case and they want information on how the criminal justice system operates. (Giliberti, 1991:717)

In 1992, the Department of Justice Canada commissioned another study involving an assessment of victim impact statements in British Columbia. The author found that statements were only completed in 2–6% of cases and then only filed in 1–2% of cases proceeding through the system. Judges expressed limited experience with the victim impact statement but the judiciary also found the admission of the statement not to be problematic and felt that its admission increased their awareness of victims' needs and concerns. As would be expected, defence counsel expressed concern over the negative impact these statements have for their clients, especially offenders charged with sexual assault or murder (Roberts, 1992).

The 1999 amendments requiring sentencing judges to make inquiries as to whether the victim has been advised of the right to tender a victim impact statement may lead to an increase in utilization and impact. To date, however, "victim impact statements have not emerged as a major criminal justice issue in Canada", and "low rates of victim participation might in part be explained by an understandable reluctance of crime victims to expose their suffering to adversarial challenge" (Roach, 1999b:291). The most recent discussion of these statements expresses support for the objectives underlying the program but recommends further research:

More research needs to be done, but victim-impact statements appear to be a symbolic and punitive reform. Even in the infrequent cases in which they are introduced, the traditional reluctance of judges to base the sentencing on victims' suffering may not have changed. Crime victims were directed to put their hopes in punishment, only to be frequently disappointed. Nevertheless, allowing victims to explain the impact of the crime was an important form of procedural justice that could promote closure for the victim and accountability for the offender. (Roach, 1999b:292)

3.2.1.4 Victims of Violence

During the 1970s, 80s and 90s there has been a gradual and systematic effort to make the judicial process more responsive to victims of violence. With respect to violence against children and women there have been significant changes

made to the substantive definitions of sexual offences and the archaic procedural and evidentiary obstacles to conviction. In addition, court process has been significantly modified to reduce the secondary victimization experienced by victims who appear as witnesses at trial. The achievements have been significant and the law reform effected with respect to victims of violence is consistent with developments in most Western liberal democracies.

With respect to sexual violence against women and children, the following list represents the major procedural and evidentiary changes enacted within the Criminal Code to facilitate effective prosecution for these offences:

- s. 276 "rape shield" law to screen evidence of past sexual conduct
- s. 276.2 exclusion of jury and public upon hearing s. 276 application
- s. 276.3 publication ban with respect to s. 276 hearing
- s. 278.1 "O'Connor" applications and the provisions to protect the privacy of private and confidential records of third parties (e.g., victims)
- s. 486(1) exclusion of public; although not designed solely for sexual offence prosecution, the terms of the power are ideally suited for these cases especially offences against children (s. 486(1.1))
- s. 486(1.2) with respect to complainants under the age of 18, they may testify accompanied by support person
- s. 486(2.1) with respect to complainants under the age of 18, they may testify behind a screen or by closed-circuit television
- s. 486(2.3) in most cases an unrepresented accused is not permitted to cross examine child witness
- s. 486(3) publication ban on the name and identity of complainant in sexual offences
- s. 486(4.1) publication ban re: identity of victim/witness for any offence
- s. 715.1 with respect to complainants under the age of 18, a pre-trial videotape of their testimony may be introduced at trial
- s. 715.2 with respect to complainants suffering from mental or physical disability, a pre-trial videotape of their testimony may be introduced

In addition to these procedural reforms, Parliament has enacted legislation criminalizing stalking (criminal harassment, s. 264) and legislation allowing for the imposition of restraining orders against potential child sex offenders (s. 161 and s. 810.1). Most recently, Parliament has passed legislation requiring that judges and police consider victims' safety in making any determination as to judicial interim release (s. 515(10)(b)).

It is in the area of protection for victims of violence that we find a considerable, by Canadian standards, body of academic literature. The process of generating academic interest follows a consistent pattern; legislation is passed with little or no academic response, but as soon as the legislation is subject to constitutional attack the commentators become intrigued. In *R. v. Seaboyer* (1991) 66 C.C.C. (3d) 321 (S.C.C.), the rape shield law was declared unconstitutional and this spawned a series of articles, both critical and praiseworthy (Cogswell, 1992; Acorn, 1991; Allman, 1992; Boyle & MacCrimmon, 1991; Schwartz, 1994; Delisle, 1992; Shaffer, 1992).

In *R. v. O'Connor* (1995) 44 C.R. (4th) 1 (S.C.C.), the Supreme Court of Canada placed restrictions on access to confidential records of complainants, and this too spawned an outpouring of comments (Alderson, 1996; Holmes, 1996; Busby, 1997; Van Dienen, 1997; Holmes, 1997; Epp, 1996–7; Feldthusen, 1996; Neufeld, 1995; Peters, 1996; Young, 1996; Mitchell, 1996; MacCrimmon, 1996; Bennett, 1996; Struesser, 1996). The literature discussing the "O'Connor" application reflects an expression of ideology with victims' rights advocates expressing concern over the relevancy of any private record, due process advocates expressing concern over impairment of full answer and defence and most others simply applauding the Court for delicately balancing competing interests with respect to this difficult issue.

Ultimately, Parliament modified the judicially-created "O'Connor" procedure by making access to private records more difficult (s. 278.1), and recently, the Supreme Court of Canada in *R. v. Mills* (1999) 139 C.C.C. (3d) 321, upheld these restrictions on access as being constitutionally sound. Academic commentators are intrigued by the dialogue between courts and legislatures with respect to the constitutional limits which should be imposed upon law reform efforts for victims of violence; however, it does not appear that academic commentary sparks the dialogue. The academic literature did not trigger the recent "O'Connor amendments", and the legislative reversal of the Daviault decision dealing with the defence of extreme intoxication was not precipitated by academic commentary and principled debate. In *Daviault* (1994) 33 C.R. (4th) 165 (S.C.C.), the Supreme Court of Canada created a defence of 'extreme intoxication' which could apply in rare cases to cases of sexual assault (previously, intoxication was never considered a defence to sexual assault). Despite the fact that this constitutional decision did not attract an outpouring of academic commentary, Parliament quickly responded and enacted s. 33.1 to prevent intoxication from being

considered a defence to sexual assault and other crimes of violence.

As mentioned in the Introduction to this report, there is a large body of criminological writings on women and children as victims of violence; however, a review of this literature is beyond the scope of this report. Nonetheless, there is one area relating to victims of violence which has attracted some academic attention and is indirectly within the scope of this report as it engages issues concerning interaction with legal process. There has been a considerable amount of writing devoted to the issue of compensating battered women and women victimized by violence (Langer, 1991; Weigers, 1994; Van Ginkel, 1990; Des Rosiers, 1992; Feldthusen, 1993; Mosher, 1994; Sheehy, 1994). In general, these articles are critical of stereotypical thinking which has presented obstacles to recovery through civil suit or application to a criminal injuries tribunal, and they are uniformly supportive of judicial developments which have facilitated civil suits for sexual violence (e.g., the judicial relaxation of limitation periods for incest victims). In fact, this is one of the only areas of law relating to victims' rights which has generated a legal textbook outlining the process for initiating civil actions for childhood sexual abuse (Neeb & Harper, 1993). It is interesting to note that, as discussed earlier, there is very little literature dealing with restitution within the criminal process yet the goal of compensating victims of sexual violence attracts a great deal of academic attention. This may be a reflection of a lack of confidence in the criminal justice system to respond to victims' financial needs and a preference for civil actions and administrative remedy.

3.2.2 Provincial Initiatives

The provision of welfare rights is the primary activity engaged in by provincial governments. As the focus of this report is the victim's role in the criminal process, the discussion of victim assistance with respect to social, psychological and financial assistance will be brief. The provincial initiatives intersect with the federal ones in three ways:

- 1) the enactment of Victims' Bills of Rights in every province which appear to guarantee certain entitlements with respect to participation and involvement in the administration of criminal justice;
- 2) the provision of victim-witness assistance programs to help victims understand the operation of the criminal justice system; and
- 3) the creation of administrative tribunals in most provinces to provide compensation for injury caused by crime.

In contrast to the limited discussion of Criminal Code restitution in the literature, there is a significant body of literature discussing and analysing provincial compensation schemes. This focus in the literature may reflect both the importance to

the victim for reasonable compensation and the skepticism of achieving satisfaction under federal law.

Provincial legislation governing compensation and enacting statutory rights are as follows:

PROVINCIAL AND TERRITORIAL LEGISLATION

Alberta

Victims of Crime Act, S.A. 1996, Chapter V-3.3

British Columbia

Victims of Crime Act, S.B.C. 1995, c. 47

Criminal Injuries Compensation Act, R.S.B.C. 1979 c. 83; amended by S.B.C. 1995, c. 36

Manitoba

The Victims' Rights and Consequential Amendments Act, S.M. 1998, c. 44

New Brunswick

Victims' Services Act 1987, S.N.B. 1987 CV-21 as amended by S.N.B. 1996, c. 36

Newfoundland

Victims of Crime Services Act, R.S.N. 1990 c. V-5

Northwest Territories

Victims of Crime Act, R.S.N.W.T. 1988 c. 9

Nova Scotia

Victims' Rights and Services Act, S.N.S. 1989 c. 14

Ontario

Victims' Bill of Rights, S.O. 1995 c. 6

Compensation for Victims of Crime Act, S.O. 1990 c. 24

Victims' Rights to Proceeds of Crime Act, S.O. 1994 c. 39

Prince Edward Island

Victims' of Crime Act, R.S.P.E.I. 1988 c. V-3.1

Victims of Family Violence Act, S.P.E.I. 1996 c. 47

Quebec

Crime Victims Compensation Act, 1994 S.Q. c. 1-6

Saskatchewan

Victims of Crime Act, S.S. 1995 c. 4-6. 011

Victims of Domestic Violence Act, S.S. 1994 c. V-6. 02

Yukon

Victim Services Act, S.Y. 1992 c. 15; repealed by S.Y. 1997 c. 11 and replaced with Crime Prevention and Victim Services Trust Act, S.Y. 1997 c. 11

Some of the provinces publish annual reports detailing the operation of their compensation schemes and other victim services. The reports are not analytical in nature and usually

provide raw data in terms of applications reviewed or granted and monies spent on various projects. The annual reports available in government document libraries in Toronto were: 1) Newfoundland, Annual Report of the Newfoundland Crimes Compensation Board; 2) Nova Scotia, Victim Service Activity Report; 3) Prince Edward Island, Annual Report: Victims of Crime Act; 4) Alberta, Victims of Crime Fund — Annual Report; 5) New Brunswick; Annual Report: Compensation for Victims of Crime Act. In addition, most justice departments in most provinces maintain a website providing information about provincial services. A Directory of Services for Victims of Crime can be obtained for purchase from the Canadian Criminal Justice Association (ccja@star.ca).

3.2.2.1 Victims' Bills of Rights

Victims' Bills of Rights build upon and borrow from the basic principles outlined in the 1985 U.N. Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (see Chapter 4.0 of this report). With some minor variations, virtually every Bill of Rights in Canada, the US or Europe contains identical guarantees with respect to notification and modest consultation in the criminal process. Although there are some variations on the theme, for the most part all Bills of Rights, whether statutory or constitutional, address some, or all, of these rights:

1. To be informed of the final disposition of the case;
2. To be notified if any court proceeding for which they have received a subpoena will not occur as scheduled;
3. To receive protection from victim intimidation and to be provided with information as to the level of protection available;
4. To be informed of the procedure for receiving witness fees;
5. To be provided, whenever practical, with a secure waiting area not close to where the defendants wait;
6. To have personal property in the possession of law enforcement agencies returned as expeditiously as possible, where feasible, photographing the property and returning it to the owner within ten days of being taken;
7. To be provided with appropriate employer intercessions that loss of pay and other benefits resulting from court appearances will be minimized.

Although Professor Waller wrote, "in 1986, Manitoba made world history by being the first jurisdiction to place principles [from the U.N. Declaration] into its own law" (Waller, 1990:463), it appears that while Manitoba was clearly the first Canadian jurisdiction to pass a victims' Bill of Rights, it may have just been following the lead of many American jurisdictions which had proposed or enacted similar legislation.

Building on the theme of empowering the victim by providing rights of participation and notification, the various provincial schemes have minor differences but are more or less similar in nature (though not quite as comprehensive) to the following provision as taken from section 2 of the Ontario legislation. This provision provides a fairly representative listing of the various rights which have been secured by victims in North America:

2. (1) The following principles apply to the treatment of victims of crime:
 1. Victims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials.
 2. Victims should have access to information about,
 - i. the services and remedies available to victims of crime,
 - ii. the provisions of this Act and of the Compensation for Victims of Crime Act that might assist them,
 - iii. the protection available to victims to prevent unlawful intimidation,
 - iv. the progress of investigations that relate to the crime,
 - v. the charges laid with respect to the crime, and if no charges are laid, the reasons why no charges are laid,
 - vi. the victim's role in the prosecution,
 - vii. court procedures that relate to the prosecution,
 - viii. the dates and places of all significant proceedings that relate to the prosecution,
 - ix. the outcome of all significant proceedings, including any proceedings on appeal,
 - x. any pre-trial arrangements that are made that relate to a plea that may be entered by the accused at trial,
 - xi. the interim release and, in the event of conviction, the sentencing of an accused,
 - xii. any disposition made under section 672.54 or 672.58 of the Criminal Code (Canada) to make representations to the court by way of a victim impact statement.
 3. A victim of a prescribed crime should, if he or she so requests, be notified of,
 - i. any application for release or any impending release of the convicted person, including release in accordance with a program of tempo-

rary absence, on parole or on an unescorted temporary absence pass, and

- ii. any escape of the convicted person from custody.
4. If the person accused of a prescribed crime is found unfit to stand trial or is found not criminally responsible on account of mental disorder, the victim should, if he or she so requests, be notified of,
 - i. any hearing held with respect to the accused by the Review Board established or designated for Ontario pursuant to subsection 672.38 (1) of the Criminal Code (Canada),
 - ii. any order of the review Board directing the absolute or conditional discharge of the accused, and
 - iii. any escape of the accused from custody.
5. Victims of sexual assault should, if the victim so requests, be interviewed during the investigation of the crime only by police officers and officials of the same gender as the victim.
6. A victim's property that is in the custody of justice system officials should be returned promptly to the victim, where the property is no longer needed for the purposes of the justice system.
- (2) The principles set out in subsection (1) are subject to the availability of resources and information, what is reasonable in the circumstances of the case, what is consistent with the law and the public interest and what is necessary to ensure that the resolution of criminal proceedings is not delayed.

