RESTORING THE WEAK AND THE VICTIMIZED

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I. INTRODUCTION

“Rescue those being led away to death; hold back those staggering toward slaughter.”
— Proverbs 24:11

“The ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people.”
— Martin Luther King, Jr.

Restorative justice is the healing balm that seeks to vigorously right societal wrongs. The starting points of restorative justice include information for victims, vindication, restitution, and a safe and supportive environment in which to accomplish healing. Restorative justice focuses on the impact that the offender has on the victim, those in community with the victim, and with community.

This paper considers restoration for the weak and the victimized through a restorative justice lens within a therapeutic justice framework. Restorative justice

1 J.D. Candidate 2016, Summit School Arizona of Law. Tremendous thanks to God, the heart of the law, and without whom this paper would not have been accomplished. Great thanks to my Comprehensive Law Professor, Judge Michael Jones, for his ever present and kind help. 1 HOLY BIBLE, PROVERBS 24:11.
2 MARTIN LUTHER KING, BEYOND VIETNAM: A TIME TO BREAK SILENCE (Speech at Riverside Church, New York, New York (April 4, 1967).
3 FUNDAMENTAL CONCEPTS OF RESTORATIVE JUSTICE, Howard Zehr, Eastern Mennonite University, Harry Mika, Central Michigan University, Akron, Pennsylvania: Mennonite Central Committee at 3.0 (1997).
4 Id. at 3.1.
describes a sequence of procedures that promote the recovery and healing of the injured while also allowing the offender to participate in reparation. Therapeutic jurisprudence is the study of how the legal system affects the behaviors and mental health of the individual. As David Wexler put it, therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent."

Is complete re-entry into society and wholeness ever possible for the abuse victim? While having no easy answers, this paper will explore restorative justice within therapeutic jurisprudence, the positive and negative aspects of restorative justice, victim empowerment, community and offender accountability, and the victims. A very brief discussion will be on the United Kingdom’s Domestic Violence, Crime and Victims Act of 2004.

II. RESTORATIVE JUSTICE WITHIN THERAPEUTIC JURISPRUDENCE – HOW IT WORKS

The broad lens of therapeutic jurisprudence views the law as a curative agent that is capable of healing the well being of the person. Generally,

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6 Zehr, supra note 3, at 3.1.2, 3.1.4.
7 BLACK’S LAW DICTIONARY (9th ed. 2009).
8 DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: AN OVERVIEW (PUBLIC LECTURE AT THE THOMAS COOLEY LAW REVIEW DISABILITIES LAW SYMPOSIUM (October 29, 1999). David Wexler is a law professor who is credited with first discussing the therapeutic jurisprudence perspective.
The relatively new field of "therapeutic jurisprudence" envisions the law as a potential curative agent, capable of affecting the psychological well-being of an individual. The question for therapeutic jurisprudence is not whether legal rules application of the law can promote the health and well being of those affected by the legal system . . . .
Arising within therapeutic jurisprudence, restorative justice provides the alternative track to our current civil justice system, providing additional resources that can be creatively used to make victims safer in the long run. Another advantage of the approach is to mend the rift of all parties involved and, globally, promoting healing to the community. The process seeks to involve all “stakeholders,” victim, offender, family members, etc., with the aim of restoring the status quo prior to the offense. Supporters acknowledge, however, that a perfect healing involving a re-connection to relationship is impossible, significant brokenness having happened often before the other wrongs have occurred. An effective use of the program therefore lies in addressing the wrong, the venue in which it occurred, and taking steps to make sure that it does not reoccur. Restorative justice may be viewed as an upward rather than lateral leap from the traditional justice system’s road of retribution, reprimand and punishment to restorative justice’ reparation, reconciliation, and transformation. “Restorative justice proponents seek . . . . holistic healing rather than the traditional justice system – one that is amenable to empathy, creativity, and long-term solutions.”

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12 Id. at 531.
13 Id.
14 Id.
15 Id.
16 Id. at 532.
III. THE POSITIVES AND NEGATIVES OF RESTORATIVE JUSTICE

Restorative Justice can have both a positive and a negative influence on the legal system.

A. The Positives of Restorative Justice

Restorative justice has made great inroads in the community in terms of bringing a new healing element to the legal world. John Braithwaite, a professor in the Research School of Social Sciences at the Australian National University, discusses the victim being actively involved in their own restorative justice experience:17 Restorative justice is key to restoring the victim, the community, and the offender.18 Braithwaite states that the lynchpin of restorative justice is restoring victim empowerment by having the victims define their own restoration.19

Emotional healing is a huge element in restoring the victim. The Ministry of Justice in Western Australia reported that ninety-five percent of victims experienced healing and satisfaction through their restorative justice conference program, particularly through conferences.20 Ninety three percent of the victims in these conferences stated that they felt the offender was held accountable, ninety-six percent stated that they

