

What is a Crime?
Challenges and Alternatives
Discussion Paper



LAW COMMISSION OF CANADA
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Preface

In modern society there are a variety of mechanisms and techniques to suggest, invite or compel appropriate behaviour and, conversely, to discourage, deter and punish behaviour considered detrimental to its interests. How do we decide which behaviours warrant intervention so that they can be deterred? What is the most appropriate way to act when we want to encourage or discourage specific behaviours? Have we come to rely too heavily on law to deal with unwanted behaviours? Why do we use criminal law as opposed to other strategies to respond to some behaviours? What does criminal law provide that is not available through other means or alternatives?

The Law Commission of Canada is mandated to systematically review the laws of Canada to determine whether they continue to meet the needs of society. Within this context, the Commission has undertaken to examine a range of strategies that society has developed in attempting to reduce and prevent unwanted and harmful conduct. This Discussion Paper on “What is a Crime?” asks questions about the context in which different prevention and deterrence strategies are used in contemporary Canadian society. It deals with some of the contradictions and ambiguities that currently exist in Canadian law regarding crime and punishment, and examines the different institutions in our society that help draw boundaries between acceptable and unwanted behaviour.

This Discussion Paper also explores some of the values that we should foster in the process of determining what constitutes unwanted conduct and our search for strategies to deal with such behaviour. Whether it is through criminal law, healthcare, public education or various forms of regulation, as a society we struggle to reduce and prevent unwanted behaviour. Have we selected the right approaches and strategies? Is criminal law always necessary? If not, can other public and private forms of intervention satisfy us? What are the dangers of using one or another mode of intervention? What values support the design and implementation of our intervention strategies? This Discussion Paper aims to engage Canadians on these questions.



The Commission is grateful for the help of the many contributors to this paper. First and foremost to Professor Wendy Chan from Simon Fraser University, who completed the first draft of this paper. However, despite Professor Chan's valuable contributions, responsibility for this paper rests with the Commission. Our thanks also go to Dennis Cooley and Steven Bittle from the Law Commission. Further thanks go to Sam Banks for completing background research for this project. The contributions of the 2002 Legal Dimensions Competition winners, Professors Brodeur, Chan, Ericson and Doyle, Penny, Rainville and Snider, were also very helpful. The Commission's thinking on this subject was helped a great deal by the members of the "What is a Crime?" study panel and on-line discussion group. Finally, the Commission is grateful for the contributions of high school students from across Canada who took part in the 2001 Roderick A. Macdonald essay contest.

The Commission encourages all Canadians to write, phone or e-mail to share their experiences and thoughts on this important subject:

By mail: Law Commission of Canada
 1100-473 Albert Street
 Ottawa, Ontario
 Canada K1A 0H8

By telephone: (613) 946-8980

By fax: (613) 946-8988

E-mail: info@lcc.gc.ca



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Executive Summary

There are countless examples within our society of how certain types of behaviour are encouraged and rewarded, while others are frowned upon and even criminalized and punished. In our day-to-day lives we are reminded that certain conduct is wrong and should therefore be avoided. At times we are rewarded for our positive social behaviour. At other times, however, our behaviour is considered inappropriate or deemed to be a minor inconvenience. In yet other instances, our behaviour might be considered sufficiently harmful to warrant some type of formal response, such as the use of penalties.

The ways in which various behaviours are understood and defined will affect whether or not they are deemed to be unwanted and whether one or more intervention strategies will be used to deal with them. For example, if behaviour is deemed to be an illness, then a healthcare or therapeutic model is likely to be used. Similarly, if something is defined as a crime, then a criminal law approach will probably dominate. In our attempts to grapple with unwanted conduct and seek appropriate avenues of redress, we are faced with a diversity of opinions as to what constitutes unwanted conduct and what is the most appropriate response strategy. Why is some behaviour considered unwanted? Why do we consider that some behaviour warrants the label of “crime”? Why do we use the criminal law to respond to some types of behaviour and not others? Is criminal law always necessary?

This Discussion Paper questions why we choose to define some behaviour as criminal and considers a range of strategies for dealing with unwanted conduct. Section II of the paper examines “What is a crime?”. Why do we define certain behaviour as criminal? How do we decide whether it is appropriate to use the criminal law for responding to certain behaviour? What are the implications of relying too heavily on the criminal law to deal with complex social issues? Have we developed an unhealthy reflex to criminal law? Section III looks at a range of other strategies that we use when responding to unwanted conduct. It examines the different ways in which we attempt to encourage certain behaviour and reduce and prevent undesirable conduct. Section IV examines some of the democratic values that should be considered when deciding what constitutes unwanted conduct, and when developing



and implementing intervention strategies. Section V considers some of the challenges that modern society faces when attempting to understand and respond to a range of behaviours. The strategies we develop in deciding which behaviour is unwanted, and how to intervene, raise important questions about how society should be governed.

The Reflex to Criminal Law

The criminal law is often used to deal with behaviour that has been deemed to be harmful or unwanted. In recent years there have been increased demands for more laws to deal with certain behaviour, as well as increased punishments for offenders. Many critics suggest that a “law and order” agenda has come to dominate discussion and debate around what has been perceived to be a “growing crime problem.”

Over the years, both academics and government have warned against the pitfalls of relying too heavily on the criminal law to deal with complex social issues. In many instances, we expect criminal law responses will keep us safe and secure. Quite often, however, there is a gap between what is expected of criminal law, and what defining and responding to behaviour as crime can achieve. For example, critics of drug enforcement laws argue years of criminalizing marijuana use have done little to reduce the production and consumption of this substance. Further, the range of relationships we have with each other — the type of society we want to live in — can be profoundly affected through our use of criminal law. Personal and social relationships are fundamentally changed when we decide that something is a crime and that some form of punishment is necessary. What do we expect from criminal law? Are these expectations realistic?

Examining some of the realities of criminal law reveals that our perceptions of what constitutes a crime arrive from several influences. Our notions of crime are generated through our experiences, our interactions with family, friends and other people we encounter in our lives, as well as through the media (for example, newspapers, television and movies). These influences all play a role in shaping our sense of what is a crime and how we should respond, including representations of “criminals” and “victims.” For example, the image of the typical criminal is an individual who is caught committing a “street crime,” such as theft, shoplifting and robbery. In terms of “victims,” in recent years there



has been a growing perception that we are all equally likely to be victimized by a street crime. On the contrary, however, if we are victimized by a crime, it is most often at the hands of someone we know, and it is often the most marginalized people in society who are victims of crime.

The notion of “harm” is often used as a basis for defining what constitutes a crime. On the surface, it seems straightforward to suggest that sufficiently “harmful” behaviour should be defined as criminal. However, there are several examples that suggest this is not an easily defined concept. For example, most people agree that causing death is a serious harm. In fact murder carries the harshest penalties in criminal law. Consider, however, that every year the number of deaths in the workplace far outnumber homicides in Canada. Even in cases where negligence is present, we rarely treat deaths in the workplace as a crime. In this respect, the concept of harm might tell us that behaviour is serious, but it tells us little in terms of how we should respond.

Intervention Strategies are Interrelated

This Discussion Paper recognizes that the ways in which we respond to certain behaviour are rarely defined and implemented in isolation from each other. It is not uncommon for behaviour to be simultaneously defined as a criminal, regulatory, health and educational issue. Smoking is one example where we criminalize the sale of cigarettes to young people, while attempting to discourage the consumption of tobacco through taxation. Healthcare professionals also work to help people quit smoking, and education campaigns are used to steer people away from starting or continuing to smoke. In this respect, although criminal law plays a significant role in society, it is only one of a range of strategies that we can and do employ to deal with behaviours that are deemed to be unwanted.

In Section III we examine a range of intervention strategies that exist in contemporary society: regulation, surveillance, therapeutic approaches, public education, community supports and reward programs. In addition to examining the reasons why we choose one or more intervention strategies, we consider some of the impacts of these choices. Although there are several consequences to using criminal law as a response to unwanted behaviour, other intervention strategies have just as poor results in that they can also be overly individualistic in nature or place unfair burdens on



certain segments of the population. In this respect, alternatives to criminal law do not automatically equate to “better” or more “effective” response strategies.

Using more than one type of response mechanism certainly provides possibilities for creative interventions. This section of the paper also challenges us to consider whether different intervention strategies might provide alternatives to a criminal law approach. In addition, it invites us to question how we might avoid the unintended and sometimes negative consequences of our decision to intervene.

Interventions in a Democratic Society

In contemporary society we are continuously faced with decisions regarding what constitutes unwanted behaviour and how we should respond. In the process of defining unwanted behaviour, we are faced with questions about the nature of the activity (for example, why should the behaviour be considered unwanted?) and whether some form of response is warranted. In this respect, asking “What is a crime?” not only raises fundamental questions about the nature of crime and its control, but forces us to think about — and perhaps rethink — the way in which unwanted behaviour is defined and responded to.

The way in which we respond to various types of conduct is a reflection of the type of society that we want to live in. If we are to use one or many intervention strategies, then we ought to consider how they measure up against some of our key democratic values. There are at least four democratic principles that should guide our discussions of whether to define behaviour as unwanted, as well as our interventions that follow. The principles that are outlined in this Discussion Paper are justice, equality, accountability and efficiency. Justice means that individuals in our society should be treated fairly, that there should be some proportionality between the punishment and the behaviour, and that their freedom of action should not be unduly limited. Justice also means that citizens should enjoy equal access to its associated mechanisms (for example, people who experience conflict with the law must have access to adequate legal services) and that we must consider issues of social justice. Equality reflects a commitment to ensuring equality in society and addressing inequities. Accountability means that people who exercise authority in our society must be held responsible for the power they exercise in both the public and



private realms, and that citizens are accountable for their own conduct. Finally, efficiency means that our intervention strategies should deliver on what they promise.

Reflecting on these democratic principles is an important part of the process of defining unwanted behaviour and deciding which mechanisms should be used to deal with the conduct. What are the principles that should be reflected in our choice of intervention strategies?

Future Challenges

The current ways in which we define and respond to unwanted behaviour may not be appropriate. In general, a reflex to criminal law has come to dominate. However, this may not be the most effective way to deal with what are often complex social issues. The reflex to criminal law is a dangerous strategy. At the same time, we need to reflect on how we understand and deal with a range of other unwanted behaviours. Why do we consider certain behaviour as unwanted? Do we have the right mix of policies for dealing with unwanted behaviour? Can we imagine more creative ways to respond to unwanted behaviour?

Both governments and society in general have a role to play in reflecting upon current response strategies and in considering how we might do things differently. Governments also have a role to play in ensuring that adequate information is circulated so that all of us better understand the possibilities and limits of how we view and respond to unwanted behaviour. Finally, all of us have a role to play in promoting democratic principles that enhance the capacity of everyone to participate in society. Promoting democratic values can be done only by practising these important values in all of our social settings, whether government, media, school, work or home. A liberal democratic society is as concerned with the reasons for and means of intervening in unwanted behaviour as it is with the ends. The Law Commission invites all Canadians to reflect upon and discuss the various issues and questions raised throughout this Discussion Paper.



I Introduction

A police officer stops a driver who is not wearing her seat belt. A company auditor questions certain accounting practices. A schoolteacher leads students in a discussion on anti-bullying. A sport association bans a player for using performance-enhancing drugs. A manager promotes an employee who has demonstrated positive team spirit. A nurse warns a patient about the pitfalls of being physically inactive. A man encourages a friend to stop smoking cigarettes. Newspaper articles caution against the rise in childhood obesity.

