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# Journal

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## flexible working

How well does it work in the legal world? There are firms and organisations, large and small, that embrace it

# Kindness in court: who cares?

Iain Smith proposes a counter-intuitive method for Scottish judges to achieve the goal of crime reduction, disruption to the cycle of violence and shrinking numbers in our creaking prisons

**S**cotland has an enviable reputation for being a country with a compassionate heart. As a nation, we have been at the forefront of a recent upsurge in understanding of the biological science of the impact of childhood trauma on the developing brain, gaining an awareness of adverse childhood experiences (“ACEs”).

Much of the campaigning has been at grassroots level, inspired by Dr Suzanne Zeedyk, leading trauma psychologist and Tina Hendry, former police officer and ACEs guru, but it is now bolstered by the backing of the Scottish Government. To date, the focus has been on health and education, but attention is now rightly turning to our justice system. Lawyers are slowly learning about ACEs, assisted by Dr Zeedyk’s article at Journal, June 2018, 16.

As a criminal defence lawyer for more than 25 years, hearing about this science was a lightbulb moment and allowed me to view my clients, who are often wounded and broken individuals, in a different way. In my job, you regularly observe scars left by trauma – an inability to self-regulate and, for many, a reliance on substances to self-medicate emotional pain.

## Relevance of background

Not every crime committed has a background of ACEs, and not everyone with significant childhood trauma commits crime. However, a significant proportion of people with convictions have had high doses of toxic stress from childhood that made it more likely, though not inevitable, that they would enter the criminal justice system.

Here is a shocking statistic: while only approximately 5% of Scottish children are in care at some point, 70% of the inmates at Polmont Young Offenders Institution have care experience. That’s not just coincidence, and research suggests we are not doing enough for children in care. Hopefully the ongoing

Independent Care Review can recommend ways to reduce that appalling figure and seek to redress this imbalance.

Experts believe that a stable nurturing adult can rescue children from such stress and provide a buffer. Adults who have suffered trauma can also be salvaged by such care. Harvard Centre for the Development of the Child states: “Researchers provide three principles – reducing stress, building positive relationships, and strengthening life skills – [as] the best long-term preventative to combat ACEs”.

## Hurt breeding hurt

What has any of this got to do with lawyers and the criminal justice system? If we look at the convicted person through an ACEs lens we may see things differently, prioritise help rather than punishment, and think creatively rather than of the futile revolving door of prison. Hurt people often hurt people, but they continue to hurt themselves more.

Looking at criminal justice social work reports, you could be forgiven for missing the huge scientific discovery of ACEs. Information is tucked away quietly under “background” and reports often only whisper about childhood adversity, saying the person had a “poor upbringing” but giving no sense of the levels of misery and toxic stress created by grown-ups, either directly or indirectly, and the enormity of the impact on the adults these ACEs-riddled children become.

The clients I deal with are often the hardest to like, but in the greatest need of love. Scratch the surface of their lives and you will witness terrible adversity and a tragic backstory. People who have high ACEs do bad things, but are rarely innately bad people. Armed with this knowledge, what effect has it had on how I practise as a lawyer?

## Professional response

I now ask clients the question “What has happened to you?”, rather than “What is wrong with you?”. I am more patient, more compassionate and I listen. In court, I discuss childhood trauma if it is relevant and suggest

long term solutions to improve the individual’s life away from crime. I try to give them hope and encourage perseverance. After court I signpost clients to seek help from agencies, for example Aid & Abet, a charity which has volunteers with experience of the criminal justice system and who have turned their lives around. They can engage with offenders, young and old, to show recovery is possible. Regrettably, when everything fails, I attend clients’ funerals, sometimes with few other people there.

It is exhausting, and as a business model it would not meet with approval from *Dragons’ Den*. So why bother with this ACEs stuff? If we all look back to why we became criminal lawyers, and it certainly wasn’t for the money, we may surprise ourselves by remembering we wanted to help the most socially deprived and overlooked citizens and to give them a voice.

The other professionals in the justice system need to play their part by becoming trauma informed. Stop using derogatory words like “neds” or “junkies”. The use of this type of language sustains stigmas and myths that somehow people “choose” this way of life. Prosecutors should look at young persons’ backgrounds and consider their individual circumstances as well as the offence itself, in order to consider diverting them away from the court rather than stamping a label on them which will stop them making progress in life.

