Soc 3395: Criminal Justice and Corrections

Classes 18-19: Victims and Criminal Justice 1: Legal Issues and Subject's Experiences

Today we will review both the legal position *and* the experiences of victims of violent crime when dealing with the criminal justice system. I will proceed in the following manner:

- First, I will briefly outline the *historical construction* of the general principle underlying all of our criminal and civil legal institutions dealing with victims.

- Second, I will trace the practical, *interactional result* of this construction by reviewing the place of victims at each stage of Canadian criminal proceedings. Beginning with the crime itself, I will proceed in stages from the police investigation, arrest/bail, the laying of charges, arraignment, the preliminary hearing, trial, sentencing, appeals, and Parole.

- Third, I will discuss some recent procedural changes that have been introduced to make the system more sensitive to victims.

- Finally, I will review data from my own research vividly illustrating victims' experiences with the justice system.

GENERAL PRINCIPLES:

- The fundamental principle underlying British, Canadian and American legal institutions dealing with victims is that a **criminal proceeding** is an **adversarial process** between two, and **only two parties: The state and the accused.**

- The **victim** is **not a party to the proceeding.** The victim has **no legal standing** to dispute decisions of the Crown Prosecutor (e.g. re: whether to prosecute or to make a plea bargain). The Crown Prosecutor works for the **state**, and is **not the victim's lawyer.**

- The victim only has **two roles** to play in this scenario: (1) to call the police to report the crime in the first place; and (2) to act as a witness for the prosecution when called.

- The traditional response to victims who complain about this lack of a recognized role is to suggest a **civil lawsuit** for damages against the offender (e.g. Fred Goldman vs. O.J. Simpson).

- This institutional format historically grew out of the concept of the "King's Peace." Basically, our system, which early on enabled victims to participate fully in criminal cases, was gradually taken over by the state under the rationale that certain crimes were so serious as to warrant prosecution by the state. The list of crimes stated as being against the "King's Peace" gradually expanded, and victims were eventually shut out of the process - particularly after lobbying by utilitarian reformers in the 1700's and 1800's. This development sharpened the contrast between

civil and criminal matters, with different standards of proof developing, etc. The standard response to victims' concerns became "Well, they can always sue."

- This situation contrasts sharply with the role of victims in countries with differing legal traditions. Other legal systems, which grew out of Roman law, did not develop so sharp a distinction between criminal and civil matters. For example, in France, as well as some other "civil law" countries, the victim may, at his or her option, join a civil to a criminal proceeding, and these are then conducted together in the criminal court. These victims are given access to legal aid, legal representation, and are able to be a part of the process at bail, during the trial, sentencing, and, more recently, parole. A similar type of representation and merger of claims is permitted under the legal systems of many of the former socialist countries.

- The Common-law principle that a criminal proceeding is a matter between the state and the accused underlies the interactions and treatment of victims **at every stage of our criminal justice process, and their dealings with all legal institutions in Canada.** We will now review these in detail *from the victim's perspective.*

PART (a): THE CRIMINAL JUSTICE SYSTEM:
(1) THE POLICE INVESTIGATION:

Problems experienced by victims have tended to revolve around three areas, particularly before the rise of the victims' rights movement in the early 1980's:

(1) **Police response to victims' initial complaints**: Victims have complained that police have at times been slow to respond in a timely fashion, and that dispatchers have been known to "screen out" what they thought were "minor" incidents, advise callers to phone back if their "private" arguments have not resolved themselves, or give vague assurances that matters will be "looked into." In addition, until recently, police responding to calls have made arrests in only a small minority of cases involving interpersonal disputes. This may be frustrating, demeaning, or downright dangerous for the victim.

It must be noted, however, that so-called "zero tolerance policies" may have reduced this latter problem somewhat. Still, government cutbacks and reduced staff may work at cross purposes here and exacerbate the other problems.