In society, there are numerous ways in which “good” or desired behaviour is encouraged and, at the same time, unwanted conduct discouraged. In our day-to-day lives we are told in various ways that certain conduct is wrong and therefore should be avoided. Whether it is driving over the speed limit, padding an account, stealing, lying to a client, cheating, smoking, hitting someone, overeating or not exercising, we are continuously made aware that certain actions are frowned upon. In certain circumstances, some of these behaviours may even be subject to some form of societal response, including punishment. We are often reminded that certain behaviour is harmful to ourselves, to others or both.

This Discussion Paper considers “What is a crime?” by examining a range of strategies for dealing with unwanted conduct, including the choices that we make to use one or more strategies. As a society, we often turn to the criminal law as our first response to unwanted behaviour. Why do we define certain behaviour as criminal? Why do we use criminal law to respond to some behaviours and not others? Is criminal law always necessary? Is it always the most effective type of response? If not, can other public and private forms of intervention satisfy us? What are the dangers of using one or another mode of intervention?

The options we have at our disposal for dealing with unwanted conduct range from the formal to the informal. At one end of the spectrum we can simply choose to do nothing. We may not call the police when neighbours play their music loudly on occasion, choosing instead to ignore it or ask them to turn the music down. We may also develop a wide range of informal control strategies to address unwanted conduct, ranging from talking to our neighbour and agreeing to certain limits on activities, to building a fence or possibly even moving. In many situations, our strategies to deal

[Criminalizing] practices tell us about our society, about its modes of governance, about its conception of citizenship, about its idea of and degree of regard for the people who make it up.

N. Lacey, “Contingency and Criminalization” in I. Loveland, ed., *Frontiers of Criminality* (London: Sweet and Maxwell, 1995) p. 26.



with unwanted behaviour do not involve public officials or formal regulations.

In other instances, however, we have developed various formal techniques to address unwanted conduct. Criminal law is one of a range of formal responses that we have come to rely upon to guard against certain forms of unwanted conduct. Different forms of regulation are also frequently used. Professional societies evaluate the conduct of their members and may sanction inappropriate conduct. Regulations, taxation and incentive schemes, codes of conduct, standards and guidelines regulate how businesses operate. There is also a range of institutions such as schools, social service agencies, churches and community groups that help us differentiate between socially acceptable and unacceptable conduct.

In our attempts to grapple with unwanted conduct and seek appropriate avenues of redress, we are confronted with a diversity of opinions. Canadians differ in opinion as to which conduct should be labelled unwanted, as well as the most appropriate way to respond to such behaviour. Even in cases where there appears to be a consensus as to the seriousness of the act, there can be differences as to how the act should be dealt with. Homicide, for example, can encompass a broad range of responses, depending on the context in which the event took place. Killing in self-defence is not considered a crime in many societies, and death in the workplace is frequently not subject to criminal sanctions, but causing death in the context of a robbery typically carries a stiff criminal penalty.

In his article, “What is a Crime? A Layperson’s Answer,” criminologist Jean-Paul Brodeur raises the example of using a cell phone while driving to illustrate the dilemmas inherent in public policy and the use of criminal law. Professor Brodeur writes:

... it is possible that following a tragedy on the highway that impacts on public opinion, government will wish to reduce the number of highway accidents caused by drivers who are distracted when using their cellular telephones at the wheel. This problem can be resolved by various regulatory mechanisms, especially through insurance. However, if the legislature wishes to suppress this conduct with the same rigour as impaired driving, it will make it a crime. In that case, *it is not so much the harmful nature of the conduct that will justify making it a crime as the fact that society wishes to restrict its occurrence effectively by permitting the police to make it a priority for action.* [Emphasis added.]

J.P. Brodeur, *What is a Crime? A Layperson’s Answer* 2002 Legal Dimensions Initiative, Law Commission of Canada, 2002, publication forthcoming.



What is an appropriate response to the use of cell phones while driving? What should governments do?

Certainly, governments would first want to determine what the problem is and then assess its severity and prevalence. Is there a link between using cell phones while driving and accidents? How frequently do accidents involving cell phones occur? Once the nature of the problem has been defined, governments must determine an appropriate response. Is the goal to prohibit the use of cell phones while driving? Governments might take into consideration various prevention and deterrence strategies that can influence such behaviour. For example, perhaps a public education campaign regarding the dangers associated with using a cell phone while driving could help change attitudes and conduct. Governments might also consider whether providing a place to stop on highways might encourage drivers to pull off the road to use their cell phones. Furthermore, an increase in insurance rates for cell phone users might help deter the use of cell phones in cars. Electronic devices could be installed in vehicles to prevent the receipt of cell phone signals while the vehicle is in motion or to monitor whether calls are made while driving.

Criminal law is only one of a range of responses that we employ as a society to deal with unwanted behaviour. The factors that should be considered in deciding whether or not to intervene and how to do so are some of the questions raised in this Discussion Paper. This paper is divided into six sections, including this introduction. The second section considers the implications of relying upon the criminal law to respond to harmful behaviour. Section III examines a range of strategies — besides criminal law — that we use to encourage desirable conduct and discourage unwanted behaviour, including the impact of using particular response techniques. Section IV examines some of the democratic values that should underpin our intervention strategies. The next-to-final section raises questions and challenges that contemporary society faces in dealing with unwanted or harmful behaviour. The conclusion invites Canadians to reflect on the ways in which they understand and respond to unwanted behaviour.



II What is a Crime?

Criminal law is a punitive response to a perceived problem. It is generally characterized as a necessary evil in a society to stave off the threat of violence, disorder and danger. However, criminal law deals with more than violence, robbery and murder. How do we decide whether it is appropriate to use criminal law beyond such offences, and how should we frame our criminal law to deal with such behaviour?

Criminal law rests on the notion of attributing personal responsibility for the crime — there are one or more clearly identifiable individuals to hold accountable for their actions. Consequently, the social, political and cultural context in which the problem occurred disappears into the background. Criminal law both universalizes the problem and individualizes its causes. It universalizes the problem in the sense that it recognizes the claim of the victim as valid and sufficient enough to demand a guarantee of protection by the state. It individualizes the problem by making individuals (mainly individual offenders) responsible for the problem. For example, while we may recognize that child abuse is the result of complex social and psychological factors, we nonetheless place responsibility for such conduct at the individual level.

Expectations of Criminal Law

Criminal law rests upon several objectives, such as deterring the individual wrongdoer and the general public, as well as reinforcing certain social values and signalling that certain behaviour has been deemed to be undesirable.

We use criminal law because we believe it will deter people from engaging in unwanted conduct. However, deterrence through criminal law varies according to the context, and critics suggest criminal law has failed to prevent people from committing certain crimes. For example, studies on cannabis use in Canada have demonstrated that 25 years of criminalization have had no significant deterrent effect, while the costs of criminalizing cannabis continue to rise.

For many observers, the criminal law carries a powerful symbolic message — it signals that society disapproves of an act and that a

We have estimated that approximately 2.5 million people in Canada used cannabis in the last year. In 1999, 21,381 people were charged with the possession of cannabis. This means that only 0.85% of cannabis users were actually charged with possession. It is also important to remember that of the number of people who used cannabis in the last year, many would have used it more than once. As a result, the actual chance of being charged for possession of cannabis in relation to the actual number of offences is in all likelihood much lower than 1%. This certainly raises concerns regarding fairness. In addition, both the effectiveness of the legislation and any deterrent effect it may have are seriously in doubt.

Report of the Senate Committee on Illegal Drugs, *Cannabis: Our Position For A Canadian Public Policy* (Ottawa: Senate of Canada, 2002) p. 359.



Our present *Criminal Code* has its roots in nineteenth-century England. Enacted in 1892, it has undergone a number of *ad hoc* revisions, with the result that we now have a *Criminal Code* which does not deal comprehensively with the general principles of criminal law, which suffers from a lack of internal logic and which contains a hodgepodge of anachronistic, redundant, contradictory and obsolete provisions. The end result is that Canadians living in one of the most technologically advanced societies in human history, are being governed by a *Criminal Code* rooted in the horse-and-buggy era of Victorian England.

Law Reform Commission of Canada, (1985-86) *15th Annual Report* (Ottawa: Government of Canada) p. 15.

Criminal responsibility as we know it today, in other words, as a crime against the social order and not an individual victim, appears to be a concept that goes back to the Middle Ages and owes its origins to the increase in royal and religious power that marked this era. [Translation]

L. Viau « Victimes des ambitions royales », *Thémis*, vol. 30, no. 1, 1995, p. 121.

formal response by the state is necessary. The struggle to define the symbolic message of criminal law has meant that, over time, laws have been reshaped and reformed to convey certain messages. Different groups play an active role in defining the symbolic message of the criminal law by campaigning on issues of concern and lobbying government to change laws.

The struggle over the symbolic meaning of the law has resulted in a complex system whereby offences are defined differently depending on the context within which the unwanted conduct occurs. For example, the *Criminal Code* differentiates between theft of property that is worth more or less than \$5,000, with more serious punishment typically accompanying theft over this amount. The *Code* further differentiates theft from theft accompanied by violence, which is referred to as robbery and is considered serious, often resulting in stiff penalties. Similarly, murder that is premeditated is treated differently and more seriously than an accidental homicide or a death that results from negligent behaviour. In each instance, the criminal law is used to convey different symbolic messages about the seriousness of the offence and how it will be dealt with by the state.

There is certainly no single, timeless and unchanging notion of crime. Alcohol consumption and certain forms of gambling are two examples of conduct that were historically treated as crimes but are no longer regarded as criminal. Conversely, it was not until the 1980s that the rape of a wife by her husband became a *Criminal Code* offence. Marijuana use is an activity that is currently being decriminalized in many countries, while various forms of undesirable conduct resulting from computer use are being subject to increased criminalization. These examples highlight how our ideas about crime change over time as well as shift with our values and beliefs.

Our notions of crime are developed through our experiences, as well as through our interactions with our family, friends and other people whom we encounter in our daily lives. We also derive our notions of crime from sources such newspapers, television, radio, books and films. We receive messages about crime and unwanted conduct through these various sources, which in turn help shape our perceptions about what should and should not be criminalized.

A prominent source of information about crime in our society is the media. From television sets to movies, newspapers and the Internet, we are regularly bombarded with a variety of messages about the nature of crime and its control. The media, and in



particular television, tend to focus on violent crime, which many observers say creates an inaccurate perception about the level of violent crime in Canada. In this way, the mass media play an important role in cultivating support for punitive solutions by enhancing fears of criminality through the representation of violent crimes.

Paper Crime Wave

Research published in the late 1970s by Mark Fishman reveals how the media constructed a moral panic concerning “crime against the elderly” in New York City. Fishman illustrates how a crime wave emerged after the media started giving priority to reports of crime against the elderly. The police responded to this increase in reporting by giving the media information about any crime against an elderly person. A moral panic ensued in which there was a perception that crime against elderly people had increased and that they were at an increased risk of victimization. A special law enforcement unit was initiated in response to older citizens’ demands for more police protection. What Fishman reveals, however, is that media and police officials effectively orchestrated this crime wave through their reporting of the event. In actuality, there was no evidence of any officially reported increase in crimes against the elderly. The concern was therefore the result of a paper (fictitious) crime wave.

M. Fishman, “Crime Wave as Ideology” (1978) *Social Problems* 25 p. 531-43.

Fuelled by the fear of crime, a greater sense of insecurity and the need to take control of one’s own safety, individuals are often lured by the commercialization of crime control products such as house alarms, video surveillance, gated communities and around-the-clock guard services. Many observers suggest that we are so preoccupied by questions of crime and security that we have become a “risk society,” fixated on how to reduce the “imminent” potential of criminal behaviour. As a result, the latter part of the twentieth century has witnessed an increasing emphasis on governments adopting a “law and order” agenda.

