

VICTIM PARTICIPATION AND THERAPEUTIC
JURISPRUDENCE:
A CANADIAN PERSPECTIVE

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Jo-Anne Wemmers, Ph.D.
Research Group Victimology and Restorative Justice
International Centre for Comparative Criminology
Université de Montréal
jo-anne.m.wemmers@umontreal.ca

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ABSTRACT

Research with crime victims suggests that victims seek participation and recognition in the justice system (Shapland et al, 1985; Kilchling, 1995; Wemmers, 1996; Erez 1999). However, victim participation in the criminal justice system is a point of debate among scholars (Ashworth, 1993; Erez, 1999). Participation can take various forms: it can mean an active decision-making role or merely consultation and consideration (Edwards, 2004; Wemmers and Cyr, 2004). In addition, there is the question of how victims are affected by their participation. While victims in Canada are currently by and large excluded from the criminal justice process, their being outside the system does, to some extent, shelter them from the offender. This raises the question: when is participation helpful or therapeutic for victims and when is it harmful or anti-therapeutic? Based on interviews with public prosecutors and victim support workers in the province of Quebec, this study explores the similarities and differences in the perceptions of these two key groups of professionals. Both prosecutors and victim support workers can be considered victims' allies in an adversarial justice system and the study reveals important similarities as well as differences between the two groups with respect to their perceptions of victim participation.

Keywords: victim participation, therapeutic jurisprudence, criminal justice

Introduction /literature

For decades victimologists have been telling us that victims want to participate in the criminal justice system. However, just how victims want to participate and the consequences of their participation in the criminal justice system have been and continue to be fervently debated (Ashworth, 1993; Erez, 1999; Edwards, 2004). Some authors emphasize the balance of rights between victims and the accused and believe that victim participation encroaches on the rights of the accused (Ashworth, 1993; Roach, 1999). Others argue that law is a social force that affects people's lives and emphasize the impact of laws and legal procedures on the individuals that they touch (Austin and Tobiasen, 1984; Wexler and Winnick, 1991). Authors such as Wexler and Winnick (1996) and their model of *therapeutic jurisprudence*, and Sherman (2003) with his model of *emotionally intelligent justice*, are examples of what can be called a growing movement to recognize the impact of legal intervention on the emotions of victims, offenders and communities.

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Therapeutic jurisprudence:

Therapeutic Jurisprudence views legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) as social forces that produce behaviours and consequences, which are sometimes therapeutic and sometimes anti-therapeutic for the persons affected by the law (Wexler and Winick, 1991 ; Wexler and Winick, 1996; Winick, 1996; Winick, 2000). This approach draws our attention to the emotional and psychological side of law and the legal process. It is not a theory but a way of looking at the law. Therapeutic jurisprudence calls for the study of these consequences in order to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, while enhancing its therapeutic effects, without subordinating due process and other justice values (Winick, 1996).

According to this approach, lawmakers and those who apply the law must be aware of its effects on the mental health of those involved (Wexler and Winick, 1991; Winick, 2000). When insensitive reactions by authorities augment victims' suffering, this is referred to as secondary victimization (Symonds, 1980). As Herman (1992) points out, a court of law is particularly effective for provoking intrusive post-traumatic symptoms. However, satisfaction with the criminal justice system has been found to be positively associated with post trauma adjustment among victims of violence (Byrne, et al, 1996). Several authors suggest that fair procedures may be therapeutic (Waldman, 1998; Wexler and Winick, 1991). In other words, when victims feel that they have been treated fairly, this would help their recovery from their victimization.

Just how legal actors and procedures affect victims, is addressed by Procedural Justice Theory. According to this theory, fairness is important because it communicates to people that they are valued and respected members of their group (Van de Bos, et al., 2001). Wemmers (1996) has established the relevance of procedural justice for victims of crime and found that victims' fairness judgements affected their faith in the criminal justice system. In particular, when victims felt that police and public prosecutors had shown an interest in them, had given them an opportunity to express their wishes and had taken their wishes into consideration, victims were more likely to feel that they had been treated fairly (Wemmers, 1996). Because of the message

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procedures send to participants about their standing in the group fair procedures impact victims' healing or recovery (Tyler and Lind, 1992; Wemmers and Cyr, 2005).

Victim Participation

What is victim participation? The victimological literature distinguishes between two types of victim participation, namely active participation where the victim has decision-making power and passive participation where victims have no power over decisions but are consulted and informed of the developments in their case (Wemmers, 2003). Edwards (2004) identifies four types of victim participation. The first type of participation that Edwards distinguishes is *control*. According to Edwards, control implies that criminal justice authorities are obliged to seek and apply the victim's preference. This type of participation is essentially the same as active participation where the victim is the decision-maker. Edward's second type of participation is *consultation*. This type of participation obliges criminal justice authorities to seek and consider victims' preferences. Consultation coincides with what is also referred to as passive participation. The third type of participation identified by Edwards is *information provision*, in which authorities are obliged to seek and consider victim information. According to Edwards, this type of participation obliges victims to supply information and does not give them an option. This type of participation is essentially the role of the witness in criminal justice: victims are obliged to testify if requested. Edward's fourth type of participation is *expression*. Here, victims have the option of supplying information or expressing emotions and authorities are obliged to allow victim expression but they are not obliged to consider it.

Victim participation of some kind is now a requirement of legal proceedings according to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), the Council of Europe Recommendations for Victims of Crime (R (85) 11) and more recently, the Council Framework Decision of the European Union (2001/220/HA). The latter is a binding decision which requires that member states ensure that victims have a real and appropriate role in its criminal legal system (Art. 2) and safeguard the possibility for victims to be heard during proceedings (Art. 3). However, these instruments are written in abstract terms in order to apply to a variety of legal systems and thus, they fail to specify exactly what victim

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participation means. In its simplest form victim participation gives victims a voice or an expressive role, while in its most elaborate form, victim participation gives victims a role in decision-making. Following these recommendations and decisions enunciated by the various international and national organizations, the right for victim participation is no longer questioned. As Sanders et al. (2001) assert, victim participation is here to stay. The question is, however, how should victims participate?