(2) **Treatment of the victim during the investigation:** Traditional problems reported by victims in the past include:

- Insensitive questioning of victims and family members after an assault or murder;
- Failure to provide the victim with information about support services;
- Putting the victim or his/her family under investigation;
- Sudden, inconvenient and upsetting demands to attend at the police station to ID suspects;

- Long delays or refusal to respond to requests for information;
- Public revelation of unwelcome information;
- Holding victims' property for investigation; and
- Returning upsetting items to victims.

(3) **Methods of informing families of death or injury:**

- In the past, many police forces did not have any standard procedures for informing families of the death or injury of loved ones, which sometimes resulted in families being informed by telephone, the press, or in an abrupt,"insensitive" manner.

Many of these problems were much worse in the past, as police forces are increasingly trained to deal with victims, and many operate their own Victims Services branches (e.g. R.C.M.P).

(2) ARREST/ BAIL:

If the police have succeeded in their investigation of the reported crime and consider that they have identified the offender, the next step is for them to inform the offender of the appropriate charges and/or make an arrest.

However, from a victims' perspective, it has been uncommon for an accused offender to be held in jail pending their first appearance in court, or thereafter. While victims, particularly in violent crimes, frequently wish to see the perpetrator arrested and locked away until trial, our legal system has evolved *alternative measures* to prompt the accused's attendance, such as issuing an "appearance notice," a "promise to appear," or a "recognizance" involving a monetary obligation.

Upon arrest, the **Criminal Code** directs that the officer in charge "shall" release the accused unless limited circumstances appear (e.g. if it is necessary to establish offender's identity, secure evidence, or prevent the continuation of the offence or the commission of another offence). In addition, if the accused is not released by police, the **Criminal Code** requires a bail hearing to be held very shortly afterwards where the Crown must "show cause" why continued detention is required.[1] Generally, the Crown only succeeds in carrying this burden if detention is necessary to ensure the accused's appearance in court, if necessary in the "public interest," or for the protection and safety of the public "having regard to the circumstances of the case."

From a victims' standpoint several aspects are very disturbing here:

(a) The mandatory language of the **Criminal Code** and burden on the Crown ensures that at least

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This onus reverses for murder, but for all other violent offences, the burden remains on the Crown to prove why the accused should be detained.

some dangerous individuals will slip through the cracks and be released pending trial;

(b) Except in the most exceptional cases, no money has to actually change hands for an accused to be granted bail;

(c) There is no place for the victim to participate and have input on the decision; and

(d) Due to the lack of information generally provided to victims, they may know nothing of the accused's release and may experience frustration, confusion and outright fear upon encountering the accused "on the street" shortly after the crime.

(3) The Charging Process:

Generally going hand in hand with matters surrounding arrest and bail is the question of the appropriate charges to be laid under the circumstances. While the police often initiate this process by "laying an information" against the accused, there *may* later be communication between the Crown and the defence, and a legal decision made to increase, decrease or withdraw the charges.

While Crown Counsel are supposedly under a duty at this stage to consider the impact of the offence on the victim when making such decisions, *actual consultation with the victim has been rare* (although prosecutors are slowly getting better about discussing these matters with the victim).

Moreover, *the victim does not have the legal standing as a party to compel Crown prosecution of the offence, to contest decisions to dismiss or reduce the charges, nor to accept plea bargains.*

From a victim's perspective, this means that there have been many instances where charges are reduced or withdrawn or "an inadequate sentence" agreed to "behind closed doors" without any input on their part. This is not only upsetting to victims, it brings home their *ineffectiveness* in a very vivid manner.

(4) ARRAIGNMENT:

Assuming that the victim has reported the crime, the police have made an arrest, and charges have been laid and not withdrawn, the next stage in the criminal process is the arraignment. This usually takes place in Provincial Court, and consists of the charges being read and the accused being asked to enter a plea.

If the accused pleads guilty, the matter will proceed to sentencing, either immediately or after the preparation of a pre-sentence report. The victim may be given no information about this procedure, and may learn of this first court appearance from the media. Moreover, if previously

asked to be a witness by police, a guilty plea means that victims may be informed they are "not required" - having no chance to tell their *story*.

