

Nova Law Review

Volume 33, Issue 3

2009

Article 3

Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime

Bruce J. Winick*

*

Copyright ©2009 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

FOREWORD: THERAPEUTIC JURISPRUDENCE PERSPECTIVES ON DEALING WITH VICTIMS OF CRIME*

BRUCE J. WINICK**

Therapeutic jurisprudence is an interdisciplinary field of legal scholarship that looks at law with the tools of the behavioral sciences.¹ In this respect, it is a descendant of legal realism, which asks us to look at law as it actually impacts people's lives, and to do so using perspectives and approaches drawn from other disciplines.² As Justice Holmes has told us, "The life of the law is not logic. It is experience."³

Accordingly, we need to understand how law actually applies in the real world, how people work with it, deal with it, respond to it. And in order to do that, we have to be interdisciplinary and we need to understand anthropology, psychology, economics, and all of those other disciplines that help us see law and the world in a much more enriched way. Therapeutic jurisprudence uses these tools and examines law through a particular lens, focusing on law's impact on emotional life.⁴ It posits that among the other consequences of law, law is a therapeutic agent. Law is a social force that has inevitable consequences for people's emotional well-being, often negative consequences, sometimes positive ones.

The law and economics movement has taught us that we have to be sensitive to law's economic impact, to conduct the cost benefit analysis of law, and to understand the importance of efficiency.⁵ In a similar way, therapeutic jurisprudence is concerned with law's therapeutic impact. We seek to avoid the mistake that we believe the law and economics approach sometimes has fallen into, which is to assume that if a law is inefficient, it there-

* Copyright 2009 by Bruce J. Winick.

** Bruce J. Winick, Laurie Silvers & Mitchell Rubenstein Distinguished Professor of Law, University of Miami School of Law, Professor of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, and Director, University of Miami School of Law Therapeutic Jurisprudence Center, J.D., New York University School of Law, A.B., Brooklyn College. I appreciate the assistance of Cecilia Traini, University of Miami School of Law, class of 2011.

1. See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY].

2. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 186 (1997).

3. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (Gryphon Editions 1982) (1881).

4. See generally LAW IN A THERAPEUTIC KEY, *supra* note 1; Winick, *supra* note 2.

5. Winick, *supra* note 2, at 190.

fore should be changed.⁶ The assumption is that cost-benefit and efficiency are the most important values. Yet, there are other important values at stake—justice, fairness, and equality, among others. Therapeutic jurisprudence suggests that the therapeutic aspect of law is an important understudied dimension. However, a demonstration that a particular law or legal practice is anti-therapeutic does not, in our view, demand that it be changed. Although important, this therapeutic dimension of law is not the highest value served by law. Understanding this therapeutic dimension is crucial to our understanding of law and how it applies to better see how it affects people and to see what we can do to reshape it. When consistent with other important values served by law, this understanding may suggest the value of restructuring law in order to make it more of a healing force. In that sense, it is a revolutionary concept. But, the therapeutic aspect of law does not necessarily trump other values, and sometimes is outweighed by them. When these values coincide with the therapeutic ones, the path to law reform is clear. When they conflict, however, therapeutic jurisprudence does not resolve this conflict. It simply sharpens the issues for further analysis and calls for more empirical research to see whether there may be creative approaches for reshaping law and how it is applied in ways that strike an appropriate balance between these competing values.

Therapeutic jurisprudence is really a fairly simple idea. It calls upon us to examine this therapeutic dimension of law with the tools of the behavioral sciences, in an effort to determine whether we can restructure legal arrangements to minimize unintended anti-therapeutic effects and maximize their potential for healing and rehabilitation. We examine not only legal rules, but legal practices and the way various legal actors—judges, lawyers, police officers, etc.—play their roles. All of these legal actors can properly be seen as therapeutic agents. In the way they act, they typically will impose either positive or negative effects on the emotional life of the people they deal with.

Therapeutic jurisprudence has had a particularly important impact on judging and lawyering. With regard to judging, we have seen in the past fifteen to twenty years the emergence of what we now call problem-solving courts, drug treatment courts, mental health courts, domestic violence courts, and various hybrid models that take the rehabilitation of the offender as a very significant goal.⁷ In these courts, the judge functions as a member of a treatment team helping to provide what often is needed motivation for the offender to opt for treatment and to help with treatment compliance. These

6. *Id.*

7. See generally JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003).

are voluntary programs. The defendant in criminal court, for example, could plead not guilty to a drug offense and receive the fair trial that our system mandates. Alternatively, he could plead guilty and accept punishment.