With the exception of one brief reference to the enactment of these Bills of Rights (Roach, 1999), there has been no academic commentary on their operation. The American Bills of Rights have been the subject of endless commentary, but primarily as a necessary component of the debate as to whether these rights warrant being entrenched in the Constitution. Even without the benefit of academic analysis, it is apparent that these schemes, though noble in spirit, do not permit meaningful participation for the following reasons:

- 1) There exists no remedy for lack of compliance with the notification requirements. Therefore, prosecutors or police (it is not clear which institution will be responsible) can violate the law with impunity. Virtually every scheme contains a provision similar to s. 2(5) of the Ontario legislation which states: "No new cause of action, right of appeal, claim or other remedy exists in law because of this section or anything done or omitted to be done under

this section". The B.C. legislation does provide some relief by having violations come within the mandate of the Ombudsman, and recently, Manitoba amended its legislation to allow for a grievance procedure with complaints being directed to the Director of Victim Support Services for investigation.

- 2) Even if notification is complied with, there is no incentive for the victim to get involved in the process because the legislation does not allow the victim to override an exercise of prosecutorial discretion. The British Columbia legislation appears to provide some form of review or remedy for violation of enumerated rights by stating that the Ombudsman Act applies. However, the Ombudsman is not entitled to investigate any prosecutorial decisions relating to the approval of a prosecution, the declining of a prosecution, any issue relating to delay in the prosecution, any decision to stay a prosecution and the "exercise of any other aspect of prosecutorial discretion". Therefore, the Ombudsman can review and investigate a claim that a prosecutor insulted a victim but he/she cannot investigate a claim that a prosecutor struck a 'sweet deal' with the accused and allowed a negotiated plea to a much-reduced charge.
- 3) Not only does the victim not have any 'veto' power over critical decisions which affect the victim, but the legislation does not generally mandate the right to participate in the proceedings. For example, British Columbia, New Brunswick and Prince Edward Island have weak provisions that require the victims' views to be heard to the extent that it is "appropriate and consistent with criminal law and procedure". Due to the fact that the Federal government has constitutional authority over 'criminal law and procedure' it may be argued that provincial legislation cannot expand upon victim participation in any meaningful way until the Federal government determines whether the criminal process should include a form of participation greater than the victim impact statement.
- 4) The legislative schemes do not provide for legal representation except for s. 3 of the British Columbia legislation which allows for a state-appointed lawyer for the victim in relation to production or disclosure of the victim's personal and private information. Legal representation is an integral component of the effective implementation of rights. Victims are now provided with a wide-range of legal rights but are never provided with the benefit of independent legal advice to assist in the exercise of the rights.

Although Victims' Bills of Rights have yet to generate any critical discussion, there has been one recent court case in which the proper interpretation of the Ontario Bill of Rights was brought into question (*Vanscoy and Even v. Her Majesty the Queen in Right of Ontario*, [1999] O.J. No. 1661 (OntSupCtJus)). Two crime victims had claimed that their rights had been violated because they were not notified of pending court dates and not consulted with respect to plea

resolution agreements. They sought declarations under the Charter of Rights and Freedoms that section 2(5) of the Act (the provision barring civil suit for violations of the Act) violated s. 7 (fundamental justice) of the Charter. It was argued that the creation of a right without a remedy violated principles of fundamental justice. The judge dismissed the application on the basis that the Bill of Rights did not actually provide any rights for which a remedy should be provided. The court stated:

I conclude that the legislature did not intend for s. 2(1) of the Victims' Bill of Rights to provide rights to the victims of crime. . . The Act articulates a number of principles, whose strength is limited not only by precatory language, but also by a myriad of other factors falling within the broad rubrics of availability of resources, reasonableness in the circumstances, consistency with the law and public interest, and the need to ensure a speedy resolution of the proceedings. Finally, even if there was an indefensible breach of these principles, the legislation expressly precludes any remedy for the alleged wrong. While the Applicants may be disappointed by the legislature's efforts, they have no claim before the courts because of it. (*Vanscoy and Even v. Her Majesty the Queen in Right of Ontario*, [1999] O.J. No. 1661 (OntSupCtJus))

3.2.2.2 Victim Witness Assistance

In terms of victim assistance, the range of available services is broad and varies from province to province. Victim assistance can be provided in many different ways, although there are two characteristic modes of delivery: through a victim-witness program which serves to guide victims through the complexities of the criminal process, or through counselling and financial aid provided by social welfare agencies. The 1980s witnessed a series of evaluative studies of victim services in various Canadian jurisdictions, but in the 1990s the evaluations were few and far between. In addition, most evaluative studies concern the provision of welfare services and very little has been explored in relation to victim-witness programs and satisfaction with the administration of criminal justice.

In 1984, a study was conducted into the impact of the Winnipeg Victim/Witness Assistance program (Brickey, 1984) and victims reported that the program was valuable in providing answers to legal process questions and in reducing the stress from the impersonal nature of court process. It was recommended that the program be expanded. Since this study, the bulk of other studies have focussed upon the provision of welfare services. However, in 1987, a review of the Yukon Victim-Witness Assistance Program found this program to be effectively serving its target population although many victims were unaware of the service and as such it was underutilized.

Meredith, examined victim assistance programs in Richmond, British Columbia and found relatively high levels of victim satisfaction with services provided by the police; however, concern was expressed over unmet needs with respect to the provision of information concerning case progress and victim services. He concluded, "overall, the general surveys conducted for this report do not indicate that current procedures and services of the criminal justice and social service systems in Richmond are leaving important needs of crime victims unmet. . . With few exceptions, the individuals involved believed that the criminal justice system had treated them well. . . The portrait painted in this report has not been one of brutalized victims shabbily treated by the police and the courts" (Meredith, 1984:57).

Stuebing (1984), evaluated the experiences, concerns, problems and needs of 402 crime victims in Red Deer, Alberta. He identified five general sources of dissatisfaction:

- 1) treatment of witnesses;
- 2) perceived leniency;
- 3) the handling of the case by the prosecutor;
- 4) lack of information before trial;
- 5) failure to be given opportunity to testify.

In addition, he identified five areas in need of improvement:

- 1) a more systematic and complete provision of information to victims and witnesses of crime;
- 2) less inconsistency and arbitrariness in the provision of crisis response and follow-up service to victims;
- 3) further development and elaboration of the CP/PCR unit (Crime Prevention/Police Community Relations Unit);
- 4) regular in-service training to enhance police awareness of victims' needs and commitment to victim-oriented initiatives and;
- 5) greater utilization of present opportunities for restitution and compensation as well as re-examination of the present limitations on the use of these practices.

Similarly, Weiler and Desgagné reviewed the role of the victim as witness and concluded that victim services were deficient except for services provided for victims of sexual abuse. The report stated:

Developments in victim services in the social development field appear to be largely limited to those specialized victim programs and training initiatives for professional staff dealing with sexual abuse and family violence matters. There is little evidence to suggest that major initiatives have been undertaken by those responsible for the facilitation and development of victim services in

encouraging or supporting developments attuned to the range of personal care and financial service requirements of victims in general. This reality is in sharp contrast to the strong support and interest expressed in surveys and conferences since 1980 among many organizations within the social development field. It is in contrast to the continued concerns expressed by many leaders representing police, the crown and courts that more direct responsibility for many required social services of victims be assumed by the existing social development network. These factors, coupled with the general interest in avoiding unnecessary duplication of services and improving the effectiveness of use of the existing service system, suggest a number of questions which merit consideration. Who should be responsible for financing and administration of the range of social development based services for victims such as mental health counseling? How are these services to be planned and developed? By whom? What relationship is to be developed between those responsible for the criminal justice and social development systems in the planning, development and coordination of these services? (Weiler & Desgagné, 1984:55)

Muir (1984; 1986), studied the provision of victim services in Calgary. She identified two concerns — proper notification of court process and compensation. Ironically, the need for compensation or restitution was expressed by legal professionals and not generally by victims; however, the low level of expressed financial need may be a product of "low awareness about the various kinds of compensation available" (Muir, 1984b:74). She also examined the Victim/Crisis Unit in which a special division of the police staffed with volunteers provided both crisis intervention and social service referrals. The services provided by this unit were favourably received by victims and a higher level of satisfaction was reported by victims who utilized this service as compared to victims who did not use the service. Muir (1986) provided some recommendations for improving police provision of welfare services and in particular, she recommended proper training for the police with respect to victims' issues and creating a mechanism to "bridge the gap" between services available in the community and the service provided by the police at the scene.

The importance of the relationship between police and community services is underscored by a Canyltec Social Research report (1987) which found that provision of services by neighbour volunteers as opposed to police headquarters volunteers led to increased victim satisfaction. Although the data did not fully support a preference for neighbourhood provision of services, it did suggest that further studies be conducted to determine if the informal and neighbourhood-based service delivery model would be more effective than the conventional police headquarters service. Currie (1987) also con-

cluded, in reviewing the Victim Support Worker Program in Vancouver (services for child sexual assault victims), that a community based program provides the most effective form of support. Finally, a 1992 review of the Child Victim-Witness Support Program in Toronto concluded that child welfare and criminal justice systems both lack adequate data to provide a rational basis for planning effective programs. With the increase in child testimony (as a result of changes to the Canada Evidence Act which facilitates the evidence of children), it has been concluded that the criminal justice system is ill-equipped to deal with these children and further education of criminal justice officials is indispensable in order to find effective ways to accommodate the special needs of child witnesses (Campbell Research, 1992).

Bragg reviewed the early victim assistance studies and concluded that victims had three basic needs and that these needs should be attended to by a co-ordinated effort of various social agencies, and not solely by the police. With respect to the needs of victims, she stated:

From these studies, the Research Division was able to accumulate considerable information regarding the needs of victims, and the level of services available to meet those needs. It seems that, in general, there are three types of needs for services as reported by victims. Immediately following an incident, victims express a need for emotional support, a sympathetic ear, and for those severely traumatized, a need for counselling. These crisis needs are usually met by friends and relatives. Professional help may be provided by crisis units of police departments, and various social services agencies such as transition houses or crisis centres. Wife assault victims may require emergency shelter, emergency transportation to a place of safety, and emergency financial aid for those who seek shelter away from home. These needs are usually met through friends or relatives, and sometimes through transition houses. In addition to the above-mentioned needs, some victims of crime also report the need for emergency medical aid or emergency home repair.

The second type of services desired by victims is follow-up services, usually in the form of information. For victims in general, this is more frequently cited than the need for crisis services. Most victims would appreciate more information on the progress of the case. Property crime victims are also interested in acquiring crime prevention information and assistance in speedy recovery of property. The majority of victims are unaware of the services that are provided by different agencies for victims of crime and would appreciate information on the availability of services in the community. This is especially

true of wife assault victims who also require information on legal options and procedures.

For those victims who are subpoenaed as witnesses, they report a third type of need, which is court related. Witnesses are usually mystified by the court process, the role of the witness and their rights. They also would like to find out about the outcome of the case (as most are not informed after the case is concluded). (Bragg, 1986:4-5)

With respect to planning for the future, Bragg noted:

There has also been a change in the type of programs the research projects are involved in. An important finding from some of the earlier studies is that victims have multiple needs and that separate criminal justice and community agencies in isolation are not likely to meet the needs of victims adequately. This finding had led to the development of coordinated efforts to assist victims. Given this perspective, while recognizing the mandate of the Ministry with regard to policing, current projects are usually part of the coordinated programs rather than concentrating on victim assistance as linked to the police. (Bragg, 1986:16)

In 1991, a Department of Justice Canada study was conducted of victims' needs and services in Nova Scotia (Murphy, 1991). Finding a disparity in the delivery of services the report recommended giving funding priority to rural victims, the elderly, children and victims of sexual abuse or domestic assault. The study recommended the creation of province-wide standards for service requirements and suggested that a victim advocate or case worker be provided to the victim to facilitate access to services.

The 1998 Annual Report of the Victims' Services Division in Nova Scotia (Victims' Services Division (N.S.), 1998) reviewed various models for the provision of victim assistance and concluded that the best model of service delivery would be one based within the Department of Justice Canada but administered by staff which was independent of criminal justice officials.

Drawing upon a report completed by victims' rights groups (The Canadian Resource Centre of Victims of Crime), the Victim Services Division reached the following conclusion with respect to service delivery models:

Regional Victims' Services was established in 1992 following a research study into the needs of victims of crime. In his 1991 report, Victims' Needs and Service in Nova Scotia, Dr. Christopher Murphy stated that, "The province of Nova Scotia, through Victims' Services Division. . . has a formal responsibility to deliver services and protect victims' rights throughout the province."

Following consideration of the various models of service delivery, Dr. Murphy recommended adopting a system-based approach. The service was to be located within the Department of Justice, but independent of line-functions (i.e., Courts, Police, Prosecution Services, Corrections), thus enabling staff to take on an advocacy role within the system. In addition, the program would have strong links with the community to interface with other services to victims of crime.

At the time a system-based model of delivery was considered somewhat of a hybrid. Existing models were usually police-based, Crown/court or community based. Subsequently, the model has become well recognized. In a recent report on services to victims, *Balancing The Scales: The State of Victims' Rights in Canada* (produced by the Canadian Resources Centre of Victims of Crime, 1998) four types of delivery models were identified:

1. Police based victim services: usually located in police departments, these types of programs are designed to help the victims as soon as possible after their contact with the justice system begins. The types of services that police based programs may include are: death notification, information about the justice system, information about the investigation, assistance with victim impact statements and criminals injuries compensation applications, referrals, etc.
2. Crown/court based victims/witness services: usually located in courthouses, and work very closely with the Crown's office. The emphasis is on court preparation. The types of services offered may be: information about court process, tours of courthouse, emotional support throughout the court process, facilitate meetings with Crown, work with child witnesses/victims, etc. Obviously, victims usually only have contact with the Crown/court based programs if the police identify and arrest a suspect.
3. Community based victim services: these types of programs are usually not government operated, but may benefit from government funding. These programs also usually specialize in the types of victims they deal with, i.e., sexual assault centres, domestic violence transition homes, etc.
4. System based services: this is a relatively new approach to providing assistance to victims in that it is not "police" or "crown" based but "system" based. This means that the victim only has to go to one place to get the types of services they can access from both

police and crown based programs. The system based model has been adopted by both PEI and Nova Scotia. (Canadian Resource Centre: 6-7)

In the discussion on the different models of victim services the report of the Canadian Resource Centre of Victims of Crime concluded:

Probably the model victim service is one that can assist different types of victims through the system. For example, what domestic violence victims need is different from what the parents of a murdered child need. The model service is also one that can provide assistance and information on all the rights that victims have such as: compensation programs, what the provincial act says, what protection the Criminal Code offers young witnesses and sexual assault victims, what services are available in the community, etc. The service should also help victims communicate with both police and Crown. (Canadian Resource Centre: 6-7)

Finally, there have been some recent studies of the Saskatchewan Victims of Domestic Violence Act. This legislation was passed in 1995 to provide special protective mechanisms for victims of domestic violence. Emergency Intervention Orders can be obtained from the court to issue restraining orders and removal orders from the matrimonial home. Victim assistance orders can be obtained from the Court of Queen's Bench to provide greater access to long-term financial remedies, and warrants of entry can be issued to allow the police to enter a home to remove a cohabitant from the premise and collect evidence of victimization. A 1996 evaluative study indicated that awareness of the program was minimal and that the police and courts did not have an effective system for tracking cases (Prairie Research, 1996). A 1999 follow-up study indicated that the Emergency Intervention Orders were effectively providing short-term protection, but that, due to lack of training, longer term remedies by way of a victim assistance order have not been effective (Prairie Research, 1999).