During this time there have been increased demands for harsher punishment for offenders. Rates of imprisonment across many western industrialized countries, particularly in the United States, have risen dramatically. In Canada, rates of imprisonment also reached high levels during the 1990s, only to decrease slightly over the last few years. For example, the incarceration rate in Canada peaked in 1994–95 at 153 per 100,000 adults, dropping to 133 per 100,000 in 2000–2001 (D. Hendrick and L. Farmer, “Adult Correctional Services in Canada, 2000–01” (2002) *Juristat: Canadian Centre for Justice Statistics, Statistics Canada, Vol. 22, No. 10, p. 4*).

Restraint in the recourse to criminal law is only one facet of the Commission’s mandate to remove anachronisms and anomalies in the law, and to develop new approaches to and concepts of the law in keeping with, and responsive to, the changing needs of Canadian society. It has always been understood by the Commission that the changing needs and perceptions of Canadian society may also urge additions to the *Criminal Code* of offences not presently prohibited by it, at least not directly and explicitly enough. The same tests which should lead to some *Code* offences being removed from the *Code* because (for example) they are no longer perceived as serious threats to our fundamental values, also lead us to conclude that some offences not presently found in the *Code* should be added to it.

Law Reform Commission of Canada, *Crimes Against the Environment* Working Paper 44 (Ottawa: Government of Canada, 1985) p. 3.

Media representations tend to exaggerate the threat of crime and to promote policing and punishment as the antidote. This is likely to accentuate fear, and thus support for law and order policies.

R. Reiner, “Media Made Criminality: The Representation of Crime in the Mass Media” in M. Maguire, R. Morgan and R. Reiner, eds., *The Oxford Handbook of Criminology*, 3rd ed. (Oxford: Oxford University Press, 2002) p. 407.



Statistics indicate an increase in the use of incarceration in recent years. From 1986 to 1996, the prison population grew by 26 per cent, the largest increase having occurred between 1988 and 1993, when the number of incarcerated persons grew by 39 per cent. From 1989 to 1995, the federal prison population increased by 22 per cent and the provincial population by 12 per cent. Particularly distressing is the fact that the number of young offenders in custody increased by 26 per cent from 1986 to 1995. The rate of incarceration was over 130 persons per 100,000 inhabitants in 1995, up from 116 in 1985...With the exception of the U.S., Canada has the highest rate of incarceration among Western-style democracies.

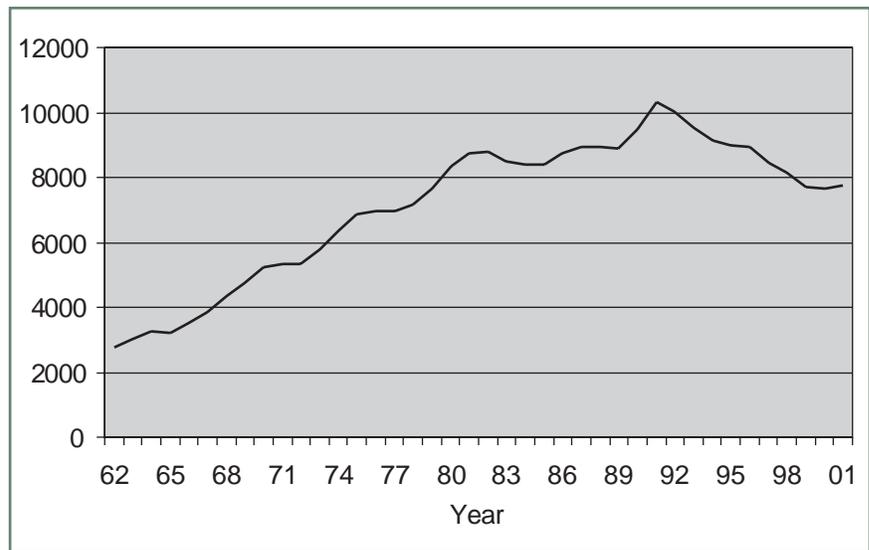
J.P. Brodeur, "Sentencing Reform: Ten Years After the Canadian Sentencing Commission" in J.V. Roberts and D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) p. 341.

Such "law and order" talk has become a dominant and daily feature of public culture as we embark on this new millennium. In our latter-day "risk society," security is purportedly in short supply and menacing outsiders imperil us from all sides...And by all appearances, our pan-Canadian obsession with "the crime problem" has been surging to ever more elevated levels since 1990.

R. Menzies, D.E. Chunn and S.C. Boyd, "Introduction" in R. Menzies, D.E. Chunn and S.C. Boyd, eds., *[Ab]using Power: The Canadian Experience* (Halifax, Nova Scotia: Fernwood Publishing, 2001) p.11.

Interestingly, an increased reliance on criminal law and punishment has come at a time when the official crime rate has actually decreased. Contrary to calls to "get tough" on criminals by implementing a law and order agenda — and reports that crime is expanding and out of control — official crime data actually suggest there has been a decrease in crime over this period. **Table 1**, developed using data produced by Statistics Canada's Canadian Centre for Justice Statistics, shows the crime rate fell dramatically beginning in the early 1990s, rising only slightly in the past year. As they depend on official crime reporting, crime statistics certainly do not present a complete picture. However, the data suggest that claims of rising and "out of control" crime levels — and reports that more punishment and control is necessary — may be erroneous and misplaced.

Table 1: Crime Rate per 100,000 Total Population Canada 1962–2001



Source: J. Savoie, "Crime Statistics in Canada" (2001) *Juristat*: Canadian Centre for Justice Statistics, Statistics Canada, Vol. 22, No. 6.

Criminal Law and Harm

It is often said that criminal law ought to be reserved for the most serious harms in society. For example, the Ouimet Report (*Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections*, 1969) stated that: "No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social



or legal means.” In *Our Criminal Law*, the Law Reform Commission of Canada relied on the harm principle when it argued the criminal law ought to be “pruned” to better differentiate between “real crimes” and public welfare or administrative wrongs: “To count as a real crime an act must be morally wrong. But this...is but a necessary condition and not a sufficient one. Not all harmful acts should qualify as real crimes. The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values.”

In 1982, the Department of Justice reaffirmed the relationship between harm and the criminal law in *The Criminal Law in Canadian Society*: “Since many acts may be ‘harmful’, and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less intrusive means do not work or are inappropriate.” While there may be a consensus that the criminal law ought to be reserved for the most serious harms, the question of what constitutes a “serious harm” proves more difficult to answer.

Death is perhaps the most serious harm that can be inflicted upon a person. Murder and manslaughter carry the harshest penalties contained in criminal law. But what does this mean in terms of other types of death? As **Table 2** indicates (see next page), each year the number of deaths that occur in the workplace far outnumber homicides in Canada. Many observers have argued that even when it might be possible to show negligence, deaths in the workplace are rarely treated as criminal events. Rather, we use insurance and regulation to respond to and prevent deaths in the workplace.

Gambling is another example of behaviour that is often deemed to be potentially harmful to both the individual and society. For example, gambling is considered harmful to the individual who develops a gambling addiction. At the same time, society is considered harmed by the actions of gambling addicts (for example, the negative impact for family members of gambling addicts and the costs associated with treatment). However, over the last several years there has been an increase in the number of government-run casinos, while private forms of gambling continue to be criminalized. Why is gambling considered harmful when it is organized by individuals but not when done so by governments? Why is gambling a crime in one context and yet decriminalized in another?

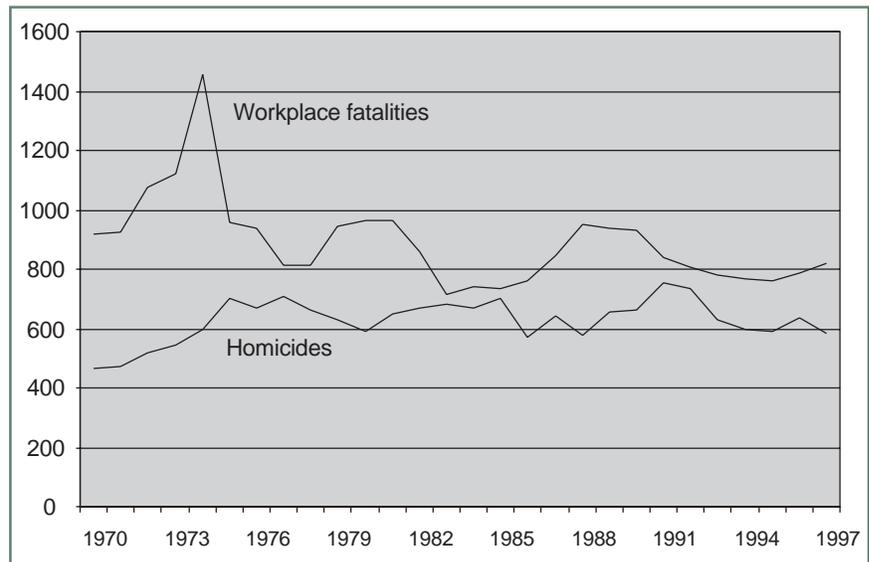
The notion of harm tells us that something ought to be taken seriously, but reveals little about how we ought to respond. The examples of murder compared with deaths in the workplace and the



decriminalization of some forms of gambling highlight some of the ambiguities and contradictions inherent in our choice of responses.

We often think that criminal law ought to be reserved for the most harmful behaviours. At the same time, however, when a problem arises, we are tempted to turn to the criminal law as a response. Is clear-cut logging a business practice or environmental degradation?

**Table 2: Workplace Fatalities and Homicides
Canada: 1970–1997**



Homicide data source: M. Dauvergne, “Homicide in Canada, 2001” (2002) *Juristat*: Canadian Centre for Justice Statistics. Statistics Canada, Vol. 22, No. 7.

Workplace fatalities data source: Human Resources and Development Canada, *Occupational Injuries and their Cost in Canada, 1993-1997* (Ottawa: Human Resources and Development Canada, 1999).

Is spanking child discipline or abuse? Do circuses entertain or abuse animals? Is euthanasia palliative care or murder? The definition of harm is at the heart of many law reform struggles. Often, the value of criminal law is symbolic — calling something a crime symbolizes our condemnation of the action. But, at the same time, the symbolic power of the criminal law creates an incentive to use criminal law, even when other less coercive responses may be more efficient. In this way, the process of defining something as harmful and calling it a crime creates its own set of contradictions.

Certainly, human conduct can be harmful in several ways. Smoking is bad for one’s health but also causes damage to other people through second-hand smoke. Driving too fast may similarly endanger one’s life or the lives of others. Jaywalking slows traffic while creating risks for the person who does it. Failing to have a medical check-up is risky for the individual and potentially costly for our healthcare system. Building a hydro-electric dam



detrimentally affects wildlife and those who live off the land. Some of these actions are criminalized, others are regulated and some are simply frowned upon. Why?

We have a tendency to think that conduct which is harmful to others justifies a greater level of societal intervention than conduct that is harmful only to the individual. But is this a satisfactory distinction? First, what is and is not harmful is often debated. Experts disagree. Politicians disagree. In our day-to-day life, we also question whether harm is “caused” by certain conduct. However, we often do not know whether certain conduct causes harm and, if so, to what degree. For example, it took many years for science to determine that second-hand smoke was harmful.

Second, even if we agree that certain conduct is harmful, we may disagree on whether it ought to be tolerated, prohibited or regulated. It is often claimed that if conduct is harmful to others, it warrants a more serious response. However, in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively. There are pressures to regulate and control conduct that primarily harms the individual. The requirements to wear a seatbelt or a helmet for certain activities are examples of a collective decision to protect people against their own risk taking.

Overall, then, what constitutes harmful behaviour is not a question that can be raised in the abstract. It is a question that needs to be asked in the context of a range of possible responses to undesirable conduct. For example, many people may question the imposition of a jail sentence for the failure to wear a seatbelt, but accept that a fine may be appropriate. The distinction between harm to others and harm to oneself is just one element of the decision whether society should intervene in behaviour deemed to be inappropriate.