The problem-solving court model offers a third alternative. If the offender is prepared to recognize that he has a substance abuse problem and that it is time to deal with it, the drug court can help him to accomplish this goal. If he voluntarily chooses drug court, he enters a behavioral contract with the court, he agrees to accept drug treatment and to participate meaningfully in it, to submit to periodic urine analysis drug testing, and to report to court every ten to fourteen days. The judge will know immediately if the defendant's urine is clean or dirty. If the defendant is doing well, if his urine is clean, the judge says, "Wow, Mr. Jones you're doing great! It's really wonderful to see your progress. Let's everyone in the court room give him a hand." This represents a new role for the judge: the judge as behavioral shaper, motivator, and compliance checker. Many of these defendants have never had an authority figure care about them. The judge's encouragement, therefore, is especially meaningful and helps to build the individual's self-esteem and self-efficacy, both of which are necessary to attainment of the goal. All of a sudden the judge is telling him, "Wow, you can do it Mr. Jones, you're doing great!" And if Mr. Jones has dirty urine that day, the judge is going to scold him or impose a sanction that has been agreed to in the behavioral contract that the individual signs in advance. And at the end of about a year and a half, those who are successful graduate, their charges are dismissed, and the arresting officer comes to court and presents them with a diploma. This represents a sea change in the functioning of the courts.

This approach is not well-suited to every court. It is not appropriate for courts that are designed to decide disputed issues of historic fact. In these instances, the judge should be a neutral umpire. But so much of what the courts are called upon to do these days does not involve this traditional adjudicatory role. Guilt or what transpired in the past is not an issue. The task is to determine disposition, to determine what will happen to the individual and whether the courts can provide help that will prevent a reoccurrence of the problem. In this respect, courts dealing with problems like substance abuse, juvenile delinquency, domestic violence, child abuse and neglect, and untreated mental illness can largely be seen to function as psycho-social agencies.

We would not necessarily think of judges as the best people to play this role. Judges, after all, are law-trained, and may not possess the psychological and social work skills needed to play these roles well. But unfortunately, our society does not put the resources that are needed into prevention and treatment programs in the community that can help people with these problems at an early stage before they get out of hand. As a result, given the lack

of such services, these problems fester and ultimately explode, and the individual is arrested and brought to court. There is always a judge in the back of the room when I give lectures, that says, "But Professor Winick, I'm not a social worker." What I tell them is, "Yes, you are. When you are functioning in one of these courts, you are functioning as a social worker. You're either going to be a good one or a lousy one, so get with the program, learn some of these skills."

Judges who function in these new courts become experts in dealing with these kinds of social problems. They learn some of the basic approaches and techniques of psychology and social work, and apply them in the court room. They learn how to motivate people to understand that they have a problem, to persuade them that they can effectively deal with it, to link them with community treatment resources that otherwise might be unavailable or inaccessible to them as a result of their problem, and to facilitate their treatment through compliance checking and encouragement. In short, they help them to solve the problem that has brought them to court and that otherwise will likely reoccur. This marks a revolutionary change in the way courts function. This new development can be seen as therapeutic jurisprudence at the judicial level.

A leading example in Broward County is Judge Ginger Lerner-Wren, who started the nation's first mental health court.⁸ As the public advocate in Broward County, she learned about therapeutic jurisprudence. When she was elected to county court, she noticed that many of the minor offenders in criminal court were there because they had committed nuisance offenses that were more a product of their untreated mental illness than of criminality. In response, she started the nation's first mental health court about a dozen years ago, explicitly based upon a therapeutic jurisprudence model. There are now more than a hundred mental health courts in the country, probably twenty-four hundred drug treatment courts, several hundred domestic violence courts, and many other such courts throughout the world.

Not only has therapeutic jurisprudence revolutionized the courts, but it has begun to transform the role of the lawyer. Our 2000 book, *Practicing Therapeutic Jurisprudence*, applies the therapeutic jurisprudence model to the practice of law.⁹ Its subtitle, *Law as a Helping Profession*, suggests that

8. See generally Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507 (2005); GINGER LERNER-WREN, BROWARD'S MENTAL HEALTH COURT: AN INNOVATIVE APPROACH TO THE MENTALLY DISABLED IN THE CRIMINAL JUSTICE SYSTEM (2000), available at http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf.

9. PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds., 2000).

therapeutic jurisprudence seeks to reframe the practice of law. That is what lawyers are. They are members of a helping profession. Like doctors, nurses, and others whose task is to help their patients or clients with a life problem. The role of lawyers is to minister to the problems of their clients. Clients come to their offices with the worst problems in the world. They are going through a divorce. They are facing criminal accusation. They are going through a bankruptcy. A business partner has screwed them. Maybe they have been in an accident and they have been horribly injured, perhaps permanently. These are the world's worst problems, and they bring them to the law office.