18 Id.
19 Id.
20 Assessing Optimistic & Pessimistic Accounts (citing Ministry of Justice, Western Australia, Juvenile Justice Teams: A Six Month Evaluation. PERTH, MINISTRY OF JUSTICE (1994)).
experienced fairness during the proceedings, and ninety-six percent said that they felt the offender had adequately apologized. 21 Victims praised the conferences for allowing them to express their feelings without being victimized. 22 Additionally, an analysis of restorative justice programs in Canada, Great Britain and the United States showed that between sixty-four and 100 percent of offenders completed the restoration and compensation agreements that they made with their victims in an effort to restore their victims to justice. 23

Further, an experiment done in Canberra, Australia, showed that victims frequently felt that symbolic reparation was far more important to them, and this included an apology from the offender with the confession acting as a securing of the victim’s satisfaction and healing. 24 And another perhaps startling revelation was the proportion of victims who felt sympathetic to their offender by the end of conferencing. 25

Additional benefits of restorative justice include anger dissipation. Studies showed a

21 Id. (citing Paul McCold and Benjamin Wachtel, Restorative Policy Experiment. The Bethlehem Pennsylvania Police Family Group Conferencing Project,” Pipersville, PA.: Community Service Foundation (1998)).
22 Id.
24 Braithwaite at 24 (citing Suzanne Retzinger & Thomas J. Scheff, Strategy for Community Conferences: Emotions & Social Bonds (1996)).
25 Braithwaite at 24 (citing T. Goodes, Victims and Family Conferences: Juvenile Justice in South Australia (1995)).
drop in anger from sixty percent to thirty percent by the end of the Canberra
conferences. Research evidence on conferencing also showed a decline in the desire for
“victim payback,” towards the offender. Victims who had been through the
conferencing process also showed a decline in their fear of being re-victimized as well as
a lessening of emotional turmoil over the crime.

Yet another advantage to restorative justice comes in the victim’s ability to show a
deepened compassion and mercy toward the offender. Goode’s study on juvenile family
group conferences in South Australia cited the most common reason that victims gave for

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27 Braithwaite at 23 (citing M. Umbreit & R. Coates Umbreit, M., and R. Coates, Victim-Offender Mediation: An Analysis of Programs in Four States of the U.S. Minneapolis: Citizens Council Mediation Services (1992)).

Id.
attending the conference was to try to help the perpetrator.\textsuperscript{28} The desire to see an appropriate penalty administered as well as any material reparations rated behind this desire to help the victimizer.\textsuperscript{29} Love seemed to carry the day towards victim and victimizer, as one victim stated at the completion of a restorative justice conference: “Today I have observed and taken part in justice administered with love.”\textsuperscript{30}

B. The Pessimistic Aspects of Restorative Justice

 Victims seldom feel they enjoy a just outcome in criminal proceedings. Most crime victims are white-collar crime victims, yet the victim is often unaware of this. Inflated prices are one example of white-collar crime, as is the domestic violence victim who is frequently too terrorized to report her assailant.\textsuperscript{31} Restorative justice cannot offer the overwhelming majority of victims a solution because a huge number of cases are not reported and the guilty rarely admit to their crime.\textsuperscript{32}

 Statistics maintain that more than ninety percent of victims will remain unaffected or untouched by restorative justice unless restorative intercessions are massively increased.\textsuperscript{33} To reach even one percent of all detected and undetected crimes, the

\textsuperscript{28} Braithwaite at 24 (citing T. Goode’s \textit{Victims and Family Conferences: Juvenile Justice in South Australia.” Adelaide: Family Conferencing Team (1995))}.

\textsuperscript{29} Id.

\textsuperscript{30} Braithwaite at 25 (citing Trish Stewart, edited by B. J. Brown and F. W. M. McElrea, \textit{Legislation in Action.” In The Youth Court in New Zealand: A New Model of Justice}, Auckland: Legal Research Foundation 1993))

\textsuperscript{31} Id. at 79.

\textsuperscript{32} Id. at 79, 80.

\textsuperscript{33} Id. at 80.
conferencing programs alone would have to be far larger than they currently are.\textsuperscript{34}

And sadly, restorative justice can intensify the victim’s fear of further victimization.\textsuperscript{37}

While going through the restorative process, a victim often realizes just who the perpetrator really is – someone having a low self-esteem, often ashamed, and far from the scary ogre the victim had imagined.\textsuperscript{38} However, some offenders truly are a daunting force to be reckoned with. When the media grabs these cases, the spotlight can undermine restorative justice. One such case involved a woman at a Canberra conference who had threatened a woman with a blood-filled syringe.\textsuperscript{35} The conference was poorly run and any emotional healing between victim and victimizer quickly declined.\textsuperscript{36} The woman later found a syringe on her car dashboard, which she appropriately thought was a threat.\textsuperscript{41} The case was aired by local television, but even though it was the only case out

\textsuperscript{34} Id. \textsuperscript{37} Id. at 81 \textsuperscript{38} Id. \textsuperscript{35} Id. \textsuperscript{36} Id. \textsuperscript{41} Id.
of two thousand Canberra conferences that showed a victim’s heightened anxiety and fear, this one case in the media was enough to weaken the goals of the conference.\textsuperscript{37} Further, victim anger may be redirected by mediators who do not allow the victim to blame or to discuss the past event, instead favoring a problem solving position.\textsuperscript{38} A victim who does not want a restorative justice process may continue to move through the process out of guilt when they would really just prefer to move on without going through a program.\textsuperscript{39}