3.2.2.3 Compensation

As with many social welfare schemes, provincial crime compensation schemes have been attacked as "radically underinclusive and under siege" (Roach, 1999a:300), but in the 1990s little was written on this topic and the available literature is generally more descriptive than prescriptive. Faieta (1989), and Bailey (1989), provide general outlines of the operation of various compensation schemes with emphasis on Ontario. Burns (1992), provides a detailed guide to the operation of all the provincial schemes and his overall assessment of their operation is encouraging:

The schemes are still relatively new and their administrators have been functioning under statutory guidelines that have been sometimes ambiguous and at times very narrow. There can be no doubt that the schemes have proved their worth. Countless crime victims have been and continue to be granted compensation for injuries they sustained as a result of their victimization. The fact that many of the schemes appear to have arbitrary inclusionary rules for recovery of compensation may be an argument for expanding their scope rather than disbanding them on the grounds of social inequity. . . . At this stage, however, the schemes have evolved in terms of jurisdiction and practice to a point that apparently continues to satisfy the bulk of the public, the legislators and (presumably) the administrators themselves. Given the resources and the opportunity to gain access to them, the schemes should largely satisfy most of the victims of violent crime as well. (Burns, 1992:367–8)

It may be that the problems respecting compensation arise primarily as a result of a low level of awareness of the nature and function of the provincial service. A 1984 study by the Federal Solicitor General (Solicitor General Canada, 1984) found that only 13% of victims had been informed of their right to seek criminal compensation. This study reviewed victim awareness of seven urban jurisdictions, and it was concluded that fiscal restraint could be achieved through eligibility requirements and ceilings upon awards, and that fiscal restraint should not be achieved by uneven and arbitrary distribution of awareness and information.

Beyond these largely descriptive articles and books, there is also a significant body of literature of a critical nature exploring the failure of compensation boards to recognize the gendered nature of violence against women. Critical of decisions which have denied compensation to battered women, these articles make compelling arguments for the restructuring of the criteria of eligibility (Hughes, 1993; Langer, 1991; Weigers, 1994; Sheehy, 1994). The commentaries argue that the tribunals often engage in “blaming the victim”, and this has resulted in the rejection of meritorious applications from battered women and prostitutes. In the 1980s, an assessment of compensation in Quebec confirmed that 21.7% of applications were rejected due to the victim’s fault (Baril et al., 1984). Complaints were also made in relation to the overly bureaucratic approach taken by the tribunal to the processing of claims. The 1994 Ontario Standing Committee on Administration of Justice did not cite “blaming the victim” as a recurring problem but did cite inordinate delay and inadequate levels of compensation as significant concerns (Ontario Legislative Assembly, 1994).

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4.0 Victims' Rights Around the World

4.1 INTRODUCTION

Earlier this century, common law and civil law jurisdictions were considered mutually exclusive paradigms for administering justice. With the development of comparative law studies this century, many common law jurists started to explore the unique features of the civil law, 'inquisitorial' system of criminal justice to determine if this mode of justice could address some of the shortcomings and failures of adversarial justice. Consistent with the trend is a burgeoning body of comparative literature on victims' rights with a view to determining the most effective and efficient manner of implementing these rights.

For the most part, the victims' rights reforms around the world are remarkably uniform. Of course, there are variations on the theme, but putting aside the unique "adhesion" procedures in most European countries (a process whereby the victim becomes a secondary prosecutor in the criminal process), all jurisdictions have adopted some form of victims' rights model (including compensation schemes, victim assistance programs, or participatory rights through victim impact statements and victims' Bills of Rights). As would be expected, the Commonwealth jurisdictions present the most relevant data for the purpose of comparison with Canada. The similar common law heritage, the use of administrative guidelines as opposed to legislation to promote victims' rights and the discretionary sentencing regimes all contribute to an identity of legal culture which facilitates comparative analysis. The American experience shares the same common law heritage but there are differences in legal culture and legal process (especially the rise of determinate and presumptive sentencing) which may prevent drawing helpful conclusions from this experience. Many American commentators have expressed regret over the unduly politicized nature of the victims' rights debate (Henderson, 1998; Mosteller, 1998), and the prolific outpouring of literature on a Federal constitutional amendment for victims has rendered much of this literature irrelevant from a Canadian perspective.

The European experience is clearly premised upon the most dissimilar legal culture; however, some of the unique components of the civil law tradition may serve to dispel some of the reservations and concerns expressed by legal professionals in common law jurisdictions regarding the increase in victim participatory rights. Many lawyers would argue that whether or not victims' rights have received international recognition as a human right, the adversarial trial process will collapse if victims can override prosecutorial decisions or if victims are allowed to participate in trial proceedings. To counter this doom and gloom prognosis, it is instructive to look at the European experience. First, most European jurisdictions allow for some form of judicial review of prosecutorial

decisions. For example, in the Netherlands and Greece a victim can have a court review a prosecutor's decision not to proceed with a prosecution. Second, most jurisdictions have followed the lead of France in creating an *action civile* in which the victim can attach his/her civil claim to the criminal prosecution and thus participate as an equal with legal representation and the right to cross-examine. Even when the victim does not have an independent, civil cause of action, some jurisdictions allow the victim to participate as a 'secondary' prosecutor. For example, in Germany the *nebenklage* procedure allows victims of serious violent crime to participate at the trial with a state-funded lawyer. To date, none of the criminal justice systems of these jurisdictions have collapsed under the weight of victim involvement and the German experience with the *nebenklage* procedure demonstrates that very few victims actually take the opportunity to participate as a 'secondary' prosecutor. For the most part, European crime victims are content to leave carriage of the prosecution to public officials, but the fact that they know they can participate, if the need arises, appears to lead to greater satisfaction with the process.

European crime victims can, and do on occasion, participate in criminal trials, and this should counter the dire prediction that victim involvement will lead to chaos within the justice system. It is not fear of collapse but fear of institutional adjustment that compels most legal professionals to fight against any further incursions into the process by victims. It must still be recognized that there are certain structural and constitutional components of our adversarial trial system that would not allow for a simple transplant of the European conception of victim as secondary prosecutor. For example, the constitutional division between criminal law (federal) and civil law (provincial) would not readily permit for the attachment of a 'parasitic' civil claim onto an existing criminal prosecution. Furthermore, the European process is judge-driven (i.e., the judge, and not the lawyers, presents the case) and the introduction of another lawyer into this process to represent the victim does not necessarily lengthen or complicate trials as European lawyers do not have as large a role to play as their Anglo-American-Canadian counterparts. There is a legitimate concern that in our adversarial system, with its focus on lawyers and the value of rigorous advocacy, the introduction of a represented victim into the process could serve to lengthen a trial process which already appears bloated and inefficient.

The reason why victim law reform has taken similar forms around the world is due to the fact that most of the reform was predicated upon the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (a document co-sponsored by Canada). Further uniformity was achieved in Europe with the passage of the 1983

European Convention on the Compensation of Victims of Violent Crime and the 1985 Recommendation R(85) (The Position of the Victim in the Framework of Criminal Law and Procedure) of the Committee of Ministers of the Council of Europe (Muller-Rappard, 1990). In many ways this latter policy is simply the European counterpart of the North American Victims' Bills of Rights. The convergence of victims' rights reform around the world is underscored by the 1998 publications of a United Nations Guide for Policymakers on the Implementation of the United Nations Declaration and the United Nations Handbook on Justice for Victims (both documents are available on the International Victimology Website — www.victimology.nl/rechts.htm). These implementation guides recognize some regional variation in the establishment of programs for victims, but, for the most part, the documents suggest the establishment of fairly uniform practices.

Although this report will focus upon the common threads among the jurisdictions, it is important to keep in mind the significant differences. In particular, there appears to be a larger and more developed volunteer infrastructure in place outside Canada for the provision of victims' services and rights. Victim Support in England and the National Organization for Victim Assistance in the US (Maguire & Shapland, 1997; Young, 1990) are examples of non-governmental agencies that make a significant contribution to the provision of victims' rights and services. Victims' rights associations do exist in Canada, e.g., CAVEAT (www.caveat.org), Canadian Resource Centre for Victims of Crime (www.crcvc.ca), MADD Canada (www.madd.ca), but compared to volunteer agencies in other jurisdictions, these Canadian counterparts make only a modest contribution to the provision of services and rights. In drawing comparisons between Canada and other jurisdictions, it is unclear to what extent the prominence of private agencies in other jurisdictions serve to confound the comparative analysis.

With respect to the available literature for this part of the report, it must be noted that the bibliographical listings are not intended to be exhaustive. Unlike the Canadian review, less reliance was placed upon the collection and review of government reports, and with respect to European literature, the report is restricted to literature available in the English language. As mentioned earlier, the American literature is not only voluminous but it is endlessly repetitive. Accordingly, not all available American material is listed and the bibliographical listings attempt to primarily capture leading articles and a selective sample of the literature on various topics which have attracted an endless outpouring of academic commentary.

4.2 DISCUSSION

4.2.1 The American Experience

The prolific nature of American academic writing in the area of victims' rights revolves around two key issues:

1. victim impact statements in capital cases (Boudreaux, 1989; Hellerstein, 1989; Bendor, 1992; Clarke & Block, 1992; Ewing, 1992; Fahey, 1992; Sperry, 1992; Cornille, 1993; Loverdi, 1993; McLeod, 1993; Sebba, 1994; Vital, 1994; Luginbuhl & Burkhead, 1995; Mullholland, 1995; Dugger, 1996; Phillips, 1997; Logan, 1999); and,
2. the value of enshrining victims' rights in the Constitution (Calcutt, 1988; Eikenberry, 1989; Dixon, 1991; Wegryn, 1993; Cassell, 1994; Scott, 1994; Weed, 1995; Barajas & Nelson, 1997; Koskela, 1997; Caissie, 1998; Mosteller, 1998; Henderson, 1998).

It is these topics which have led to the conflation of law and politics and has led to victims' rights being perceived as another political platform for law and order priorities instead of being perceived as a matter of legal principle. The short history of victim impact statements in the US underscored the political ideology that has dominated debate. In 1987, the US Supreme Court ruled that victim impact statements were not admissible in a capital sentencing hearing because they were inflammatory, irrelevant to the issue of the offender's moral culpability and not capable of meaningful rebuttal by the accused [*Booth v. Maryland*, 107 S. Ct. 2529 (1987)]. Four years later, the Court reversed this decision in a rhetorical flourish that included statements such as: "Justice, though due to the accused, is due to the accuser also" and "by turning the victim into a faceless stranger at the penalty phase of a capital trial [our earlier decision in 1987] deprives the state of the full moral force of the evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for first degree murder" [*Payne v. Tennessee*, 111 S. Ct. 2597 (1991)].

This rapid volte-face can only be explained by the "hydraulic pressure" of public opinion and political aspirations to effectively serve crime victims. Although the academic literature contains irresolute debates over the proper penological theory to justify victim evidence, it is clear that the Supreme Court's reversal was not predicated upon this literature or an evolving penological perspective. The Supreme Court of the US paved the way for victim impact evidence to be introduced on the delicate issue of whether to order the death penalty, and since then, victim impact evidence has been entered in many trials with little restriction and little guidance from the judiciary. Victim impact evidence is also introduced at parole hearings across the country and initial indications suggest that release upon parole was less likely when the victim tendered an impact statement (Bernat et al., 1994). The current American situation with victim evidence in capital cases is summarized in the following, rather disconcerting statement:

Some eight years after *Payne* was decided, it is now readily apparent that victim impact evidence is here to stay, and, indeed, will likely come to

enjoy even broader use in capital trials. At the same time, it is also clear that the increasing use of the emotionally potent testimony is occurring in a context almost entirely free of procedural controls and substantive limits, raising the specter of a return to the era of unfettered decision making condemned over 25 years ago by the Supreme Court in *Furman v. Georgia*. Death penalty jurisdictions, eager to give a “voice” to otherwise silenced murder victims, have exhibited a glaring inability (or unwillingness) to address the most basic questions associated with victim impact evidence, including: Who should be qualified to testify? What are the legitimate bounds of “impact”? What is the basic purpose of impact evidence? And how should it bear on jurors’ death penalty decision? The absence of answers to these basic questions has, on a regular basis, led to the admission of highly prejudicial and plainly improper evidence in capital prosecutions nationwide. (Logan, 1999:176)

Commentators have always been alert to the political dimensions of victims’ rights reform (McCoy, 1993), but the transparency of the political infiltration of the debate can be found in the voluminous writings on the value of a victims’ rights constitutional amendment. An amendment to the 6th Amendment of the American Constitution (the trial rights of the accused) was proposed in 1982 by the President’s Task Force on Victims of Crime which would have guaranteed the victim “the right to be present and to be heard at all critical stages of the proceedings”. Despite the failure to entrench victims’ rights within the American Constitution in the 1980s, recent years have seen victims’ rights groups succeed in having enacted amendments to 29 state constitutions and in introducing such an amendment in Congress in 1996. The following amendment was raised for consideration in Congress in 1996 (and there have been countless revisions since):

VICTIMS’ RIGHTS CONSTITUTIONAL AMENDMENT (SENATE JOINT RESOLUTION 52)

Section 1

To ensure that the victim is treated with fairness, dignity, and respect, from the occurrence of a crime of violence and other crimes as may be defined by law pursuant to section 2 of this article, and throughout the criminal, military, and juvenile justice processes, as a matter of fundamental rights to liberty, justice, and due process, the victim shall have the following rights: to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender; to be heard at any proceeding involving sentencing, including the

right to object to a previously negotiated plea, or a release from custody; to be informed of any release or escape; and to a speedy trial, a final conclusion free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation by the accused or convicted offender, and the notice of the victims’ rights.

Section 2

The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation.

In introducing this proposed amendment, President Clinton stated:

When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be. Having carefully studied all of the alternatives, I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights — to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present, to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released; restitution from the defendant; reasonable protection from the defendant and notice of these rights. (Remarks by the President at announcement of Victims’ Rights Constitutional Amendment, June 25, 1996, The Rose Garden)

The political nature of this debate is transparent, and, accordingly, this report will not outline the various arguments made in support, or in opposition, to constitutional amendments and victim impact statements. Instead, this report will briefly assess the current status and effectiveness of legislation which provides participatory rights and, to a lesser degree, welfare rights.