How should we as lawyers deal with these problems? We, of course, are going to deal with their legal problems. But in the process, let us understand that our clients are people who possess the full range of human emotions that inevitably interrelate with the legal problems they are encountering. Let us look at the client holistically. This is what we teach our doctors these days. It is not a case of colon cancer that has come to the office, it is a person that happens to have colon cancer. We need to understand that the client is a person, a fellow human being. It is our role to understand their emotional problems, as well as their legal ones, and to minister to the whole person. As lawyers, we inevitably are therapeutic agents. If we ignore their problems, we can further exacerbate their psychological difficulties. By contrast, an awareness of the predictable emotional problems that accompany legal difficulties and the possession of a rudimentary understanding of the interpersonal skills needed to deal with them can help the client to solve the legal dilemma in a way that also enhances her emotional well-being.

If we adopt this more comprehensive vision of the role of the lawyer, our clients will be better off both legally and psychologically, and as a result of the relationship, will be much more satisfied with the professional encounter. In addition, we as lawyers will experience a heightened sense of professional satisfaction. Our role as lawyers is to help people, to serve their needs. And there is great joy in using the legal, analytical, and problem solving skills we possess to help people. If we can understand this to be our professional role, we will find the real joy in the practice of law.

Let me turn my attention to the *Nova Law Review* and the topic of your upcoming issue—victims' rights. I am aware of the story of Melissa Lewis, your dear departed former editor who had a special interest in victims' rights and worked on this topic and yet, ironically, was herself tragically the victim of a very serious crime and was killed.¹⁰ What tragic irony that is, let us meditate upon it. It is entirely appropriate that the law review has dedicated this

10. See Heather Baxter, *In Memory of Melissa Britt Lewis*, 33 *NOVA L. REV.* 533 (2009).

issue to Melissa Lewis and to the further exploration of the topic of victims' rights that she made such an important part of her short legal life.

What does therapeutic jurisprudence have to contribute to our thinking about victims' rights? Therapeutic jurisprudence focuses our attention on the emotional life of people touched by the law, and of course, victims are very much affected by how they are treated by the legal system. They have been the subject of a crime—sometimes a violent crime. They have suffered predictable emotional responses as a result of that crime: anxiety, fear, depression, humiliation, anger, powerlessness, and betrayal. Some develop the syndrome of post traumatic stress disorder where they relive, periodically, the high anxiety of the crime situation.¹¹ Some develop a form of learned helplessness. They have been victimized and that victimization is something that gives them a sense of powerlessness.

This sense of powerlessness, which they may tend to generalize to other aspects of their lives, could develop into what psychologist Martin Seligman called the syndrome of learned helplessness.¹² They react in an amotivational way to life. They do not set goals, they surrender to their predicament. They feel helpless, hopeless, and function in a way that mirrors the symptoms of clinical depression. They may not be able to get out of bed. They feel that life no longer matters. A lot of people who have experienced serious crimes may react in this way.

Now that we have a bit of an understanding of how the crime might impact at least some victims emotionally, let us think about how the law and legal processes might respond to them. The basic insight of therapeutic jurisprudence is that the legal processes that people encounter will impose consequences for their psychological well-being—either negative or positive. The law reform agenda of therapeutic jurisprudence calls upon us to think creatively about how these legal processes can be reshaped to minimize their anti-therapeutic consequences and maximize the potential for the healing of the victim. We cannot ignore the emotional aspect of their victimization, but must take it into account in deciding how the legal system should react to them. We must be careful not to revictimize them by how we deal with them

11. AM. PSYCHIATRIC ASS'N, DSM IV: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–68 (4th ed. 2000); JUDITH HERMAN, *TRAUMA AND RECOVERY* (1997); Anita K. McGruder-Johnson, et al., *Interpersonal Violence and Post-Traumatic Symptomatology: The Effects of Ethnicity, Gender and Exposure to Violent Events*, 15 J. INTERPERSONAL VIOLENCE 205 (2000); J.P. WILSON, *TRAUMA, TRANSFORMATION, AND HEALING: AN INTEGRATIVE APPROACH TO THEORY, RESEARCH, AND POST-TRAUMATIC THERAPY* (1989).

12. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975); see Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 42 (1995).

in the criminal justice process. Yet, often we do just that in the way that police officers take their statements, in the way prosecutors interact with them, and in what they experience in the courtroom.

If we view the plight of the victim through the lens of therapeutic jurisprudence, the test becomes how we can better understand the psychological dimensions of their victimization and how we can reshape the legal process to facilitate their healing and human potential. How can the criminal justice system help to turn victims into survivors? A concern for the needs of the victim should, in important respects, be taken into account in redesigning how police, judges, court personnel, prosecutors, and defense lawyers play their roles. They should understand how crime has upset the emotional equilibrium of the victim, and attempt to restore it.