Along with this thought, the restorative justice processes are already infused with shame for both victim and perpetrator.\textsuperscript{40} To force an individual to deal with terms that include “forgiveness,” and reconciliation,” sometimes serves to diminish the legitimate anger and rage that the victim inevitably initially feels at the hands of the offender.\textsuperscript{41} Critics of restorative justice accurately state that the program does not cure the offender’s underlying issues, such as unemployment and poverty.\textsuperscript{42} The process cannot redesign the criminal justice system because far too many elements such as a strong welfare state, strong families, and human rights programs, must be strongly infused into the system to cure the core wrongs.\textsuperscript{43}

\textsuperscript{37} Id. at 82.
\textsuperscript{38} Id. (citing Jennifer Brown, \textsc{The Use of Mediation to Resolve Criminal Cases: A Procedural Critique}. Emory L.J. 43 at 1274 (1994)).
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 83.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 91
\textsuperscript{43} Id. at 92
Id.
IV. VICTIM EMPOWERMENT, COMMUNITY, AND OFFENDER ACCOUNTABILITY

No matter the motives, conscious or unconscious, it was my responsibility, my choice, that I was in Central Park that night. I don't feel sorry for that choice or for myself, and I don't blame myself for having made it. Though I never, ever imagined the run would have the result it did, I understand why I was out there.\(^44\)

Trisha Meili (also known as the Central Park Jogger)

A. Victim Empowerment

Restorative justice is not just a healing from the harms of others. It may also be a transforming recovery from one’s destructive self as in the case of Trisha Meili:

An assumption running through the criminal justice system is that the victim will benefit in some way from the prosecution and punishment of the offender.\(^50\) Although the five juvenile males who were thought to have attacked Trisha have been cleared of blame, at the time of the assault she did not know that they were not responsible for her injuries. Only one man was found to have assaulted Trisha, but she still needed healing. And in going through the trial process she discovered that it was not the prosecution that consoled her and eased her pain, but rather the psychological and spiritual journey she embarked on to understanding at a deeper level what had happened to her that night.\(^45\) She chose a road of victim empowerment.\(^46\) Trisha’s discovered that her wounds were far more extensive and long-standing than the injuries administered in the vicious attack by her offenders.\(^47\) Instead of focusing on the many negative

\(^{44}\) Linda G. Mills, The Justice of Recovery: How the State Can Heal the Violence of Crime, 57 HASTINGS L.J. 457 (February, 2006), citing Trisha Meili, I Am the Central Park Jogger: A Story of Hope and Possibility, at 457 (2003)). (Trisha Meili is also known as the Central Park Jogger). \(^{50}\) Id. at 458.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id.
aspects of her attackers, her own restorative justice journey was an internal one. She learned that her negative body image had driven her to anorexia throughout her life, pushing her to run alone in Central Park on the night she was raped.\textsuperscript{48} The impact of the assault drove her to a new journey of personal restorative justice as she became aware that she was just as much in need of restoration and justice from herself as she was from her assailant.

Not that the victim does not greatly benefit from the offender being held accountable. Mills argues that victim healing involves far more than punishing the perpetrator, and that by reforming victim roles the victim has many more options from which to choose healing.\textsuperscript{49} Incorporating restoration theories in the process has been found to both reduce the potential for victims to turn become victimizers and also stops the victimization inheritance to future generations.\textsuperscript{50}

In understanding victimization, several theories discuss what steps are necessary for the victim to heal.\textsuperscript{57} The typical victim in the public view is female, and they are generally viewed as passive and incapable of controlling the circumstances that caused the crime.\textsuperscript{51} This theory has been shown to be inaccurate, mainly because it does not take into account the individual personality of both victim and offender.\textsuperscript{59} During the 1970’s, victimology progressed into a deeper understanding of the relationship between victim and perpetrator, and the still limited role a victim plays in convicting an offender and administering punishment.\textsuperscript{52}

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 459.
\textsuperscript{57} Id.
\textsuperscript{51} Id. at 477.
\textsuperscript{59} Id.
\textsuperscript{52} Id. at 479.
At current date, although victims often seek emotional and physical healing for their trauma outside the courts, the justice system is still the primary avenue for the victim to experience resolution. So, the legal system largely defines the role of the victim in healing and in punishment. In taking a look at what roles are available for victims within the justice system, one must ask how these roles either hinder or add to victim empowerment and healing. Under the protectionist approach, the victim, especially the female victim, is still protected from blame. Within this role, the victim must play a part in convicting and punishment. The justice system has traditionally looked at the victim as being far too traumatized to make his or her own decisions. This assumption about victim traumatization has led to an aggressive intervention by our justice system on behalf of the victim, even when they do not seek it.

However, the victim deserves far more than what our justice system has traditionally offered. They deserve not just a meaningful voice in the criminal justice system, but they also desperately need a voice for survival. Victim inclusion in the justice process increases their likelihood of recovery and also prevents the likelihood of victimization transferring to the next era.