4.2.1.1 Participatory Rights in America

In the fifteen years since the issuance of the President's Task Force on Victims of Crime, the federal government and all 50 state governments have enacted legislation in the nature and spirit of the Canadian Victims' Bills of Rights. In essence, this legislation guarantees notification of key proceedings and outcomes, some right of consultation with the prosecutor and the right to be heard and be present at significant proceedings. As of 1997, 29 states have ratified "victims' rights" constitutional amendments which are similar in design to the statutory listings of rights.

Of course, there are some minor differences in stated entitlements and some implementation differences between the various states. For example, some states require the police to notify victims of their rights, some states place the burden on the prosecutor and some states do not designate a public official responsible for notification. However, for the purposes of this report, the American jurisdictions will be considered as a monolithic entity.

Although the Canadian Bills of Rights and the American statutes are virtually identical, it must be recognized that some American jurisdictions have gone much further than Canada in articulating a set of rights and an enforcement mechanism. Most commentators consider Arizona to be the frontrunner in expanding the catalogue of victims' rights, and to provide some flavor of the potential scope of an expansive legislative approach to victims' rights (to be contrasted with the representative and limited Canadian listing set out in Chapter 3.0 of this report), the key provisions of the Arizona regime are included in their entirety below:

13-4405. Information provided to victim by law enforcement agencies

- A. As soon after the detection of a criminal offense as the victim may be contacted without interfering with an investigation, the law enforcement agency that has responsibility for investigating the criminal offense shall:
 1. Inform the victim of the victims' rights under the victims' bill of rights, article II, Constitution of Arizona, any implementing legislation and court rules.
 2. Inform the victim of the availability, if any, of crisis intervention services and emergency and medical services and, where applicable, that medical expenses arising out of the need to secure evidence may be reimbursed pursuant to 13-1414.
 3. If an arrest has been made, inform the victim:
 - (a) That a suspected offender has been arrested and that, on request, further information and notice of all proceedings in the case will be given to the victim.
 - (b) Of the next regularly scheduled time, place and date for initial appearances in the jurisdiction.
 - (c) That the victim has the right to be heard at the initial appearance.
 - (d) That the right to be heard may be exercised by the submission of a written statement to the court and advise the victim on how the statement may be submitted.

4. If a suspected offender has not been arrested, inform the victim that the victim will be notified by the law enforcement agency that a suspected offender has been arrested at the earliest opportunity after the arrest and that, on request, further information and notice of all proceedings in the case will be given to the victim.
5. If a suspected offender is cited and released, inform the victim of the court date and how to obtain additional information about the subsequent criminal proceedings.
6. If the case has been submitted to a prosecutor's office, provide the victim with the name, address and telephone number of the prosecutor's office.
7. Provide the victim with the names and telephone numbers of private and public victim assistance programs, including programs that provide counselling, treatment and other support services.
8. In cases of domestic violence, inform the victim of the procedures and resources available for the protection of the victim pursuant to 13-3601.
9. Provide the victim with the police report number, if available, other identifying case information and the following statement: "If within thirty days you are not notified of an arrest in your case, you may call (the law enforcement agency's telephone number) for the status of the case."
- B. The law enforcement agency that has the responsibility for investigating the criminal offense shall provide all notices to the victim required under this section.

13-4408. Pretrial notice

- A. Within seven days after the prosecutor charges a criminal offense by complaint, information or indictment and the accused is in custody or has been served a summons, the

prosecutor's office shall give the victim notice of the following:

1. The victims' rights under the victim's bill of rights, article II, 2. 1, Constitution of Arizona, any implementing legislation and court rule.
 2. The charge or charges against the defendant and a clear and concise statement of the procedural steps involved in a criminal prosecution.
 3. The procedures a victim shall follow to invoke his right to confer with the prosecuting attorney pursuant to 13-4419.
 4. The person within the prosecutor's office to contact for more information.
- B. Notwithstanding the provisions of subsection A of this section, if a prosecutor declines to proceed with a prosecution after the final submission of a case by a law enforcement agency at the end of an investigation, the prosecutor shall, before the decision not to proceed is final, notify the victim and provide the victim with the reasons for declining to proceed with the case. The notice shall inform the victim of his right on request to confer with the prosecutor before the decision not to proceed is final. Such notice applies only to violations of a state criminal statute.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992. Amended by Laws 1992, Ch. 209, 10.

13-4419. Victim conference with prosecuting attorney

- A. On request of the victim, the prosecuting attorney shall confer with the victim about the disposition of a criminal offense, including the victim's views about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations and pretrial diversion programs.
- B. On request of the victim, the prosecuting attorney shall confer with the victim before the commencement of the trial.
- C. The right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992. Amended by Laws 1992, Ch. 209, 16.

13-4423. Plea negotiation proceedings

- A. On request of the victim, the victim has the right to be present and be heard at any proceeding in which a negotiated plea for the

person accused of committing the criminal offense against the victim will be presented to the court.

- B. The court shall not accept a plea agreement unless:
 1. The prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim pursuant to 13-4419.
 2. Reasonable efforts are made to give the victim notice of the plea proceeding pursuant to 13-4409 and to inform the victim that the victim has the right to be present and, if present, to be heard.
 3. The prosecuting attorney advises the court that to the best of the prosecutor's knowledge notice requirements of this chapter have been complied with and the prosecutor informs the court of the victim's position, if known, regarding the negotiated plea.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992. Amended by Laws 1992, Ch. 209, 17.

13-4431. Minimizing victim's contacts

Before, during and immediately after any court proceeding, the court shall provide appropriate safeguards to minimize the contact that occurs between the victim, the victim's immediate family and the victim's witnesses and the defendant, the defendant's immediate family and defence witnesses.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992.

13-4433. Victim's right to refuse an interview

- A. Unless the victim consents, the victim shall not be compelled to submit to an interview on any matter, including a charged criminal offense witnessed by the victim that occurred on the same occasion as the offense against the victim, that is conducted by the defendant, the defendant's attorney or an agent of the defendant.
- B. The defendant, the defendant's attorney or another person acting on behalf of the defendant shall only initiate contact with the victim through the prosecutor's office. The prosecutor's office shall promptly inform the victim of his right to refuse the interview.
- C. If the victim consents to an interview, the prosecutor's office shall inform the defen-

dant, the defendant's attorney or an agent of the defendant of the time and place the victim has selected for the interview. If the victim wishes to impose other conditions on the interview, the prosecutor's office shall inform the defendant, the defendant's attorney or an agent of the defendant of the conditions. The victim has the right to terminate the interview at any time or to refuse to answer any question during the interview. The prosecutor has standing at the request of the victim to protect the victim from harassment, intimidation or abuse and, pursuant to that standing, may seek any appropriate protective court order.

- D. Unless otherwise directed by the victim, the prosecutor may attend all interviews. If a transcript or tape of the interview is made and on request of the prosecutor, the prosecutor shall receive a copy of the transcript or tape at the prosecutor's expense.
- E. If the defendant or the defendant's attorney comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under Arizona constitution.
- F. For the purposes of this section, a peace officer shall not be considered a victim if the act that would have made him a victim occurs while the peace officer is acting in the scope of his official duties.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992. Amended by Laws 1992, Ch. 209, 24.

13-4436. Effect of failure to comply

- A. The failure to use reasonable efforts to perform a duty or provide a right is not cause to seek to set aside a conviction or sentence.
- B. Unless the prisoner is discharged from his sentence, the failure to use reasonable efforts to provide notice and a right to be present or be heard pursuant to this chapter at a proceeding that involves a post-conviction release is a ground for the victim to seek to set aside the post-conviction release until the victim is afforded the opportunity to be present or be heard.
- C. If the victim seeks to have a post-conviction release set aside pursuant to subsection B, the court, board of executive clemency or state department of corrections shall afford the victim a reexamination proceeding after the parties are given notice.
- D. A reexamination proceeding conducted pursuant to this section or any other proceeding

that is based on the failure to perform a duty or provide a right shall commence not more than thirty days after the appropriate parties have been given notice that the victim is exercising his right to a reexamination proceeding pursuant to this section or to another proceeding based on the failure to perform a duty or provide a right.

Added by Laws 1991, Ch. 229, 7, eff. Jan. 1, 1992. Amended by Laws 1992, Ch. 209, 26; Laws 1993, Ch. 255, 52, eff. Jan. 1, 1994.

13-4437. Standing to invoke rights; recovery of damages

- A. The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victim's bill of rights, article II, 2.1, Constitution of Arizona, any implementing legislation or court rules. In asserting any right, the victim has the right to be represented by personal counsel at the victim's expense.
- B. A victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victims' rights under the victims' bill of rights, article II, 2.1, Constitution of Arizona, any implementing legislation or court rules. Nothing in this section alters or abrogates any provision for immunity provided for under common law or statute.
- C. At the request of the victim, the prosecutor may assert any right to which the victim is entitled.

This Arizona regime is the high-water mark in terms of legislative protection for crime victims and it may not represent an attainable standard for Canada. As in Canada, there are only a few American academic, evaluative studies of the impact of these participatory rights upon the criminal process and their relationship to victim satisfaction. Before turning to these reports, it must be noted that there exists an entirely different body of literature from which some inference can be drawn about the impact of victim rights law reform. Unlike in Canada, there is a growing body of American case law chronicling the battle of crime victims to convert their symbolic legislative recognition into practical action. Even though every American jurisdiction has granted some participatory rights to victims, the federal regime and 40 states expressly deny remedies for violations of these rights. Ten states allow for remedial action either by way of appellate review of public officials' decisions, disciplinary action or damages for the intentional violation of rights. In the past ten years, victims have relied upon the courts to review state inaction with respect to participatory rights by requesting legal remedies

when they exist or by attempting to fashion new remedies in the great bulk of jurisdictions which have denied legislative remedies.

To date, the most dramatic judicial construction of victims' rights has been the Hance case in 1993 (*Hance v. Arizona Board of Pardons and Paroles* 875 P. 2d 824). In that case, the Arizona Court of Appeal set aside an offender's release on parole because of the failure of state officials to notify the victim of the hearing. As indicated above, Arizona has the most extensive panoply of rights in the US and it has also provided for various statutory remedies. Although the case was the first of its kind in North America it was not a great leap of faith for the court as the legislature had already contemplated the type of remedy ordered by the court. Beyond this case there are only a handful of examples of court-ordered remedies for a victim/plaintiff. For example, in *Myers and Daley*, 521 N. E. 2d 98 (1987), the Illinois Appeal Court upheld an award of costs to a crime victim who needed to initiate a suit to compel the prosecutor to provide information about his case, and in *People v. Stringham*, 253 Calif. Rptr. 484 (1988), the Court of Appeal upheld a decision of a trial judge setting aside a plea bargain which the victim had rejected.

Despite growing court battles over the scope and enforceability of victims' rights, victims have largely been unsuccessful in litigation. Due to the fact that most federal and state legislation does not provide remedial provisions, most courts have construed the Bills of Rights as being merely directive or permissive [e.g., *People v. Thompson*, 202 Cal. Rptr 585 (1984); *People v. Pfeiffer*, 523 N. W 2d 640 (1994); *Dix v. Shasta*, 963 F. 2d 1296 (1992); *State v. Holt*, 874 P. 2d 1183 (1994)]. The failure of state legislators to provide remedies and the failure of the courts to fill the gap has led many commentators to criticize legislative Bills of Rights as being an illusory reform. In fact, this is one of the major arguments made in favor of constitutional entrenchment as entrenchment would trigger judicially-created remedies. Even the US Department of Justice has recently confirmed that the absence of significant remedial provisions is a major factor in the perceived failure of victims' rights reform:

Today, there are more than 27,000 crime-related state statutes, 29 state victims' rights constitutional amendments, and basic rights and services for victims of federal crime. Nevertheless, serious deficiencies remain in the nation's victims' rights laws as well as their implementation. . . . Even in states that have enacted constitutional rights for victims, implementation is often arbitrary and based upon the individual practices and preferences of criminal justice officials. . . . Victims should have standing to enforce their rights, and sanctions should be applied to criminal and juvenile justice professionals who deny victims their fundamental rights. . . . Victims report that criminal and juvenile justice officials at times disregard their statutory and constitutional rights, and that

they have no legal recourse when their rights are violated. States should enact provisions that give victims measures to enforce their rights when they are disregarded. (US Department of Justice, 1997:ix)

One unique feature of American victims' rights legislation is that some jurisdictions have established victims rights compliance projects to evaluate the success of integrating participatory rights into the criminal process (US Department of Justice, 1997). The compliance mechanisms range in scope and authority with Colorado officials having the authority to investigate claims of non-compliance and the power to order institutional change or adjustment, Minnesota officials only having the power to recommend change and Wisconsin only allowing officials to discuss victim concerns with officials whose actions have been called into question. Victims' Rights Compliance Projects appear to be an effective model for fostering institutional compliance with the stated objectives of Victims Bills of Rights, but formal evaluations of their effectiveness have yet to be completed. The Office for Victims of Crime, a division within the US Department of Justice, has recently issued a report evaluating the experience with compliance efforts in three states, and it has provided a useful checklist of issues which need to be addressed for establishing an effective compliance mechanism:

The creation of a victims' rights compliance enforcement function affords state policymakers and administrators an opportunity to review and reassess the status of victims' rights implementation, as well as the current delivery of victims' services in the state.

An analysis of this sort may allow officials to assess how a compliance enforcement mechanism will interrelate with current delivery systems.

When state officials begin planning victims' rights compliance enforcement mechanisms, they may want to consider the following:

- which agency, individual, or body will accept accountability for the compliance effort;
- what type of system — a strong state presence or a decentralized board or committee-driven structure — will work most effectively within the current political context of the state;
- what will be the role and support of other groups active on victims' issues, including various state and local victims' advocacy groups and victims' service providers, as well as criminal justice practitioners who have been active in incorporating the concerns of victims in their daily practice;
- whether it is appropriate or viable to create remedies for agency violation of victims' rights laws, to identify the scope and circumstances

that would trigger remedies, whom and/or what may prescribe them, and if changes to current constitutional and/or statutory language are necessary to reflect these remedies;

- whether the creation of a victims' rights compliance system is viable under current budget constraints;
- what, if any, alternative functions and responsibilities a victims' rights compliance program should undertake, such as providing direct counseling to victims or training and technical assistance to promote victims' rights outreach and education; and how evaluation tools and techniques can be built into the liaison program successfully. (Office for Victims of Crime, 1997:viii)

In terms of evaluative academic studies in the 1990s, the general thrust has been to demonstrate that victims' participatory rights have not dramatically changed the legal landscape (Kelly & Erez, 1997; see also Davis & Smith, 1994). A study of 500 felony cases in Ohio revealed that victim impact evidence does not have a significant impact upon the sentence outcome — traditional aggravating factors, gravity of offence and prior record, are still the prime determinants of sentence. The study also confirmed earlier assertions that victims did not present themselves as unduly punitive or vengeful in their statements with only one third even requesting imprisonment or other harsh sanctions. Written victim statements filed with the court in advance of sentence had a greater impact on the choice of sentence than did oral statements provided at the hearing, and the author concluded that this may be a product of the judge having reached a firm conclusion before conducting the hearing such that statements introduced at the sentencing hearing fall upon a decision maker who has already reached a firm conclusion (Erez & Tontodonato, 1990).

