

**Therapeutic Jurisprudence
and Victim Participation
in Justice**

Therapeutic Jurisprudence and Victim Participation in Justice

International Perspectives

Edited by

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This book is dedicated to the memory of Bruce J. Winick—a pioneer of therapeutic jurisprudence, a fine scholar, and a caring human being.

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Therapeutic Jurisprudence and Victim Participation in Justice: An Introduction

Edna Erez, Michael Kilchling & Jo-Anne Wemmers

Therapeutic jurisprudence (TJ) looks at various aspects of the law to determine whether or the extent to which substantive rules of law, legal procedures, and the roles or actions of legal actors are therapeutic. Conversely, it considers how the same processes can be non-therapeutic, or even anti-therapeutic. TJ emanated some two decades ago from mental health law, as scholars began looking at the positive and negative therapeutic aspects of proceedings leading to the involuntary civil commitment of mental patients (Wexler & Winick, 2001; Wexler 2008). TJ continues to develop into a conceptual framework that has applications in numerous areas of the legal milieu, such as informal interactions between various legal actors that result in formal actions, or how processes and outcomes are conveyed or presented to participants. The physical legal setting creates an additional level of complexity, and qualities inherent in such locations may either promote or depress TJ.

Although TJ originated within legal academia, it quickly gained a thoroughly interdisciplinary perspective. It has attracted the interest of social scientists including psychologists, criminologists, and community-minded researchers such as social workers, swiftly transitioning from an academic interest to a field of inquiry relevant to and applied by practicing professionals in diverse areas of U.S. law. What began as an American¹ exercise soon crossed international boundaries, especially in English-speaking countries—such as Canada, Australia, and New Zealand—and then beyond. The International Network on Therapeutic Jurisprudence website (INTJ, 2009) shows that TJ

1. The term “American” refers solely to the United States.

writing, while overwhelmingly in English, can also be found in Spanish, Portuguese, Italian, French, Japanese, Dutch, Swedish, Hebrew, and Urdu. A perspective that originated in the field of mental health law has evolved into a psychologically sensitive way to look at virtually all aspects of law and justice. Thus, TJ writings now inform the often-disparate proceedings involved in criminal, juvenile, family, personal injury, immigration, probate, and many other subfields of law. In this volume, we will extend the application of TJ principles and concepts to address an area that so far has received little attention in TJ literature—crime victims’ participation in criminal justice around the world.

The application of TJ principles to substantive and procedural criminal law began with the agenda of improving the implementation of the law. TJ strives to accomplish harmonious functioning of the law by observing court proceedings and outcomes with an eye directed towards increasing therapeutic value for participants. A parallel agenda has impacted juvenile law, providing insights into ways to increase juvenile therapeutic benefits from participation in proceeding. With this general aim, TJ has addressed institutions such as “problem-solving courts,” especially drug treatment courts (Winick & Wexler, 2003). TJ investigators looked at how courts can improve the compliance of defendants with orders of the court, and how courts can enhance long-term law-abiding behaviour even as their jurisdiction draws to a close. For example, “graduation ceremonies” are routinely held in drug treatment courts, providing participants with a memorable event that supports their transition to the next phase of their life, which will hopefully be free of both drugs and courts. In the criminal court context, the application of TJ is not limited to the arena of problem-solving courts. Indeed, TJ lends insights that can be used in criminal courts more generally, and to other juridical bodies that address victim harm and grievances in an attempt to achieve reconciliation. In criminal law, the TJ literature extends beyond the structure and function of courts to include the professional roles of lawyers. This is especially true of defence lawyers, as discussed in *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008), authored by workshop participant David Wexler. The emphasis on defence lawyers is indicative of the fact that, until now, the bulk of TJ work has focused on the rehabilitation of criminal defendants; the relevance and contribution of TJ for victims’ issues has lacked a presence on centre stage.