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53 Id. at 482.
54 Id. at 483.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
B. Restorative Justice and Community

The community is also a victim in the broader sense. And restoring the victim often involves restoring the community.  While restorative justice meetings have strongly promoted forgiveness for the individual, redressing an individual harm will not heal the community. The peace and quality of life is often disrupted in a community after a crime, and restorative justice programs bring hope to establishing a safer community where all citizens live without fear. This is why it is so important for the community to actively participate in the sanctioning process of the offender. One significant role that community plays is to define fresh and original sentences rather than have the victimizer go through the typical internment. And during the restorative process, the offender importantly pays reparations to not only the victim, but also to the community, with the end-goal of getting the offender to own his actions by looking through his own transforming restorative justice lens.

61 Christopher D. Lee, Comment, They all laughed at Christopher Columbus when he said the world was round: the not-so-radical and reasonable need for a restorative justice model statute, 30 ST. LOUIS U. PUB. L. REV. 523, 531 (forthcoming 2011).
62 Id. at 532.
63 Id.
64 Id.
65 Id. at 533.
66 Id.
C. Offender Accountability

When an offender makes an effort to right harm, if only partially, he or she is saying, “I am taking responsibility, and you are not to blame.\textsuperscript{67}

The adversarial game of our criminal justice system teaches offenders to look only to themselves.\textsuperscript{68} Traditionally, offenders are discouraged from acknowledging responsibility, and are given very little ability to act on responsibility.\textsuperscript{69} If an offender can distance himself from the victim, this sometimes “neutralizes,” the victimizer’s actions in his own eyes so that he may further detach from any sort of victim reparation.\textsuperscript{70} Restorative justice argues for accountability over punishment. To be truly accountable, the offender must face his victim and understand that his actions maimed or destroyed the physical and emotional life of another.\textsuperscript{70} Further, restorative justice may have the greater impact on severe offenders.

What is needed for the offender’s healing? To protect the victim and the victimizer, some offenders should be under temporary restraint so that the victim will be safe physically and emotionally. The offender needs accountability that addresses the harm and encourages empathy towards the victim.\textsuperscript{71} Beyond this, the ultimate goal of

\textsuperscript{67} HOWARD ZEHR WITH ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 12 (Good Books, 2002).
\textsuperscript{68} Id. at 7.
\textsuperscript{69} Id. at 14.
\textsuperscript{70} Id. at 15.
\textsuperscript{71} Id. at 25.
restorative justice is the healing and re-entry of the offender into society as a trusted member of the community.\textsuperscript{72}

\section*{V. VICTIMS}

\subsection*{A. Children as Victims}

I'll show't the king and undertake to be Her advocate to the loud'\textquoteright st. We do not know How he may soften at the sight o' the child: The silence often of pure innocence Persuades when speaking fails.\textsuperscript{73}

How does one determine the signs of sexual abuse in a child? A good indication is that the victim will often show symptoms that cannot be criminally proven, but are clear indicators that the child needs help.\textsuperscript{74} Christian Diesen maintains that children react in diverse ways to abuse, including helplessness, secrecy, and compliant behaviors.\textsuperscript{75} However, these symptoms may not be present or they may present themselves under other stressors, such as parent separation or divorce.\textsuperscript{76} Here, the legal system must stay the course with these little victims, discovering what behavior is associated with what trauma.\textsuperscript{77}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{72}] Id.
\item[\textsuperscript{73}] William Shakespeare, Winter’s Tale, Act II, Scene II, 1609-1611.
\item[\textsuperscript{75}] Id.
\item[\textsuperscript{76}] Id.
\item[\textsuperscript{77}] Id. at 145-46.
\end{itemize}
\end{footnotesize}
The trauma of a crime inflicts tremendous stress on the average adult. How much more so for the average child. Here, legal support is again critical. The small victim must be strengthened in every way possible before he or she appears in court, and must be given the long-term rehabilitation tools that are vital to full recovery. However, although the child may be heard and helped in the trial process, this ordeal does not solve all issues.

Tali Gal & Vered Shidlo-Hezroni state that the criminal adversarial process rarely benefits children and that they can be further traumatized by the process. Those victimized in the home suffer the most.

Because the victim is a child, their understanding of the legal process and procedural rules is often quite limited. Their anxiety level is greater and they often feel that they are the ones who have done wrong. When taken out of their natural environment of home and school and then forced to the forefront of a criminal proceeding, their feelings of alienation and fear from the victimization are intensified.

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79 Id. at 592.
80 Id. at 590.
82 Id.
83 Id. at 2933-44.
84 Id.
85 Id.
An additional stressor is that of language.\textsuperscript{85} Court language may be terrifying to a young child who does not have fully developed language abilities, and this will therefore magnify already existing anxiety.\textsuperscript{97} A large number of professionals are involved in the process of helping the child, involving multiple interviews and reports from child protective services and education officials. This too will often add to the juvenile’s fear that he or she is the one under investigation\textsuperscript{86}.