Prior to the 1990s, there was a body of literature which found a correlation between victim participation and victim satisfaction. Davis and Smith reviewed this literature and found the evidence lacking. In conducting their own study of 293 victims in the Bronx, Davis and Smith found that there was no indication that victim impact statements led to greater satisfaction and recommended that:

Basic research is needed to ascertain the proportion of victims who want to participate more fully in the justice process and to determine who these victims are. It is necessary also to find out how many victims want to participate. Is it enough to keep them informed? To allow them to be in court during sentencing? To prepare written impact statements? To permit them to allocute? What victims want might or might not be compatible with the aims of the criminal justice system and the rights of the accused. However, until we understand what victims want, we cannot debate

their proper role in the justice process intelligently. (Davis & Smith, 1994:11–12)

The relationship between victim satisfaction and victim participation can be affected by the dynamic between victims and the relevant justice officials. Henley, Davis & Smith (1994) found that despite expressed sympathy for victims, prosecutors and judges were "lukewarm" to the admission of these statements. These findings are consistent with conclusions drawn by Professor E. Erez in studying other jurisdictions (Erez, 1999). A survey of 1,300 victims from various states revealed that the rate of implementation of victims' participatory rights did not significantly vary between states with "strong" victims' rights laws and states with weaker legal protection. However, victims in the "strong" states did express greater satisfaction with both the process and outcome, but, "still, the comparative figures cannot conceal the fact that many victims, even in States where legal protection is strong, gave the system very negative ratings" (Kilpatrick, Beatty & Howley, 1998:6).

Professor Tobolowsky (1999) has provided a clear summary of the existing empirical evidence (including studies conducted before the 1990s) examining the implementation of participatory rights. With respect to the basic right of notification of case progress and outcome, she states:

Just as the extensive notification provisions have received only limited judicial interpretation, they have been the subject of only limited empirical research. Based on surveys conducted at approximately the time of the President's Task Force, a few researchers concluded that their crime victim respondents sought more information as to developments in their cases. Respondents also indicated that the provision of such information would increase their satisfaction with the disposition in their cases and the criminal justice system generally. In a study of the results of an early victim assistance program in which victim liaisons, *inter alia*, notified victims of court dates, however, other researchers found no significant differences between the control and the experimental program groups in the percentage of victims who felt that they "had been treated well in court" or "had been informed of the status of their case". Similarly, in a study to determine the effect of various forms of victim participation in the criminal justice process — including victim notification — on victims' distress levels, researchers found that notification of court proceedings had no significant effect on victims' feelings of distress soon after their victimization or subsequently thereafter. (Tobolowsky, 1999:46–48)

With respect to the right to be present at court:

Few researchers have attempted to assess the effect or impact of victims' presence at criminal justice proceedings. One study focused on the effects of victims' court attendance and knowledge of dispositions of their cases on their perceptions of their offenders and on sentences imposed generally. Researchers found that court attendance itself appeared to improve victims' perception of sentencing outcomes generally, but had no impact on their perceptions of their offenders. Other researchers found that court attendance had a correlation with whether offenders received sentences of incarceration or probation and the length of the incarceration sentences imposed, but had no significant impact on victims' satisfaction with the sentences imposed or with the criminal justice system generally. These researchers also found that court attendance had a limited positive effect on victims' distress levels. Thus the results of this limited empirical research regarding the effects of court presence are somewhat inconclusive. (Tobolowsky, 1999:56–57)

With respect to the right to be heard or consulted regarding plea resolution agreements:

Despite the continuing expansion of victims' rights to be heard regarding plea negotiations and agreements, researchers have devoted little attention to assessing the effectiveness of such rights. One of the few such efforts is a field experiment conducted over twenty years ago to evaluate the use of pretrial settlement conferences to which the judge, prosecutor, defence attorney, defendant, victim and investigating officer were invited. The research results provide support for policy advocates on all sides of the issue of the effectiveness of victims' rights to be heard regarding pleas. From a systems standpoint, the conferences seemingly shortened the length of time it took to close cases, but did not cause significant changes in the proportion of cases litigated or defendants convicted. In terms of the dynamics of the conferences, they were dominated by the professionals with lay members mainly providing requested information. The sessions were attended by only one-third of the invited victims, but victims and other lay participants indicated modest gains in information and satisfaction with their treatment as compared to non-participants. Subsequent field studies generally confirmed these research results. Seizing upon various aspects of these studies, commentators again have advocated various mechanisms through which victims can provide expanded input regarding plea negotiations and agreements. (Tobolowsky, 1999:66–68)

With respect to the right to participate in the sentencing process:

At the outset, despite advocates' and analysts' portrayal of victims' desire for greater participation in the criminal justice process, and especially the sentencing process, estimates of the extent to which victims have taken full advantage of their rights to be heard at sentencing have varied considerably. Based upon a survey of probation staff and prosecutors in thirty-three states, one researcher concluded that victim impact statements were prepared, on average, in over three-fourths of felony cases. Only eighteen to twenty-six percent of victims, however, were present at sentencing; approximately fifteen percent submitted authorized written statements independently of the victim impact statement included in the pre-sentence report; and nine to thirteen percent of victims reported having made oral allocution statements at sentencing. In a survey of victims in five states, other researchers found that while almost fifty percent of victims reported having been consulted about the sentences in their cases, only twenty-seven percent reported actually making a victim impact statement. Researchers conducting a local study found that fifty-five percent of the felony case victims submitted a victim impact statement, eighteen percent were present during trial or sentencing, and six percent exercised their oral allocution right at sentencing. This final figure is comparable to a state-based study concluding that oral or written allocution at sentencing was exercised in less than three percent of felony cases studied. Hypothesizing the reasons for the less than anticipated exercise of these victim rights to be heard, one researcher suggested an explanation: victim unawareness of the right due to lack of notification, discouragement or the absence of active encouragement by criminal justice personnel of their exercise, and actual victim choice of non-participation. The explanation of victims' failure to take full advantage of their right to be heard at sentencing likely includes all of these factors. (Tobolowsky, 1999:81–83)

With respect to victim satisfaction and participation in the sentencing process:

Finally, especially in light of the limited changes in sentence outcome, the impact of the victim's right to be heard on victim satisfaction must be considered. At the outset, survey results have varied as to whether victims even believe that their input has affected sentence outcome. As to victims' sat-

isfaction with their right to be heard or increased satisfaction with the resultant sentence outcome, research results are inconclusive. In a five-state survey of victims, half were not satisfied with their opportunity to provide input in the sentencing decision. In specific studies, however, the provision of victim input has not been found to result in any significant increase in victims' satisfaction with the specific sentence imposed or with the criminal justice system generally. (Tobolowsky, 1999:89–90)

4.2.1.2 Welfare Rights

Turning to the provision of welfare rights through victim services, a recent study by Davis, Lurigio & Skogan (1999) has provided this overview of the needs of crime victims:

Two studies have examined in detail victims' needs in the aftermath of crimes. The study by Friedman et al. (1982) of New York City crime victims who reported their crimes to police, tallied the proportion of victims who needed each of twelve different kinds of assistance, from borrowing money to receiving psychological counseling, to finding a temporary place to stay. They found that improving security (for example, repairing or upgrading locks and doors) and borrowing money were the types of help that victims needed most but were unlikely to receive from family, friends, or neighbors. A study of English crime victims by Maguire and Corbett (1987) came to similar conclusions with respect to the large percentage of victims who need help with improving security and making ends meet, but do not receive such assistance from their social networks. Other research has emphasized victims' needs for such practical assistance as obtaining compensation for property losses and injuries, repairing damaged property, installing new locks, replacing stolen documents and credit cards, and finding transportation and child care (Shapland et al., 1985; Smale, 1977). Maguire (1985) found that the most common victim's need was for information on insurance claims, compensation programs, crime prevention strategies and case progress. Furthermore, he suggested that victims' needs were determined, in part, by the victimization experience. And, as Wemmers (1996:19) noted, 'The extent to which [victims'] needs are perceived as a problem is also influenced by factors such as aid from family or friends and the skills of the victim'.

The importance of security assistance and emergency financial aid, which has been found

in various studies, is interesting when contrasted with results of Roberts' (1987) investigation of victim services programs. Roberts surveyed 184 victim assistance programs throughout the United States. He found that security and financial assistance were among the least common services that programs offered throughout the United States. Only 13% offered assistance with security and only 24% offered financial help. Moreover, Roberts observed that most programs did not intervene immediately but did so days or weeks after crimes had occurred. By that time, it might be too late to help victims resolve such urgent practical problems as repairing broken doors, windows and locks or buying groceries.

In summary, research suggests that victim services programs might be failing to meet important victim needs. Studies indicate that the counseling services emphasized by victim programs do not match the immediate, practical, and short-term security needs of many crime victims. (Davis, Lurigio & Skogan, 1999:104)

[Author's Note: The references provided in this quotation are not necessarily included in the bibliographical listings found in this part of the report].

The above study was conducted with four victim service programs which were considered by experts to be "among the best victim services programs", and it was concluded that the programs "helped only a small proportion of respondents with most types of problems" (Davis et al.:102). This is best accounted for by the fact that 52% of the sample was not even aware of the existence of the programs. Those who did participate in the programs were generally pleased with the level of service but the majority of victims still looked to support from networks of family, friends and neighbours instead of assistance programs (Davis, Lurigio & Skogan, 1999).

A recent study of 893 justice officials in Florida found that the "criminal justice community is well situated to observe and respond to the needs of victims" (Lucken, 1999:143) with 85% of police, 60% of court officials and 50% of probation officers having made referrals to victim services. However, 53% of justice officials were uncertain about the efficacy of existing programs, and a clear majority (80%) were in favor of creating a centralized victim service centre. The survey data painted a picture of a "victim ensnared in a service referral maze that begins with an overburdened and admittedly ill-informed criminal justice system and ends with various social service organizations that are not designed to meet victim needs exclusively" (Lucken, 1999:147). In terms of the goal of integrating victims' needs into the administration of criminal justice, the author of this study concluded:

The findings indicate that most victim services and assistance, with the exception of restitution/

compensation, cannot be, and have not been provided by the criminal justice system. They are instead provided by a collection of agencies that are part of a larger and fragmented social service network. Moreover, in attempting to access this network, victims have had to rely on a generally overwhelmed, unreceptive and uninformed criminal justice system. It is concluded that integration — understood broadly as “brought into membership in or partnership with” and narrowly as “awareness of” and sensitivity to victims’ issues, responsibility to victims’ needs and incorporating services into routine procedure — has not occurred. (Lucken, 1999:153)

This conclusion is consistent with a recent assertion made by the US Department of Justice that “today only a fraction of the nation’s estimated 38 million crime victims receive much-needed services such as emergency financial assistance, crisis and mental health counselling, shelter and information and advocacy with the criminal justice system” (US Department of Justice, 1997, Executive Summary:vii). The major complaint with respect to the victim-witness programs throughout the US has been lack of funding, lack of space and attrition of volunteers (Roberts, 1990) and it may be that the low level of delivery is simply a product of fiscal restraint and not a failure of the concept. Other commentators are not as condemnatory as to the past achievements and future prospects for the service field. The executive director of NOVA (National Organization for Victim Assistance) identified eight basic service elements:

1. crisis intervention;
2. supportive counseling and general advocacy;
3. support during case investigation;
4. support during prosecution;
5. support after case disposition;
6. crime prevention services;
7. public education services;
8. training of allied professionals. (Young, 1990:193–195)

In a survey of over 100 victim service programs, it was found that most programs were attempting to deliver all eight of these identified service elements. The most significant weakness in the programs related to inadequate training of the staff. The author also concluded that there is little guiding research into the effectiveness of various service programs (Young, 1990). Nonetheless, the author still expressed optimism seven years after the completion of this initial report:

It is clear that in the next decade, the field of victim assistance will continue to build on its successes. It is probable that victim services will be fully integrated into the criminal justice system, crisis services will be available in most communi-

ties, victims’ rights will be incorporated into the constitutions of most states (if not in the federal government), victimology (by whatever term it is called) will be a part of most educational curricula from elementary school through graduate-degree program, and victim assistance will become a recognized and respected profession. (Young, 1997:203)

4.2.1.3 A Note on Compensation

Before turning to the European experience, it is worth noting that one area of extensive academic commentary is the comparative analysis of compensation schemes around the world. In the literature we find elaborate evaluations of European schemes (Hertle, 1991; Villmow, 1991; Wemmers & Zeilstra, 1991; Merigeau, 1991; Rossner, 1991; Morgan, 1995) and comparisons between France and the US (Campbell, 1989), between Australia and the US (Kersh, 1994), between Europe and other European countries (Dunkel, 1985) and between Britain and the US (Greer, 1994).

For the most part the reviews are not positive. With respect to the US it is said that “a recent review of victim service and restitution programs across the country has revealed that many probation and parole agencies lack comprehensive restitution programs” (Franck, 1992:120). Similar criticisms are made with respect to the compensatory schemes in England (Greer, 1994; Villmow, 1991). The failure to achieve a successful and effective compensatory scheme is not a result of victim indifference as it is clear that victims have placed financial support as an important unmet need. In Germany, a pilot project in court-assisted compensation indicated that both offenders and victims were enthusiastic participants in this exercise in restorative justice.

The perceived failure of the American enterprise has led one commentator to recommend consideration of the French adhesion process in which victims can attach their civil claims to ongoing criminal trials (Campbell, 1989). As is often the case, failure in the implementation of domestic policy will lead to consideration of alternative modes of delivery found in other jurisdictions.

4.2.2 The European Experience

The literature provides an abundance of descriptive material outlining the role of the victim in European criminal process (Jousten, 1987; Kaiser, Kury, & Albrecht, 1991; Jousten, 1994; Maguire & Shapland, 1997). The historical development of victims’ rights in Europe follows a similar pattern to that found in North America:

Internationally, the “victims’ movement” has been in serious motion for less than 20 years, although there has been isolated earlier developments (such as the introduction of state compensation for victims of violent crime in Britain and New

Zealand in the 1960s). Indeed, in most Western countries, the real thrust has occurred only over the past 10 years. In Europe, victims receive a considerable boost from a number of important initiatives in the mid-1980s, including a Convention and two important Recommendations by the Council of Europe in 1983, 1985, 1987 (on, respectively, state compensation, the position of the victim in the criminal justice system, and assistance to victims). Before this, in only three countries, the United Kingdom, Germany and the Netherlands — had victims' issues achieved any prominence. More recently, many former Eastern Bloc and Third World countries have begun to give serious attention to victims, a key impetus deriving from the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Authority. The reasons for the unprecedented growth of interest in crime victims around the world are not totally clear, but its primary causes are related to public reactions against increasing crime rates, combined with increasingly impersonal, uncaring, and ineffective criminal justice systems and growing awareness of the serious impact of crime on people. (Maguire & Shapland, 1997:212)

The unique feature of the European experience has been the existence of four models for victim participation in the criminal process:

1. The right to prosecute privately for any offence in theory (e.g., England, Finland and Cyprus);
2. The right to privately prosecute for petty or minor offences (e.g., Austria, Denmark, Germany, Poland and others);
3. The right to secondary prosecution if the public prosecutor declines to proceed (e.g., Austria, Norway and Sweden);
4. The right to serve as a subsidiary prosecutor (to assist the prosecutor) (e.g., Austria, Germany, Poland, Sweden and others).