However, that is not to say that TJ lacks the potential for making contributions to the area of victims, and to victimology. Indeed, using the phrase “victims of crime” to search the bibliography on the INTJ website reveals articles addressing TJ and victims, including perspectives from scholars in the United States, Canada, Australia, and India. These findings are probably the result of

efforts such as the pioneering collection of articles edited by Wexler and Winick—*Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996)—featuring a section on the “wide-angle lens of therapeutic jurisprudence.” For example, a chapter by Richard P. Wiebe addresses “The Mental Health Implications of Crime Victims Rights” (Wexler and Winick, 1996, p. 213). With the high prevalence of mental illness in U.S. prisons (see, e.g., Human Rights Watch, 2009), and the greater prevalence and incidence of victimization of the mentally ill (see, e.g., Teplin et al., 2005), mental health was and still is an important topic to address. There may be as much to gain in rehabilitating victims as there is to gain from rehabilitating offenders, though an inability to achieve the latter should not discourage us from attempting to help the former, as victims are likely more amenable to rehabilitation than offenders.

In an attempt to encourage the study of potential impact of TJ approaches for victims, the Onati conference on TJ and victim participation in the criminal process broke important ground by addressing victim welfare and well-being during, and as a result of, participation in proceedings (e.g., Erez, 1999; Wemmers & Cyr, 2005). The next developmental steps in expanding the purview of TJ to important aspects of the law are being addressed through this collection. First, a major workshop on TJ and the role of victims in the criminal process brought scholars together to share their ideas, with interdisciplinary and international input. Next, the publication of the chapters in this book allows for the sharing of these ideas with a wider audience. Our hope is that the volume will serve to solidify the place of victims within the therapeutic jurisprudence research agenda.

Where victims are concerned, the TJ inquiries relate to the impact of proceedings on victim welfare. This includes measuring their level of satisfaction or dissatisfaction with the criminal justice procedure, beginning at the time of interaction with the police. The termination of the process can be hard to conceptualize due to high recidivism and re-victimization rates. Just as some offenders commit a disproportionate amount of crime, some individuals may be disproportionately victimized. The end of the process may involve alerting the victim(s) when the offender is released, paroled, or moved to another facility, a practice that has expanded rapidly in the U.S. since its inception in Kentucky fifteen years ago. A victim notification system is now employed statewide in 80% of states, and in some jurisdictions in 47 of the fifty United States (Halladay, 2009). Yet victim participation may take many forms, ranging from their physical presence at various events, through providing some input, to full-fledged participation and representation by counsel. When the TJ lens is focused on a particular area or problem, other perspectives will arise from the increased attention of creative researchers, and it is our hope that this will occur with attentive readers of this volume. For instance, one issue

not directly addressed here but clearly important for future work relates to apology and its significance to victims. What types of victim interactions with offenders are most and least likely to prompt an offender to apologize? How can victim statements be used to help facilitate a meaningful apology?

To situate the formulation of answers to such questions, the first section of this volume addresses victim participation. Winick (this volume) begins this section with a discussion of how TJ can contribute to our understanding of the plight of victims of crime, with a focus on how the legal process can be re-imagined to facilitate their healing and human potential. Winick provides an overview of TJ perspectives as an interdisciplinary framework to examine victim participation and input in proceedings. Envisioning law as an instrument of healing and rehabilitation, he argues that rules of law, legal processes, and the roles played by those who apply the law—judges, lawyers, police officers, and court personnel—should be the focus of attention when we address victim participation in justice. According to Winick, TJ can play a vital role in transforming legal proceedings at all levels so that victims may purposefully evolve into survivors. Such a focus would help ameliorate and minimize the secondary victimization that victims often experience as a result of existing practices within the criminal justice system.