Canadian Criminal Justice

Before presenting the study, we need to briefly describe the Canadian criminal justice system and victims' role in it. Canada shares the common law legal tradition. In common law, victims are essentially witnesses to a crime against the State. Outside of their role as a witness to the crime, Canadian victims have no special legal standing. The criminal trial is an adversary procedure, which pits the State against the accused. The State has the task to prove beyond a reasonable doubt that the accused committed the crime for which he is accused. In practice, most cases are plea-bargained. This means that the State, or the Crown as it is called in Canada, will reduce the charges in exchange for a guilty plea by the accused.

Should the case go to trial, the victim may be called upon to give testimony. Victims do not have a choice when it comes to testifying. They are either called upon by the Crown or by the defence and should they be requested to give testimony, they are legally obliged to comply. Moreover, when testifying, victims are not at liberty to say whatever they want. Instead, they are expected to reply to the questions that are asked of them. They cannot refuse to answer a particular question and they cannot include information that they think is important unless it is asked of them.

The word victim did not enter the Canadian Criminal Code until 1989 when legislation for Victim Impact Statements (VIS) was introduced (Laurin and Vien, 1996). The VIS is a written statement by the victim that is presented to the judge at sentencing. In a VIS victims may include information about the consequences of their victimization that they believe are relevant for the

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judge. Since they were first introduced at sentencing, VIS have been introduced at federal parole hearings, allowing victims at voice a multiple stages of the criminal justice system.

Besides the VIS, there are some other special provisions in the Code for witnesses who are also victims. However, these measures are only available for certain crimes such as sexual assault or when the victim is a minor. Available measures include publication bans protecting the identity of the victim and the mandatory legal representation of the accused when cross-examining the victim in order to ensure that the victim will not be directly questioned by the accused (Laurin and Vien, 1996; Wemmers, 2003). The VIS is the only available measure that is specifically intended to give victims' a voice in the criminal justice process.

The division of powers in Canada is as such that the Criminal Code is under federal jurisdiction. However, the provinces in Canada are responsible for the administration of justice and therefore the development and implementation of victim policy. Thus, law-making is done centrally by the federal government and its application is delegated to the provinces. In the province of Quebec, a victims Bill of Rights, the *Loi sur l'aide aux victimes d'actes criminels* was adopted in 1988. This law outlines victims' rights to information, reparation and support. The law specifies that victims have the right to be informed of their rights and of their role in the criminal justice system. Victims have a right to support, to be informed of the progress of their case and to present their views at appropriate stages of the criminal justice process. In 1995 the *Ministère de la Justice, Québec* introduced the INFOVAC program in order facilitate victim notification by the police and the courts.

In a recent study on victims' experiences in the Quebec criminal courts, Wemmers and Cyr (2006) found that victims were not systematically informed about the services available to them. Most victims were not asked by police if they wanted information about victim support and most did not know where to go for help or information. This might not be an issue if the victims in this study were not affected by their victimization, but almost three-quarters of respondents were victims of violent crime and most victims said that they were affected by the crime. In all, 45% of the victims who participated in the study showed symptoms of PTSD. Yet, almost half of the

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victims of violence said that they had not received information about the provincial compensation program. Not surprisingly, many victims were dissatisfied with the information they received about services and their dissatisfaction grew over time. In addition to the lack of information about services, most victims were not informed of the developments in their case. Almost all victims (91%) said that they wanted to be notified about the developments in their case. Over 70% of victims were dissatisfied with the information they received about upcoming court proceedings and their dissatisfaction grew over time.

With respect to VIS, Wemmers and Cyr (2006) found that most victims said that they had made a written victim impact statement. The victim impact statement was introduced in the Criminal Code in order to provide victims with a systematic opportunity to inform the court of the impact of the crime. While two-thirds of victims felt that the victim impact statement allowed them to say what was important, one-third felt that it did not. Victims were not particularly satisfied with the victim impact statement. When asked if they would submit a victim impact statement again in the future, one quarter said that they would probably not. Moreover, as their cases progressed through the criminal justice system, victims were less inclined to feel that the victim impact statement was important. These findings suggest that the victim impact statement is not satisfying victims' need for recognition and participation in the criminal justice process. This raises the question, when and how is victim participation therapeutic for victims.

The present study sought to better understand the potential for healing of victims of crime in the criminal justice system by examining victim participation and its perceived impact on victims. Further, it aimed to explore the similarities and differences with respect to the perceptions of victim support workers and Public prosecutors. Criminal justice professionals were interviewed to determine their views about victim participation in the criminal justice system and its impact on victims. Firstly, the study asks when is participation therapeutic and when is it anti-therapeutic for victims? Secondly, it looks at the different stages of the criminal justice process and asks which stages are particularly therapeutic and which as anti-therapeutic. Thirdly, it

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considers what could be done to make victim participation more therapeutic and less harmful for victims.

Method

As the influence of the criminal justice system on the process of victim healing has been relatively unexplored, a qualitative method was used for this study. The study explores the perceptions of actors in criminal justice actors with respect to victim participation. As this is an exploratory study, the samples do not need to be representative at a national level.

The study used in-depth interviews of the parties involved in legal proceedings, as well as the legal and allied professionals who interact with victims and who have first hand experience in observing or attending to participants' emotional reactions or needs. Thus prosecutors, defence lawyers, judges, and victim assistance personnel were interviewed about their experiences with procedures, legal decisions and remedies regarding victim input that have proved to be helpful, empowering and therapeutic and those that have had adverse or antitherapeutic effects on participants. Most interviews were conducted one-on-one, however, in one interview two victim support workers were interviewed together.

The interviews address the common therapeutic issues associated with participation. Questions about the difference in therapeutic effects between offence categories will be included in the interviews of the legal and allied professionals in the relevant jurisdiction. By including input from all the various professionals involved in proceedings, the research may identify previously unrecognized factors that enhance or detract from participants' welfare. Contingencies and circumstances of therapeutic and antitherapeutic effects are explored.

The interviews conducted in French and lasted on average 90 minutes. The quotations presented in this paper were translated by the researcher for the purpose of this paper.