In addition, most jurisdictions provide for some form of appellate review or administrative review to question the decision of a prosecutor not to proceed with a case (Jousten, 1987; Spinellis, 1997). Even in Russia the victim is actively involved by being allowed to participate in the hearing and in argument; observers have noted that Russian victims often interrupt testimony with their comments and questions (Boylan, 1998).

The model for victim participation in Europe is found in the French *partie civile* procedure. This is a mechanism whereby the victim can attach his/her civil claim onto an existing crimi-

nal trial and then participate fully in the hearing. This process was created as part of the original Napoleonic Code and therefore vestiges of this process can be found in virtually every other European jurisdiction. The basic components of the *partie civile* are:

His [the victims] appearance in the criminal trial is by no means a formality, His rights are summarized. . . as follows:

. . . the '*partie civile*' has the following rights at the trial: to be legally represented; to suggest questions to be put to the accused or witnesses; to give evidence without taking the oath; to submit a case which the court must answer; at the conclusion of the evidence to give his views thereon (his '*summing up*' being before that of the prosecution and defence); in the *cour d'assises*, to address the court on the civil issues outwith[sic] the presence of the jury, i.e., after the criminal aspect of the case has been decided. If the case is investigated by a *juge d'instruction*, the '*partie civile*' may refuse to be questioned except in the presence of his lawyer (who has a right of access to the '*dossier*' recording the judge's investigations); comment on a request by the accused to be released from pre-trial custody; ask for expert evidence to be obtained; appeal certain decisions of the *juge d'instruction*, of which he must be given notice and finally has right of audience before the *chambre d'accusation* when such appeals are being considered, and when the *chambre* is deciding on the question of committal for trial.' (Lord Cameron of Lochbroom, 1991:329)

Related to the *partie civile* process is the German *nebenklage* process. For designated categories of offences (primarily sexual assault), the victim can become a secondary prosecutor with legal representation and full participation in the proceedings. This process does not require the attachment of an accompanying civil claim, and the participation by the victim prevents the case from being withdrawn by public prosecutors. Surprisingly, one report found that few victims take the opportunity to participate in this manner and sexual assault victims only participated in 19.2% of available cases (Pizzi & Perron, 1996). This is consistent with other evidence indicating that most European victims do not take the opportunity to fully participate in the proceedings despite the potential to do so (Jousten, 1987; Maguire & Shapland, 1997; Krainz, 1991).

In the 1990s a number of empirical studies were conducted in Germany to evaluate victim participation and satisfaction. As in North American studies, the empirical studies conducted in Germany indicate that victims do not simply act upon unduly punitive motivations and many are simply interested in proper compensation (Baurmann & Schadler, 1991; Kilchling, 1991). One of the more disturbing findings has been the failure to effectively implement victims' rights. Not content

with the subsidiary prosecutor protection, Germany enacted in 1986 the Victim Protection Act that, for all intents and purposes, is the German counterpart to North American Bills of Rights. A preliminary study revealed a uniform lack of knowledge about the various rights provided to victims, and professional resistance to the concept. Similar to findings in North American research, the study also revealed that the primary source of stress and anxiety for the victim is not the process itself but rather uncertainty about the process and a lack of information to explain the process (Kaiser, 1991). A more recent study confirmed a general state of ignorance amongst judicial officials about the legislation and the failure of judicial officials to educate and advise victims of their rights. The general thrust of this study is summarized as follows:

Successful implementation of the new laws has been, from the beginning, difficult to accomplish. One in every four judges and prosecutors indicated that the victim was 'never' advised of their rights, and almost half of the judges and prosecutors informed the victim only 'when queried', even though the law imposes such a duty on the public officials. The observance of the duty to advise and instruct an interested party such as the victim would contribute to more stringent protection of their rights. It sounds almost cynical that the majority of the judges and prosecutors stated that they had 'simply forgotten' to carry out their duty to instruct the victims, or found 'no suitable opportunity' to do so. This clearly indicates that the victim protection provisions are really not taken seriously by the major participants in the criminal justice process. And, of course, it follows that if victims are not even informed of their rights, then the opportunity to exercise their rights in general is limited or restricted. (Kury, Kaiser & Teske, 1994:77)

There has recently been an extensive review of the approach to victims' rights in Poland (Bienkowska & Erez, 1991; Bienkowska, 1991; Erez & Bienkowska, 1993; Marek, 1996; Stefanowicz, 1992; Bronistowski, 1993). It has been stated that Poland is "one of the Eastern European countries mentioned as a haven for victims" (Bienkowska & Erez, 1991:217), but the available literature does not necessarily establish this jurisdiction as a model jurisdiction. As in other jurisdictions, Polish victims express dissatisfaction and a lack of knowledge of their various rights (Bienkowski & Erez, 1991; Stefanowicz, 1992). However, despite the low frequency of victim utilization of the right to be a subsidiary prosecutor or attach a civil claim to the criminal process, it appears that there is increased victim satisfaction when the victim becomes more involved in the process as a subsidiary prosecutor. The same study highlights the importance of ensuring that victims are made aware of these rights because the low utilization rate of a popular procedural mechanism can only

be explained by ignorance of the existence of the right (Erez & Bienkowska, 1993).

Studies in the Netherlands confirm that victims have a strong need for information. Their perception of being treated fairly is contingent upon the proper receipt of information. Despite the enactment of guidelines with respect to victim notification and information, it is apparent that the guidelines are honoured more in the breach than in compliance. This could lead to unfortunate results as the study indicates that victims who did not receive requested information demonstrated a decrease in their perceived obligation to obey the law (Wemmers, 1995; Wemmers, Leeden & Steensma, 1995). A further study of victim satisfaction concluded that victims place greater importance on process than outcome and this may explain the decrease in victim satisfaction when information is not forthcoming. The Dutch victim seemed most interested in restitution and fair process and these factors were most directly related to victim satisfaction (Wemmers, 1996; Wemmers, 1994).

Finally, a recent study was conducted to assess compliance with Council of Europe Recommendation R(85) 11 regarding the furnishing of basic information to crime victims. A review of 22 jurisdictions assessed compliance with the duty to provide information about services, compensation and legal advice, the outcome of the police investigation, the final decision as to whether to prosecute and the date and place of the hearing. Even with respect to the date and place of the hearing, it was found that most victims are not being properly notified. Although states have succeeded in formally implementing the terms and conditions of the Council of Europe Recommendation, there has been little actual implementation. Beyond establishing a routine method of imparting information and creating educational leaflets, the report recommended as an effective solution the appointment of a victims' advocate. The most important determinants of whether victims would receive relevant information is the attitude of the responsible public official and whether or not the victim has chosen to act as a secondary or subsidiary prosecutor (in which case, receipt of information is consistent and clear). The report concludes:

In general, victims of crime attach much importance to notification. Only if they know of their rights can they exercise them, and only if they are being informed of the decisions taken in their case are they safeguarded from becoming the "forgotten figure in criminal justice". The criminal justice process stands to gain from a successful transmission of information to the victim, for it can do much for the sympathy and support the public feels and provides to the system. That makes it particularly critical that in the practice of the countries involved in the comparative research on which this article is based, there are so many problems that need to be overcome to ensure adequate provision of information. The realization of

the importance of information is there. The many pieces of legislation, guidelines and policy documents bear testimony to this. What is now needed is a commitment on the part of legal practitioners to put this realization into practice. (Brienen & Hoegen, 1998:185)

4.2.3 The Commonwealth Experience

In many ways the British experience is similar to the Canadian one; however, the small body of literature in England presents a rather cynical and unenthusiastic acceptance of victims' rights. The United Kingdom entered one reservation to the U.N. Declaration and that was with respect to the principle that the victims' views should be heard where appropriate (Ashworth, 1993). Commentators express doubt about the feasibility of making effective orders of reparation within the British criminal justice system (Wasik, 1999) and about the justifiability of introducing victim impact evidence at sentencing hearings (Ashworth, 1993). Doubt is also expressed as to whether the British practice of charge bargaining and sentencing discounts is at all consistent with the interests of victims (Fenwick, 1997(b)). The resistance to victim impact evidence compelled Professor Edna Erez to recently write a rejoinder entitled, "Who's Afraid of the Big Bad Victim" (Erez, 1999), in which she reviewed the existing empirical evidence (none of which originated in England) and concluded that the "social science evidence clearly suggests that we have no reason to fear, and every reason to include, victims in the criminal justice process" (Erez, 1999:356).

The similarity between the British approach to participatory rights and the Canadian approach is that the British have articulated the rights in a non-enforceable instrument and the Provincial governments have articulated rights in a legislative context which appears virtually unenforceable. The governing British regime is described as follows:

At present, procedural and service rights for victims in the United Kingdom exist on a quasi- or non-legal basis since they are contained in various Home Office documents, including the Victim's and Court's Charters. Both Charters are part of the Citizen's Charter, and therefore appear to share its obscure legal status. It may possibly have some quasi-legal status, but, as a White Paper, it clearly has no legal status. While the Victim's and Court's Charters tend to be couched in prescriptive and, in places, very precise language, they do not provide victims with legal remedies if their provisions are breached. However, a general grievance procedure is provided for victims under the 1996 version of the Victim's Charter and in relation to mistakes in the conduct of court business under the Court's Charter. Such complaints may now ultimately reach the Parliamentary Commissioner for Administration. (Fenwick, 1997:323)

In the scant literature available, commentators condemn this "quasi-legal" instrument for promulgating victims' participatory rights (Miers, 1992; Fenwick, 1995; Fenwick, 1997(a)).

The Australian and New Zealand experiences appear consistent with the British experience in that there has been some professional resistance and a failure to enact an enforceable Bill of Rights. Although New Zealand introduced the practice of admitting victim impact statements as early as 1987 (Hall, 1992), nine of ten Australian jurisdictions resisted introducing legislation as late as 1994. However, Australia has produced a fair share of government reports in the 1990s (e.g., Community Law Reform Committee of the Australian Capital Territory, 1993; South Australian Attorney General's Report on Victims and Criminal Justice, 1990), and much of the empirical evidence relating to victim participation and satisfaction is found in studies conducted in Australia.

The following studies were completed in Australia in the 1990s:

- 1) Douglas, Laster and Inglis (1994): In Victoria (a jurisdiction without authority to admit victim impact statements), the standard police report was woefully deficient in terms of providing information about the circumstances of the victim; however, a review of sentencing practices did not reveal that harm to the victim was related to sentence outcome.
- 2) Erez and Roeger (1995): In South Australia, the introduction of victim impact evidence did not affect sentence outcome both in terms of the proportion of prison sentences imposed and in terms of the average prison sentence. The introduction of victim impact evidence also did not lead to a discernible increase in compensation and restitution order.
- 3) Erez, Roeger and Morgan (1997): In South Australia, a survey of 427 victims confirmed the importance of outcome for victim satisfaction, but did not suggest a clear relationship between "process control" (participatory rights) and satisfaction. The introduction of a victim impact statement had only a marginal effect on victim satisfaction.
- 4) Erez and Roeger (1999): Interviews with legal professionals revealed the agreement of lawyers and judges that victim impact statements have not increased sentence severity, nor have they changed sentencing patterns in any significant fashion. Practitioners did not report any adverse effects of victim statements on court administration. The interviews revealed a "rich repertoire of strategies used by the legal profession" to maintain an illusion of objectivity and distance from the victim and his/her statement of harm. The

authors concluded that “contemporary VIS practices in Australia and elsewhere are successful in maintaining the time-honoured tradition of excluding victims from criminal justice with a thin veneer of being part of it” (Erez & Roeger:235).

- 5) Erez and Laster (1999): In a study of lawyers and judges in South Australia it was found that legal professionals support the concept of victim participation in principle, but they often ignored or minimized the importance of the victim impact statement and the harm experienced by the victims.

Government reports in the 1980s were critical of the admission of victim impact statements (Australian Law Reform Commission, 1987; Victorian Sentencing Committee, 1988) and it appears that professional resistance was the result in the 1990s (Mitchell, 1996). All state governments have enacted Bills of Rights contained in administrative guidelines and most have simply been published and distributed as a brochure. As in England, the only commentary on this administrative process of creating rights and entitlements has been critical:

Despite the issuing of DPP guide-lines and Declarations or Charter of Victims’ Rights, little real change has occurred as far as the role of victims is concerned, and they continue to lack any formal role in court proceedings. While the DPP guide-lines and the various Declarations or Charters of Victims’ Rights may be of symbolic value, they have proven to be largely ineffectual for five reasons. First, the DPP guide-lines provide that consideration for the victim be only one of many factors to be taken into account. Thus, it is always open to a prosecutor to justify a decision the victim may disagree with on the basis of the other considerations. Secondly, the ‘rights’ contained in the various Declarations and Charters are all dependent on victims being aware of these rights, and then making a request for the relevant right in question to be granted. There is no legal obligation on the police, the Prosecutions’ Department or the DPP to inform victims of these rights. Consequently, many victims remain ignorant of these rights, and even if aware, often have difficulty knowing how to exercise them. The third reason is that time constraints often prevent prosecutors from considering the victim, even if they are inclined to do so. Fourthly, even if a breach of the Rights or Guidelines can be proven, none provide for any judicial or administrative remedies. Finally, and most importantly, there is the largely hidden factor of bureaucratic

resistance to change, particularly changes that add to the burden of a Department.

Andrew Kartmen summarizes the situation succinctly:

Criminal justice professionals have little incentive to act in accordance with the wishes and needs of victims, since they are not directly accountable to them, either legally or organizationally. Official priorities are to achieve high levels of productivity and to maintain smooth coordination with other components of the system. Victims are viewed as a resource to be drawn on, as needed, in the pursuit of organizational objectives that are usually only incidental to the satisfaction of the interests of the individual victims. (Garakawe, 1994:599–600)

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5.0 Social Science Perspectives, Mediation and Victim Satisfaction

5.1 INTRODUCTION

The evaluation of participatory rights outlined in the earlier chapter calls into question basic assumptions most people make about the needs and objectives of victims. Contrary to expectations, it has been found that victims are not vindictive in their approach to most offenders and that participation in the sentencing process does not significantly improve victim satisfaction. In addition, despite the best efforts of state officials, it appears that victim assistance programs are not meeting the needs of victims. Accordingly, it may be that the criminal justice policy makers have designed programs upon faulty assumptions regarding the psychological and financial needs of victims, or that the existing programs have simply been poorly implemented. This part of the report will examine the views of social scientists and social service providers to determine if there is a better understanding of the plight of victims than the conventional understanding espoused by criminal justice officials.

