

Victim or Offender – A Useful Debate?

Aoteoroa Therapeutic Jurisprudence Conference
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Acknowledgments and introduction

It's fantastic to be here. Before I begin [Maori acknowledgment].

I'd also like to thank the organisers of this timely conference for inviting me to contribute today. It's certainly great to be back in New Zealand which, I confess, is a frequent destination for someone as interested in innovative justice as I am.

I was here in the summer of 2014, when the Centre for Innovative Justice visited Project Restore to try and import some of the lessons from New Zealand's well developed framework of restorative justice conferencing. I also was here only three months ago, when we took some very excited students on a study tour for our new subject, Innovative Justice.

Ad lib re study tour and what you saw.

New Zealand, then, is the perfect place for a therapeutic jurisprudence conference – a chance to reflect on the lessons of the past and opportunities for the future. One of these opportunities, I believe, is to move beyond the divisive debate that has always been companion to the criminal justice system, but which can tend to attach to discussions of therapeutic jurisprudence as well.

Therapeutic justice – who does it prioritise?

Although everyone well versed in them knows that therapeutic approaches are about tackling the causes of offending and therefore *preventing more crime*, there is still a tendency within the wider public and even some professional circles to assume that they are primarily concerned with ‘helping’ the offender – that they prioritize offenders *over* victims because of where energy is directed.

Many examples of this suspicion abound. When, as Attorney-General, I first established a network of specialist Indigenous courts, they were regarded with skepticism in certain quarters - a ‘soft option’ that would let offenders ‘off the hook’ - or as one member of the opposition at the time labelled it, ‘apartheid justice’. Yet this could not be further from the truth, the presence of community Elders and Respected Persons seated beside the Magistrate *increasing* the gravitas of the proceedings and the likelihood that they would be regarded as a *tough* option by those who come before them. Over a decade on, our Koori Courts have been vindicated and significantly decreased rates of offending.

Other specialist courts, however, have evolved from a different imperative. Specialist family or domestic violence courts are a particularly good example, originally established to improve the court experience for victims, with specialist judges and support workers, safe waiting places and remote witness facilities.

As much as these courts have certainly improved victim experience, evidence suggests that this focus alone has not contributed to a reduction in offending. An increasing number of specialist family violence courts, therefore, have incorporated a therapeutic approach to dealing with offenders as well.

For example, the Marin County Family Violence Court program in the US involves regular appearances, as well as mandatory phases including a 52 week perpetrator program, fines, restitution measures, drug and alcohol treatment and community service, with a further voluntary phase to address other issues such as housing and parenting. The program offers graduated incentives, such as certificates and other forms of recognition. It also delivers sanctions such as ‘flash incarceration’, admonishment by the judge, as well as other measures such as submission of an accountability essay.

Some commentators caution, however, against what they see as an ‘apparently uncritical acceptance of the appropriateness of therapeutic jurisprudence and restorative justice as judicial responses to domestic violence’.

Similarly, they are concerned that this approach means that a focus on victim safety and support is diminished, if not lost, particularly in the context of already stretched services. This is an important reminder and, certainly, I don't suggest for a minute that a treatment equates with offender accountability, or that referrals of any kind are a solution in and of themselves.

What needs to be understood, however, is that therapeutic courts are not about 'doing therapy' with an offender. Rather, their aim is to break the cycle of crime by leveraging a more personalized sense of accountability. Their aim is the creation of 'no more victims', an ambition in which we can all share.

This audience is well aware of this, of course, but we need to start bridging this understanding in the wider community as well. We will certainly need to do so if we are to overcome the oft-found reluctance of many governments to embrace therapeutic approaches on anything more than a pilot or small scale.

Victims AND offenders

To do this, those interested in therapeutic approaches need to help reframe wider discussion about victims and offenders – otherwise known as the law and order debate. This debate, frequently rehearsed at different times throughout the electoral cycle, is currently hostage to an approach as adversarial as the system that many of us are trying to change.

That this is the case is pretty strange if you think about it. After all, no matter how different we are, we all want a safe community. We all want less crime committed and fewer victims created as a result. Often it's assumed that, to achieve this, we must lock up as many offenders as possible in order to keep the 'rest of us' safe. In our scramble to do so, however, we often fail to recognise that many offenders are victims of crime or serious disadvantage themselves.