At present, the victim has a subsidiary role in the court process. The prosecutor decides the important issues of what to charge, whether to plea-bargain, what charge to plea-bargain to, how to present the evidence, and whether to call the victim as a witness. The victim frequently has no voice on these questions. They are peripheral players, and once again feel marginalized and disrespected. They feel powerless once again, a feeling that might contribute to depression and learned helplessness. In this way, the criminal justice process contributes to the anti-therapeutic consequences of their victimization. Instead of perpetuating their sense of powerlessness, we need to empower them. And yet, the criminal justice system does not empower them at all.

How can we begin to think about addressing the emotional needs and the interests of the victim? Everyone in the criminal justice system who deals with the victim—judges lawyers, police officers, and court personnel—needs to be sensitized to these issues and to learn about the emotional responses that victims are likely to experience. This calls for education designed to increase their psychological understanding and their ability to respond to the victim with empathy and sensitivity.

How can we deal with the high potential for victims to experience a form of post traumatic stress disorder? One of the leading remedies is to get people to express about it, to talk about it, either to a therapist or to a neighbor, to journal about it, to open up about it rather than holding it inside where it will ultimately come back to haunt them.¹³ We need to provide opportunities in the police station for victims to talk about what happened to them and how they felt about it. It would be desirable to have social workers within

13. See JAMES W. PENNEBAKER, *OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS* (1990) (describing the psychological and physiological benefits of expression in dealing with post traumatic stress disorder caused by a variety of traumatic events, including crime victimization).

the police and court process who can address the needs of the victim. It would be beneficial to have them complete an intake form in which they are asked to describe what happened to them and how they felt about it as a means of helping them get past it. In the alternative, they could be asked to dictate their feelings into an audio tape. In addition, asking them to prepare a victim impact statement that can be used at sentencing can also accomplish this objective.¹⁴

In our criminal justice process, the prosecutor, not the victim, decides whether and what to charge, whether to offer a plea bargain, and how to present the evidence. This is appropriate, as the prosecutor has the responsibility of seeking the public interest. The victim has his or her own interest in these questions, but it may not truly reflect the public interest. And so we cannot give the victim a veto on these matters. But at the same time, the prosecutor should take her views into account. What the victim needs is a voice, not necessarily a veto, however, the victim's voice is rarely listened to in our criminal justice process. Under Florida law, the prosecutor is supposed to consult with the victim about plea bargaining and sentencing, but this is rarely followed.¹⁵ When the victim learns after the fact that the prosecutor has agreed to a plea bargain, and that the case, in effect therefore, is over, she again will feel disempowered, marginalized, disrespected, and in effect victimized once again.

Prosecutors need to talk with the victim beforehand, giving them a voice, not a veto. Even though the prosecutor ultimately will make the decision, the prosecutor should hear the victim's views, listen to the victim's voice, convey empathy, and in the process treat the victim with dignity and respect. Should the prosecutor decide not to follow the victim's views, he should explain why, on balance, he has reached a different conclusion.

Therapeutic jurisprudence has frequently drawn on insights from the literature on procedural justice.¹⁶ This is an empirical literature that helps us understand how people experience judicial and administrative hearings.¹⁷ This literature shows that the satisfaction of litigants with the procedures

14. *Id.*

15. FLA. CONST. art. I, § 16.

16. See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 119–38 (2005); Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002).

17. E.g. E.A. LIND & T.R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS, (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); E.A. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952–59 (1990).

they receive and their ability to accept the outcome are dependent upon several factors. The first is “voice,” the basic need that people have to tell their stories and be listened to. The second is “validation,” the feeling that the judge has taken them seriously. The third is whether the judge has treated them with dignity and respect and has acted fairly and in good faith. Let us adapt these insights to the way the criminal justice process deals with the victim. The prosecutor and the other judicial officials with whom they will deal should give the victim this sense of voice. They should accord them validation, pay attention to them, take them seriously, and take their arguments into account, even if they ultimately reject them. They should listen to them attentively, always treat them with dignity and respect, and provide them with a process that they will feel is in good faith. Even if the prosecutor makes a decision that the victim is unhappy with, the victim will then be more likely to accept it. Treating the victim in this way will nonetheless increase their satisfaction with the process and their ability to accept the outcome. Moreover, treating the victim in this way can avoid much of the re-victimization that the existing process imposes, and thereby assist the victim to heal and move forward.

These are some of the factors that therapeutic jurisprudence suggests we need to take into account in thinking about how to recast our criminal justice system so that it pays more attention to the emotional needs of the victim. These are preliminary perspectives on how therapeutic jurisprudence can improve the plight of the victim in our criminal justice system. We need to value the emotional well-being of the victim, and make greater use of psychological insights and approaches in reshaping our criminal justice process in order to better accomplish this. This symposium and the approach I have outlined can do much to help us reimagine a more humane criminal process that helps to bring about healing for the victim, rather than revictimization.