Putting aside the role of the victim and the measures taken to increase victim satisfaction, it is clear that public dissatisfaction with criminal justice is pronounced and passionate. If members of the public generally maintain a negative perspective regarding the criminal process, it may be impossible for modest reforms with respect to victim participation to significantly affect a fairly well established negative point of view. Recognizing that the criminal process is the subject of fear and disrespect, there were major developments in the 1990s in creating alternatives to criminal courts based upon principles of restorative justice. Mediation is the primary alternative to the criminal courts which is offered to offenders and victims, and this part of the report will also evaluate whether mediation programs have been able to achieve what the conventional criminal cannot — that is, an increase in victim satisfaction.

5.2 DISCUSSION

5.2.1 Psychological Perspectives and the Role of Health Care Workers

It is common knowledge that the impersonal criminal justice system can lead to psychological distress and secondary victimization for the victim. Many of the law review articles adopt this as a working premise and the commentators often cite Kilpatrick and Otto (1987) as support for this assertion. However, in reviewing the seminal Kilpatrick and Otto article, it is clear that the assertion of psychological distress is an assumption and is not based upon a proper empirical foundation.

Available studies do confirm some of the assumptions regarding secondary victimization but the findings also place some qualifications on the view that victims suffer high levels of distress within the criminal process. In 1979, a Dutch study found that victims regularly experienced feelings of guilt upon victimization, with victims of violence experiencing the greatest level of guilt. More significantly, no clear relationship existed between feelings of guilt and the need for retaliation, and this may explain why studies of victim impact statements have not led to expressions of vengeance as guilt-ridden victims do not necessarily turn to vengeance in wrestling with their guilt. Nonetheless, 70% of victims in this study did believe that sentences were too lenient (Smale & Spickenheuer, 1979).

In 1994, a study of 500 cases in Ohio indicated that victim distress is largely a function of offence type, victim perception of sentence severity and the demographic characteristics of the victim. The author noted that “the most important predictor of current victim distress was level of distress following the victimization. Victims who received restitution were less distressed than those who had not. Unmarried victims and non-white victims had higher levels of distress than married victims and white victims.” Beyond the ability of restitution to temper victim distress, it was found that a perception of sentence leniency can contribute to the aggravation of victim distress (Erez et al., 1994:47).

What constitutes victim distress? A study of over 500 victims in Kentucky confirmed that depression, somatization, hostility, anxiety and fear of crime were all associated with victimization. Symptoms were persistent and tended to last 15 months after the crime. Even after 15 months victims displayed a high prevalence of Post Traumatic Stress Disorder (PTSD):

... after three months, the victims in this study showed pervasive symptomology across diverse domains, including depression, anxiety, somatization, hostility and fear. All victims exhibited a similar profile of symptoms, but violent crime victims were clearly the most severely distressed. Although victims' symptoms declined from these levels over the next 6 months, they soon leveled off. After 9 months, there was little evidence that crime victims would continue to improve. After 15 months, which is where our study ends, violent crime victims were still more symptomatic than were property crime victims who, in turn, were still more symptomatic than nonvictims. (Norris & Kaniasty, 1997:276; see also Norris, Kaniasty & Thompson, 1997)

In a 1997 study of over 500 victims in South Carolina it was found that more than 90% of all victims believed that the criminal justice system should be responsible for providing a broad range of services, including psychological counseling, information about case status, personal protection, legal assistance, social service referral information, and assistance in dealing with police or court. Reported access to such services fell below victims' expectations with the lowest proportion of victims receiving access to psychological counseling and the highest proportion receiving access to assistance in dealing with police or court. In addition, 50% of the sample met diagnostic criteria for PTSD during their lifespan but despite the high prevalence of PTSD in the entire sample, most participants reported inadequate access to victim services, including mental health services (Freedy, Resnick, Kilpatrick, Dansky & Tidwell, 1997).

A 1998 Dutch study confirmed some of the findings of the Norris and Kaniasty study. The primary finding was that there is no difference with respect to fear of crime "between non-victims and victims of either property or violent crimes, not before, and not after the incident took place" (Denkers & Winkel, 1998:151). However, crime victims reported being less satisfied with life, reported less positive affect, and reported perceiving the world as being less benevolent and themselves less worthy than non-victims. Victims perceived themselves as being more vulnerable than non-victims. Nonetheless, victims were not necessarily more afraid of crime, people or situations, nor did they perceive a greater negative impact of crime than non-victims. Finally, the study shows a relationship between well-being and victimization; victims, both before and after the crime, appear to be 'unhappier' than non-victims (Denkers & Winkel, 1998).

It appears that some of the assumptions regarding secondary victimization have not been fully verified by empirical study (although they have clearly been sustained in qualitative evaluation based upon informal interviews), and the relevant psychological literature speaks primarily of distress levels attendant upon the commission of the crime and not the criminal process. Further, it is not a dramatic revelation to conclude that victims experience distress upon victimization, and as such the studies cannot really contribute in a significant way to the development of public policy. With respect to state-induced secondary victimization, the studies reach general conclusions which are in accord with common sense but do not contribute to a greater understanding of the process of secondary victimization.

For example, Norris and Thompson conducted a study into victim alienation with 200 American crime victims and they concluded that "these results indicate that criminal justice officials (most specifically the police) can either intensify or ease the victim's alienated state" (1993:527). Nonetheless, a recent review of the psychological literature is instructive and serves to ensure that assumptions made concerning the victim's psychological well-being have some basis in clinical experience. The relevant literature has been surveyed as follows:

Criminal victimization can leave psychological scars that endure as long or longer than any physical or financial damage (Fischer, 1984; Frank, 1988; Henderson, 1992). Criminal victimization may result in anxiety disorders, depression, drug and alcohol abuse, fear, flashbacks, lowered self esteem, sexual dysfunction, somatic complaints, suicidal ideation, suspiciousness, and a sense of social isolation (Fischer, 1984; Keane, 1989; Lurigio & Resick, 1990). In some cases victims may suffer from posttraumatic stress disorder (PTSD) (American Psychiatric Association, 1994).

Although much of the research on the impact of crime has focused on rape, victims of other crimes may suffer qualitatively similar consequences (Resick, 1987). Other factors being equal, like level of violence and victim's perception of danger, rape may harm the victim's mental health more than do other violent crimes (Kilpatrick, 1989; Kilpatrick et al., 1985), but this issue is not settled (Resick, 1987; Riggs, Kilpatrick & Resnick, 1992). Significant psychological injuries have been reported among victims of many other crimes, including assault (Lurigio & Resick, 1990; Riggs et al., 1992; Shepher, 1990; Steinmetz, 1984; Wirtz & Harrell, 1987), attempted rape (Becker, Skinner, Abel, Howell, & Bruce, 1982), bank fraud (Ganzini, McFarland & Cutler, 1990), burglary (Brown & Harris, 1989), child abuse (Caviola & Schiff, 1988), kidnapping (Terr, 1983), and robbery (Kilpatrick et al., 1985). In addition, families of crime victims in general (Riggs & Kilpatrick, 1990) and of rape (Mio, 1991; Orzek, 1983) and homicide (Amick-McMullen, Kilpatrick & Resnick, 1991; NcCune, 1989) victims in particular often develop psychological symptoms as a result of the crime. Finally, community residents may suffer as a result of public vandalism, a crime with no specific victim (Reiss, 1986).

The consequences of victimization are not necessarily intuitively obvious. Although crime victims indeed experience more mental health problems than do other persons (Ganzini, McFarland, & Cutler, 1990; Kilpatrick et al., 1985; Riggs et al., 1992; Santiago, McCall-Perez, Gorcey, & Beigel, 1985), the severity of the crime does not necessarily predict the severity of the symptoms. For example, Becker et al. (1982) found that victims of attempted rape and rape did not significantly differ in their short- and long-term responses to the assault; Ganzini et al. (1990) found significant levels of depression in victims of the relatively placid crime of bank fraud. Furthermore, though it is clear that support from family members and friends can assist victim's recovery (Janoff-Bulman & Frieze, 1983), those persons do not

always understand the extent of psychological trauma and may think the victim should have recovered earlier than is reasonable to expect (Mio, 1991; Riggs & Kilpatrick, 1990; Sales, Baum & Shore, 1984). In addition, not all crime victims will react the same way to similar victimizations (Lurigio & Resick, 1990; Shapland, 1986). (Wiebe et al., 1996:416–7)

[Author's Note: References within the text of this quotation are not necessarily found in the Bibliographical Materials for this part of the report.]

After providing this survey, the author of the report goes on to consider whether or not the assertion of some commentators (e.g., Erez, 1999) that victim participation in the criminal process is potentially therapeutic has any foundation in fact. It appears that justice as therapy has not been borne out by the evidence, yet there still remains some hope that procedural control for the victim could assist in recovery:

Although legislatures have enacted a plethora of statutes attempting to ease the victim's experience with the court system, research does not yet support the contention that the quality of this experience significantly aids the victim's eventual psychological recovery (see, for example, Cluss, Boughton, Frank, Stewart & West, 1983; Lurigio & Resick, 1990). Maximizing procedural justice, however, most likely does no harm. It is difficult to see how provisions that seek respectful treatment of victims in court could interfere with their recovery, and such provisions may be of significant benefit (Resick, 1987). Furthermore, because a victim's perception of control has been shown to be important to recovery (Kelly, 1990), and persons who believe they have had a voice in court proceedings are generally more satisfied with those proceedings than those who do not so believe, it is possible that the notions of "voice" and "control" represent the same underlying psychological process. If so, victim participation in the court process may be therapeutic, including at plea bargaining and other stages generally closed to the public. (Wiebe et al., 1996:425)

In two studies commissioned by the Solicitor General Canada, it was concluded that rape victims and child sexual abuse victims suffer psychological ill-effects years after victimization. Victims who did receive support from family and friends showed better adjustment over time; however, symptoms of psychological distress were evident with child sex abuse victims ten years after the events (Solicitor General Canada, 1990–1). In turning to the psychological impact of non-sexual offences (Solicitor General Canada, 1992), the

report is inconclusive and the author presents a critical perspective on the value of existing psychological studies:

Part of the problem stems from the fact that researchers working in the field of victimology operate from diverse academic perspectives. For example, social psychologists studying reactions to stress, negative outcomes and victimization have focused primarily on the assumptions, attributions, and perceptions that influence (or are influenced by) the psychological and behavioral responses to distress, personal failure and/or loss of control. Other psychologists, usually those with clinical training, have concentrated their efforts on the emotional trauma that may accompany unpredictable and sudden negative life-events. Many are also interested in the social support received by crime victims, the quality of service provided by victim assistance agencies, and the effectiveness of treatment strategies. Unfortunately, the theory and research findings of researchers and practitioners working in these various fields of psychology have seldom borrowed from or melded with the wealth of data on victimization accumulated by criminologists. (Solicitor General, 1992:2–3)

In light of the fact that most jurisdictions have established victim service programs, there is a growing body of literature which explores the role and function of social workers and other health care professionals in attending to the needs of victims. Manuals have been developed to train these volunteers and professionals to deflect the constant criticism of poor training among service providers (e.g., for the Victim Assistance training in British Columbia, see Quong, 1991). Books and articles have been written to explore the role of the social worker in providing victim services (Roberts, 1990; Roberts, 1997). However, the literature has been critical of the contribution made by social workers and probation officers. In England, it has been noted that probation services are ill-equipped to deal with victims' needs. No studies have been conducted to determine what the views of victims are with respect to the provision of services by probation officials, and the limited review of victims' perspectives indicate that they are wary of being attended to by officials whose primary responsibility is to supervise offenders (Williams, 1996; Nettleton, Walklate & Williams, 1997). In Holland, one study indicated that victim support workers tended to demonstrate an 'upward bias' towards victims (i.e., a misperception imparted to victims that they are "worse off" than others) and as such suggested that this could seriously undermine the therapeutic value of the service. The authors concluded that extensive training must be employed to offset victim support worker biases and that deployment of volunteer workers could assist in ensuring that victims and support workers are in a relationship of 'social solidarity' (Winkel & Renssen, 1998).

5.2.2 Mediation and Restorative Justice

Despite the criticism of social worker and probation officer involvement with victim support, there is a growing body of literature which encourages the involvement of social workers. This literature concerns social work involvement in the mediation process, and it is argued that social workers, who have experience in crisis intervention, are ideally suited to facilitate face-to-face confrontations between offender and victim (Roberts, 1997). Mediation is seen as a new field for social work practice (Umbreit, 1993; Umbreit, 1999). In contrast, a victim-offender mediation program in Italian juvenile justice was reviewed and it was found that despite the benefits of mediation services for youthful offenders, social workers were not properly trained in mediation techniques (Baldry, 1998).

Restorative justice (as discussed in Chapter 2.0 of this report) seeks to heal the wounds triggered by victimization and to instill a sense of accountability in the offender. One of the first contemporary victim-offender mediation programs in the world was established in Kitchener, Ontario in 1974 and since then there has been an explosion of restorative justice programs around the world. There are now 26 programs in Canada and 300 in the US — “the field has actually grown more rapidly in Europe in recent years, with 17 programs in Austria, 31 in Belgium, 5 in Denmark, 19 in England, 130 in Finland, 73 in France, 293 in Germany, 4 in Italy, 44 in Norway, 2 in Scotland, 10 in Sweden” (Umbreit, 1999:216) (it should be noted that there may be many more mediation programs in Canada than are listed by Professor Umbreit). The body of literature on this topic is vast and it is beyond the scope of this report to provide an exhaustive outline of existing programs and their efficacy; however, a brief overview will be provided.

It would be of value for the development of public policy to conduct a large-scale review of mediation programs found world-wide as there is reason to believe that mediation and other restorative justice measures will continue to grow into the future. The continued growth of mediation programs in Canada is secured by two facts: 1) restorative principles of sentencing have been incorporated into the Criminal Code as part of the fundamental purpose of sentencing (s. 718) and alternative measures have also been incorporated into the Code (s. 717); 2) unlike the studies of victim participation in sentencing (the results of which are somewhat inconclusive), the general thrust of evaluations of mediation programs indicates that they are successful and lead to victim and offender satisfaction. Anecdotal evidence suggests that mediation may not work well for certain offences and offenders (e.g., family violence scenarios); however, the reviewing literature does not directly address this issue.

