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The impact of sentencing on the offender

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(Transcript of presentation)

The impact of sentencing on the offender

A colleague and his family recently got a puppy. My family and I had done the same thing a few years ago and we had great success with a particular puppy school. So I recommended that he and his family take their puppy down to the puppy school. They followed my advice and recently told me they were amazed at just how well things were going and what amazed them in particular is that the philosophy of the woman who runs the puppy school is that you never punish the dog. You praise the dog and positively reinforce it. His amazement was that, as a boy growing up, his family took quite the opposite practice with their dogs. Each time the dog, for example, peed on the floor they rubbed the nose in, maybe hit him with the paper, throw him out the door and so on and so forth. He was amazed that he didn't have to resort to any of those practices with his dog.

I tell this story because psychologists have long known that the best way to modify and shape behaviour is not by punishment but by positive and negative reinforcement. People may be familiar with a series of studies done in the 1960's before ethics were in vogue, particularly animal ethics. These studies were done by a man called Martin Seligman who is now known as the founder of positive psychology. What he did was he had a device that would allow him to turn on an electric shock on either side of a small boundary. So the dog is actually in a box and there is a small fence. So of course what the dog does when you turn on a shock on one side is they jump around for a second and they realise they can jump over, and they do that. Once they have done that about 50 times they do it incredibly quickly. He then has a light you can see in the back and he turns the light on, turns the shock on, and from then very quickly you only need to turn the light on and the dog just casually walks over, doesn't even care. Now, the nasty part of the study is that he restrained a number of dogs in harnesses on the side that had the shock. So he restrains the dog until, in fact, the dog realises they can't do anything. Then after 50 trials, he put the dog back into the box, even for example the next day, and what the dog does is he no longer jumps over the barrier. The dog sits there, in fact typically they get shocked until they just lay down and start to whine.

So this to me is a metaphor of what we do in the criminal justice system. We essentially put aside the lessons we know about human behaviour and in fact we reinforce the dynamics in offenders that have contributed to their offending. And, although it's metaphorical, where I work, we literally do see the offenders lying down on the floor crying.

When I was asked to speak about the impact of sentencing on the offender, I was quite happy to do so. But I realised that it was a difficult task. Within psychology first of all there is a lot of overlap with law. Psychology is the science interested in the study of human behaviour, mental processes, and naturally law tries to change behaviour. So there is a natural nexus between science of human behaviour and any kind of agency such as law that tries to change behaviour. In the area of sentencing research there actually has been quite a lot of psychological research. Missing from the list is the research on the impact of sentencing on the actual offender. I mean the impact of sentencing on the individual, the shaping of their attitudes, the perceptions of the criminal justice system, the likelihood of reoffending and so forth.

A colleague commented to me that he always sees it as very strange that on the morning on which offenders who are in the community are going to be sentenced, they wake up, they go to have the breakfast, they go to the court house, they go to the solicitor's office and they go to court prepared basically to be handed over. So the surprise I think for psychology is that very often there are lessons about these matters, that is the impact of sentencing on the particular individual, but all too often there are neglected. In fact if one scours the research literature there would literally be a handful of studies that have spoken in any sort of systematic way to offenders. What I would like to do is to address the three possible areas of inquiry for this particular topic.

The first is when we look at the impact of sentencing on the offender; naturally we are interested in the offender's perceptions. Obviously, our perceptions shape our attitudes and our attitudes shape our behaviour. Second, the impact of sentence on offenders' rehabilitation. And finally, the impact of different sentencing options on the person serving the sentence.

Much research has been conducted about procedural justice, which we often think of as an umbrella term that encapsulates a number of elements of justice. This tells us that the fairness of the process itself, not just the outcome, predicts things such as the offender's perceptions and acceptance of the sentence. Contrary to public belief, often offenders are quite satisfied with the sentence. They often talk about the fact that they think it's quite fair. There are a range of principles then that we need to take into account when we think about the effect of the sentence upon the individual, ie. how we are shaping typically his opinion about the sentencing. Obviously the emphasis on consistency - there is discussion among offenders about why so and so got such a sentence and they didn't, or this sort of thing.

Second those who carry out the procedures must be seen to be impartial and neutral.