If, however, the accused pleads not guilty, a hearing date will be set by agreement of counsel. Rarely do these parties ever consider the circumstances of victim-witnesses when setting a court date, and this may be weeks or months away. Indeed the only notification a victim may receive may be in the form of a sudden subpoena to appear in court on the chosen date. The delays inherent in the process may be very frustrating to victims, and may be further added to by adjournments.

(5) Preliminary Inquiry:

For certain offences a preliminary inquiry may be held, *at the election of the accused*, in order to determine whether there is sufficient evidence to send the accused to trial on the charges. In essence, this give the accused "two kicks at the can," as, if there is not enough evidence, the matter may be dropped at this time. Victims, when witnesses, are required to be present at this point. Several things must be noted:

- The victim's experience as a witness may be marred by a disturbing confrontation with the accused and/or defence witnesses who have traditionally shared the same waiting room prior to the hearing;

- Victims and their family have often been excluded from proceedings (subpoenas);

- If present, victims and their families have traditionally been given little if any information on the disturbing evidence that may be presented;

- Witness fees are woefully inadequate to cover the costs in attending court;

- Evidence pointing to guilt is often excluded due to legal and constitutional arguments (voir dires);

- Witnesses are required to go up on the stand and go through, in explicit detail, the disturbing events of the crime. This not only brings upsetting memories flooding back, it often amounts to *re-living the event*. For victims who are undergoing counselling or are on medication, this can exacerbate their condition.

- Victims are giving testimony, in many cases, in a public courtroom, and are being examined and harshly cross-examined by lawyers. Ironically, "victims are often attacked by defence counsel as the opposite party." For victims of violence and sexual assault, such attacks may result in re-victimization.

At the conclusion of the preliminary hearing the accused is either discharged (and goes free), or

is ordered to stand trial at a later date.

(6) The Trial:

If the accused is discharged at the time of the preliminary hearing, this is often upsetting to victims. If s/he is ordered to stand trial, however, there are more frustrations to come. Many of the above comments regarding delays, lack of input, shared waiting rooms, possible exclusion from the courtroom, upsetting and/or excluded evidence, inadequate witness fees, and harsh cross-examination are equally applicable to the trial itself.

The differences at trial are that:

- There may be additional upsetting evidence;

- The victims have had to endure a further period of uncertainty; and,

- The issue is now guilt or innocence ("proven guilty beyond a reasonable doubt").

Thus the victim may have to relive the crime not only once, but *twice*, and still have to face the possibility that the accused be found "not guilty" and freed.

Moreover, in those cases where the accused is convicted following trial, there is always the possibility of appeal. This can drag the process out even longer, and victims in these cases face continued uncertainty as to the fate of the offender. Indeed, they may fear for their own safety in those cases where the offender has been granted bail pending determination of his/her appeal.

(7) Sentencing:

When an offender has been convicted of an offence, the court will hear representations of both Crown and Defence counsel before passing sentence. Victims have objected to several aspects of this process:

(a) Victims, at least until the introduction of a law allowing "victim impact statements" in 1988, were denied any input in the determination of the sentence imposed;

(b) There has been a historical trend towards more lenient sentencing coupled with an increasing emphasis on rehabilitation;

(c) The courts have generally kept public opinion at arms length, even while acting ostensibly on behalf of the state for the public benefit;

(d) Continued lack of information being provided to victims;

(e) Disparity and inconsistency in sentencing practices;

(f) Myriad problems relating to obtaining restitution through the sentencing process which, ultimately, result in few victims ever receiving anything.

Also, with regard to Victim Impact Statements, victims have reported problems. These include:

(i) Until recently, were only done at the discretion of judge;

(ii) Restrictions on victims' comments;

(iii) Must be filed 2 days prior to sentencing. Problem when sentencing done after immediate guilty plea;

(iv) Cross-examination by defence;

(v) Often aren't passed on to CSC and Parole;

(vi) Often ineffective in impacting final sentence.