The second article in this section presents empirical research examining victim participation through a TJ lens. Erez, Ibarra, and Downs (this volume) provide an American perspective on victim participation reforms and welfare based on interviews with criminal justice professionals and victims-turned-activists. They examine the outcomes of some of the reforms that were instituted in attempt to improve victim status, reporting that they have had some positive or therapeutic effects. The chapter attempts to provide a framework for further analysis for reforms that warrant additional exploration and evaluation. Still, this dataset offers unique insight into the process described by Winick (this volume), demonstrating how victims transition into survivors and activists.

Providing an even more diverse array of viewpoints, Kury and Kilchling, (this volume) discuss research on the legislation and implementation of accessory prosecution in Germany. Based on interviews with victims and various criminal justice professionals (judges, public prosecutors, defense lawyers, victim lawyers acting as accessory prosecutors, and victim support workers), they relate that the mere presence of the victim lawyer can significantly change the atmosphere in the courtroom, thus affecting the willingness of the defense to treat the victim more respectfully. The utilization of victim lawyers, which continental law allows, is a concept that should be further explored in other legal systems as a potential new tool for victims seeking therapeutic outcomes.

The chapter by Wemmers (this volume) details the perspectives of Canadian judges, prosecutors, and victim support workers on therapeutic concerns for crime victims. While lamenting that victims in Canada are currently largely excluded from the criminal justice process, the author concedes that victim exclusion from the system does to some extent shelter them from the offender. Faced with this reality, based on her interviews, Wemmers attempts to answer the question: when is participation helpful or therapeutic for victims, and when is it harmful or anti-therapeutic? Though the voices of victims are not included, their experiences are relayed through the sentiments of key actors in the criminal justice proceedings who interact with victims on a daily basis. It would be interesting to know if their viewpoints coalesced with the perceptions of victims.

The second section of this volume considers victims and the law. First, Wexler (this volume) outlines a proposal for law school victim legal advisor clinics. Wexler proposes that students affiliated with a law school clinic could offer capable and legally knowledgeable accompaniment to victims who may need help understanding the proceedings. This proposal takes the position that by better informing victims of how the criminal justice works their frustration with the system could be tempered. As Wemmers (this volume) finds in her interviews with criminal justice professionals, lawyers, prosecutors and judges often find that victims often do not understand the system and misinterpret normal criminal procedure as a personal attack on their integrity. This proposal would bring victims into the court without compromising the rights of the accused. Furthermore, such a role could afford law school students with counselling experience while sensitizing them to the needs of victims. This kind of tool will augment measures currently practiced in legal settings to improve the victim's lot in proceedings. In this way, the creation of new tools begets the need for even newer tools, as the potential for growth within the area of victim TJ is only matched by the need to examine current applications more closely.

Second, Walther (this volume) works to enumerate victim rights in Germany as a means of creating new applications. Walther notes that in Germany, no doctrinal or particular constitutional framework exists from which specific victim's rights could be developed. Therefore, the creation of a conceptual constitutional framework would itself be a new tool for TJ, ensuring that rights are no longer a matter of "simple" law codified in the German criminal procedure code. Instead, the role of the victim as witness, accessory prosecutor, and interested party should conform to five specific central rights: 1) The right to make evidentiary motions, 2) the right to ask for an expansion of the accusation, 3) the right to ask questions at the taking of evidence and make statements,

4) the right to have the support of an attorney, if necessary at the expense of the state, and 5) the right to be informed and to have the assistance of interpreters. While delineation sometimes equates to limitations, victims' rights should provide a number of channels leading towards active participation, including the right to pose questions, to oppose orders of the court, and to challenge questions (Walther, this volume). Such guidelines would provide new applications specific to the German system, but it becomes apparent that analogous delineations in other legal contexts could provide similar opportunities for analysis.

The third article in this section addresses the role of the victim in Austrian criminal procedure. Based on victim surveys, Sautner and Hirtenlehner focus on victim satisfaction with legal procedures. The survey is especially timely, as the Austrian system has undergone fundamental reforms of procedural law aimed at strengthening the victim's position. These alterations mark a paradigm shift that upgrades the victim from a pure witness to a full process party, so the survey's aim was to find out how satisfied the victims were with their role in criminal proceedings at that time, and the extent to which they approve of the new rights they will be given. The article addresses both substantive issues related to changes in victim role in proceeding and with methodological considerations on how to study such changes and avoid some potential research pitfalls. Their contemplation of prospective applications of similar methodologies allows for a smooth transition to the third section of the book: new applications and tools in TJ.