DISCUSSION POINTS

- *How can the distinction between harm to others and harm to oneself be used in reflecting on the choice of intervention strategy?*
- *Are there examples of conduct that are solely harmful to the individuals engaged and not to society?*
- *Do we have sufficient information to determine whether conduct is harmful or not? Is it sufficient to determine what is and is not harmful?*



The Realities of Criminal Law

At first glance, it may appear that calling something a crime is relatively straightforward. For example, suppose a person shoplifts a jacket worth \$100. Most would agree that a crime has been committed. A store employee has the right to detain the person until the police arrive. The police can arrest the individual and lay criminal charges for theft. But suppose an employee embezzles \$50,000 from a company. As with the theft of a jacket, most people would agree that a crime has occurred. But what if the company owner decides to deal with the matter privately? Perhaps the employer decides not to call the police, choosing instead to deal with the matter as an internal management issue and seek private compensation from the individual employee. In such circumstances, criminal charges may never be laid. Why is it that we choose to devote public resources to one type of theft, while another type of theft may be treated as a private matter? What are the consequences of these types of choices for determining what is a crime and who is a criminal?

The use of criminal law is also influenced by representations of criminals and victims. We typically think of crime as unwanted conduct that takes place at the street level by individuals. Theft, shoplifting, robbery, and physical and sexual assault are a few examples that come to mind when we think about crime. Many crime surveys ask people to identify where they are “afraid to walk at night” to assess people’s fear of crime. This type of question is based on the assumption that crime is something that happens to us on the street and is committed by strangers. Contrary to this, however, many researchers have shown that much violence occurs in the home, at the hands of people who are known to the victim, and often within relationships.

The limits of focusing on individual street crime also become apparent when considering crimes against the environment and corporate wrongdoing. A recent survey in the United States indicated that more than 1 in 3 households in the study had been victimized by economic crime (for example, fraud by financial planners, auto repair shops or merchants who price fix). However, fewer than 1 in 10 reported this victimization to the authorities.

Research challenges the perception that we are all equally likely to be crime victims by revealing that the most marginalized groups in society have the greatest chance to be victimized by crime. At the

...we find that the American public is becoming well acquainted with theft by deception (as its victims) and tends to view the commission of such crime with an increasingly jaundiced eye...we found that over 1 out of 3 households had been victimized by white collar crime in the past year. This level of victimization is high when compared to earlier studies on white collar crime victimization, even after taking into account definitional differences of victimization.

National White Collar Crime Center, *The National Public Survey on White Collar Crime* (Morgantown, WV.: National White Collar Crime Center, 2000) p. 22.



same time, however, marginalized communities have pointed to the inadequate response by the state to their victimization. For example, family and friends of the dead and missing women from Vancouver's downtown eastside have claimed that for years the police and city officials ignored their claims that a serial killer stalked and killed women in their community.

An examination of the demographic makeup of those incarcerated in Canada's federal prisons reveals that an overwhelming proportion are men, who made up 97 per cent of the total prison population in April 2001. Within this group, 16 per cent were Aboriginal, a high figure when set against the proportion of Aboriginal people in Canada. Other social characteristics such as being young and disadvantaged increase the likelihood of both being a victim of crime and being incarcerated. This is particularly true with regard to crimes such as assault and property offences.

Many observers argue that people who fit the typical offender profile are over-policed, while those who commit serious harms but do not hold these characteristics are typically under-policed. Often people from poor and working class backgrounds charged with committing street crimes are less able to resist the use of criminal law, whereas the business and professional classes who engage in corporate wrongdoing are better able to resist the criminal label as a result of their influence and financial resources. Many argue that as the gap between rich and poor widens, those who have been "left out" are seen by the "haves" as the cause of disorder. This has led some observers to argue that, "while the rich get richer, the poor get prison" (from J. Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice*, 4th ed. [Boston: Allyn & Bacon, 1995]).

In contrast to our stereotypical notions of who is a criminal, studies using self-report data reveal a different portrait of who commits crime. Using confidential interview and questionnaire techniques, researchers have asked people if they have ever committed a crime. The results suggest that almost everyone has committed a crime at some point. This raises interesting questions of why we criminalize certain people in society for behaviour that we may all have committed at some time.

Researchers who study the harmful conduct of corporations offer a number of explanations for why authorities fail to prosecute these offences, even though corporate wrongdoing affects many more people and is probably more costly than street crime. The difficulties of making a successful prosecution, difficulty of

Victimization studies have shown that the impact of crime is uneven. It falls disproportionately on the poorer and more vulnerable sections of the population and serves to compound the growing economic and social inequalities which have risen dramatically...

R. Matthews and J. Young, "Reflections of Realism" in J. Young and R. Matthews, eds., *Rethinking Criminology: The Realist Debate* (London: Sage Publications, 1992) p. 2.

The 1996 Census of Population indicated that Aboriginal peoples constituted 2% of the total Canadian adult population. In 1999/00 they constituted approximately 17% of admissions to both provincial/territorial and federal sentenced custody. Over the last twenty years the proportion of Aboriginals commencing provincial/territorial incarceration has remained relatively constant between 15% and 18% (except for the interval between 1987/88 and 1992/93). However, their representation with respect to federal sentenced custody has increased steadily over the past 20 years, from 8% to 17%...This increase has occurred despite changes made by Parliament to the sentencing provisions of the Criminal Code...designed to address Aboriginal over-representation in custody.

C. Lonmo, "Adult Corrections Services in Canada, 1999-00" (2001) Juristat: Canadian Centre for Justice Statistics, Statistics Canada, Vol. 21, No. 5, p.8.



The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated. It is not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.

Report of the Aboriginal Justice Inquiry of Manitoba (1999) Aboriginal Justice Implementation Commission
<http://www.ajic.mb.ca/volumel/chapter1.html#1>.

For the same criminal behaviour, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upperclasses. In other words, the image of the criminal population one sees in our nation's jails and prisons is an image distorted by the shape of the criminal justice system itself. It is the face of evil reflected in a carnival mirror, but it is no laughing matter.

J. Reiman, *...And the Poor Get Prison: Economic Bias in American Criminal Justice* (Boston: Allyn & Bacon, 1986) p. ix.

Justice and the Poor

Everyone was...surprised in the 1960s when U.S. researchers discovered that criminal behaviour was not linked exclusively to lower-status people and poor neighbourhoods. Using self-report studies, which asked (mostly young) participants to reveal, in total confidence and without fear of punishment, what illegal actions they had committed, researchers made two shocking discoveries.

First of all, the vast majority of all male adolescent participants reported having committed illegal acts that could have landed them before youth courts. Girls were much less likely to engage in illegal behaviour. When Canadian criminologist Marc LeBlanc questioned 3,000 young Montrealers, he found that more than 90 percent had committed delinquent acts in the previous year, and that more than 80 percent had contravened the Criminal Code. The most common offences were shoplifting, vandalism, driving a car under the influence of alcohol or taking mild drugs, especially marijuana. Nine percent had committed more serious crimes such as robbery.

The second surprise was that the children of parents with professional jobs were as likely to report having committed illegal acts as the children of poorer parents with low-status jobs. Contrary to the strong link between crime and social class of origin that had been taken for granted until then, it seemed that they were not related at all. This finding caused huge controversies in criminology circles that continue to this day. It also inspired dozens of other self-report studies, which produced contradictory and inconsistent results and therefore failed to establish that young people from low-status or poverty backgrounds were more likely to get involved in crime or to commit more serious crimes. In Canada, a study of 57 young people in New Brunswick found that boys whose fathers had professional occupations were less likely to commit delinquent acts than the sons of blue-collar workers. But other studies, including the large LeBlanc survey in Montreal, found no relationship between delinquency and the parents' education or occupation.

National Council of Welfare, *Justice and the Poor*, 2000 (<http://www.ncwcnbes.net/>) p. 5.

detection, a belief that regulatory bodies are more effective for changing corporate behaviour, and the need to protect the marketplace from too many restrictions are some of the explanations that have been provided.

DISCUSSION POINTS

- *Do we rely too heavily on criminal law to deal with complex social issues?*
- *Why have we developed a reflex to criminal law? How can we, as a society, resist the reflex to criminal law?*
- *What factors influence our understanding of crime? How do these factors influence our crime control strategies?*
- *Why do we treat some people as criminals and not others?*



- *Do we rely on stereotypes to classify certain people as criminals?*
- *Are we concerned that our society incarcerates mostly young men and Aboriginal peoples?*

The Impact of Criminal Law

The impact of the criminal law flows in many directions. For example, recent decisions by the courts to use existing laws to punish individuals for failing to disclose one's HIV-positive serostatus when giving blood or engaging in unprotected sexual activity has raised concerns that individuals may not seek HIV testing for fear of incarceration. Criminalization may also have an adverse effect on patient-caregiver relationships over issues of confidentiality and consent, and society may be lulled into a false sense of protection by the criminal law.

The range of relationships we have with each other can be profoundly affected by the way in which we respond to unwanted behaviour. Families, friends and personal relationships support the realization of important physiological, emotional and material needs. Law, policies and other intervention strategies affect the ability of families to nurture their own members. To ignore this impact of our choices on personal relationships in our society is therefore short-sighted. In designing criminal law policy, and in the choice between different forms of response strategies, we should consider the impacts that such choices have on people's ability to engage in harmonious personal relationships.

Criminalization: Does it Make Sense?

There is widespread concern about the use of criminal sanctions to prosecute persons who engage in activities that risk transmitting HIV, and about proposals to amend the Criminal Code to create an HIV-specific offence. In particular, it is feared that an HIV-specific criminal offence would further stigmatize HIV/AIDS and other sexually transmitted diseases (STDs), as well as people with the disease and some of the populations most affected by it, such as gay and bisexual men, injection drug users, and sex workers.

Would public health laws not be better suited than criminal law to deal with those individuals who, knowing that they are HIV-positive, engage in behaviours that can transmit HIV without using precautions and without informing their partners about their HIV status? Before resorting to criminal prosecutions as social policy, we should consider whether it will be counterproductive, ultimately doing more harm than good.

Info Sheets — *Criminal Law and HIV/AIDS*, The Canadian HIV/AIDS Legal Network, <http://www.aidslaw.ca/Maincontent/issues/criminallaw/e-info-cltoc.htm>.



...it appears that a harsh punishment (imprisonment) is no more effective a deterrent than a milder punishment (probation). Careful research has compared the recidivism rates of offenders sentenced to prison or probation...The results indicated that the recidivism rates were about the same, although, according to deterrence theory, people sentenced to prison should be less likely to reoffend than people placed on probation...A proposition that has found widespread support in the literature is that it is not the severity of the sanction that deters offenders, but the certainty of being punished. This is logical: if the probability of being apprehended and punished is close to zero, the severity of the penalty is irrelevant. On the other hand, if you know that you are going to be caught and punished, whether the penalty is three months in prison or a year will not make much of a difference to your decision to commit a crime.

J.V. Roberts and D.P. Cole, "Introduction to Sentencing and Parole" in J.V. Roberts and D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) p. 7-8.

Personal and social relationships can suffer through the use of criminal law if an individual is incarcerated and therefore unable to spend time with his or her family members or friends. The stigma of the criminal law affects the future of these relationships. For example, it can impede one's ability to reintegrate into society since it is much more difficult to find paid work with a criminal record.

The use of criminal law also reflects a desire to structure governance relationships around notions of punishment. By employing criminal law, we send the message that people will be punished if they are caught committing an act that is against the law. Can there be unintended negative consequences if we rely too much on the criminal law? When groups are over-criminalized they tend to question the impartiality of the system. In this respect, trust in society is not always fostered by the use of criminal law strategies.