Third those directly affected by the decisions should have a voice and representation in the process. In our criminal justice system, obviously we do through legal representation, provide the offender with a voice, but all too often in my experience, it's a voice that's really quite surprisingly removed from the whole process. In my day to day work with offenders it never ceases to amaze me how little they really understand about things such as what they exactly have pleaded to. Almost all of my clinical work these days is assessment and a lot of pre-sentencing assessment. They almost never know exactly what they have played into. Their lawyer will give them certain instructions when they come to see me and they get very confused about what they are supposed to be saying in any case. Although some judges do emphasize and try to spend time with the offender in understanding these sorts of principles. I think of course there are many other that impinge on sentences, such as worrying about courts of appeal. Very often I think although the offender is the product of these proceedings, they are very far removed from it, and the vast majority have very little understanding. So if this is true then what it's telling us is that their perceptions of fairness for the offender are at best blurred. If that's true, then it affects their perceptions and attitude to fairness and their faith in the criminal justice system that is intended to shape them. I do not even want to talk about the next step, which for example could be a prison, and how they see the fairness in that environment. Principles of therapeutic jurisprudence are a very powerful, relatively new area which

emphasizes that when the law makes decisions about people they must take into account the so-called therapeutic effects. So that's really the perceptions of sentences, - the bottom line being that we must take into account the offender in that process, it shouldn't just be at some arms length with the offender.

The second area really is the one that I work most with which is rehabilitation opportunities. We are at a point in time where we know much more than we have known about factors that contribute to offending and re-offending. The sentencing process is one that obviously provides an opportunity to identify and set in place opportunities to address factors related to offending. But all too often that process, or that opportunity, is forsaken. If we look at my state in Victoria we have new extended supervision order legislation to keep sexual offenders on intensive supervision orders beyond sentence. But in our State, at the point of sentencing, the court has no external information, for example, by a way of extensive assessment of the majority of sexual offenders. That of course is done once they are sentenced and they go into prison or into the community but the judgement is done sometimes in a vacuum. Sometimes what you know about the offender much later is simply not reflected at the time the sentence is made. So his opportunities again are lost. In so called problem courts there are opportunities that can be realised in identifying and using this particular time to make change in people's lives.

In my clinical work we now train our mental health professionals by having them work in the jail where they can see real mental illness. It is no use sending psychiatry students to psychiatric units in hospitals - all they will learn about is schizophrenia and maybe major depression. We have to send them to the jails to see the full range of mental illnesses. So in a Melbourne assessment prison at any time we have got about a 100 out of 300 people who are on psychiatric medication and that's an example of rehabilitation opportunities lost.

Offender's attitudes to the criminal justice system and to their sentence, and these attitudes re-enforced over time, are related to likelihood of offending. To the extent that the sentencing process itself helps to shape offender's attitudes, the process and outcomes have a direct bearing on likelihood of re-offending. Sometimes we don't think about that as a process, we often focus on the outcome. A final example of that is what I'll call offender's disclosure. Obviously the adversarial nature of the system is such that there is a great risk for the offender in revealing too much information prior to sentence because that can negatively affect sentence. In our forensic mental health system, for example, people found not guilty because of mental impairment, essentially get trained over time not to talk about difficult things because that will get in the file. Then when they go before an administrative tribunal or judge it might decrease the chances of getting freedom. So matters such as denial or minimization are often over emphasized in the sentencing process. In some of the work that I do when you are with an individual they do minimize and deny, and you go to court and you basically say that, then that has a negative effect on them. Very often as soon as they are sentenced the degree of disclosure increases. So if you see the same individuals prior to sentence and post-sentence, there are very different presentations. The point I make with that is again is a lost opportunity for any sort of rehabilitation in the extent in which rehabilitation leads to reduction in offending.

We know very little about the impact of particular kinds of judgments (different sentencing options - extended supervision orders, indeterminate sentencing, mandatory sentencing) on individuals and their motivation. Drawing on personal experience, the first paper I published was in the area of the death penalty. I was working and living in the United States. You can imagine what the environment's like in institutions where people never get out or where they know they will die. Compare that to our system where by and large in Australia now most defendants do get out. There is motivation, there is still hope for them. Sometimes, not in every case naturally, that translates into positive benefit vis-a-vis knowing that they need to change their lifestyle in order to succeed.

The other area we know virtually nothing about is, for example, women compared to males, aboriginal offenders compared to others. The effect of sentencing on them could be very, very different than on mainstream individuals. I don't think that is typically taken into account in mainstream sentencing.

There is really a dearth of research that looks specifically at these matters and most of what we know comes very anecdotally and that's not terribly helpful. Looking at the impact of whatever we are doing, our sentencing process on the offender. From a more general societal view what is the overall effect, for example, of incarceration. It is very often difficult in a sausage factory justice system to really begin to focus on these things. So one is heartened by different programs you will hear about, different courts for the hard-basket cases.

In Victoria at the moment we have a multiple and complex needs program targeted each year at the 50 most difficult people in the system. They have to have a number of issues - mental illness, intellectual impairment, criminal justice issues, repeat offenders. When services do take these individuals into account, what we are seeing is that you are seeing people turn around in a way we hadn't seen before. We thought it would be very difficult to engage this group. Quite the opposite - they are often showing up to appointments and revealing things because now people are focusing on them, taking into account their perspectives. One hopes that over time such an approach will begin to pay off.