In the third section—addressing TJ in the context of restorative and transitional justice—Gal and Shidlo-Hezroni (this volume) elucidate the case of child victims, followed by Buntman's analysis (this volume) of the victims of apartheid in relation to the South African Truth and Reconciliation Commission. Gal and Shidlo-Hezroni focus on child victims within the criminal justice system, examining the idea of restorative justice as reflective of a TJ approach. Situating their analysis within a discussion of young victims' vulnerability in the current legal system, the article explores restorative justice and its main principles, theories, and supportive movements. This allows for careful consideration of the different ways justice officials can provide child victims with better therapeutic outcomes.

Whereas Gal and Shidlo-Hezroni's chapter discusses a specific population, Buntman (this volume) discusses a unique legal body. The Truth and Reconciliation Commission (TRC) was created in the 1990s as a quasi-judicial body with both legal and political mandates intended to substantially contribute to healing victims, both individually and collectively, from the wounds and violence that accompanied apartheid. This was accomplished through a "therapeutic

investigation,” though Buntman notes that whether or not the TRC is judged to have been therapeutic for victims depends significantly on whom the victims are understood to be. Therefore, Buntman considers four categories of victims: 1) victims who came forward to the TRC, 2) victims as defined by the TRC’s legislative authority but who did not come forward to the TRC, 3) victims of apartheid who were not victims of gross violations of human rights, as defined by the law, and 4) the conflict-ridden, divided, and torn South African society emerging from apartheid and into democracy. Using this framework, Buntman discusses successes (e.g., established the rule of law) and limitations (e.g., narrow definition of victims) of the TRC, extending the analysis by examining five internal or implicit logics of reconciliation—pragmatism, Christian notions of grace and forgiveness, African communalism, positivism, and law—that have impacted how TJ has functioned in this setting. Buntman’s analysis details how diverse intersecting powers can influence TJ, revealing why careful attention should be given to definitional considerations of victims within any TJ framework. Without precise definitions that accept the disparate motivations inherent when distributing victim conscious criminal justice, it becomes possible to inadvertently create new victims.

The fourth section contains three chapters addressing the controversies and limits arising from affording victims special TJ considerations. The first chapter asks, “Is revenge therapeutic?” (Van Stokkom, this volume). Pemberton and Reynaers (this volume) continue by discussing how victim impact statements mitigate the rights of suspects, a sentiment echoed by Hoyle (this volume) in her chapter considering how victim emotions and impact statements may lead to more punitive sentencing. Despite our optimism for the positive potential of TJ, in order to stay informed and avoid unintended negative consequences, it is important to consider some controversies and limitations.

In questioning the therapeutic value of emotions such as anger, resentment, and resultant revengeful desires, the first chapter (Van Stokkom, this volume) in the section on controversies and limitations addresses potential adverse implications of increased victim participation. The author notes that such reflection is especially relevant given political pressure to impose severe sanctions. Meanwhile, the public seems to be increasingly more aware of the failures of correctional systems to reduce recidivism, and the high proportion of crimes committed by individuals with criminal histories. But is the public also becoming more aware of victims? Here Van Stokkom comments on what happens when victims take centre stage, resultant emotions of both defendants and victims, and the role of TJ within restorative and criminal justice frameworks. The discussion works to tease out an answer to the question: is revenge therapeutic? By building upon Van Stokkom’s methodology, conclusions, and ref-

erences, it becomes possible to create an empirical framework for providing additional outcome measures to determine how revenge impacts therapeutic settings. This chapter suggests new ways TJ scholars could look at their datasets, and new interactions to observe. Meanwhile, the next chapters detail the therapeutic benefits and limitations of a tool that is already firmly entrenched as a focus of TJ researchers: the victim impact statement.