Recruitment

Professionals who participated in the study were recruited in the geographical area of Quebec. A request was made to the local authorities and professional organizations in the greater Montreal area for their collaboration with the study (e.g. the chief judge in Montreal, Quebec was approached to encourage judges in her court to participate in the study). When this did not lead to sufficient volunteers, professionals were approached on an individual basis and invited to participate. In all, 3 judges, 3 defense lawyers, 8 prosecutors and 11 Victim Support workers were interviewed. Despite our efforts, we had great difficulty in recruiting judges and defence lawyers. Saturation of the data was not reached for these two groups making the findings with respect to these two groups inconclusive. We were, however, able to recruit a sufficient number of prosecutors and Victim Support workers. Hence, this paper focuses exclusively on the data gathered from prosecutors and Victim support workers.

The Sample

Among the 11 victim support workers who were interviewed, two were directors of victim support offices and nine were victim support workers. Three people interviewed were male and the eight were female. Their years of experience varied from one and a half to thirteen years. The average number of years of experience for the sample was five and a half years. All of the respondents worked in victim assistance offices (*Centre d'aide victimes d'actes criminels, CAVAC*) in the province of Quebec: four worked in the city of Montreal, five in the Laval and one in Longueuil.

The eight public prosecutors who were interviewed had on average 21.6 years of experience, the minimum number of years of experience was three and the maximum was 33 years. In all, four were female and four were male. All of the respondents worked as Crown prosecutors in the province of Quebec: three worked in Montreal, two worked in Laval and three worked in Val d'or.

Data Analysis

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Interviews were taped and transcribed verbatim, then subject to coding in a manner of grounded theory. Data analysis was a two-step process: 1) the categorization of the data and 2) the quantitative treatment of the data. In the first step, common themes and variations in participating victim support workers' and public prosecutors' were identified and analysed. In the next step, the number of times that each theme appeared was tallied. Thus, the findings provide an overview of the principle themes that emerged from the data and their relative importance.

Results

Things found to be therapeutic for victims who participate in the criminal justice system

Victim Support

When Victim support workers were asked what they had found to be therapeutic for victims who participated in criminal justice proceedings, they mentioned a number of different things that they felt were therapeutic for victims who participate in criminal justice proceedings. Their responses touched on three general themes: respect and recognition; support and information; and regaining control. What's interesting to note is the variety in their responses and that no one position dominated.

Respect and recognition

Eight victim support workers mentioned that, in their experience, signs of recognition and respect for the victim had a therapeutic affect on victims. Essentially, respect and recognition means that victims feel that they have been listened to and that people heard what they had to say and believed them.

" Being heard. Being recognized as a victim.." ENT16-CAVAC6

" ...it means to be treated with respect, to be listened to by the prosecutor and the police, to be understood, to give time to the victim" ENT13-CAVAC4

".. to be believed.... Their biggest fear is that they won't be believed" ENT9-CAVAC2

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Support and information

The second theme centres on the support and information that is offered to victims by those working in the criminal justice system. It's about officials taking the victims in hand, informing them about what is happening and being there for the victim. The responses of six of the ten victim support workers that were interviewed fall under this theme.

"...To prepare the victims... Information is the basis. After that what is therapeutic is being accompanied by someone, either a victim support worker or friend. It's feeling that your are taken into consideration, that you have a role to play ..." ENT14-CAVAC5

" when the police investigators are supportive ..." ENT6-CAVAC1a

..." coaching..." ENT17-CAVAC7

Regaining control

Three victim support workers said that they had found victim participation to be therapeutic when it allowed victims to take back a sense of control over their lives.

"... For me it's personal pride, to have completed the process,...to have fought.... To (re)affirm one's self" ENT9-CAVAC2

" To take back control from their aggressor.... The person was violated and lost a certain control over their life and it's this that we can give it back to them " ENT21-CAVAC11

Public prosecutors

When the public prosecutors were asked what they had found to be therapeutic for victims, they mentioned three general themes: respect and recognition of the victim, voice or speaking out and sentencing.

Respect and recognition

Five public prosecutors gave examples based on their experience, which essentially reflected respect and recognition of the victim. While their responses vary in terms of the concrete act, they all emphasize validation or recognition of the crime victim.

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"I have never yet met a victim who did not appreciate meeting with the prosecutor" ENT2-PROCUREUR1

" To be believed is therapeutic" ENT7-PROCUREUR4

"When charges are laid" ENT4-PROCUREUR2

Voice

Four of the eight of the public prosecutors that were interviewed mentioned the therapeutic effects of speaking out about what happened to them. Voice was considered cathartic at any stage in the criminal justice process: from reporting the crime to the police to delivering a victim impact statement at sentencing.

"to express one's self at sentencing regarding the consequences of the crime" ENT8-PROCUREUR5

"Reporting the crime to the police" ENT4-PROCUREUR2

"Often it's just telling us their story" ENT11-PROCUREUR7

Sentencing and compensation

Three public prosecutors said that they had found that outcomes could be therapeutic for victims. These respondents stressed the importance of punishment of the offender and compensation of the victim.

"What also helps, when one is able to assess the damages, is to be reimbursed for any damages" ENT2-PROCUREUR1

"In my opinion, it is to express one's self and to see the individual punished for the acts they committed..."ENT10-PROCUREUR6

"To have followed the criminal justice process to the end and then have the judge give a reasonable sentence that he explains to the accused and to the victim. This person will leave the court feeling that the system works and that can be therapeutic." ENT5-PROCUREUR3

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A comparison of the responses by victim support workers with those by public prosecutors shows that both groups acknowledge that respect and recognition are therapeutic for victims who participate in criminal justice proceedings. These two groups of professionals differ, however, on everything else that they consider therapeutic. Victim support workers view victim participation in terms of victim empowerment: the victim regaining control. They also consider support and information from criminal justice authorities as something that is therapeutic for victim who participate in the criminal justice system. Prosecutors, however, emphasize voice or expression as something that they consider therapeutic for victims as well as sentencing and compensation.