(8) PAROLE:

If a sentence of imprisonment is passed by the court, and appeals are exhausted, the offender is incarcerated. Yet, this is not the end of the story for victims, who frequently express uncertainty and concern over a parole system that may release offenders into society after serving but a fraction of their original sentence (UTA's can be granted at 1/6 of an offender's sentence, full parole eligibility is set at 1/3 in most cases, while statutory release is generally set at the 2/3 point). Victims often feel that they have little if any say in these decisions.

Particularly upsetting to victims in the past was the system of mandatory supervision under which many violent offenders who had been refused parole were permitted to serve as much as the final third of their sentence "under supervision" in the community. Until 1986 the National Parole Board had no discretion to stop them. Yet, studies by the Solicitor General indicated that the number of violent crimes committed by offenders released on mandatory supervision were far higher than those released on full parole.

Added to these failures is again the relative lack of information available to victims from parole and corrections authorities. While the Parole Board may release information that is already publicly available, victims of violent crime may, and only upon request, receive additional information such as:

(a) The date and type of release, destination of the offender and whether the offender might be in the vicinity of the victim while in transit;

(b) Certain terms and conditions attached to the release when this may help reduce the victim's fears;

(c) Whether the offender is returned to custody, should that become necessary before the end of the sentence; and

(d) The fact that the offender has escaped custody, or has become unlawfully at large.

Interestingly, the Federal Government repealed the **Parole Act** in 1992. In its place is the new **Corrections and Conditional Release Act.** Not much has changed, however, with regard to information available to victims. Sections 26 and 142 still place the onus on the victim to request information, and the nature of the information that may be released has not changed much.

Victims have objected to this position on three grounds:

(i) By placing the onus on victims like this, many violent offenders may be released and seek to wreak revenge on unsuspecting victims or victims that are trying to forget about the crime;

(ii) Victims have **no right to information** from the Parole Board, and, indeed, the release to victims of information regarding an offender's place of incarceration have been, until recently, prohibited by the **Privacy Act.**

(iii) Until recently, representations by victims to the Parole Board have, as a matter of procedure, been shared with the offender. This has at times resulted in harassment. Now there is some discretion to limit this, but very little. This, of course, merely increases victims' fear of retaliation, or silences them, depending on what they do.

(9) OTHER MATTERS:

- Young Offender's Act.
- Dangerous Offender Legislation.
- Section 745.

(10) Recent Changes to Criminal Justice Institutions Relating to Victims of Crime:

While the above appears to render the position of the victim in the criminal justice system untenable, there have been a number of high-profile initiatives in recent years attempting, at least in part, to make the process more sensitive to victims' concerns.

The *Federal Government*, for example:

(i) Passed Bill C-89 in 1988, amending the **Criminal Code** to allow victim impact statements at sentencing, **in camera** hearings, improved restitution and return of property to victims. It also

enabled courts to order a ban on publishing the identity of witnesses, and imposed a "victim fine surcharge" on fines - which money is **supposed** to be used to help pay for victims services. The practical implementation of these changes is not only taking time, but has been uneven across the country.

(ii) Passed legislation regulating the use by defence counsel of the victim's prior sexual history in sexual assault cases. Although there was a successful court challenge to the constitutionality of these provisions, the federal government passed modified legislation in 1992. Nevertheless, this has remained a hot issue with defence lawyers.

(iii) Passed legislation in 1993 making criminal harassment ("stalking") an offence. Prior to this all that existed were the notoriously ineffective "peace bonds."

(iv) Introduced further restitution provisions to the **Criminal Code** authorizing a sentencing judge to award damages for bodily injury, loss of income or support "where the amount is readily ascertainable," and enabling the victim to later enforce it as a civil judgement. (the older provision only applied to property damage, and was little known and little used).