Much of our thinking about the power of the criminal law is based on notions of deterrence: we assume that if we make behaviour a crime and attach penalties to the action, people are less likely to engage in the conduct. However, deterrence involves at least three elements: swiftness of punishment, severity of punishment and certainty of being caught. When people demand longer and harsher penalties, they are focusing on the severity element of deterrence. Research has shown that certainty of punishment, rather than severity of punishment, has the greatest deterrent effect. The use of criminal law may not be efficient when it requires enforcement resources that may be difficult to marshal.

DISCUSSION POINTS

- *What does our reliance on the criminal law say about our society?*
- *Do we have examples of the criminal law being unjustly applied to certain groups?*
- *What are the difficulties of using the criminal law to deal with economic wrongdoing? Can these difficulties be remedied?*
- *How do criminal law strategies affect our relationships?*
- *Do criminal strategies deter others from engaging in unwanted conduct?*



III Other Intervention Strategies in Society

Although criminal law plays a central role in our responses to various forms of undesirable conduct, we often use other strategies to deal with unwanted behaviour. Contemporary governments rarely assume sole responsibility for responding to unwanted conduct. Instead, institutions and actors, including governments, individuals and communities, work together to deal with undesirable conduct. The control of alcohol is one such example. Criminal justice agents attempt to deter drunk driving. Healthcare professionals treat individuals for alcoholism. Governments tax the purchase of alcohol; bar and restaurant owners exercise caution when serving alcohol to customers; and public education campaigns advocate restraint or responsible consumption.

Overall, then, social control in contemporary society is produced through a complex web of relations — families, friends, schools and our places of employment all play a role in teaching us what is considered appropriate conduct when responding to inappropriate behaviour. Through these various social institutions we are rewarded for behaving appropriately and punished or disciplined when we engage in unwanted conduct. In this respect, schools, the workplace and other institutions have as much to do with defining and producing appropriate conduct as law and legal processes.

This Discussion Paper recognizes that the various response mechanisms are rarely used in isolation and that actors operate within a complex system of incentives and controls that do not function independently from one another. It is, however, important to consider if multiple response mechanisms place unfair burdens on individuals or groups for dealing with unwanted conduct, or if using more than one type of response opens up possibilities for creative interventions. In some instances, for example, relying on a combination of response strategies might be used to avoid excessive criminalization, but they might also produce unintended consequences. For example, implementing community-based responses might place undue expectations on communities to deal with complex social issues. Introducing higher taxes on cigarettes created smuggling problems that required criminal intervention. Placing the onus on bar staff to control excessive drinking might have the unintended consequence of raising the insurance rates of

...there has developed a new mode of governing crime which I would characterize as a responsabilization strategy. This involves the central government seeing to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work, etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizations...Its primary concern is to devolve responsibility for crime prevention on to agencies, organizations and individuals which are quite outside the state and to persuade them to act appropriately.

D. Garland, "The limits of state sovereignty: Strategies of crime control in contemporary society" (1996) *The British Journal of Criminology*, 36(4), p. 452.



drinking establishments compared with those of other commercial establishments.

This section examines the different ways in which we attempt to encourage positive conduct and reduce and prevent undesirable conduct. In particular, we examine the use of regulation, public education, therapeutic strategies, surveillance, community controls and reward programs as ways of dealing with unwanted behaviour. This review of response strategies is not meant to provide a comprehensive list of strategies that are found within society, but to illustrate the range of possibilities, their interrelatedness and their impacts.

Regulation

There is a complex array of response mechanisms encompassed under the concept of regulation. From rules and regulations with attached penalties to licensing, directives and standards, as well as best practices and reward programs, there are a variety of tools available to elicit appropriate conduct and deter unwanted behaviour.

Regulation works to produce responsible action through a system of rules which can be used by governments and private actors. It is not necessary for governments to be directly involved since rules may be derived from professional bodies, industry associations or other independent entities. It is a managerial logic, wherein regulation is used to ensure the smooth operation of various economic and social processes. Sanctions are structured to combine persuasion in the majority of cases with direct enforcement, such as licence revocation, in a smaller number of situations. The use of warnings and civil penalties straddles the middle ground of regulation.

Mechanisms for consistency, accountability or systematic evaluation of regulations can be put in place. Disputes can be more quickly resolved than when law enforcement agencies are involved. Compliance may be enhanced by the voluntary nature of the commitment or the participatory structure of the dispute mechanism. Regulation may also help stimulate proactive conduct on the part of the individual, agency or company. In this respect, regulation encourages us to forge positive personal and social relationships.

One disadvantage of regulatory processes is the longstanding perception that corporations receive preferential treatment and that the harms they create are not taken seriously but rather dismissed as the “cost of doing business.” This raises questions about the

Compliance with rules and standards is rarely automatic and, as such, needs to be induced. The traditional approach is to coerce compliance by means of threats of penalties...An alternative is to reward regulated entities for complying and to make it easier for regulated entities to comply. In practice, new social regulations contain a mix of coercive, facilitative, and incentive features...The traditional enforcement approach assumed that compliance would not be readily achieved in the absence of coercion. The new approach assumes that compliance is more readily achievable. The key implication of the distinction is that compliance can be enhanced through other means than enforcement alone.

P.J. May, “Social Regulation” in L.M. Salamon, ed., *The Tools of Government — A guide to the New Governance* (New York: Oxford University Press, 2002).



legitimacy of an approach that is available to and benefits only certain segments of the population. In addition, enforcement by regulatory agencies may be inadequate. For systemic, harmful conduct, there is often a low risk of prosecution.

It is difficult to measure the success of regulation in effecting appropriate social control: it depends widely on the context, the strategies selected and the population affected. This is an area that continues to be studied and debated. Nevertheless, regulation provides a rich example of using different tools to accomplish objectives similar to criminal law, without necessarily relying on punishment as a method of deterrence.

Attributes of Good Rules

- Commonly viewed as necessary
- Appropriate to the situation being addressed
- Provide for consistent application with reasonable exemptions
- Set forth predictable expectations
- Can be understood by affected entities

From: P.J. May, "Social Regulation" in L.M. Salamon, ed., *The Tools of Government — A guide to the New Governance* (New York: Oxford University Press, 2002) p. 165.

DISCUSSION POINTS

- *What tools should be considered to better address the harms that emerge in the business world?*
- *Should a regulatory approach be used more frequently to deal with behaviour presently criminalized?*
- *Are there instances where there is too much regulation? What is the impact of regulation on our social relationships?*

Surveillance

Increasingly, responses to unwanted behaviour involve the use of monitoring and surveillance. Surveillance is sometimes carried out through the use of concealed devices and without notice to the subject that he or she is being surveilled by public law enforcement agencies or the private sector. It also includes videotaping, where subjects of surveillance may be vaguely aware that devices are being used in their general proximity, but do not know when the device is pointed directly at them. Examples include the use of closed-circuit TV (CCTV) in public spaces or at automated banking

The discourse of EMS [Environmental Management Systems] reflects a distinctly "managerialist" view of the challenge of environmental degradation. Improving management practices — in particular, by adopting an organization-wide management system based on the "total quality management" concept — is the best way to improve the environmental performance of organizations and their products. This implies a particular conception of the environmental crisis. While acknowledging that industrial society has produced severe environmental degradation, the managerialist conception does not view this crisis as a fundamental challenge to existing institutions and practices of industrial society. Rather, major environmental disasters of recent memory are interpreted primarily as management process failures, the environmental crisis is seen as under control and gradually improving, and well-planned and properly implemented management systems are seen as the key to managing the adverse environmental impacts of business.

S. Wood, *Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada* (Ottawa: Law Commission of Canada) publication forthcoming.

Self-regulatory approaches may...reduce compliance and enforcement costs for government. The development of standards, through objective processes where standards are audited and certified by third parties, is also attractive because it is credible. Such practices are expanding in the private sector and the public sector. From a business perspective, these instruments encourage active participation in the development and adoption of such measures. Businesses can use these standards to demonstrate commitment and accountability to standards to their own stakeholders and the outside world...On the other side of the equation, there is research that shows that self-regulatory measures are introduced by proactive industry associations and companies wishing "to stave off government regulation."

F.P. Eliadis Foundation Paper: *Instrument Choice in Global Democracies* (2002) <http://policyresearch.gc.ca>.



Surveillance is paradoxical and ambiguous, exhibiting more than one face...surveillance simultaneously represents both a means of social control and a means of ensuring that citizens' rights are respected.

D. Lyon, *The Electronic Eye: The Rise of the Surveillance Society* (Minneapolis: University of Minnesota Press, 1994) p. 219.

machines and the use of traffic cameras at certain city intersections. Computer tracing is also a prevalent form of surveillance.

Advances in technology have made it much easier to gather very private information. The omnipresence of electronic surveillance means that when we get on an airplane, buy groceries, take a book out of the public library or use our credit cards, our actions are often being recorded. Technology has allowed monitoring and surveillance to occur out of sight; while people may know they are the subjects of surveillance, they may be unaware of how extensive others' knowledge of them actually is.

The arguments against monitoring and surveillance typically centre on issues of privacy. The personal relationships and lives of ordinary citizens are seen to be at risk when large and powerful agencies gather and share information. Opponents of surveillance claim that it is intrusive and people have a right to be left alone. Supporters counter that monitoring and surveillance is an important tool since it can decrease opportunities for unwanted behaviour and, in turn, increase public safety and efficiency.

The introduction of monitoring and surveillance as a method for responding to unwanted conduct raises many questions. Some observers argue that installing CCTV in a high crime area reduces theft and property damage and represents a cost saving compared with the resources necessary to protect property through more traditional means (for example, the costs associated with using police). Others, however, argue that the CCTV cameras simply displace crime into neighbouring areas not surveilled by CCTV. Moreover, there are questions about the extent to which we are prepared as a society to be "watched" to ensure our safety and whether surveillance is really efficient without strong enforcement mechanisms. The implications of monitoring and surveillance for our relationships in everyday life have yet to be fully understood. How will issues of justice and fairness be understood when people's everyday activities are monitored and classified? How do issues of trust unfold in a society that is constantly "watched"?

DISCUSSION POINTS

- *Do people modify their behaviour if they believe they are being watched?*
- *What are the long-term consequences of living in a surveillance society?*
- *Is monitoring and surveillance more or less coercive than other forms of responses?*



Therapeutic Approaches

Characterizing a problem as requiring a therapeutic approach is based on a belief that some form of medical or psychological treatment is an appropriate solution. We may, for example, characterize a problem as a disease or illness. By defining a problem as a disease, one places it under the jurisdiction of healthcare professionals. We define compulsive gambling as a “sickness” or an addiction to invoke the image of someone who has little control over his or her behaviour and therefore needs treatment. Alcoholism is another example of conduct considered unwanted that has been transformed to the status of medical illness or disease. Depending on the nature of the illness, many different forms of treatment, from counselling to prescription drugs, can be ordered.

Control through therapy greatly impacts upon our personal relationships. Like criminal law, the therapeutic model is an individualistic response. The individual becomes a “sick person” who needs to be helped or healed; he or she may be characterized as being unable to assume normal social roles, not responsible for his or her illness. Over the course of the twentieth century many behaviours and conditions have been medicalized. Communities have sometimes dealt with “problematic” individuals by choosing to subdue them through medicalization. In extreme cases, a therapeutic model imposes confinement, and individuals may lose their autonomy and self-determination.

Another concern that stems from a medical or therapeutic approach is the burden that is created for certain economic relations. The increasing gap between the rich and poor, and the rising cost of medical care means that not everyone is able to afford the same access to necessary treatments. Some observers suggest that poor people who have less access to healthcare professionals may be more likely to be criminalized as a result of a behavioural problem, while more affluent individuals may be treated medically for their conduct.