Pemberton and Reynaers (this volume) proffer that victim impact statements may adversely affect the rights of suspects and the impartial nature of the trial, and, despite the relative wealth of scholarship on the subject, need still greater scrutiny. Moreover, they suggest that the therapeutic focus of victim integration reforms is alien to the criminal justice process, making victim impact statements a less than effective participation measure. The authors contend that better articulation of the envisioned therapeutic benefits and closer inspection of the therapeutic literature will reduce the tension with established criminal justice principles, while simultaneously providing a more fruitful base for conducting research into the effectiveness of victim impact statements. This new emphasis on the victim is also likely to lead to TJ scholarship on the role of the prosecutor, an area just now emerging (Wexler, *in press*), and closely related to victim rights. If prosecutors are to play a more therapeutic role, it will likely be easiest for them to begin with their relationships with victims. In fact, one of the contributions in this volume (Erez, Ibarra, & Downs) notes how a prosecutors' friendliness with defense attorneys and informal exchanges in the courtroom before the court convenes, described as the "work group" phenomenon (Eisenstein & Jacob, 1977), have baffled and offended victims (Erez, Ibarra, & Downs, this volume). As we keep in mind such interesting nuances that are ripe for observation and systematic scrutiny, the final chapter in the book again reminds us of the potential for negative consequences when victim participation in criminal justice settings is non-therapeutic, or anti-therapeutic.

Hoyle (this volume) details the transition of criminal justice in the U.S. and U.K. from a private to a State-led process, a shift that has altered the role of victims. Rather than some victims (e.g., wealthy) going on the offensive through available legal channels, states now seek justice in the form of punishing an offender. In some systems, it seems punishing the offender is more important than "rewarding" the victim, or at least returning them to their status quo, which has motivated victims' rights movements aimed at enhancing the place of victims in the criminal process. As we have noted, one such method now available in some legal systems is the victim impact statement. In this chapter, Hoyle reminds us that the timing of the victim impact statement is worthy of careful consideration. She suggests that post-sentence victim impact statements would preserve the principle of just deserts, and allow judges and juries to re-

turn to their prior reliance on more objective sources to judge a crime's severity. This provides an example of a way to limit victims' rights, while providing a clear locus for their assertion. Interestingly, while many of the chapters have focused on the TJ context as a place, this article reminds us of the importance of time and timing. If researchers are to observe and record the processes involved in TJ, they should be prepared to then provide evidence-based suggestions for how to improve the order of operations. And maybe the place can also be altered. For example, perhaps there should be TJ courts, where citizens seeking therapeutic recourses to victimization can have a different kind of day in court.

The contributions in this volume address various ways in which victims are incorporated into TJ. This includes instances in which the alleged victim's interests can conflict and compete with the defendant's interests and adequate protection by the law. The use of the term 'alleged victim' (Walther, this volume) underscores the complexities inherent in providing victims with rights before the defendant has been definitively found to be the offender. Research and real world experiences have shown that eyewitness statements are not always accurate, so involving the victim may lead to more defendants unjustly being found guilty. This necessitates careful consideration of the role of human emotions in criminal trials and reinforces the need to weigh the potential benefits for victims with the impending consequences for defendants.

It is our hope that this collection will stimulate interdisciplinary TJ activity centering on the role of victims, launching a major new direction of TJ research and practice. TJ criminal law writing, which has traditionally focused on courts and their relationship with criminal defendants, is now poised to mature and to branch into other areas. The role of TJ in the work of criminal justice professionals, such as prosecutors, is just beginning (Wexler, in press), and coincides with the new emphasis on TJ and victims spearheaded by this volume. TJ research is growing diverse enough in scope to provide a more complete reality that will inform a convergent framework based on the experiences of all actors involved in the legal process.

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