(v) Passed legislation in 1995 facilitating the use of DNA evidence in criminal proceedings.

(vi) Passed Bill C-37 in 1995 which amended the **Young Offender's Act** to increase sentences for those convicted of murder in Youth Court.

(vii) Passed Bill C-72 in 1995 which limits the use of the drunkenness defence.

(viii) Passed Bill C-41 (the "Hate Bill") in 1995 to increase sentences for crimes committed specifically against identifiable minorities as a result of hatred towards that group.

(ix) Passed Bill C-68 on gun control in 1995, with the support of several victims groups. This increases penalties for illegally importing firearms and for the use of guns during the commission of a crime. It also sets up a national firearms registry, which has been phased in gradually over a number of years.

(x) Passed legislation in 1996 to somewhat tighten up eligibility for judicial review hearings for murderers under s.745 of the **Criminal Code**.

(xi) Passed legislation in 1996 to create a new category of "long-term offender" mandating tougher supervision. This is in addition to 1986 amendments tightening the notorious "mandatory supervision" program, as well as the existing "dangerous offender" law. As well, the federal government and several provinces have been looking at electronic monitoring for violent as well as non-violent offenders.

In addition, *Provincial Governments* have been active. For example, they have:

(i) Long since introduced Criminal Injuries Compensation Programs.

(ii) Introduced Victim-Witness programs in some police and Crown Prosecutors offices across the country. These programs generally provide workers who help provide information, counsel witnesses as to what to expect in court, and who may, in some instances, attend court with victims.

(iii) Passed so-called "Victims' Bills of Rights," which typically list things like "the victim should be treated with compassion and fairness," but *specifically deny* any legally enforceable remedy should this not be the case.

(iv) Many police forces are being increasingly trained to deal with situations where they must inform someone of the death of a loved one, and to provide information as to where services may be available for victims of violent crime generally.

(v) Several provinces, including Ontario and Manitoba, have introduced legislation giving police chiefs and provincial correctional officials the right to publicize the names of sex offenders and other criminals released into their community that they believe pose a threat. In addition, Ontario has introduced legislation preventing offenders from hiding their criminal records by officially changing their names.

(v) Ontario has proposed the introduction of a computerized system to inform victims of the progress of an offender's trial.

Finally, there are four more emerging developments:

(i) A slightly more open position by Correctional Services and the Parole Board regarding the release of certain information on offenders has culminated in the recent introduction of a 1-800 number to call for information.

(ii) In addition, B.C. has recently announced that victims will be permitted to make oral submissions at parole hearings in that province (in other provinces, victims have to apply to attend hearings, and, as they are only permitted written submissions, cannot effectively address or respond to matters that emerge therein).

(iii) The new Federal Victims' Bill of Rights. This has been working its' way through parliament over the last year or so, and may include increased, but carefully limited opportunities for victim input on matters such as bail and parole hearings, as well as removing the discretion of the judge such that victims will henceforth have a "right" for victims to make a victim impact statements.

(iv) A slowly developing trend where victims apply to have private counsel act on their behalf as "intervenors" in the criminal justice process. For example, it has become common, since the enactment of the **Charter of rights**, for Canadian judges to grant standing to private lawyers

representing victims in sexual assault cases. These lawyers appear in order to assert their client's right to privacy with respect to documents such as personal diaries and confidential psychiatric records. This trend is in its infancy, but such use of private lawyers was also openly undertaken with limited success in the notorious Bernardo case.

When they can afford it, victims will likely continue to make such applications to be heard. However, it is unclear to what degree, if at all, criminal courts will authorize the expansion of this very limited exception to the traditional criminal justice process.

Taken together, these recent, proposed, and inconsistently implemented changes have made some minor progress towards alleviating the victim's plight when facing the criminal justice system. However, *many of these remain at the discretion of officials within the system*. It must be remembered that the victim is still *not a party to the proceeding*, and thus has *very few, if any, enforceable rights* in a process that is still controlled by the state and defense counsel.