Among some of the more stressful events in the child’s judicial experience are testifying in court, waiting to give their testimony, fear of continued family abuse and just being at the courthouse itself.\textsuperscript{87} Having to give repeated testimony along with an abrasive cross-examination have been linked to a higher risk of trauma for the child, the distress from this carrying over into adulthood.\textsuperscript{88}

A study done in Australia showed that children who were interviewed after a cross examination that often took hours or days described it as “horrible,” “confusing” and “upsetting,” and many felt that they were being told that they were untruthful in their testimony.\textsuperscript{101} The combination of all stressors involved may lead to a ‘secondary victimization’ for these children.\textsuperscript{89}

\textsuperscript{85} Id. at 2944.
\textsuperscript{97} Id. at 2943.
\textsuperscript{86} Id. at 2943-56.
\textsuperscript{87} Id.
\textsuperscript{88} Id. 101
\textsuperscript{89} Bas van Stokkom, \textit{Victims’ Needs, Well-Being, and ‘Closure’: Is Revenge Therapeutic?} at 4467 in \textit{THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES}.
\textsuperscript{103} See Tali Gal and Vered Shidlo-Hezroni, \textit{Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims} at 3156.
B. Avoiding the negative

Because crime victims in general have benefited greatly from the therapeutic benefits of restorative justice, therapeutic jurisprudence is calling out for the further use of restorative justice with child victims. Although there are no studies that specifically focus on restorative justice for children, the majority of victims who have attended restorative justice conferences have shown significantly positive outcomes. If children are allowed to actively participate in restorative justice programs, the outcomes have been significantly better than those results from other restorative practices for the victim that are currently in place.

Psychological support prepares the victim for trial, and it is also highly important that the victim obtain as much healing as they can before trial so that they are well "girded up," for the trial process, especially cross-examination. This healing-before-the-trial process takes into consideration that the trial will entail yet another painful ordeal that the child must face on top of the pain of the crime.

\[90\] Id. at 3169.
\[91\] Id.
\[92\] See Diesen, supra note 88, at 592.
\[93\] Id.
However, Diesen strongly recommends additional research in order to identify and adequately treat abuse.94 This, combined with consistency in application will allow social services to identify those cases that need police investigation prosecution.95

C. Forgiveness as the Greater Good

“The weak can never forgive. Forgiveness is an attribute of the strong.”96 Crucial to the healing of the wounded and their re-entry to society is compassion and forgiveness of the wrongdoer.

Sue Burrell, Staff Attorney for The Youth Law Center in San Francisco, California reflects on the case of Richard Thomas, a case of lost opportunities. Sixteen year-old Thomas was convicted to a seven-year prison sentence in a California adult court for setting fire to eighteen year-old Sasha Fleischman’s clothing while she was asleep on a bus. Fleischman identifies as an “agender,” someone who is neither male nor female, and Thomas was charged as an adult by the Alameda County District Attorney's Office for the hate crimes of assault and aggravated mayhem. This horrible incident left Sasha with third degree burns and hospitalization for several weeks. Juvenile court was not considered in the charging decision, instead our criminal justice system’s automatic push to imprison Thomas inexorably kicked in.

94 See Diesen, Therapeutic Jurisprudence – an Introduction from a Swedish Perspective at 146.
95 Id.
Thomas’ act, though horrible, was still that of an impetuous and immature teenager. Juvenile courts are the avenues to deal with disturbing but still childish actions. The best of kids can be cruel and thoughtless on occasion, and to Richard, it may have seemed like something he did to make himself feel better by making fun of someone who was so different. A moment of foolishness for a lifetime of regret.

This case could have been a lighthouse for restorative justice between criminals and victims if our system had allowed it. Richard felt horrible about what he had done in a moment of senselessness and quickly wrote Sasha an apology letter coupled with a public expression of shame and repentance. Amazingly, Sasha’s family was also open to a mutual and public healing process with their objective to see restoration for both young people. Sasha’s mother even went to the District attorney to request a restorative justice process, but was refused. She also gave a media statement expressing the pain that they all felt for Richard and his family, strongly maintaining that it was a childish impulse that drove Richard, stating that, “A 16-year-old’s actions – however severe the results – don’t have any place in the adult judicial system.”

While far from perfect, the juvenile system provides accountability and individual services to the offender. They must receive full educational services, as well as individualized treatment according to their particular needs with the goal in mind of allowing the juvenile offender to grow up to move forward successfully after incarceration.

Further, there is restorative justice in many juvenile courts that brings victims together with the perpetrator and with those in the community who have peripherally
suffered from his actions. Bringing the perpetrator face-to-face with the victim is crucial to the victim’s healing, as the victim may discuss the harm they have suffered and have a hand in their reparation. This accountability focuses on the victim and the community and allows the youthful perpetrator to see the victim as another human, not a depersonalized object.

In the case of Richard, he will be housed in a juvenile facility until he turns eighteen and then sent to the overcrowded California prison system, which has problems providing adequate health and mental care for inmates. Richard will then be with criminally established inmates twenty-four hours a day, a hideous prospect for someone with no record other than one youthful, albeit awful, incident. The perpetrator may become the victim in this environment. He will not have parental guidance to assist him in the learning process of exercising good judgment and responsibility. All said and done, he will most likely have further contact with the criminal justice system as a repeat offender adult.