Finally, it should not be assumed that a medical or therapeutic approach is somehow less coercive than a punitive approach. During the 1960s and 1970s, for example, the penal system in the United States was guided by a rehabilitative philosophy, in which it was thought that criminals were “sick” and in need of treatment. The justice system was reformed to make it possible to keep individuals incarcerated until they were “cured” of their criminal

The key to medicalization is the definitional issue. Medicalization consists of defining a problem in medical terms, using medical language to describe a problem, or using a medical intervention to “treat” it.

P. Conrad, “Medicalization and Social Control” (1992) 18 Annual Review of Sociology p. 211.



tendencies. As a result, under the guise of treatment, prisoners received longer and harsher penalties than they would normally have received.

DISCUSSION POINTS

- *What are the effects of having one's conduct defined as an illness? How does it compare with being criminalized?*
- *How can we ensure that we do not use a therapeutic model to simply control dissent or difficult people in our society?*

Public Education

Changing attitudes and conduct through the use of public education campaigns is a strategy widely used by governments and private institutions. The belief is that the strategic use of communications can play a key role in raising public awareness, changing attitudes and promoting personal and community involvement. These campaigns seek voluntary conduct modification by persuading rather than coercing citizens to alter their views and conduct on a particular issue of concern. Individuals and communities are thereby persuaded to claim responsibility for dealing with problems.

Public education campaigns take on many different forms depending on what mode of communication is used to spread the message. Billboards, public lectures, television commercials, posters and brochures are some of the better-known forms of public education mediums. Various types of issues such as smoking, literacy, road safety, environmental matters and gender issues have been targeted. Programs that have produced significant changes in conduct and attitudes about difficult subjects share several common characteristics. They contain a simple, yet powerful message that is action-oriented, there is a clear understanding of who is the audience, and the campaigns are directed in such manner that the issue can be understood through one's own personal experiences.

Many public education campaigns attempting to deter unwanted conduct such as car thefts, abuse and racial intolerance are backed up by the threat of criminal law. While these campaigns encourage voluntary conduct modifications by promoting greater awareness of targeted issues, in many instances, failure to comply or change can result in individuals finding themselves involved in the criminal justice system.



Deterring harmful conduct through public education has several positive implications. In terms of personal and social relationships, more people may engage in political or civic activities, and participation can hone peoples' understanding of the issues and of political life. In this respect, public education might encourage communities to work together to address unwanted behaviour and encourage people to change the way they think about the behaviour.

However, not all public education campaigns fulfill their objectives, nor are they necessarily focused on the right conduct. Lack of commitment and leadership, inadequate preparation and documentation, poor communication networks and lack of financial resources can all contribute to poor public education campaigns. Furthermore, while public education campaigns are helpful for influencing how we think about particular issues, they are unable to address the underlying causes of why people engage in unwanted conduct. In this respect, public education campaigns are similar to criminal law in that they often invite the individual to change his or her conduct. We may be told, for example, that smoking is bad for us and that prolonged smoking can cause a host of health-related problems, but campaigns against smoking cannot tackle the reasons why people start and continue smoking. Public education campaigns place the onus on individuals to recognize and understand why their conduct is undesirable and then make the necessary changes. Consequently, some individuals may respond well, but others may need more help before a change in conduct is forthcoming.

Scared Straight

One education campaign that gained popularity in the United States in the 1980s is referred to as the "scared straight" phenomenon. The most notorious of these programs was initiated in a New Jersey penitentiary, where young offenders, as part of a court-ordered program, visited inmates in a maximum-security prison to hear about the pitfalls of becoming involved in a life of crime. The program elicited considerable media coverage as well as a documentary program hosted by a Hollywood actor. Critics noted that education material from the program — conveyed by the media and documentary — portrayed crime as an individual choice, "having little relationship to any social variables," and something committed by "vicious, barely human criminals." As Grey Cavender notes, "there was no discussion of the relationship between crime and other social institutions or the socio-economic structure. There was no mention of the link between the serious unemployment problem among juveniles...the fact that much of our crime is economic in nature...[and] that most delinquents do not become adult offenders..."

Quotes taken from: G. Cavender, "Scared Straight: Ideology and the Media" (1981) *Journal of Criminal Justice*, Vol. 9, pp. 431-39.



DISCUSSION POINTS

- *Are all forms of unwanted conduct suitable for public education campaigns?*
- *Are some types of public education campaigns more likely to be successful than others in deterring unwanted conduct? Does it matter who the target audience is?*
- *Should we continue to invest in public education campaigns aimed at deterring unwanted conduct?*
- *How do we measure the “success” of public education campaigns?*

Community Supports

Controlling unwanted behaviour through the use of informal community controls is not a new phenomenon. However, in recent years, finding solutions to unwanted conduct in the community has enjoyed renewed interest from government and private agencies. The use of community controls may include support programs such as Alcoholics Anonymous groups, exit strategies for young sex trade workers, “quit smoking” support groups, anger management courses as well as informal forms of dispute resolution that can include victim-offender mediation programs, family conferences and Aboriginal justice programs. Decision-making powers are given to the victims, offenders and the community with the idea that preventing unwanted conduct may be more effective if solutions are practical and include the values and attitudes of the community.

Many observers suggest that communities may be more effective than the criminal justice system in reducing and preventing unwanted behaviour. The appeal of informal community control and support rests on the view that government and communities must accept mutual responsibility for harmful conduct, and that the offender’s community can help to restore pro-social values and attitudes in a holistic, supportive and healing environment.

However, many questions have been raised about the impact of the wide range of community intervention strategies. Is there a risk that informal community responses may widen the net of control, particularly in cases of less serious conduct? Are there enough resources to implement these programs properly? What types of communities have the capacity to implement community-based



responses? For example, will a close-knit community of less than 10,000 people have the same capacity to implement community responses to unwanted behaviour as a small rural or large urban community? Do people have a choice about participating in these programs? What is the community and how can it be represented? Will community disapproval be enough to shame someone into taking responsibility for his or her actions? Are all forms of harm appropriate for these programs?

DISCUSSION POINTS

- *Are certain types of unwanted conduct more suited to community controls than others?*
- *Are some communities better suited to implement community controls than others?*
- *What are the benefits and limitations of self-help programs? Are they sufficient?*

Reward Programs

Rewards are used often as part of our various intervention strategies to encourage people to behave in certain ways. We rely on rewards to encourage appropriate types of behaviour or to discourage inappropriate ones. Parents reward children for doing housework by giving them extra allowance. Airlines reward customers who use their services frequently by allowing them to use travel points (air miles) to pay for their flights. Companies use annual bonuses and sales commission programs to reward productive employees.

The primary purpose of establishing rewards is to motivate individuals and institutions to pursue desired goals more vigorously and efficiently. Financial incentive schemes, taxes and subsidies reward companies and individuals who behave as it is deemed appropriate. For example, the Scientific Research and Experimental Development (SR&ED) Program provides tax incentives to Canadian businesses that conduct research and development in Canada. This program is intended to encourage businesses — particularly small and start-up firms — to conduct SR&ED that will lead to new, improved or technologically advanced products or processes. Registered retirement savings plans (RRSPs) reward individuals who save for their future with tax credits. On the other hand, the tax system may be used to reduce the over-production of goods regarded as harmful to society (cigarettes and pollution, for example).



Performance standards are frequently used in industry as a way of structuring rewards. Performance standards usually define a performance measure and allow business firms to select the best way to meet the standards. The key to performance standards is that they do not specify a particular behaviour that ought to be followed. Rather, they specify an outcome. For example, environmental legislation in a particular sector may indicate an acceptable level of phosphate emissions. Companies are then free to choose an appropriate technology to meet the standards. If the standards are achieved, the company receives a reward (tax credit for example); if not, the company is not rewarded and may be penalized. Similarly, a corporation that has demonstrated responsible management in the disposal of toxic waste might be rewarded by being permitted to store larger quantities of waste on-site for longer periods of time than a company that has not managed its waste effectively.

Regulators can provide incentives in other ways. Governments reward positive behaviour through incentive-based regulation programs. Regulators might adjust rates according to external criteria such as cost-of-living or quality of service. For example, in the United Kingdom, regulators of electricity, gas and water introduced schemes allowing higher price increases to companies whose service performance is high relative to other companies in the industry. If a company's efforts to improve service are successful, the company is permitted to earn a higher rate of return. On the other hand, if the company's efforts are unsuccessful, the company's rate of return will be lower. Incentive-based regulation schemes reward companies for achieving positive outcomes.

Other examples may also be found within the insurance industry, such as when lower insurance rates are provided to non-smokers or to automobile drivers who achieve safe driving records over a certain period of time. Similarly, homeowners are rewarded with reduced home insurance rates if they do not file a claim for a number of years or if they have a home alarm system installed. In each case, individuals are rewarded for achieving certain goals or for exhibiting good behaviour.

Overall, then, reward programs allow government and the private sector to use incentives to encourage people to behave in particular ways. By creating various performance-based rewards, authorities do not have to spend considerable resources enforcing codes or regulations, and can instead focus on whether or not certain outcomes are obtained. The strength of this approach is that punishment is used in the last instance in cases where the desired



outcome is absent. In this respect, the role of government shifts from enforcement to an auditing function (for example, has the desired behaviour been met and are sufficient policies and procedures in place to ensure certain performance). Reward programs also encourage innovation in that the government and private sector will search for unique and efficient ways to encourage individuals and corporations to achieve certain goals (for example, the introduction of air mile programs to encourage air travel with a particular airline). As with regulatory schemes, however, reward programs are primarily used in the corporate sector, raising questions as to whether it is fair that such a strategy benefits only a certain segment of the population. There is also some debate about the criterion used to determine whether certain goals have been met and, in turn, whether rewards are warranted. For example, the private and public sectors might have conflicting ideas as to what constitutes an appropriate outcome, which may also differ from public expectations.

DISCUSSION POINTS

- *Can we imagine using reward mechanisms to deal with other forms of unwanted conduct?*
- *What are the issues surrounding reward programs?*
- *Are they an acceptable way of encouraging appropriate behaviour?*
- *Could we imagine using them to replace some criminal penalties?*



IV Democratic Values and Intervention Strategies

The previous chapter examined a range of intervention strategies that we employ as a society to deal with unwanted behaviour. In addition to suggesting these strategies are interrelated, we noted that alternatives to criminal law do not necessarily equate to better or more effective ways of dealing with harmful behaviour. When is it appropriate to use criminal law? How can we enhance the potential of other intervention strategies? How can we better understand and minimize the negative impacts of our intervention strategies? What constitutes an effective approach or strategy for dealing with unwanted behaviour?

As a society we struggle to understand how we might intervene to punish, discourage or reward certain activities. The way in which we intervene or respond to conduct is a reflection of our conceptualization of the behaviour, as well as the type of society we want to live in. Each intervention strategy has its own logic and associated outcomes, and no strategy exists independently from other strategies. For example, the criminal justice system is a highly structured system that requires the participation of certain actors (including police and security forces, Crown prosecutors, defence lawyers, victim agencies, judges and juries, and correctional authorities, to name a few) and traditionally emphasizes the goals of punishment, deterrence and rehabilitation. Regulatory strategies include various regulatory or monitoring mechanisms in such areas as the corporate sector and the environment. Regulations may emphasize compliance incentives (carrots) to encourage “appropriate” behaviour, as opposed to punishment (sticks) as a means of deterrence.

In this section we examine some democratic principles that underpin our approaches to dealing with harmful behaviour. In particular, we examine the principles of justice, equality, accountability and efficiency. If we are to use one or another intervention strategy or strategies, then we ought to consider how they measure up against some of our key democratic values.

Justice

The notion of justice occupies a central feature in our democratic society. We expect that individuals ought to be treated fairly and that their treatment by others, particularly authorities, is respectful.