Certainly, prisons are largely populated by individuals experiencing a spectrum of social and economic disadvantage. One survey of NSW prisons revealed that:

- around half of the inmates did not finish Year 10 of schooling
- half the male population and two-thirds of females were unemployed,
- a third overall had been placed in care as juveniles
- just under one in five had a history of parental incarceration
- the majority had used illicit drugs and consumed alcohol at high risk levels
- almost half reported having been assessed for a mental health problem.

Meanwhile, 34% of young people in custody in Victoria have had previous child protection involvement and 64% of young people in the juvenile justice system have experienced child abuse, neglect or trauma. Stories emerging from the Royal Commission into Institutional Responses to Child Sexual Abuse certainly echo these statistics – lives destroyed by the ultimate betrayal of trust, propelled into mental illness, substance abuse, poverty and then offending.

ABI

Further, though prevalence rates for acquired brain injury, or ABI, in the general population sit at around 2.2%, a Corrections Victoria commissioned study revealed that 42% of men and 33% of women surveyed from the Victorian prison population had a confirmed ABI. In this study the leading cause was non-traumatic brain injury related to drug and alcohol abuse stemming from multiple forms of disadvantage. Other studies, however, reveal a high proportion of traumatic brain injury being the direct result of violent crime, including family violence.

In other words, not only is the proportion of people with ABIs in custody dramatically higher than in the wider population, an imbalance that is echoed in incarceration rates of people with disabilities generally, but this proportion is often the result of experience of crime.

Despite this, the prevalence and even existence of ABI is not well understood across the justice system. Commonly termed ‘the hidden disability’, ABI often goes unnoticed, in part because it can manifest in interrelated ways - a range of problems coinciding to create a chaotic existence, yet each not necessarily severe enough to qualify for available support.

As a result, the complexities of ABI slip under the radar of an unwieldy and undiscerning system. Research indicates that no Australian jurisdiction systematically attempts to identify ABI in its prison population, while data is still not being retained and screening is still not being conducted, despite the staggering numbers revealed by the report prepared for Corrections Victoria.

Left unchecked, all of this means that courts will remain ill-equipped; people with ABI will continue to be warehoused in a network of prisons that are fast becoming the 21st century's asylums; and public funds will continue to be spent on *entrenching*, instead of diverting people from, institutionalisation.

That is why the Centre for Innovative Justice is currently in partnership with a community agency, Jesuit Social Services, to establish an ABI Justice User Group – to increase understanding of the issue, certainly, but also to support and build capacity for people with ABI who have been directly involved with the criminal justice system and can help to develop a more constructive response.

Inside Access/Family Violence

Meanwhile, other work of the Centre for Innovative Justice and its neighbor, the Mental Health Legal Centre of Victoria, has highlighted the particular link between experience of family violence and offending. In fact, despite many similarities, the profile of female and male offenders is fundamentally different.

Studies from a range of international contexts identify that, when compared to male offenders, women have higher levels of victimisation, poor mental health, substance misuse, unemployment and low educational attainment. Women also differ in that their time in custody is different, with shorter but more frequent periods. To this end, a NSW Parliamentary Select Committee calculated that simply abolishing sentences of six months or less would immediately bring about a 60% drop in the prisoners received into custody weekly.

There is another real difference, however, between male and female offenders. Though studies vary, some authors suggest that exposure to traumatic events is nearly universal among incarcerated women. An Australian Institute of Criminology study found that 87% of incarcerated women were victims of sexual, physical or emotional abuse either in childhood or adulthood, while one in the US estimated that 98% of the prisoners surveyed had been exposed to at least one category of trauma, the most common being violence perpetrated by a partner.

The prevalence of victimisation amongst women prisoners, then, has been understood for some time, as has been the fact that family violence is the primary reason that women are made homeless. Perhaps less widely articulated is the way in which the experience of family violence can be a *pathway to offending in itself*.

In other words, what is not as well understood is the pathway that exists from victim to offender – the idea that people can be both, one which challenges the core dichotomy on which we base both our discussion and response.