Things found to be anti-therapeutic for victims who participate in criminal justice proceedings

Victim Support

When victim support workers were asked to indicate what they had found to be anti-therapeutic or harmful to victims who participate in the criminal justice system, their responses centred on two themes: a lack of recognition and respect as well as testifying and cross-examination.

Lack of recognition and respect

Eight of the ten victim support workers interviewed, mentioned how victims were treated by authorities as anti-therapeutic. Many focused on the lack of recognition and respect towards victims.

"to not be heard" ENT14-CAVAC5

" to not be believed..." ENT18-CAVAC8

"To not be consulted... to not have things explained to them" ENT20-CAVAC10

Another facet of disrespect is indifference. Four victim support workers mentioned the indifference or lack support for victims within the criminal justice system as anti-therapeutic

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"The indifference of the justice system.... The police tell the victim that if anything happens they will contact her. But it doesn't happen like that. They give the victim false information, which leads to a feeling of injustice." ENT16-CAVAC6

"They call the police but they don't feel believed... They don't feel safe. They don't feel supported at all. They are left in fear. Completely terrified. As a result they lose faith in authorities" ENT18-CAVAC8

Testifying and Cross-examination

Three respondents mentioned testifying and cross-examination during the trial as anti-therapeutic with respect to victim participation.

"Cross-examination... they feel guilty... like they are accused... especially when the accused represents himself..." ENT17-CAVAC7

"...Testifying in court. ... Not necessarily the cross-examination, just the questions, re-telling what happened in front of a room full of strangers.....They are very much afraid and then they are ordered to testify" ENT21-CAVAC11

Public prosecutor

When public prosecutors were asked about what they had found to be anti-therapeutic for victims who participate in the criminal justice proceedings, like the victim support workers, they mentioned cross-examination and confrontation of the victim as well as a lack of recognition and respect.

Cross-examination and confrontation

Seven of the eight prosecutors that were interviewed, mentioned the cross-examination as something they had found to be anti-therapeutic for victims who participate in criminal justice proceedings.

"It's unfortunate but it is necessary in the search for the truth. It's when they are cross-examined by an adept defence lawyer, who is there in order to uncover any contradictions It is one of the elements behind victims' decision to not report the crime to the police.. " ENT7-PROCUREUR4

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"When victims are cross-examined a long time, that can be very painful" ENT8-PROCUREUR 5

Lack of recognition and respect

Five prosecutors mentioned the poor treatment of victims by authorities as anti-therapeutic.

"The worst thing for victims is the way that they are treated or mistreated by the justice system. One often has the impression that they came for nothing, that no one takes care of them.... treating victims like suspects " ENT2-PROCUREUR1

"..To be misinformed... a poor comprehension of the criminal justice procedure " ENT4-PROCUREUR2

One prosecutor mentioned the negative attitudes toward victims held by some professionals:

"Sometimes the lack of empathy from the police who are the first response workers to come into contact with victims. Often you hear victims say that their (the police) attitudes were not appropriate, that they (victims) didn't feel listened to or believed... " ENT12-PROCUREUR8

Unlike, their responses to what is therapeutic for victims who participate in the criminal justice system, victim support workers and public prosecutors generally raise the same issues with respect what is anti-therapeutic for victims. Both groups of professionals mentioned the lack of recognition and respect and cross-examination as being anti-therapeutic. However, public prosecutors mention cross-examination more often than victim support workers do, while victim support workers more often mentioned a lack of recognition and respect as anti-therapeutic.

Therapeutic Phases in the Criminal Justice Process

Victim Support

When victim support workers were asked what phases of the criminal justice process they had found to be most helpful for victims, they either identified a particular moment in the criminal justice process or they felt that there was no phase that was particularly therapeutic. When

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respondents identified a particular phase as therapeutic, they mentioned either reporting the crime to the police or the trial.

Reporting the crime to police

The most common answer given by victim support workers was that reporting the crime and denouncing their aggressor, was the most therapeutic phase in the entire criminal justice process. Seven of the ten victim support workers who were interviewed said that in their experience this particular phase was generally therapeutic.

"I would say reporting the crime to the police. After that, the victim is faced with so much stress that they often wonder whether they made the right decision to go to the police. However, I think that at least when they report the crime, in a crisis situation, I think that this helps them." ENT17-CAVAC7

"It really depends, but, in general, I would say when the police take the victim's complaint" ENT16-CAVAC6

The Trial

Two victim support workers said that it was the trial phase that was therapeutic. However, here too the respondents emphasized moments when the victim reasserted herself by telling her story.

"It's the trial.... When I consider the point of view of victims of sexual violence, it's testifying.... Each time, for her, it's as if it permits her to reassert herself with respect to what happened" ENT19-CAVAC9

"I think it's the trial, testifying.... It's first of all therapeutic for victims to take all of their courage, to prove to themselves that they are courageous and that they are capable. But it is also an opportunity to be tested, to be confronted with learning how they will react when face-to-face with their aggressor. To speak not only in front of their offender but also in front of strangers..." ENT18-CAVAC8

Not a phase but an attitude

Two respondents felt that no one stage was particularly therapeutic, but that it all depended on how things were done.

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"It's not a stage... it is how things are done... if the victim has the impression that they were treated with a minimum of courtesy, attention, respect... it's a question of attitude...." ENT 9-CAVAC2

"... any stage, it's about feeling that they are important. Being informed... They just want to be considered and be recognized" ENT21-CAVAC11

Public prosecutors

When the public prosecutors were asked which phases of the criminal justice process they found to be most therapeutic for victims, they mentioned two phases: the beginning and the end of the criminal justice process.

Reporting to the police

Like the victim support workers, most prosecutors felt that the initial denunciation by the victim to the police was the most therapeutic stage of the entire criminal justice process. Six of the eight prosecutors interviewed said that this had been their experience.

"It's reporting the crime to the police. To openly declare that they were the victim of a crime" ENT5-PROCUREUR3

"That begins at the beginning. When victims meet the police. " ENT2-PROCUREUR1

"The meeting with police.... really the first declaration. Then often, in general, it's certain that court is difficult, that re-awakens emotions. I think that reporting the crime for the first time, it is the first therapeutic step..." ENT11- PROCUREUR 7

The end of the criminal justice process

Two prosecutors felt that the end of the criminal justice process was the most therapeutic phase for victims.