How can our criminal laws better reflect the public's concern for safety, while promoting their desire for a democratic society based on peace, liberty, tolerance and justice? To accomplish this goal, legislators and the Canadian public as a whole, should try to apply more reason than fear in developing criminal law-infrastructure for safety. They must recognize the symbolic and political power of criminal laws, and determine the effectiveness of each punitive measure in terms of securing personal and public safety. Finally, legislators must always choose the solutions that will result in a peaceful, free, tolerant, and just society.

H. Dumont, “Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction” (2001) 39 Osgoode Hall Law Journal: para 8.



This is a cornerstone value within Canadian society, and we should ensure that our intervention strategies respect it. We also aspire to a society that does not unduly limit freedom of action. Although we accept that certain limits are needed, we worry about living in a society that unnecessarily enforces coercive and restrictive codes of conduct. A just society does not want undue limitations on freedoms.

Criminal law often imposes limitations on freedoms through incarceration, probation orders that impose curfews and prohibit consumption of alcohol, or conditional sentences that mandate the completion of community service work. The authority to detain and punish is, in this respect, an immense power within a liberal democratic society. However, as we illustrated in the previous section of this Discussion Paper, other forms of intervention may be as equally coercive. In highly hierarchical societies, for example, criminal law seems unnecessary because individuals whose conduct is deemed undesirable are shamed or shunned. But social and community pressures to conform to certain ideals may effectively stifle expressions of dissent within the community. Many critics caution against relying too heavily on communities to administer justice when the community itself does not espouse notions of justice.

Justice must also be served by guarding against the power exercised in other contexts. Historically, we have witnessed a range of problems that can surface when drug therapy is used to control marginalized groups. For example, many women have been treated for hysteria or depression for not exhibiting “gender-appropriate” behaviour, such as not paying “sufficient” attention to their families.

Concern with undue limits on freedoms has become increasingly relevant in an era of rapidly changing technology. Many people express concern over the potential harms associated with the uncontrolled use of monitoring and surveillance mechanisms. The Orwellian view of an individual unable to escape surveillance frightens us. Concerns for liberty and justice must be present in our discussions about surveillance via cameras, recorders and other forms of technology. As a society, we should guard against how information about us is collected by both public and private agencies. Given the proliferation of technology in contemporary society, we need to ensure that privacy is protected in the context of examining the range of intervention strategies we employ.

Justice means more than guarding against undue restrictions on freedoms. Justice can become a hollow concept if individuals do not enjoy access to its associated mechanisms. Citizens should have equal opportunity to be treated fairly and justly. A common concern



for many observers of the criminal justice system is that marginal populations, such as Aboriginal people and certain minority and economically disadvantaged groups, have poor access to legal services when they experience conflict with the law. While more affluent people can afford legal services and may be able to resist the power of the criminal justice system, more marginalized individuals lack the necessary services and supports, and are therefore less likely to resist punishment and detention. Similar concerns have been raised in the context of medical care, where more marginalized groups lack resources to receive counselling or treatment for their problems.

Notions of justice also raise questions regarding the different contexts within which intervention strategies are employed. At times, the corporate world was most likely to have access to regulatory mechanisms to deal with corporate fraud, while the individual worker who took money from the cash register was more likely charged with a criminal offence. As a society we often use regulatory approaches for corporations or bureaucracies, but hesitate to do so in the context of individual offences. Why? We must ask questions about the range of intervention strategies that are available and why we assume that certain strategies are only appropriate for certain harmful acts. Why do these access disparities exist? Are they warranted?

At a societal level, the value of justice also includes consideration of social justice or the idea of a just social distribution. Throughout this Discussion Paper we have cautioned against intervention strategies that are overly individualistic in nature and scope. Criminal law, for example, has been used often as an overly individualistic response that cannot take into consideration the broader social context within which behaviour occurs.

DISCUSSION POINTS

- *How can we guard against undue restrictions of freedoms in our intervention strategies?*
- *How can we improve access to justice for all citizens?*
- *Do our intervention strategies focus too narrowly on the individual context, without considering the broader social context?*
- *How can we ensure that our intervention strategies better reflect notions of social justice?*



Equality

Equality is at the core of our democratic society. Law and related policies should therefore reflect a commitment to equality and to addressing inequities. It is in this light that recourse to criminal law is often debated. Many observers argue that the overrepresentation of Aboriginal peoples and other minorities within the criminal justice system is an indication that the system has been unable to uphold the value of equality. When disadvantaged populations feel unjustly targeted by police, trust is compromised. In turn, this invites further disengagement from society and increased opposition between groups. Although conflict is inevitable, Canadians have expressed a desire to move beyond opposing visions to recognize the importance of ensuring equal participation of everyone in our system of governance.

The challenge of addressing inequalities is considerable, and in many cases our intervention strategies might contribute to further inequalities within society. Although criminal law is sometimes used in unequal ways, similar dynamics can also be found within other intervention strategies. Regulation, for instance, might unfairly target certain individuals or populations, and community-based strategies have been criticized for perpetuating many of the same inequalities as the criminal justice system. Healthcare providers, volunteers and social clubs can also project stereotypes and prevent full participation of their members and citizens in general. The subtle ways in which people are served by volunteer organizations, counselled by medical professionals or told what to do by community organizations may also result in discrimination and inequalities. For example, studies indicate that those in authority are more likely to challenge the parenting styles of women from marginalized backgrounds than more affluent women. As a diversity of beliefs continues to characterize Canadian society, we must guard against intervention strategies that aim primarily at enforcing a single set of beliefs, and strategies that perpetuate inequalities.

Contemporary forms of monitoring and surveillance also provide an example within society of how we must guard against potential inequalities. Forms of surveillance can be readily used by those in positions of power to monitor the behaviour of all citizens. Cameras to detect prowlers, for instance, can be installed by those who can afford them to control entry and deter the passer-by from stopping or snooping. Similarly, surveillance can be used to contain or prevent expression of dissent from groups who want to exercise their democratic right to question political decisions.



Equality also demands that we should address systemic inequalities. It is one thing to treat people equally and yet another to recognize and support diversity and difference. For example, beginning in the 1970s, women law reformers lobbied for changes to the treatment of women in Canadian prisons. Their main concern was that women did not have access to the type of institutional programming necessary to meet their needs. If women did have access to programs, it was typically access to those designed by and for men in male institutions. In a sense, providing women and men with equal access to institutional programming actually resulted in unequal treatment — it assumed that men and women who experienced conflict with the law had the same needs. A similar point can be made with respect to medical interventions. Critics note that most medical research subjects are male and that women are frequently excluded from the research process. Questions therefore follow as to whether the results and benefits of medical research apply to everyone equally. While we may take steps to ensure that everyone has equal access to medical treatment, if the treatment is based on discriminatory results, then equal access becomes a hollow concept. In this respect, unless our intervention strategies consider the wider context within which inequality emerges, our responses risk perpetuating discriminatory practices within society.

Overall, then, equality is a work in progress that all sectors of society must strive to achieve. The value of equality imposes particular responsibilities upon us, as we understand that discrimination and inequality in our relationships prevent citizens from having access to equality, dignity and full democratic participation. We must therefore reflect upon the way in which various intervention strategies are used within our society and examine the ways in which they might contribute to inequality.

DISCUSSION POINTS

- *Do our intervention strategies support notions of equality?*
- *How can notions of equality inform our responses to unwanted behaviour?*
- *How can our intervention strategies be designed to address concerns with inequity?*



Accountability

Accountability means that people exercising authority must account for the way in which they use their power within the public and private spheres. It also means that citizens should take responsibility for their conduct and the consequences of their actions.

The criminal law process aims at ensuring individuals take responsibility for their actions. Convicted persons are held accountable in a public forum for their conduct. The criminal law system is also said to provide a framework of accountability for the power that is exercised by the state. The police must respond to several levels of accountability. Crown attorneys are bound by codes of conduct, as are judges. Penal institutions are subject to rules and legislation. Although the accountability framework within the criminal justice system is not without its difficulties, it aims to render the process open and transparent.

Questions have also been raised about the accountability structures within other intervention strategies. Because there is a network of partnerships involved in the delivery of services, incentives, rewards, warnings and penalties, society is less able to understand who is responsible for dealing with unwanted or harmful behaviour. For example, if corporations work together to create and implement self-regulation, then how can citizens ensure the process is transparent and accountable? Similarly, a decrease in resources available to social service providers has meant that service agencies have had to work together to draw from limited funding and resources. How are these partnerships formed? Who is accountable in terms of resource allocation and services provided to clients? Is there a need to examine methods that enhance the transparency of various regulatory mechanisms?

Accountability of public and private institutions involved in monitoring and surveillance of citizens also raises concerns. Who is empowered to carry out the surveillance? How are they regulated? How is the information kept and where is it circulated? We must continue to reflect on the fragile balance between privacy and control. We need to consider how the transparency of the process is linked to our desire to improve the accountability of all response mechanisms within society.

Accountability of less formal intervention strategies must also be examined. Our increased reliance upon community-based responses raises concerns about whether the process of defining and responding to unwanted behaviour is transparent and



accountable. On one hand, allowing the community to deal with unwanted conduct helps foster positive social relations — it can empower individuals and communities to restore or transform relationships. On the other hand, concerns have been raised about the capacity of communities to deal with complex social issues, as well as the accountability of actors involved in community-based interventions. How can we guard against abuses of power? How can we ensure that communities have the necessary resources and skills to undertake such endeavours? How can we ensure that communities have the capacity to deal with difficult issues?

DISCUSSION POINTS

- *Are the criminal justice system and alternative responses to unwanted behaviour sufficiently transparent and accountable?*
- *How can we ensure that our responses to unwanted conduct are accountable?*
- *Are there ways to ensure that people take responsibility for their actions in a context that also recognizes the responsibility of the community?*

Efficiency

We deserve public policy that can achieve the results it promises. In the context of undesirable conduct, much can be said with regard to the value of efficiency. Many statutory prohibitions cannot be enforced because of lack of public resources, and the costs of many prohibitions may outweigh the harm caused. Difficulty in detection and enforcement, and wide disregard for the prohibition are all indications that a criminal law strategy may prove to be ineffective. For example, many have argued that the “war on drugs” constitutes an inefficient use of resources. Similar concerns might be raised with respect to calls for increased control or regulation of new and “emerging” problems, such as the growing concern with unwanted behaviour on the Internet. Is it efficient to spend considerable time and resources developing intervention strategies when it is doubtful they will achieve the desired results?

Efficiency can be measured by the results achieved. For example, public education campaigns are often deemed ineffective because their impact on social behaviour is marginal and they do not always yield the desired results. Community initiatives conducted with



justice and transparency may appear overly costly to develop and implement. Efficiency might also be thought of in terms of the impact of policies and programs on our thinking and habits, such as when public education helped change how people think about drinking and driving, or wearing seat belts. Certainly efficiency is not the only criterion to measure in designing social policy aimed at the deterrence of undesirable conduct. At times, what is at stake is so important that resources must be marshalled to accomplish the goal, no matter what the cost. Interventions around violence and certain forms of deceit may be in that category.

The value of efficiency also suggests that we need to evaluate and re-evaluate our intervention strategies. Many observers suggest we know very little about the impact of our intervention strategies, and that more research and evaluation is therefore necessary. Further, a choice of intervention strategy or strategies may be deemed appropriate at one point, but redundant, ineffective or even inappropriate at another point. For example, programs introduced to intervene in the lives of street-involved youth might be beneficial at a particular time, yet ineffective when new problems emerge. In this respect, efficiency concerns may suggest the need for more ongoing and creative design of public policy.

Many regulatory schemes or reward programs have been labelled as inefficient in cases where they are perceived to result in “excessive regulation,” thereby impeding the “free flow of the economy” or the “efficiencies of the market.” The way in which individuals and corporations respond to governmental incentives and regulation continues to be studied and debated. It is often difficult to predict how actors will behave following the implementation of a complex mix of strategies and, therefore, we are often unable to determine which complement of strategies would be the most efficient.