## Recognising trauma

What effect could awareness of childhood trauma have on judges? I seek to encourage judges to consider presiding with kindness when it comes to dealing with these vulnerable and wounded offenders.

As a society, we rightly recognise that there can be fallout from war for soldiers and this can create casualties in civilian life because of PTSD. We empathise with veterans because we feel a duty of care to them and we try to help them. Yet why should children who have experienced high levels of toxic stress be treated so differently? Their wounds may not be state inflicted but may be passively created by societal failure. In care until 15



years of age, children who are looked after by local authorities are seen as a “wee shame”; thereafter the same kids are deemed “wee shites” and treated as a problem in the community. And as for the next generation? James Docherty from the Violence Reduction Unit says: “When it comes to parenting with ACEs, what you don’t transform, you transmit.”

Surely it’s time to try something different. ACEs research gives a bio-psycho-social platform and evidence based awareness to develop a new approach.

## Two American ideas

The innovative Community Justice Scotland team has invited two prominent United States judges to come over to Scotland to share their ideas at events in March 2019. Both judges employ a judicial concept created by academic lawyer and psychologist Tom R Tyler, called procedural justice. The basic pillars of this are “voice, respect, neutrality and understanding”. The jurisprudence behind procedural justice is that persons who perceive they are being dealt with fairly and with dignity before a court will respect the decision of the court, the judge and the law.

Judge Ginger Lerner-Wren created America’s first mental health court in 1997 in Florida. There are now over 400 specialist mental health courts in the USA and worldwide. Her problem-solving court is an example of how to dispense what she calls “the law reform science of therapeutic justice”.

She has recently published a book called *A Court of Refuge: Stories From the Bench of America’s First Mental Health Court*. It sets out the remarkable efforts she and her team have made to divert people with mental illness and co-occurring substance use disorders

from an anti-therapeutic setting in jail to more humane treatments in the community. In the mental health court, treatment is offered over punishment, with monitoring through a collaborative and inter-disciplinary process. It mirrors how the Violence Reduction Unit reduced knife crime in Glasgow by treating violence as a public health concern, a disease that needed to be cured at source.

Interviewed recently on her “humanising” approach, she said: “We developed a collaborative process that was a swift diversionary means of having individuals transported out of an inappropriate system of care (i.e., a jail). The court instead acted like a funnel to move people from one inappropriate system to a humane system of health care.”

Judge Victoria Pratt sat as a judge in Newark, New Jersey, in a notorious court nicknamed the “Green Monster”. She was appointed by the then mayor, now Senator, Cory Booker. She says: “I just get on the bench and treat people the way I would want my family members to be treated.” She ensured people left her court with hope, as without it they were sure to return.

## Smart justice

Presiding with kindness will garner respect not only for the judge, but the court and the law. It will improve responses, and the judge may be that person who disrupts the cycle of offending by showing compassion. The degradation ceremony seen in our sheriff courts, often characterised by frustrated judges shouting at and humiliating broken people, doesn’t work. Why not set a positive

example for offenders to look up to, rather than fear? Court participants may, however, pay attention to someone who is kind. Being informed of ACEs may allow judges to make informed and transformative disposals. A judge’s job is not an easy one and is undoubtedly emotionally taxing, but kindness literally costs nothing and can happen without training or delay.

Some of you may think this approach is soft on crime and pandering to the “snowflake generation”. It is, however, “smart justice”, a term coined by Karyn McCluskey, the co-founder of the successful Violence Reduction Unit and now CEO of Community Justice Scotland. Smart justice means long term reduction of crime, and genuine and real benefits financially by reducing crime (it costs £44,000 to keep someone in jail for a year) – a no-brainer for the humanitarians among us. It will require a leap of faith, a change of lens and perseverance.

At the end of an illustrious career spanning two decades, one judge displayed compassion on their last day on the bench by hugging an offender who was always in and out of the court. A very bold thing to happen in a Scottish court. Imagine, however, what might have happened to the girl if the judge had hugged her (metaphorically) the first time she appeared in court rather than the last time? 

**Anyone interested in attending an evening event with Judge Pratt and Judge Lerner-Wren in either Glasgow on 11 March 2019 or Livingston on 12 March 2019 can email Iain Smith at [iain@keegansmith.org](mailto:iain@keegansmith.org)**



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