"Starting at the end of the criminal justice process.... It (the criminal justice process) is part of a therapeutic process but it is not therapeutic." ENT10-PROCUEUR6

"Knowing that justice was done.... Finally being able to turn the page..." ENT12-PROCUREUR8

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Comparing the responses by victim support workers and public prosecutors, both groups of professionals identify reporting the crime as the most therapeutic phase. When victims assert themselves and publicly denounce their victimization, this is believed to be helpful for victims. However, unlike victim support workers, prosecutors do not mention the importance of attitude or how things are done. The question that was put to respondents does clearly ask about phases, which may explain why prosecutors only mentioned specific phases and did not talk about attitude. However, the same question was put to both groups of professionals and it is interesting to observe the differences between groups. It may be that prosecutors simply do not recognize the importance of attitude in the same way that victim support workers do. Another difference is that unlike public prosecutors, victim support workers do not identify the end of the criminal justice process as a phase that is therapeutic for victims. This is interesting given that victim support workers will often have contact with victims throughout the criminal justice process and see how victims feel when it's over.

Anti-therapeutic phases in criminal justice proceedings

Victim Support

When asked what phases they had found to be anti-therapeutic, the victim support workers gave a wide variety of responses. Overall, their responses fall into three major categories 1) certain phases of the criminal justice process 2) how things are done 3) unnecessary delays and inconvenience.

Specific phases

Eight of the ten victim support workers interviewed mentioned certain phases in the criminal justice process, which they had found to be anti-therapeutic for crime victims. However, there was little consensus on which particular phases were anti-therapeutic. A variety of phases were mentioned including arraignment (when the accused enters a not guilty plea), acquittal and cross-examination. Common to all of the phases mentioned, however, is non-validation of the victim.

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"There is the arraignment and then the sentence. The sentence because here in Quebec they are never harsh enough. And even then, there is not a sentence that can equal the victim's suffering. Arraignment because... the person just has to plea guilty or not guilty. If she pleads guilty, that means that if one reports the crime to denounce something, to speak before the judge, then that will not happen. In that case, that can be anti-therapeutic. But if the person pleads not guilty, then that too can be anti-therapeutic: 'How's that? He doesn't recognize what he did?'" ENT14-CAVAC5

"Well, it's cross-examination. There, all victims leave it feeling victimized. They were questioned, they were doubted, they were not respected... they relive the crime too..." ENT13-CAVAC4.

" When there is a violation of release conditions and the victim has to call the police. It is rare that something is done at that stage. That is disillusioning, a feeling of having been wronged, to no longer be taken seriously" ENT16-CAVAC6

"It's really the police investigation... As soon as they want to see the release conditions respected it starts to get tough....Because at one point the police make them feel like they are bothersome... Often detectives don't reply to messages..." ENT18-CAVAC8

"The preliminary inquiry, I would say. Because if the victim is called to testify she will have to testify. But that will not be the real testimony for the trial. I find that it is a stage that could easily be removed if one wanted " ENT6-CAVAC1a.

How things are done or perceived

Two victim support workers felt that there was not simply one phase that was particularly anti-therapeutic. Instead they emphasized how things were done and how they were perceived by victims.

"It's not any stage that is more or less positive or negative than the other. It is the way in which the process is experienced and perceived ... " ENT9-CAVAC2

"It's the attitude of the defence lawyers. One understands that it's their job but victims are affected by it.... Victims are always afraid of walking into the offender at the courthouse. The courthouse is cold and impersonal ... victims don't know what to do ... they arrive and wait and no one comes to talk with them." ENT6-CAVAC1a

Unnecessary delays and inconvenience for the victim

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Two victim support workers mentioned unnecessary delays and inconvenience as harmful for victims.

" ... there is one delay after another. There are many files that, unfortunately, are delayed by more than a year or even two years..." ENT19-CAVAC9

"It often happens that victims come to the court for nothing. ... it's discouraging... For example, a victim who received a subpoena two weeks earlier. Then she is anxious, she doesn't sleep because she is anxious about testifying. Then she waits at the courthouse for hours, only to be told in the end that she can come back in four months..." ENT6-CAVAC1a

Public prosecutor

When asked what they had found to be the most anti-therapeutic or harmful stage for victims, the public prosecutors mentioned different stages: cross-examination, plea bargaining and the sentence or verdict. However, their responses reveal that it is not so much one particular stage that is considered anti-therapeutic but victims' lack of understanding of the criminal justice process and how it works that causes them to interpret what is happening as a personal affront.

Cross-examination

Four prosecutors mentioned the cross-examination and with it, the confrontation with the accused and / or his lawyer as the most anti-therapeutic stage of the criminal justice process. Cross-examination is believed to be particularly painful because it can undermine the victim and suggest that he/she should not be believed.

" That would be the trial. The cross-examination to which victims must be subjected. The confrontation with the accused and his lawyer..." ENT12-PROCUREUR8

"It's the cross-examination that is often the worst. That lawyer has something to prove. He has to raise a doubt....." ENT5-PROCUREUR3

To be doubted

The idea of doubting the victim was raised by a second prosecutor as well. However, this time doubt was associated with a particular verdict rather than the cross-examination.

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"The verdict, if it is an acquittal. Feeling like you're not believed. ... Frustration regarding the criminal justice system... Not understanding what is the role of the police, the Crown, and juries is frustrating and not very therapeutic..." ENT4-PROCUREUR2

Not understanding criminal law

As is illustrated by the above quote, some prosecutors felt that victims' lack of understanding of how the justice system works was anti-therapeutic. In all, four of the eight prosecutors that were interviewed mentioned victims' lack of understanding of criminal law as an aggravating factor that had an anti-therapeutic effect on victims.