DISCUSSION POINTS

- *What does efficiency mean in terms of addressing unwanted conduct? How can our responses be more efficient?*
- *How can we balance different values and principles? Can we measure whether efficiency must be sacrificed for equality or justice?*
- *What other values should be reflected in our choice of intervention strategies?*



V Challenges For Our Society

This document identifies several trends in our society regarding the way in which we understand and respond to unwanted behaviour. An important theme has been that, as a society, we often use a range of strategies to prevent or discourage certain conduct. We also noted that many of our intervention strategies are meant to complement rather than detract from each other, and that we should attempt to ensure that our approaches are informed by various democratic principles.

The purpose of this section is to reflect upon the challenges for our society in understanding and dealing with undesirable behaviour. Do we need to rethink how we conceptualize and respond to unwanted behaviour? Do we have the right mixture of policies? How can we ensure that our responses reflect our democratic values? How can they address the underlying causes of the behaviour? How do we know whether we have succeeded? What is the role of government in supporting or prioritizing a range of intervention strategies?

This section is divided into two parts: first, it invites Canadians to reflect on the lack of coherence that at times stems from our response strategies. Second, it considers the ways in which our responses might better promote democratic values.

Promoting Coherence and Coordination

The options for responding to unwanted behaviour do not exist in isolation from each other. In almost any area of social life more than one strategy for responding to a problem is available, and we are often faced with a choice about how to respond. We may, for example, simply choose to tolerate certain behaviour, or exercise our discretion by not resorting to formal response mechanisms. A homeowner may tolerate a neighbour who parks his car illegally even though he or she could call a city by-law enforcement officer and have the car ticketed. A police officer may warn and release a youth to the care of his parents rather than lay formal charges.

In many instances we use more than one method of responding to a problem or for compelling certain behaviour. For example, in the field of environmental regulation, corporations adopt voluntary environmental management systems, but they also receive



incentives from governments if they reduce emissions, and they are subject to regulations and monitored by public officials and environmental groups. Many strategies are at play to prevent conduct that is harmful to the environment.

At times, our methods of responding to unwanted behaviour work at cross-purposes or target only one of many behaviours that share similar characteristics. As a result, there are often contradictions and ambiguities that arise because of the choices we have made in responding to certain behaviour. The example we gave earlier in this document raised questions around how we treat homicides versus workplace fatalities.

Quite often many different strategies are called upon to deal with a particular behaviour. How we respond to smoking illustrates the complexity of our intervention strategies. As a medical issue, smoking causes health problems and, over the past several decades, Health Canada has funded a public education campaign that encourages Canadians to quit smoking. Governments also try to influence consumer behaviour through the use of tax policies and restrictions on cigarette advertising. Municipal governments have enacted by-laws that prohibit where smoking is permissible. Public health agencies create support programs for smokers who want to stop smoking. In a way, we invest a considerable amount of resources to prevent people from smoking, to make it difficult to smoke in public and in private places, and to assist people to quit smoking. Governments do not, however, invoke the criminal law to punish people when they smoke.

However, we should also not assume that avoiding the criminal law means the overall level of coercion or social control within a society has been decreased. For example, the introduction of government-run casinos means certain forms of gambling have been “decriminalized.” Does this mean that the overall level of intervention by governments has decreased? Does decriminalization mean that Canadians are freer to pursue gambling activities than we otherwise would be? Perhaps this is not the case. Gambling outside of government-run casinos remains illegal, and the police continue to investigate private gambling. Moreover, a new regime of private security complete with sophisticated surveillance technologies and investigation techniques has emerged to control illegal activities inside casinos. Finally, the rise of government-run casinos has corresponded with the growth of “gambling addicts” that are said to require treatment and intervention by the medical profession.



The “decriminalization” of some forms of gambling may have been associated with an overall increase in social control in society. Given the lessons that we have learned from decriminalizing gambling, what might be the outcome if we decriminalize marijuana? Should we expect an overall reduction in social control? If we should strive for fairness and equality in our response to unwanted behaviour, how can we ensure that all actors involved will promote these values?

Governments have a major role to play in providing guidance and supporting best practices, as well as ensuring coordination between diverse actors. For example, many observers argue that criminal law should be regarded as the tool of last resort to solve social problems. However, the move away from the criminal law may imply a resurgence of a therapeutic model and hence the demand for greater resources to be devoted to these types of programs. It may also require some measure of liaison and networking between public and private agencies.

Governments also have a pivotal role in ensuring that information circulates so that society continues to learn about the possibilities and limitations of our interventions. For example, there is a significant role for governments in providing information about dangerous products, harmful conduct and the best practices to respond to unwanted behaviour. Many actors are involved in research and the dissemination of information: universities, private corporations, non-profit groups, research institutes and the media, to name a few. Some of these agencies may not act objectively as they have a vested interest in obtaining support. The case of tobacco products is a good example. It is now well known that the tobacco industry did not disclose completely its understanding of the harm caused by smoking. Furthermore, it is unclear whether there is sufficient sharing of information between actors to ensure that knowledge circulates and informs the strategies that public and private actors develop.

DISCUSSION POINTS

- *How do our responses to unwanted conduct relate to one another?*
- *Can the use of multiple response mechanisms prevent excessive use of the criminal law and other regulatory mechanisms?*



- *What are some of the negative consequences of relying upon multiple response mechanisms to deal with unwanted behaviour?*
- *How can we reinforce the coordinating role that governments should play?*

Promoting Democratic Values

We also strive for our society to be governed in a way that promotes and enhances the capacity of all members to participate in their system of governance. As meaningful participation in society is one of the most important values of our democratic society, our governance relationships must be shaped by a concern that people not be prevented from contributing to our system of governance. The strategies that we develop to decide which behaviour is unwanted, and how to intervene to prevent its occurrence, raise questions about how we want to be governed.

We develop and deploy various intervention strategies throughout society. Employers use strategies to deter employees from stealing office supplies, from engaging in harassing conduct or from using the Internet for non-work-related purposes. Schools attempt to prevent bullying in the schoolyard or to encourage healthy snacking. How do they decide which strategies to use? How should they decide which strategies to use?

This Discussion Paper illustrates how choosing a range of intervention strategies has an impact on various relationships in our society. It also illustrates that our democratic principles are at stake in the choice of strategies. All institutions, from schools to employers, from prisons to large corporations, from government actors to volunteer associations, must be supported in developing strategies that enhance our democratic capacity and do not undermine the healthy relationships that Canadians have developed to participate in society.

In that context, we want to reflect on some issues regarding how we define and respond to unwanted behaviour: Do we overuse inefficient criminal or punishment strategies? Do we have community programs that are operated unfairly? Do we have therapeutic support that undermines the ability of patients to truly participate in their care? Do we have strategies that affect one social group more than another?



Accountability is the ability of all citizens to ask questions and to participate in the definition of and response to unwanted behaviour. How can we ensure that the strategies we employ to respond to unwanted behaviour are open and transparent? How can we ensure that opportunities for abuses of power are minimized and that those which do occur are dealt with appropriately? How can we ensure that the right actors are held accountable?

The reflex to criminal law and punishment is a dangerous strategy. We should strive for a society that is not governed by fear and criminal law but by the values of participation and trust. We hope for society and its governments to develop response strategies that are rooted in an understanding of the limits of a criminal law approach and recognize the benefits of alternative response techniques.

Promoting the democratic principles such as the ones identified in this Discussion Paper can be done only through the practice of such values in all of our social settings — in schools, the media and public institutions. Governments have a role in supporting the capacity of different institutions to democratically develop intervention and prevention strategies. They could help different actors reflect on the use of coercive methods for dealing with problems. Governments may be able to prevent the use of unduly coercive strategies within places of work to deal with employees' misbehaviour. Governments can and do help schools develop intervention strategies to deal with students' misconduct by educating students about the values of privacy and tolerance. In short, governments can and do exercise leadership in helping the many actors develop intervention strategies that reflect our democratic values. The question is could they do more and could they do it differently?

Governments in cooperation with citizens should search for democratic intervention strategies. This is a new role that involves supporting community endeavours, steering decision-making processes along important democratic values and principles (such as the values identified in this Discussion Paper), creating occasions to reflect upon our intervention strategies, and proposing models and best practices. Governments and society in general must also review their use of intervention strategies along democratic principles: Is the use of criminal law in certain sectors effective and just? Are regulatory tools such as taxation and business incentives sufficiently accountable or transparent?

...there are numerous tools that government can deploy to achieve a regulatory agenda. All normative functions, from the State to the family, have a range of options in selecting among these governing instruments. In the traditional optic, regulatory objectives may be achieved through one of two main forms: sanctions (sticks) or rewards (carrots). Of course, there is a third...where the idea is to create a climate of compliance rather than a simple fear of sanction or pursuit of an inducement as the motive for action."

R.A. Macdonald, "The Governance of Human Agency" (2002) Background Document submitted to the Special Committee of the Senate on Illegal Drugs, para 62.



Governments do act as models. Their use of criminal law to respond to different social issues is one instance that reflects certain values. Government could also readjust its criminal law policy to recognize the limits and the danger of using criminal law to respond to social problems. For example, criminal law could be used primarily to deal with crimes involving the abuse of power, while at the same time recognizing the limited ability of the criminal law to enhance societal relationships.

All of us should also ensure that our democratic values inform decisions to criminalize certain behaviour or to respond using alternative intervention strategies. Part of this might include making the decision-making process more open and accountable. Who decides what the government's chosen response will be to a perceived problem? How are those decisions made? What factors or circumstances contribute to the government's decision to criminalize or decriminalize certain behaviour? What principles or democratic values are used to guide the decision-making process? How might the government develop a process or institute strategies that help in avoiding the reflex to criminal law to deal with complex social issues?

Finally, government could also move toward criminal law reform that recognizes the role and limitations of the different actors in preventing unwanted behaviour. It could reflect on the necessity of developing a criminal law policy that is clearer and more understandable to the general public in order to enhance the ability of citizens to participate meaningfully in discussions about criminal law and its alternatives.

DISCUSSION POINTS

- *How can our society and governments help different institutions in reflecting on the use of intervention strategies to deter unwanted behaviour?*
- *Should government re-align criminal law policies to ensure that they do not unduly focus on the misbehaviours of marginalized groups?*
- *Should governments move to have a criminal law policy that is less complicated and more readily accessible to citizens?*



VI Conclusion

A liberal democracy is as concerned with the means of intervening in unwanted behaviour as it is with the ends. In considering how we can promote a good and safe society, we must reflect on the strategies we use to confront unwanted behaviour. Any society must have the tools to realize the vision that it has of itself: a just, safe, prosperous and egalitarian society. How we reach these goals is the question raised in this Discussion Paper.

We started from the proposition that society shapes and is shaped by the intervention strategies it develops. Our comparative use of criminal law, regulation, surveillance, community control, therapy, public education and reward programs says a lot about our society, about its structure of governance and about its values. This Discussion Paper reflects on the use of several of these strategies that seek to elicit good behaviour among citizens.

Many questions remain to be answered about the appropriate mix of policies and instruments and the way in which the myriad intervention strategies operate to complement or detract from each other in various contexts. In order to complete its studies on the question of what is a crime, the Law Commission is interested in exploring various contexts in which the interaction of different strategies presents particular challenges for society. Such studies ought to be done with a view to understanding how Canadians are affected by the range of instruments and tools that are used by the different institutions that govern them.

Certainly, we are all concerned about the proper use of criminal law strategies, and it is also clear that we all have a role in the way that our society develops its approaches to unwanted behaviour. We invite Canadians to reflect on their role in a democracy that is searching for intervention strategies that are efficient, equal and just.



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