Sasha is now a college student at MIT who has the good sense to understand that what Richard did was a senseless act. Yet she says that she does not want Richard to be judged too harshly, knowing that teenagers can do crazy things. She asks, “Why can’t our justice system recognize this?”

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What happens when a victim’s family want to spare their son’s killer the death penalty?

Victims’ rights have been seen as a system that makes sure the victim is seen, heard, and that justice is done towards the offender. But the Autobees’ are examples of mercy extended through a personal healing process. The Autobees’ chose to see their son’s death at the hands of Edward Montour through a therapeutic lens that would bring healing to them as well as to their son’s murderer.

Edward Montour, a mentally ill prison inmate, killed Eric Autobee, a Colorado corrections officer, in 2002 in a prison kitchen. Montour pled guilty and was sentenced to death, but the sentence was overturned after a United States Supreme Court ruling that judges acting without juries could not impose death sentences. A trial judge overturned Montour’s conviction and allowed him to withdraw the guilty plea. A new trial was ordered with Montour stating that he would re-plead guilty if he could have a life sentence without the possibility of parole instead of the death penalty. George Brauchler, the Arapahoe County District Attorney in Colorado, refused.

And then the Autobee family came forward to plead for their son’s killer. While initially supporting the death penalty, they had time to reflect after the first trial and realized that their own healing process included pleading for life imprisonment for Montour instead of capital punishment. They implored Brauchler to relent, but he again refused and proceeded toward the death penalty, stating that Colorado victim rights don’t apply to “aggravating factors” during sentencing. He stated that the Autobees’ attempt to
mitigate the sentence was not within their “rights,” and fought long and hard against the Autobees’ desire to glean some restorative justice from a tragedy.

However, Eric’s father, Bob Autobee, realized that Eric’s legacy of warmth, love and forgiveness could overcome their initial feelings of vengeance and violence toward Montour. They realized that living in hatred would not serve restorative justice and give them closure, but forgiveness would, and this forgiveness included minimizing Montour’s penalty.⁹⁸

D. Pathways to Healing

There is probably no checklist that once accomplished will allow for complete healing or the victim. But Bruce J. Winick has some suggestions that may promote the process.⁹⁹

First responders need to be adequately trained to immediately recognize and treat victim needs.¹⁰⁰ A recently traumatized victim may be in extreme shock and be terrified of re-victimization.¹⁰¹ An understanding of what they have been through and empathy

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¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*
are crucial instead of blame or repression.\textsuperscript{102} The victim needs to re-establish equilibrium and gain control over their lives and to accomplish all of this, everyone within the criminal justice process should be highly trained in restorative justice to make them aware of victim needs at all stages of healing.\textsuperscript{117}

Additionally, child victims had positive responses at conferences when they were made aware of their surroundings, prepared, and greeted and acknowledged at the beginning of conferences.\textsuperscript{103} Respectful treatment and involvement in the decisionmaking processes combined with an apology by the offender were greatly beneficial, as were the skills of conference facilitators.

To further promote the victim’s healing, everyone involved in the legal process should be trained in the social and psychological services in order to increase sensitivity to the victim’s particular needs.\textsuperscript{104} Winick states that the community is again key in the

\textsuperscript{102} Id.
\textsuperscript{117} Id.
\textsuperscript{103} See Tali Gal and Vered Shidlo-Hezroni, Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims at 2906.
\textsuperscript{104} See Bruce Winick, Therapeutic Jurisprudence and Victims of Crime, at 4.
role of helping the victim, and he encourages the courts to have social workers “on demand,” if quick intervention is necessary.\textsuperscript{105}

Learned helplessness is also a by-product of a crime victim, and so court proceedings should encourage victim empowerment instead of a sense of loss of control.\textsuperscript{106} Courts further need to take responsibility to make sure that the victim knows that they are not responsible for what they did and teach them how to avoid further victimization.\textsuperscript{107}

Post-traumatic stress disorder is a very real problem.\textsuperscript{123} All involved in the legal and healing processes need to encourage the victim need to keep talking about their feelings over the assault.\textsuperscript{108} Intake and processing forms should encourage the victim to write down these feelings.\textsuperscript{109} For those who are challenged in writing due to language or literacy barriers, or hesitant about writing down what happened to them at intake, the court should design appropriate forms or have a court official fill them out for the victim.\textsuperscript{110} Writing out the incident serves a dual purpose: improving legal proceedings in future cases and sharing victim pain with others who have been assaulted to help them in

\textsuperscript{105} \textit{Id.} at 4-5.


\textsuperscript{107} \textit{Id.} at 7.

\textsuperscript{123} \textit{Id.} at 5.

\textsuperscript{108} \textit{Id.} at 5 (citing J.W. Pennebaker, \textit{Opening Up: The Healing Power of Confiding in Others} (1990)).

\textsuperscript{109} \textit{Id.} at 5.