"...Victims can have difficulties with the suggestions regarding the sentence, what you call plea bargaining. It is at that point that I say that I am not the victim's lawyer But that can be difficult for victims who find themselves in front of a done deal and ask why the prosecutor did not ask for a more severe sentence. I consider other factors. Certain victims can find that difficult if they are not well informed, if I keep them in ignorance, I think that that can be problematic. They would rather know the whole truth; the why... " ENT8-PROCUREUR 5

Comparing the responses of victim support workers with those of the prosecutors, it appears that both groups identify phases that cast doubt on the victim and fail to validate their victimization as anti-therapeutic. Specific stages which both groups frequently identified as potentially anti-therapeutic were testifying and cross-examination. However, victim support workers and prosecutors differ in their reasoning with respect to why questioning the victim is anti-therapeutic. Whereas victim support workers consider how victims are treated as important in understanding the negative impact of certain stages, prosecutors see victims' own lack of understanding of the workings of the criminal justice system as responsible for its negative impact. We will return to the question of how to reduce the negative effects of the criminal justice process in the next section.

What Can Be Done To Make Things Better

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Victim Support

Information

When Victim support workers were asked what they did that could make victim participation in the criminal justice process more satisfying, all of them replied information. Information, they believe, reassures victims and reduces their anxiety.

"I would say it's information. It is the basis of our work. To inform, how things are going, what are your rights..." ENT14-CAVAC5

"In the first place, information....Emotionally, this is helpful because the people will feel anxious with respect to the justice process. But because we inform them they feel some relief. We also tell them what they can do. We offer them choices..." ENT18-CAVAC8

Recognition and validation

In addition to information, two victim support workers mentioned recognition and validation of the victim and their feelings.

"To feel that you are taken into consideration. To be a human being; not just a name on a subpoena." ENT14-CAVAC5

"It is to validate, normalize that which they are experiencing. And of course listening. ... The whole process of empowerment that we try to help with ..." ENT19-CAVAC9

Victim support workers were also asked what they did, or had to do, that could be anti-therapeutic for victims. While their responses varied, one dominant theme that emerged was the limitations of their powers.

Helping victims help themselves

Five victim support workers mentioned in one way or another the limits of their mandate as a source of frustration for victims. Three focused on victims who want victim support to take over for them and contact the Crown or other agencies on their behalf. Victim support workers saw this tendency as dysfunctional and hindering victim empowerment.

"Sometimes victims don't understand our mandate. They want to be taken care of and that is very dissatisfying.... They want us to do things for them. They want us to go after the

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information that they need....Part of our mission is that the victim regain control over her life." ENT6-CAVAC1

" If you take over for the person, that you take steps in her place, that you answer for her, or you decide for her what is best..." ENT13-CAVAC4

"... (C)ertain victims want you to do a lot of things in their place. Personally, I try to do as little as possible. That may sound terrible to say.... If I know that the person is capable of doing it themselves, I will put it back in his hands No, you have to help yourself... Try to bring them to take back their autonomy, to take back power.... It's an obligation that I give myself.... I don't think that you're helping someone; you're keeping them in a victim state, I find... " ENT21-CAVAC11

One victim support worker similarly referred to the limits of their mandate, however, rather than emphasizing victim empowerment, she focused on victim advocacy, which she saw as outside of her authority.

"...(O)ur mandate is not to defend the rights of victims, to advocate for the modification of laws, to take position in specific cases, to be the representatives of victims' needs. That is not our mandate..... Often victims call us because they have experienced injustices and they want us to take steps going farther. Write letters to the Minister of Justice and all that in an effort to obtain that to which they have a right. That is a limit of our mandate....". ENT20-CAVAC10

Don't shoot the messenger

Three victim support workers mentioned that victims sometimes don't like what they hear.

Victims may be disappointed when they are confronted with the reality of the criminal justice process.

"I explain to them the criminal justice process as it is. It's a very realistic approach. Whether it is viewed positively or negatively, I tell them how it works in court. However, sometimes people don't like how it works. That's fine. You have the right to not be satisfied with how the justice system works. But my role is just to explain how it works..." ENT9-CAVAC2

Having enough time

Another victim support worker mentioned being rushed and having little time for victims.

"Sometimes it's a complete rush at the office or at the courthouse. You don't have time... You don't have all the time to give all of the information..." ENT14-CAVAC5

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Public prosecutors

Contact with victims

When prosecutors were asked what they did that could make victim participation in the criminal justice process more satisfying, all of them mentioned their relationship with victims.

Prosecutors felt that if they communicated more with victims, better informing them, then this would make victim participation more satisfying.

"The more you communicate with them, the more you meet them, the more you call them, the more you include them, the more they are content.... " ENT7-PROC4

"To keep them informed of all the steps of the judicial process. For victims there is nothing like knowing where they are going" ENT8-PROC5

Four prosecutors spontaneously justified their failure to spend more time on victims, stating that the major obstacle holding prosecutors back from doing what they could to make victim participation more satisfying was a chronic lack of time due to the volume of work.

"If the workload was less heavy, one would certainly have the time, one could take time for them...." ENT10-PROC6

However, one prosecutor made it very clear that it was not his job to think about the victim.

"It is not our role to bother about the victim. Our role is to represent society. We have a role to inform (victims) but not to manage victims' emotions.... We are not psychologists..." ENT4-PROC2

Prosecutors were also asked what they did or had to do that could make victim participation in the criminal justice system dissatisfying. Their responses were varied.

Not following victims' wishes

Four prosecutors said that sometimes they had to act against the victim's wishes and that this was anti-therapeutic for victims.

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"When you are Crown prosecutor, you have all the power because the Crown has the power to do anything in his cases..... If he wants he can drop the charges, he can use his discretion without having to give reasons..." ENT2-PROC1

"If ... I force the victim to testify and that is not what he wants, that is certainly a negative aspect. If I judge that the crime is serious and that there is a danger for the victim or for her children or for other people I cannot exclusively listen to what the victim wants. That will certainly have a negative consequence for the victim.... " ENT8-PROC5

Having time

Three prosecutors felt that when they had to rush and had no time for the victim that this had a negative impact on victims.