This means that, even if the community understands that women might have to kill abusive partners in self-defence, it cannot compute that they may commit *theft* because of family violence. Yet women can accumulate debt as an indirect result of the violence or as a deliberate element of the violence itself.

Women also indicate that the violence and coercion in their relationship forced them to assume culpability for their partner's offences. Increasing the complexity, women might find themselves in conflict situations, becoming both alleged perpetrators and victims of domestic violence.

This means that, for a substantial number of women in our prisons, *they* are the ones who were assaulted; *they* are the ones made homeless; *they* are the ones propelled into poverty or substance abuse...yet they are the ones locked up. Beyond conducting the research, the CIJ understands this first hand. In fact, the CIJ has helped the Mental Health Legal Centre and its program, Inside Access – which visits Victoria's maximum security prison to provide legal assistance to women on civil law matters - to conduct an audit of 50 randomly selected case files.

Even in that relatively brief exchange, family violence emerged as a significant contributor – to women’s trauma, to their poverty, to their mental illness, to concerns about their children, to concerns about their release and to the cycle of women’s offending. In this and the other ways, then, male family violence is a direct contributor not only to the increasing population of male prisons, but female prisons as well. The question then becomes to what extent we would need women’s prisons at all were it not for the prevalence of family violence.

Throwing out the either/or - reframing the debate

Now that the community has begun to grapple with the concept of family violence, we have huge sympathy for these women when they are victims – we want to help, to repair, to punish those who caused them harm. Yet once they stray over onto the wrong side of the law, we seem to have a sympathy bypass.

What is it that allows us to compartmentalize our response in this way? What is it that enables us to offer immense compassion to those who have been wronged themselves until their resulting dysfunction trips them over to into wrongdoer and we are jostling instead to see how harsh we can be?

If we genuinely want to prevent crime, this is not an intelligent, or even pragmatic, reaction. Sending damaged people to prison so that they can emerge more damaged – and let's be clear, nothing is more likely to cause criminal behaviour than prison - is not going to keep *anyone* safe.

Instead, it is going to turn already marginalized people into more hardened, repeat offenders, cementing the cycle of institutionalization and propelling more victims – who continue to experience the ongoing effects of the crime they have experienced – beyond the reach of our apparently limited concern.

To acknowledge these realities is not about being soft on crime, nor is it about making excuses for those who commit it. Yes, there are serious offenders who need long term incarceration, who need to be met with the full force of the law. If we want our sentencing practices to work, however, we need to perceive the individuals involved, rather than just criminalise this disadvantage. We need to address family violence, sexual assault, substance abuse and homelessness. We need to understand that warehousing people with mental illness or ABI in prisons is simply spending money on entrenching dysfunction.

Taking a therapeutic approach to the debate

We have to start bridging this divide – the gap between the reality in our prison populations and our rigid criminal justice response. Though we must take care about how it is conveyed – being sure that are not seen to be excusing violent behaviour, justifying it, letting people off the hook - this is of course means promoting the more widespread use of therapeutic jurisprudence.

We *must* reinforce the value of addressing the causes, as well as the consequences of crime, so that we can prevent the creation of more victims.

We must explain that addressing the victimisation or disadvantage that underlies so much offending – treating mental illness, substance abuse and trauma – gives people a better chance to establish a constructive life.

What's more, we must get better at identifying this disadvantage or victimisation in existing offender populations – in women *and* men who are already imprisoned for a variety of reasons but who may well have a history of trauma.

We must also, however, address the potential offending that may well be ahead for so many other victims – for victims of child sexual abuse and neglect, for victims of brain injury, for victims of family violence. This means that we must not only offer a restorative response to repair harm, but a therapeutic one as well – one which diverts people from trajectories into dysfunction and crime.

This, then, is how we ought to progress the discussion around therapeutic jurisprudence – not to excuse the inexcusable, but to identify the potential for the justice system to act as a positive intervention with everyone who comes before it.

That potential is the reason that I stay in this game; that I keep testing the conventions of the law; that I keep looking for more innovative approaches. It's the reason that I keep visiting New Zealand, too. I hope that this particular visit can help contribute to a more therapeutic approach, both to the way in which we talk about victims *and* safety, offenders *and* crime.