\textsuperscript{110} \textit{Id.}

\textit{Id.}
their restoration process.\(^\text{111}\) Police and court officials encouraging the victim to tell their story and to testify about what happened in court can lead to a healing effect.\(^\text{112}\)

However, the victim’s fear and anxiety at the thought of facing the perpetrator in the courtroom may cause the victim to relive the trauma.\(^\text{113}\) The legal system can suggest other options, such as videotaping or closed television.\(^\text{114}\)

The victim’s distress level is often elevated by our legal system, which is geared to protect the rights of the accused whose liberty is at stake.\(^\text{115}\) Victim’s rights often go by the wayside and the victim can view the criminal process as a humiliating experience that strips the victim of dignity and disallows them from any sort of input in the defendant’s charging or sentencing.\(^\text{116}\) Winick stresses the fact that although defendant rights will sometimes predominate over those of the victim, more attention needs to be given to the victim.\(^\text{117}\) Court procedures could well prove to be a further victimization if consideration is not shown throughout the proceedings.\(^\text{134}\)

Winick further states that in looking at the psychology of procedural justice, when the victim is treated with fairness and are allowed to participate at all levels of

\(^{111}\) at 6.  
\(^{112}\) Id.  
\(^{113}\) Id.  
\(^{114}\) Id. at 7.  
\(^{115}\) Id.  
\(^{116}\) Id.  
\(^{117}\) Id.  
Id.  
Id.  
Id.
proceedings, they are much happier with the court proceedings, even if those proceedings end up with an unfavorable decision towards the victim.\textsuperscript{135}

It would appear that a sense of “voice” and having their feelings validated are crucial to restoration.

\textbf{E. Revenge as Restorative Justice, or as Payback?}

Can revenge restore the victim? The bottom line is that although temporary relief may be had for the victim, revenge prevents healing.\textsuperscript{118}

The irony of therapeutic jurisprudence is that it relies on a justice system that is inherently anti-therapeutic. Retributive justice works against the aim of restorative justice.\textsuperscript{137} One aims high at the healing of all parties, while the other has historically aimed at punishment, therefore, the victim’s restorative goals may not be in line with the legal system’s agenda of judgment and justice.\textsuperscript{119} The amazing benefits of therapeutic

\textsuperscript{118} Bas van Stokkom, \textit{Victims’ Needs, Well-Being, and ‘Closure’: Is Revenge Therapeutic?} at 4413 in Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives. \textsuperscript{137} \textit{Id.} at 4444-63.

\textsuperscript{119} \textit{Id.}
jurisprudence and all its healing elements may be a complete disconnect with the adversarial system’s criminal procedures.\textsuperscript{120}

Western legal systems have traditionally practiced retribution as opposed to revenge.\textsuperscript{121} Retribution has a set of principals and limits as administered with no personal tie to the victim.\textsuperscript{122} Revenge, however, takes it personal, and the meting out of punishment often allows the victim to take pleasure in the suffering of the perpetrator.\textsuperscript{123} The pleasure intrinsic in retribution is that of justice being done.

\textsuperscript{120} Id. \\
\textsuperscript{121} at 4506. \\
\textsuperscript{122} \\
\textsuperscript{123} at 4524. \\
\textit{Id.} \\
\textit{Id.} \\
\textit{Id.}
However, vengeance in our justice system is often seen as the “undoing of evil,” and a way of setting the record straight.\textsuperscript{124} Humanity has an instinctive switch that gets flipped when we are wronged and we reflexively experience a need to “get even.” Many consider vengeance to be at the core of our justice system, and it does appear to have a moral affect. The ennobled wronged and wounded victim stands up to assert self-respect and righteous anger against the villainy of the criminal.

However, vengeance can become an obsession that can bring great harm to the one seeking revenge as well as to others.\textsuperscript{125} The crusading “revenger” may escalate the drive to pay back the offender, leading to a Shakespearean Montague and Capulet mutual retaliation where neither side gives up on the payback.\textsuperscript{126}

Further, a major moral objection is that the victim takes satisfaction in forcing the perpetrator, possibly now turned victim, to suffer.\textsuperscript{127} Philosopher Trudy Govier stated that this use of suffering is only a means to an end for the original victim, while actually only destroying self-respect and self-worth.\textsuperscript{128} The original victim is now on the same level as the offender with no true restorative justice accomplished for either side.\textsuperscript{148}

\begin{flushleft}
\textsuperscript{124} Id. at 4527. \\
\textsuperscript{125} Id. \\
\textsuperscript{126} Id. \\
\textsuperscript{127} Id. at 4542. \\
\textit{Id.}
\end{flushleft}
Govier states that because morality is based on our responsibility to others and an obligation to treat all humanity with respect, the desire for retaliation and vengeance is necessarily iniquitous. To cultivate revenge is to cultivate evil within us, thus perpetuating further malicious action.