" I don't think that it is by choice but by obligation. It's the lack of time for victims. Technically, victims of personal crimes such as assaults and sexual assaults, should be met in the morning before the trial." ENT7-PROC4

Critical questioning

Finally, one prosecutor mentioned sometimes having to question victims and, although this was necessary, it was anti-therapeutic for the victim.

"When we have preliminary meetings with victims, we ourselves have to confront them with certain aspects of their deposition, of their statement. The aspects that are not clear and are contradictory. Victims, at that point, have to ask themselves questions about our role with respect to them. But, as I told you, we have a responsibility to remain neutral.... " ENT12-PROC8

Comparing the responses of the victim support workers with those of the public prosecutors reveals both similarities and differences. Both victim support workers and public prosecutors recognize the therapeutic value of information and recognition. However, prosecutors seem to focus on their relationship with victim rather than mere information. This is an interesting difference given that prosecutors identified lack of information as a reason why victims were often adversely affected by the criminal justice process. While information was clearly part of their idea of better contact with the victim, it was also more than that, including consideration and interest.

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Another similarity is that both prosecutors and victim support workers recognized that when they failed to follow victims' wishes, this led to dissatisfaction among victims. However, their reasons for diverting from victims' wishes were very different. For victim support workers, their refusal to follow victims' wishes was primarily from a therapeutic standpoint, namely, that victims have to take back control over their lives and must therefore do things themselves. But for prosecutors, it was typically from a legal standpoint that they are not the victim's lawyer and that, as representatives of the State, they must take into account other interests as well.

Giving Victims Their Own Lawyer

In the interviews, many respondents raised the point that victims' poor understanding of criminal law was in itself anti-therapeutic. We asked both victim support workers and prosecutors what they felt would be the therapeutic and anti-therapeutic effects if victims were to have their own lawyer.

Victim Support

Seven of the ten victim support workers questioned felt that if victims were to have their own lawyer, they would be shown more interest and consideration, which would be reassuring and, hence, therapeutic. Two victim support workers felt that if victims would have their own lawyer, this would enhance victim participation and involvement in criminal justice procedures. One victim support worker said that if victims would have their own lawyer this would give them more choices.

However, victim support workers were also concerned about the costs: who would pay? Seven of the ten victim support workers interviewed saw the costs of a lawyer as a major impediment for victims.

Victim Participation and Therapeutic Jurisprudence

While, most of the victim support workers saw advantages as well as disadvantages, overall they tended to see more pros than cons. Only one victim support worker had a clearly negative opinion.

Prosecutors

When the prosecutors were asked what they thought if victims were to have their own lawyer, five raised concerns about the possible impact on the criminal justice system. They were concerned that adding an actor would mean that cases would take even longer and that this would increase the already heavy burden on the system. Five prosecutors raised concerns about the costs of such a service. Four prosecutors felt that in the existing criminal justice system, it would serve no point to provide victims with a lawyer because he would have no role to play.

On the positive side, four prosecutors did mention that if victims were to have a lawyer he could filter information and better inform the victim. One prosecutor said that he had once experienced this in a case that involved a wealthy victim. The victim hired a lawyer who kept him informed and explained the procedure to him. Three prosecutors said that if victims had their own lawyer, he could then represent the victim's point of view. One prosecutor felt that if victims were to have their own lawyer, they would probably have a better contact with the Prosecution than what they currently have.

Comparing the responses of victim support workers with those of the public prosecutors, both groups had mixed views about whether victims should have their own lawyer. However, victim support workers generally saw more advantages than disadvantages while prosecutors tended to see more disadvantages.

Discussion

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When is participation therapeutic? Both victim support workers and public prosecutors agreed that participation was therapeutic for victims when they were shown recognition and respect and that their participation was anti-therapeutic when these were absent. Their responses converge with research on crime victims that recognition and respect are associated with victim satisfaction (Shapland et al, 1985; Wemmers, 1996) and associated with post trauma adjustment among victims of violence (Byrne, et al., 1996). Victims seek validation and they are helped when they find the validation that they seek.

The finding that recognition and respect are crucial for victims' participation in the criminal justice system to be therapeutic corresponds with the research on procedural justice. When victims are validated, respected, considered and consulted, they will find that they were treated fairly by authorities (Wemmers, 1996). Fair procedures are therapeutic for victims (Waldman, 1998; Wemmers and Cyr, 2005). However, when victims are excluded, not respected or recognized, not consulted or considered, they will feel that they were treated unfairly (Wemmers, 1996). Unfair procedures are anti-therapeutic for victims because they have a negative impact on the victim's well-being (Wemmers and Cyr, 2005). A key feature of procedural justice is that when people feel that they were fairly treated, this provides a cushion of support, making unfavourable decisions more palatable (Lind and Tyler, 1988; Tyler, 1990; Wemmers, 1996). In other words, if a prosecutor treats the victim with dignity and respect and is able to gain the victim's confidence, then the victim will still feel fairly treated, even when the prosecutor makes an unpopular decision. This is particularly important in the criminal justice system where prosecutors and victim support workers cannot guarantee victims favourable outcomes.

In terms of what is therapeutic, the public prosecutors in this study believed that testifying, was sometimes therapeutic. Similarly, reporting the crime was viewed by victim support workers and prosecutors as therapeutic. Both testifying and reporting to the police provide victims with an opportunity to speak out and denounce their victimization. Respondents mentioned reporting the crime and testifying as therapeutic due to their expressive value but not victim impact statements. Victim impact statements were introduced in Canada in order to provide victims with a voice in the criminal justice process. While some authors consider expression to be

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therapeutic (Erez, 1999; Herman, 2003; Edwards, 2004), others argue that voice alone is not therapeutic and that victims seek feedback or consultation (Wemmers, 1996; Sanders, et al., 2001). The respondents in this study apparently do not consider victim impact statements to be a therapeutic tool with respect to victim participation in the criminal justice process as none of them mentioned victim impact statements in the interviews.