There is a vast body of literature outlining the nature of mediation programs around the globe (Messmer & Otto, 1992; Wright & Galaway, 1989; Kaiser, Kury & Albrecht, 1991; Wright, 1996; Fisher, 1993; Hughes & Schneider, 1989). For

the purposes of this report, a handful of North American studies conducted in the 1990s will be reviewed to demonstrate the general consensus which has been reached regarding the desirability of this alternative to criminal punishment.

The sampling of North American studies confirms the 1989 conclusion that in the US “mediation programs appeared to be fairly widespread and functioning well” (Hughes & Schneider, 1989:231). In 1993, Professor Mark Umbreit (who is responsible for conducting most of the evaluative studies) concluded, “victims of violence have often been among those who advocate extending the mediation process to more serious cases. However, this does not include domestic assault. The mediation process has been effective in assisting victims of violent crimes in regaining a sense of power and control in their lives, as well as the ability to ‘let go’ of the victimization experience” (Umbreit, 1993:73).

In 1994, an evaluation of four victim-offender programs in the US revealed that the vast majority of offenders voluntarily chose to participate in the process, and that victims who undertook mediation were generally more satisfied with the criminal process than those who had not chosen mediation (81% of victims were satisfied after mediation compared to 58% of victims without mediation). In addition, it was found that mediation led to a higher rate of success in securing restitution. However, the authors concluded that despite the growth of mediation it has still had little impact in most jurisdictions due to underutilization (Umbreit & Coates, 1993).

In a study of victim-offender mediation in Minneapolis in 1990 and 1991, it was found that the mediation process had a significant impact on victims feeling less upset about the crime and less fearful of being revictimized by the same offender. However, this increase in victim satisfaction is confounded by the passage of time, which clearly contributes to the gradual reduction of fear and anxiety. The mediation program did lead to a higher success rate in completing restitution, but offender satisfaction was not increased as it was with the victim (Umbreit, 1994a).

In a 1994 report, qualitative research into the views of Canadian criminal justice officials showed that there was strong support for the concept. There was concern expressed about inadequate funding and too few referrals; however, there was professional recognition that mediation serves an important function in the administration of criminal justice: “even in Winnipeg, which represents the largest victim offender mediation program in North America and Europe, concern was expressed that many more cases filed in criminal court could be dealt with more effectively through mediation” (Umbreit, 1994b:6).

A recent study of one of the largest Victim Offender Reconciliation Projects (VORPs) in the US showed a great willingness of victims and offenders to meet for mediation. For violent crimes, only 58% of victims and 69% of offenders were willing to confront each other; however, the figures rose considerably for property crimes and crimes of a minor nature (79% of victims and 77% of offenders). In cases in which mediation was successful, 96.8% of all mediation agreements

were completed and successfully discharged. There were more failures with respect to mediation agreements for property offences, "so while it is harder to get the parties to a mediation session in personal crime cases, once they did meet, the agreements were at least as durable as, or maybe even more durable than, those in property offence cases" (Niemeyer & Shichor, 1996:33).

In a 1997 study of victim-offender meetings/confrontations in Winnipeg and Minneapolis, it was found that victims in both sites reported moderately high levels of satisfaction with the justice system and victim-offender mediation. They also reported being less upset about the crime, having less fear that they will be revictimized, and having more positive views of the offender. Victims in juvenile victim-offender mediation reported that participation in mediation significantly enhanced their sense of participation in the justice system when compared to those victims who participated in adult victim-offender mediation. It was hypothesized that the greater victim satisfaction found in juvenile victim-offender mediation may simply be a product of the fact that the victim rights reform has primarily related to adult victims and offenders, and with the paucity of services available in juvenile court, the availability of mediation takes on heightened importance. The author concluded:

This study lends empirical support to the emerging practice theory of restorative justice, of which victim-offender mediation is the most well established and clear expression. Restorative justice emphasizes that crime is first an offense against people rather than against a legal abstraction called "the state." Holding offenders accountable is understood to mean taking direct responsibility for making things right to the person(s) who was victimized, rather than simply enduring ever-increasing amounts of costly punishment by the state with no responsibility to the direct victim. (Umbreit & Bradshaw, 1997:38)

Finally, a study of mediation in four Canadian sites (Calgary, Langley, Ottawa and Winnipeg) led to the following findings:

- 91% of victims and 93% of offenders would participate in mediation again;
- 92% of cases successfully negotiated;
- greater client satisfaction among victims (78%) and offenders (74%) who participated in mediation than those who didn't;
- 89% of victims satisfied with outcome (91% of offenders);
- 80% of victims and offenders who participated felt they were treated more fairly by the justice system as opposed to 43% of victims and 56% of offenders who didn't;
- mediated agreement was viewed as fair by 92% of victims, 93% of offenders;

- fear of revictimization by the same offender was significantly less (11%) as opposed to 31% by those who didn't participate;
- remaining upset about the crime was less for victims in mediation (53%) as opposed to 66% for those not in mediation. (Umbreit, 1999)

The author concluded that:

These findings suggest that the quality of justice experienced by many victims and offenders may be significantly enhanced through expanded use of mediation in criminal conflicts. Similarly, diversion of appropriate criminal complaints to mediation after a charge has been laid but prior to a trial has important potential for reducing the caseload pressures facing nearly all courts, thereby freeing up resources to be used for other purposes. Finally, use of mediation after a finding of guilt in a criminal court can strengthen the process of holding the convicted offender accountable directly to the victim through a determination of a mutually agreeable restitution plan. (Umbreit, 1999:226)

It is impossible to do justice to the extensive body of literature available on mediation and the criminal process. Suffice it to say that the sample of studies discussed is reflective of overall optimism expressed about the value of victim-offender mediation. This report is primarily about victim participation in the process and therefore the topics of mediation and alternatives to criminal court are beyond the scope of this report. However, it is critical to review this restorative justice movement as it may be that in some cases victim satisfaction can only be enhanced outside of a criminal court setting. Studies of mediation programs consistently reveal a high level of victim satisfaction for some cases; however, the empirical evidence relating to increased victim participation in the criminal process does not lead to the same finding. The studies do demonstrate that victim participation has not led to chaos in the courts, nor has it led to a significant impact on sentence outcome. However, when the studies turn to victim satisfaction the results are inconclusive and discouraging. These studies have been reviewed throughout the paper; however, to contrast the encouraging prospects for mediation and victim satisfaction with the rather muted endorsement of victim participation as the path to happiness, a lengthy summary from Professors Erez and Kelly is set out to demonstrate this muted endorsement:

Do opportunities for victim participation increase victims' satisfaction with the criminal justice system? Research results are divided and suggest at best modest effects. One study found that filing VIS usually results in increased satisfaction with

the outcome (Erez & Tontodonato, 1992). Another found that victims' participation generally increases victims' satisfaction (Kelly, 1984). Sometimes merely filing a VIS heightens victims' expectations that they will influence the outcome. When that does not happen, victims' satisfaction may actually be reduced (Erez et. al., 1994).

Another study that randomly assigned victims' cases to various treatments found that VIS had no effect on victims' feelings of involvement or satisfaction with the criminal justice process or its outcome (Davis and Smith, 1994). These results are consistent with an earlier quasi-experimental study by Davis (1985) that also did not find any effect of VIS on satisfaction with justice. Similarly, studies of the VIS program in Canada (Department of Justice Canada, 1990) and in Australia (Erez et al., 1994) revealed that victims who provide information for VIS are not necessarily more satisfied with the outcome or with the criminal justice system.

In contrast, a comparative study of victims in the continental criminal justice systems (which allow victims a party status and significant input into the proceedings) suggests that victims who participated as subsidiary prosecutors or acted as private prosecutors were more satisfied than victims who did not participate (Erez and Bienkowska, 1993). These differences may suggest that the more participation a jurisdiction affords crime victims, the greater victim levels of satisfaction. (Kelly & Erez, 1997:239)

The evidence on victim satisfaction with increased participation in the criminal process is not convincing. In addition, there is no evidence to demonstrate that victim participation can lead to a decrease in victim distress (except for the fact that participation through the VIS may lead to increased orders for restitution and restitution is a factor in reducing victim distress (Kelly & Erez, 1997)). The absence of evidence may suggest one of three possibilities:

- 1) victim participation will not lead to victim satisfaction;
- 2) victim participation has not led to increased satisfaction because the current participatory rights are underutilized, and often merely symbolic in nature; or
- 3) current studies are inconclusive and deficient and therefore better studies need to be undertaken.

Regardless of which possibility is the most plausible explanation, there is one proposition established on the state of the current evidence: victims do not feel greater satisfaction when they participate within the current criminal process but they do experience some relief of distress and increased satisfac-

tion when their cases are resolved outside of criminal courts in some cases. At a minimum, for true victim rights advocates, this proposition should lead to greater consideration and study of alternatives to adversarial criminal courts.

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6.0 Concluding Remarks

The literature on victims' rights in the 1990s paints a picture of an exponential growth in the 'victim industry' with little indication of progress being made in ameliorating the plight of the victim. This is why a recent book has characterized the modern crime victim as 'all dressed up with nowhere to go' (Elias, 1993:26). A recurring theme in the literature has been the symbolic endorsement of the concept of empowering victims while, at a practical level, legal professionals develop strategies to neutralize the symbolic gains achieved at the political level. True victim participation will require structural reform of the adversarial system, and structural reform is threatening to the vested interests of legal professionals.

Nothing constructive can be accomplished until the political objectives of the movement are co-ordinated with the constraints of an adversarial criminal process. For example, in 1994 the Standing Committee on the Administration of Justice in Ontario considered the enactment of a Victims' Bill of Rights similar to statutory enactments in other provinces. The Committee concluded that the government should focus its efforts on identifying deficiencies in the process and determine which services and remedies should be established. The Committee indicated that the government's position on a Bill of Rights was negative because of fears of creating expectations that could not be met:

A victims' bill of rights typically sets out the kinds of services a victim may ask for and contains no government commitment to make those remedies and services available. Victim's bills of rights such as those available in other provinces may often mask an absence of resources for victims. A close look behind such bills may reveal they're little more than a cover for failure to provide adequate programs and services. (Standing Committee, 1994:31)

A little over a year later, a Victims' Bill of Rights was proclaimed in force in Ontario despite the failure to conduct any studies on the needs of victims and the impact that victims' participatory rights would have on the criminal process. Political considerations have taken precedence over an informed approach to the proper integration of the victim into the criminal process. Political aspirations, which can shift with the winds of public opinion, cannot serve as a solid foundation for legal reform. The point is that it is easy for political actors to make promises and establish institutions but without a proper understanding of the issue, based upon proper research, these promises are doomed to failure.

It is somewhat ironic that the highly professionalized justice systems of Europe have legal mechanisms that facilitate greater victim participation in the process. The irony of this inversion of expectations is that common law regimes are founded upon a tradition and history of private prosecution and community involvement (e.g., the jury), whereas continental inquisitorial systems of criminal justice have traditionally frowned upon lay involvement. The fact that these highly professionalized systems can accommodate true victim participation should have led legal scholars and criminologists to study and evaluate the features of continental justice which serve to facilitate true participation. However, as with most areas concerning victims' rights, there is little original research of an empirical nature.

We have created an edifice of victims' rights legislation without comprehensive research being conducted into:

- 1) the needs of victims;
- 2) the relationship between victim satisfaction and victim participation;
- 3) the impact of professional resistance; and
- 4) the impact of the criminal process on victims' psychological functioning.

Very few Canadian studies have been conducted with the exception of Department of Justice Canada studies in the 1980s. Presumably these studies fueled the law reform efforts of the past two decades, but little, or nothing, has been done to determine the impact of these law reform efforts on victim satisfaction. Public policy has been built upon assumptions and stereotypical views of crime victims, and even if many of these assumptions turn out to be true, there still remains the question of why the wide-ranging legal reforms of the 1980s and 1990s have not served to placate the fears and concerns of crime victims. Symbolic recognition of the moral obligation to assist those who are victimized has been established around the globe, but effective implementation of law reform measures has failed.

At a 1990 meeting to address the implementation of the U.N. Declaration, Professor I. Waller listed the various questions which, in his view, should be addressed in assessing the level of compliance with the principles contained in the Declaration. These questions are listed below. In reviewing this list it will become apparent that in most jurisdictions the answer to these questions still remains the subject of debate, and the inability to answer these questions is evidence of what has or has not actually been accomplished by the victims' rights movement. Professor Waller's questions are as follows:

- How are victims informed of the different sources of assistance, of their rights, and of what they have to do to secure these rights?
- What informal mechanisms for the resolution of disputes are supported or encouraged by the law?
- Do victims have the right to start legal proceedings against the offender?
- Do they have a right to legal aid?
- What specialized legal services exist?
- Are victims informed about the progress of their case?
- Are they informed about what role they should play in the proceedings?
- Are they regularly consulted in the scheduling of cases?
- How are their views and concerns taken into consideration by the court?
- How is the right of the victim to privacy and safety protected?
- How is the right of the victim to fair restitution from the offender secured? Is restitution a sentencing option?
- Once a court order has been made, what must be done to have the order actually enforced?
- Do victims have the right to State Compensation for their loss?
- What training is provided to persons who come into contact with victims, for example to the police, justice, health and social service personnel?
- What is done to help victims of abuse of power? (Waller, 1991:68)

A consensus was reached many years ago that crime victims have been unjustifiably excluded from the criminal process, yet debate continues as to the most effective and balanced approach to the reintegration of the victim into the process. A great deal has been achieved in pursuing this goal; however, it appears that we have reached a crossroads in this quest. Symbolic recognition of the rights of crime victims has been secured and the question is whether or not we are content to leave the state of victims' rights at this abstract level with the hope that symbolic recognition will eventually lead to a modified prosecutorial ethos in which victims' needs and interests are specifically addressed by public officials. Victims' rights are far too important to relegate them to mere abstract statements of principle and the time has come to translate symbolic recognition into a practical and meaningful law reform agenda.

Victims' rights tend to be associated with a conservative, crime control agenda, and this association is borne out by some of the American reforms that have served to erode an accused's constitutional rights. However, this erosion is neither natural nor inevitable, and can easily be prevented. The current disdain with which the public views the criminal process should compel lawmakers to consider deep structural reforms that will include an increased participatory role for the victims of crime. Putting a human face on the sentencing process will help in combating the legitimacy crisis that currently plagues North American criminal justice.

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Appendix A — List of Cases

Booth v. Maryland, 107 S. Ct. 2529 (1987).

Dix v. Shasta, 963 F. 2d 1296 (1992).

Hance v. Arizona Board of Pardons and Paroles, 875 P. 2d 824.

Payne v. Tennessee, 111 S. Ct. 2597.

People v. Myers and Daley, 521 N.E. 2d 98 (1987).

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R. v. Willaert, 105 C.C.C. 172 (Ont. C.A. 1953).

R. v. Zelensky, 41 C.C.C. (2d) 97 (S.C.C. 1978).

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Vanscoy and Even v. Her Majesty the Queen in Right of Ontario, O.J. No. 1661 (OntSupCtJus) [1999].