In 1983 in a classic study on retribution, Susan Jacoby maintained that revenge was still taboo in Western culture. However, in our time the revenge taboo has been considerably weakened. Revenge feelings have seen a resurrection in politics, corporations, and the legal profession. Emotions such as anger, resentment, and revenge have been resuscitated and given a societal stamp of approval. The victim is a

\[\text{129 Id. at 4542.}\]
\[\text{130 Id.}\]
\[\text{132 Is Revenge Therapeutic? in THERAPEUTIC JURISPRUDENCE et. al., at 4557.}\]
\[\text{133 Id.}\]
\[\text{134 Id.}\]
\[\text{Id.}\]
stronger voice that is no longer faceless and nameless, and the media has proclaimed the truths and needs of the injured ones.\textsuperscript{135}

In line with therapeutic trends, the victim is further encouraged to voice all troubled feelings, even if these are somewhat exaggerated.\textsuperscript{136} This person is now a banner for public retribution and public support because retribution is sought on their behalf.\textsuperscript{137} Lawyers and victim advocates maintain that only the toughest penalties will show the victim that he is being taken seriously by the criminal justice system.\textsuperscript{138} And a failure to administer the toughest of penalties to an offender is often viewed as a devaluation of the victim and a further infliction of pain.\textsuperscript{159}

\textsuperscript{135} \textit{Id.} at 4557-68.
\textsuperscript{136} \textit{Id.} at 4568.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{159} \textit{Id.}
drive the community to rage and castigatory desires. And when a victim realizes that the offender may be a vulnerable victim him or herself, the victim may feel a sense of disappointment lending itself to payback. Thus, a withdrawal from the harshest penalty toward the victimizer may feel like the cruelest of insults.

Such zeal for reprisal manifested more acutely in the ‘ninety’s when victim groups embraced the more therapeutic avenues of “closure” and “healing.” The term “closure” has become the catchword for victims’ rights movements and has been used extensively as justification for harsher penalties. Franklin Zimring a lawyer with the University of Chicago and a Director of the Center for Studies in Criminal Justice stated that the death penalty is an example of a policy that serves victim’s interests of promoting healing and justice. Zimring states that the death penalty offers closure and is viewed as a service to the victim. It administers a positive impact with which the community may identify. Not quite the intent of restorative justice which seeks restoration

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139 Id. at 4566.
161 Id.
140 Id. at 4578.
141 Id. at 4583.
164 Id.
166 Id.
between all parties, Zimring offers the thought that the greater the suffering visited on the offender, the more healing experienced by victim, their loved ones, and the community.\textsuperscript{143} As Judith Kay points out, capital punishment as revenge is instead meted out as part of survivor therapy, stating that relatives of the victim who oppose the death penalty did not truly love the deceased victim.\textsuperscript{144}

The good news is that many are truly troubled by the language of revenge.\textsuperscript{145} Families of the victim state that capital punishment did not bring further peace or closure but rather prolonged their grief.\textsuperscript{146}

A recent study found that victim movement is truly leading to the more therapeutic restorative justice approaches to healing and closure.\textsuperscript{147} California’s Proposition 8 pushed to limit victim rights and liberties in order to restore the humanizing of criminal

\begin{flushleft}
\textsuperscript{143} Id.
\textsuperscript{145} Is Revenge Therapeutic? \textit{in THERAPEUTIC JURISPRUDENCE} et. al., at 4590.
\textsuperscript{146} Id.
\textit{Id.}
\end{flushleft}
offenders.\textsuperscript{148} The proposition encouraged a view of victim worthiness balanced against the view of a degraded criminal offender.\textsuperscript{173}

Revenge is clearly not the total focus all victims.\textsuperscript{149} Many victims just want to move on and revenge does not accomplish this, it simply perpetuates the issue.\textsuperscript{175}

VI. THROUGH THE SYSTEM: THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

The move toward restorative justice within the realm of therapeutic jurisprudence is spreading throughout our world. The Domestic Violence, Crime and Victims Act of 2004 is a criminal justice Act that amends Part 4 of the Family Law Act, 1996, the Protection from Harassment Act, 1997, and the Protection from Harassment (Northern Ireland) Order of 1997.\textsuperscript{150} The ultimate goal of the United Kingdom’s Domestic Violence Crime and Victims Act of 2004 is to provide for the victims of homicide while making common assault an arrestable offense.\textsuperscript{151} It targets victims of crime, particularly those of domestic violence, and attempts to offer enhanced legal protection and

\begin{flushleft}
\textsuperscript{148} Id.
\textsuperscript{173} Id.
\textsuperscript{149} Is Revenge Therapeutic? in THERAPEUTIC JURISPRUDENCE et. al., at 4603-11
\textsuperscript{151} Id.
\textsuperscript{151} Id.
\end{flushleft}
assistance. Among its many changes, it allows for new rules in place for trials where children are concerned, permits bailiffs to use force when necessary to enter homes, and is opening the door for further reforms throughout the United Kingdom.\textsuperscript{179}

Whatever mode of healing the victim chooses – confrontation of the perpetrator, attempting to restore the wrongdoer, the less effective and more harmful option of revenge, and many other avenues - restorative justice is carving out a pathway for both victim and offender to pursue healing.

\textsuperscript{152} \textit{Id.}

\textsuperscript{179} \textit{Id.}