The therapeutic impact attributed by prosecutors to sentencing was not echoed in the interviews with victim support workers. Likewise, some prosecutors argued that the criminal justice process was not therapeutic until it was finally over. Research suggests that this may be an artefact of the criminal justice process as excluding victims from procedures may lead them to place greater importance on outcomes or sentencing (Wemmers, 1998). Compared to the public prosecutors, the victim support workers focussed more on procedural issues, or how things are done rather than outcomes. Victim support workers were more likely mention information, support, and regaining a sense of control as therapeutic. Many victim support workers felt that any stage in the criminal justice process can be potentially harmful if instead of validating the victim, it inconveniences, neglects or casts doubt on the victim.

Both prosecutors and victim support workers said that they had found cross-examination and confrontation of the victim to be anti-therapeutic, however, prosecutors were more likely to mention this than victim support workers. Perhaps prosecutors mentioned this more often because they see victims in court and victim support workers see victims both in and out of court. Victims' role in the Canadian criminal justice system is limited to that of a witness. It is the only formal means for victims to participate in the criminal justice process. Yet, this form of participation is considered by the respondents by and large to be anti-therapeutic. Cross-examination aims to question and to cast doubt on the validity of the victim's claims and as such can be quite difficult for victims.

While testifying and in particular cross-examination and confrontation with the offender are considered especially difficult stages for victims, these stages are key to justice process and cannot be removed. However, according to the respondents, we can reduce their negative impact

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by providing victims with information, preparing them for these stages and explaining to them how the justice system works so that they understand that the fact that they are questioned does not undermine the legitimacy of their complaint and that these are normal stages in the criminal justice process. Information, they argued, can reduce anxiety and reassures victims. Specifically, public prosecutors believed that they could improve their relationship with victims and reduce the risk of secondary victimization by contacting them and better informing them.

An obstacle preventing victim support from being more helpful for victims is its mandate, which limits what victim support workers can do for victims. Victim support aims to empower victims and therefore victim support workers will not act on behalf of victims. Instead, they provide victims with the tools, which will allow them to help themselves. According to the respondents, victims are not always appreciative of their efforts to enable victims. An important question is whether or not it is realistic to expect victims who have suffered trauma and are in a state of shock to take action themselves. Often following their victimization, victims will suffer from dissociation and be unable to take an active stance, phoning the courts, government compensation programmes or other service providers (Poupart, 1999; Wemmers, 2003). Recognizing this, the Council of Europe adopted a policy in favour of out-reaching (Council of Europe, 2006). Perhaps we need to re-consider the assumption that victims are agents who will reach out when they need help.

The most important obstacle preventing the prosecutors in this study from investing more in their relationship with victims is a lack of time. Currently, prosecutors rarely have contact with victims unless they are required as witnesses. Clearly, having regular contact with victims would tax the available resources. However, research suggests that we should not overestimate the time needed for a qualitatively good interaction with victims. Research with victims shows that fair procedures are not particularly time-consuming and that there is not a relationship between number of contacts and quality of relationship (Van den Bos and Lind, 2002; Wemmers and Cyr, 2006). In other words, a qualitatively good relationship is not more time-consuming.

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Interestingly, none of the respondents argued that it was impossible to consider the victims' feelings in the courtroom setting. Therapeutic jurisprudence argues that we consider how people are affected by the law and that we use this information to enhance the law's effectiveness. Clearly, for these respondents, it is possible to consider the victim's feelings in the criminal justice process and avoid secondary victimization. This does not mean that victims should not be confronted and cross-examined but rather, that victims should be provided with information and support so that they can put questioning into context and not view it as a personal attack or disbelief.

In some criminal justice systems, such as continental Europe, victims can be legally represented in the criminal justice process. The respondents in this study had mixed feelings about the idea of providing victims with their own lawyer. Victim support workers were more positive towards the idea than prosecutors, however, both raised doubts about its effectiveness. The respondents recognized that if they had their own lawyer, victims would be better informed and their interests would be better represented and considered in the criminal justice process. But who would pay for this? Crown prosecutors worried about the negative impact that this would have on the criminal justice system making case processing time longer and more costly. Moreover, they pointed out that a victims' lawyer would have no formal role and so there would be no point to this.

In terms of what victim participation means, the present findings suggest that in order to be therapeutic, victim participation should mean consultation and consideration. Edwards (2004) describes several different types of participation ranging from simple information to consultation to active decision-making. The present findings do not suggest that victim participation should mean that victims be given an active role in decision-making. This conclusion coincides with that of Wemmers and Cyr (2004), following interviews with victims of crime. When victim participation means respect and recognition, as the respondents in this study have expressed, it does not put victims at increased risk of exposure and confrontation. Instead, it cushions the possible negative impact of confrontation and cross-examination without limiting the rights of the accused. Edwards (2004) suggests that victim dissatisfaction with participation may be

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because victims and authorities have different expectations with respect to the role of victims. He offers that victims may expect an information-provision or consultative role, whereas authorities see victim participation simply as expressive. The importance that some of the prosecutors in this study placed on voice coincides with Edwards' suggestion victim participation is viewed primarily as expressive. However, the public prosecutors and victim support workers in this study recognized the therapeutic impact of information and consultation. The present findings suggest that authorities do seem to understand victim participation in terms of consultation and information. They simply do not always act accordingly.

Overall, the two main groups of professionals who can be considered important allies of victims in the criminal justice process reported more convergent than divergent views. The agreement between public prosecutors and victim support workers is noteworthy given that these two groups play very different roles in the criminal justice system and runs contrary to the findings by Regehr and Alaggia (2006) with respect to prosecutors and victim advocates in the Canadian province of Ontario. Victim support workers are mandated to assist victims while public prosecutors represent the State and their job is to prosecute the accused. Yet both groups work with victims and their views can shape victims' expectations and their experiences in the justice system. The finding that these two groups recognize the importance of how victims are treated by authorities for victims' psychological well-being is encouraging.

While the findings are instructive as an exploratory study, they cannot be generalized to other settings. One must bear in mind that the present study is based on a small, non-representative sample. Further research with a larger and representative sample is needed in order to better understand how professionals view the impact of law, as a social force, on victims.

In order for victim participation to be therapeutic, victims should be consulted and considered. There is no evidence that the structure of the criminal justice system needs to be changed before it can become therapeutic. However, we do need to provide the necessary resources to allow better information and communication with victims.

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